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Editorial

The editors are pleased to present the 2019 double issue of the Pécs Journal of International and European Law, published by the Centre for European Research and Education of the Faculty of Law of the University of Pécs.

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A word of sincere gratitude is of course due to the anonymous peer reviewers of the current issue.

We encourage the reader, also on behalf of the editorial board, to consider the PJIEL as a venue for publications. With your contributions, PJIEL aims to remain a trustworthy and up-to-date journal of international and European law issues. The next formal deadline for submission of articles is 15 March 2020, though submissions are welcomed at any time.

The editors

Consequences of the Ex Parte Communications in the Arbitration between Croatia and Slovenia

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Public disclosure of the ex parte communications in the arbitration between Croatia and Slovenia has given rise to a situation without precedent in the history of international arbitration. This article analyzes from the international law point of view the consequences of the telephone conversations between Dr. Sekolec, the arbitrator appointed by Slovenia and Ms. Simona Drenik, Agent of Slovenia. There is no doubt that the fundamental principles of the arbitration process, including due process, procedural fairness, impartiality and independence have been violated in the arbitration between Croatia and Slovenia to the prejudice of Croatia. Considering the essential importance that those principles have in the international arbitral proceedings and rendering a fair and just award, as well as political connotations of the ex parte communication, this article argues that the proceedings should have been terminated. In addition, this article argues that Slovenia's actions, i.e. the ex parte communication constitute a material breach of the Arbitration Agreement because they defeated one of the objects and purposes of the Arbitration Agreement – the settlement of the maritime and land boundary dispute between Croatia and Slovenia in accordance with the rules and principles of international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result. Therefore, Croatia was entitled to terminate the Arbitration Agreement under Article 60, paragraph 1 of the Vienna Convention on the Law of Treaties.

Key words: ex parte communication, international arbitration, unilateral withdrawal, Arbitration Agreement, material breach, termination.

1. Introduction

The arbitration between Croatia and Slovenia, concerning the delimitation of the maritime and land boundary between the two States, has again turned the attention of practitioners and scholars to the question of ex parte communication in international arbitration. While there is no generally accepted definition of ex parte communication, it is usually defined as "a communication between counsel and the court when opposing counsel is not present".[1] It is precisely this type of conduct

[1] See A. G. Bryan, *Black's Law Dictionary*, 9th edn., West Group, Eagan 2009, p. 316. See also L. W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, Houston Law Review, Vol. 36, 2000, p. 1343; P. S. Wall., *Guide to Ethics of Ex Parte Communications*, Journal of Business Ethics, Vol. 81, 2008, p. 555; R. M. Mosk & T. Ginsburg, *Becoming an International Arbitrator: Qualifications, Disclosures, Conduct, and Removal*, in R. Chernick, D. M. Kolkey & B. Reeves Neal (Eds.), Practitioner's Handbook on International Arbitration and Mediation, 3rd edn., JurisNet, LLC, Huntington 2012, p. 405. International Bar Association (IBA) defines ex parte communications as "oral or written communications between a party representative and an arbitrator or prospective arbitrator without the presence or knowledge

that occurred during the arbitration proceeding between Croatia and Slovenia – communication between one of the arbitrators and the Slovenian agent without presence of the Croatian representative. Although ex parte communication does not represent nothing new in the world of international arbitration,[2] in other words it is as old as international arbitration itself,[3] the fact is that the arbitration between Croatia and Slovenia is one of the rare cases in international arbitration in which a public disclosure of ex parte communication occurred.[4] The scandal is even bigger given that the ex parte communication has occurred in an important inter-state arbitration concerning border dispute which the two countries had been trying to resolve for nearly a quarter of a century.[5] Moreover, the high political tensions that preceded the arbitration, because of which even the European Union had to mediate, have culminated with the disclosure of the ex parte communication. The consequences of this scandal are multiple, as well as the numerous legal issues related to them.

Part 1 of this article gives an overview of the existing rules of major international arbitral institutions relating to ex parte communication, and thus provides a comprehensive view of the existing legal framework for ex parte communication in international arbitration. Part 2 looks into the most prominent soft law rules of arbitral institutions and bar associations that also address the issue of ex parte communication in international arbitration. Part 3 describes the ex parte communication that occured in the arbitration between Croatia and Slovenia including the events that preceded the public disclosure of the ex parte communication. In addition, this part examines the legal rules regarding the ex parte communication that were applicable in the arbitration between Croatia and Slovenia. Part 4 of this article considers the consequences of the ex parte communication in the arbitration between Croatia and Slovenia. First of all, it describes the events that immediately followed the public disclosure of ex parte communication. Further, this part analyzes from the legal point of view Croatia's unilateral withdrawal from the arbitration, as well as Croatia's purported termination of the Arbitration Agreement. This Part also examines the question of jurisdiction of the Arbitral Tribunal to decide on the validity of the termination of the Arbitration Agreement by Croatia. Finally, Part 5 discusses the Arbitral Tribunal's Partial Award, in the parts relating to the previous questions, as well as the events that followed after the Arbitral Tribunal rendered its Final Award, including Slovenia's lawsuit against Croatia before the Court of Justice of the European Union because of Croatia's rejection of the arbitral award and its implementation.

2. Rules of International Arbitral Institutions Governing Ex Parte Communication in International Arbitration

Existing rules of major international arbitral institutions in different ways govern the issue of ex parte communication between one party and an arbitrator in international arbitration. However, as a general rule, it is well accepted that ex parte communication is prohibited in international arbi-

of the opposing party or parties." See International Bar Association, IBA Guidelines on Party Representation in International Arbitration, International Bar Association, London 2013, p. 3, https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (20 June 2019).

[2] See *e.g.* A. Sarvarian, *Professional Ethics at the International Bar*, Oxford University Press, Oxford 2012, p. 100.

[3] The arbitration as a method of peaceful settlement of international disputes traces its roots back to the Greek city-states. In its modern form, international arbitration began with the Jay Treaty of 1794 between the United States and Great Britain. See *e.g.* C. F. Amerasinghe, *International Arbitral Jurisdiction*, Martinus Nijhoff Publishers, Leiden 2011, pp. 4-7; see also J. H. Ralston, *International Arbitration from Athens to Locarno*, Stanford University Press, Stanford 1929, pp. 152-194.

[4] As examples of ex parte communications in international arbitration can be mentioned two cases similar to the arbitration between Croatia and Slovenia. The first case is the *Buraimi Oasis Arbitration (Saudi Arabia v. United Kingdom) of 1955; see R.* Goy, *L'Affaire de l'Oasis de Buraimi*, Annuaire Français de Droit International, Vol. 3, 1957, pp. 188-205; J. B. Kelly, *The Buraimi Oasis Dispute*, *International Affairs, Vol. 32, 1956, pp. 318-326.* The second case is the *Victor Pey Casado et al. v. Chile* case; see *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award of 8 May 2008, paras. 34-43; C. Schreuer, *Víctor Pey Casado and President Allende Foundation v Republic of Chile: Barely an Annulment*, *ICSID Review - Foreign Investment Law Journal, Vol. 29, 2014, pp. 321-327.*

[5] See also M. Avbelj & J. Letnar Černič, *The Conundrum Of The Piran Bay: Slovenia V. Croatia – The Case Of Maritime Delimitation*, Journal of International Law & Policy, Vol. V, 2007, pp. 1-19; T. Bickl, *Reco*nstructing the In*tractable: The Croatia-Slovenia Border Dispute and Its Implications for EU Enlargement*, Croatian Political Science Review, Vol. 54, 2017, pp. 7-39; S. F. Gagro, *Border Dispute in the Adriatic Sea between Croatia and Slovenia*, Acta Universitatis Danubius Juridica, Vol. 9, 2013, pp. 5-17; Z. Gržetić, V. Barić Punda & V. Filipović, *Boundaries In The Northern Adriatic 1948-2009: With Particular Emphasis On Chronological Cartographical Analysis*, Comparative Maritime Law, Vol. 49, 2010, pp. 19-72; V. Sancin, *Slovenia-Croatia Border Dispute: From "Drnovšek-Račan" to "Pahor-Kosor" Agreement*, European Perspectives – Journal of European Perspectives of the Western Balkans, Vol. 2, 2010, pp. 93-111.

tration.[6] In other words, ex parte communication can not be tolerated in international arbitration except in certain limited circumstances explicitly provided by the rules of international arbitral institutions.

The Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States (hereinafter "PCA Optional Rules"), which were applicable in the arbitration between Croatia and Slovenia,[7] in Article 15(3) clearly state that "all documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party and a copy shall be filed with the International Bureau". [8]

Given that the PCA Optional Rules are based on the Arbitration Rules of the United Commission on International Trade Law (UNCITRAL), Article 17(4) of the UNICTRAL Arbitration Rules states similarly: "All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law."[9]

Rules of other arbitral institutions contain similar provisions regarding communication between parties and arbitrators. The Arbitration Rules of the International Chamber of Commerce (ICC) in Article 3(1) provide that "all pleadings and other written communications submitted by any party, as well as all documents annexed thereto, shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for each arbitrator, and one for the Secretariat. A copy of any notification or communication from the arbitral tribunal to the parties shall be sent to the Secretariat."[10] Moreover, the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration is explicit regarding ex parte communications. The Note states, in Section IV(34), as follows: "An arbitrator or prospective arbitrator shall not engage in ex parte communications with a party or party representative concerning the arbitration."[11]

Likewise, explicit prohibition of ex parte communication, with certain limited exceptions, can be found in the International Arbitration Rules of the International Centre for Dispute Resolution (ICDR) in Article 13(6): "No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any arbitrator, or with any candidate for party-appointed arbitrator, except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or impartiality and independence in relation to the parties, or to discuss the suitability of candidates for selection as a presiding arbitrator where the parties or party-appointed arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any candidate for presiding arbitrator."[12] An almost identical provision regarding the explicit prohibition of ex parte communication can be found in the Administered Arbitration Rules of the Hong Kong International Arbitration Centre in Article 11(5),[13] as well as in the Arbitration Rules of

[6] See Mosk & Ginsburg 2012, p. 410; M. F. Gusy, J. M. Hosking & F. T. Schwarz, *A Guide to the ICDR International Arbitration Rules*, Oxford University Press, Oxford 2011, p. 98; D. Bishop & M. Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, in A. J. Berg, van den (Ed.), Arbitration Advocacy in Changing Times, Kluwer Law International, Alphen aan den Rijn 2011, p. 395.

[7] Art. 6(2) of the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia (hereinafter "the Arbitration Agreement") provides: "Unless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States." See 2009 Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, 2748 UNTS 3

[8] See Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States (1992) (hereinafter "PCA Optional Rules"), available at https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/ (20 June 2019).

[9] See United Nations Commission on International Trade Law, *UNICTRAL Arbitration Rules, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, United Nations, New York 2014, available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf (20 June 2019).

10 See International Chamber of Commerce, *Arbitration Rules, Mediation Rules*, International Chamber of Commerce, Paris 2017, available at https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration - and-2014-Mediation-Rules-english-version.pdf (20 June 2019).

[11] See International Chamber of Commerce, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, 30 October 2017, available at https://cdn.iccwbo.org/content/uploa ds/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf (20 June 2019).

[12] See International Centre for Dispute Resolution, International Dispute Resolution Procedures, 2016, available at https://www.icdr.org/sites/default/files/documentrepository/International_Dispute_Resolution_Procedures_En glish.pdf (20 June 2019).

[13] See Hong Kong International Arbitration Centre, Administered Arbitration Rules, 1 November 2013, available at http://www.hkiac.org/sites/default/files/ck_fileb-

the Singapore International Arbitration Centre in Article 13(6).[14] Similary, the Arbitration Rules of the World Intellectual Property Organization (WIPO) state in Article 45: "Except as otherwise provided in these Rules or permitted by the Tribunal, no party or anyone acting on its behalf may have any ex parte communication with any arbitrator with respect to any matter of substance relating to the arbitration, it being understood that nothing in this paragraph shall prohibit ex parte communications which concern matters of a purely organizational nature, such as the physical facilities, place, date or time of the hearings."[15]

Another important arbitral institution – the International Centre for Settlement of Investment Disputes (ICSID), also deals with ex parte communication in its arbitral rules. Administrative and Financial Regulations of the ICSID provide, in Regulation 24, that during the pendency of any proceeding the Secretary-General shall be the official channel of written communications among the parties and arbitrators.[16]

The London Court of International Arbitration (LCIA) has similar rules. The LCIA Arbitration Rules, in Article 13(1), state: "Following the formation of the Arbitral Tribunal, all communications shall take place directly between the Arbitral Tribunal and the parties (to be copied to the Registrar), unless the Arbitral Tribunal decides that communications should continue to be made through the Registrar."[17] The same Article, in paragraph 4, provides that "during the arbitration from the Arbitral Tribunal's formation onwards, no party shall deliberately initiate or attempt to initiate any unilateral contact relating to the arbitration or the parties' dispute with any member of the Arbitral Tribunal or any member of the LCIA Court exercising any function in regard to the arbitration (but not including the Registrar), which has not been disclosed in writing prior to or shortly after the time of such contact to all other parties, all members of the Arbitral Tribunal (if comprised of more than one arbitrator) and the Registrar".[18]

3. Soft Law and Ex Parte Communication in International Arbitration

In addition to the rules of international arbitral institutions that apply in arbitral proceedings conducted before them, there are many rules, codes and guidelines of arbitral institutions and bar associations that in the form of soft law inter alia address the issue of ex parte communication in international arbitration.[19] Although not binding on arbitrators and parties in arbitral proceedings, these soft law instruments set forth generally accepted standards of ethical conduct for the guidance of participants in arbitral proceedings with the aim of ensuring the fairness and integrity of international arbitral proceedings. Among these soft law instruments probably the most prominent are: IBA Guidelines on Party Representation in International Arbitration; IBA Rules of Ethics for International Arbitrators; American Bar Association and American Arbitration Association Code of Ethics for Arbitrators.[20]

rowser/PDF/arbitration/2013_hkiac_rules.pdf (20 June 2019).

[14] See Singapore International Arbitration Centre, Arbitration Rules of the Singapore International Arbitration Centre, 1 August 2016, available at http://www.siac.org.sg/our-rules/rules/siac-rules-2016 (20 June 2019).

[15] See *World Intellectual Property Organization*, WIPO Arbitration Rules, 1 June 2014, available at http://www.w ipo.int/amc/en/arbitration/rules/index.html (20 June 2019).

[16] See International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules, April 2006, available at https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf (20 June 2019).

[17] See London Court of International Arbitration, LCIA Arbitration Rules, 1 October 2014, available at http://www. lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article 13 (20 June 2019).

[18] Ibid.

[19] On soft law and international arbitration see G. Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, Journal of International Dispute Settlement, Vol. 1, 2010, pp. 1-17.

[20] See also E. Sussman, *Ethics in International Arbitration: Soft Law Guiadance for Arbitrators and Party Representatives*, in L. W. Newman & M. J. Radine (Eds.), Soft Law in International Arbitration, JurisNet, LLC, Huntington 2014, p. 239.

The IBA Guidelines on Party Representation in International Arbitration, which have become widely accepted by the arbitration community as an expression of arbitration best practises, provide in Guideline 7 that "unless agreed otherwise by the parties, and subject to the exceptions below (Guideline 8), a party representative should not engage in any ex parte communications with an arbitrator concerning the arbitration".[21] Accordingly, a party representative may have ex parte communications only in defined circumstances set out in Guideline 8. These circumstances relate to providing a general description of the dispute and obtaining information regarding the suitability of the potential arbitrator (party-nominated or presiding arbitrator).[22] However, during these communications a party representative should not seek the views of the prospective party-nominated arbitrator or presiding arbitrator on the substance of the dispute.[23]

The IBA Rules of Ethics for International Arbitrators, which reflect internationally acceptable guidelines developed by practising lawyers from all continents, in Rule 5.3, state: "Throughout the arbitral proceedings, an arbitrator should avoid any unilateral communications regarding the case with any party, or its representatives. If such communication should occur, the arbitrator should inform the other party or parties and arbitrators of its substance."[24] The only circumstance in which ex parte communication is permitted relates to the participation of a party-nominated arbitrator in the selection of a third or presiding arbitrator (Rule 5.2.).

Unlike international standards, a more liberal approach toward ex parte communication in arbitration has been long favoured in the United States. Party-nominated arbitrators in the United States were traditionally considered partisan and thus allowed to have ex parte communications with the parties that appointed them.[25] However, thanks to the 2004 version of the Code of Ethics for Arbitrators in Commercial Disputes of the American Bar Association (ABA) and the American Arbitration Association (AAA), which has become tremendously influential in the arbitration community,[26] arbitration standards in the United States have come closer to international standards regarding ex parte communications in arbitration. The 2004 Code established a presumption of neutrality for all arbitrators, including party appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise.[27] Therefore, Canon III of the Code explicitly prohibits ex parte communication except in certain limited circumstances. But Canon X expands the possiblity of ex parte communication for the so-called 'Canon X arbitrators', i.e. for arbitrators appointed by one party who are not subject to rules of neutrality. Still, Canon X arbitrators may not at any time during the arbitration disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision; communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.

There is no doubt that the look into the soft law instruments has also confirmed the inadmissibility of ex parte communication in international arbitration. As well as binding rules of arbitral institutions, soft law instruments allow ex parte communication only in certain limited circumstances. But even then, ex parte communication is not allowed during, and about the deliberations and the likely outcome of the arbitration.

[21] IBA Guidelines on Party Representation in International Arbitration (2013), p. 6.

[22] Ibid, p. 7.

[23] Ibid.

[24] IBA Rules of Ethics for International Arbitrators, International Bar Association, 1987, available at https://www.trans-lex.org/701100/_/iba-rules-of-ethics-for-international-arbitrators-1987/ (20 June 2019).

[25] See W. W. Park, *Arbitrators and Accuracy*, Journal of International Dispute Settlement , Vol. 1, 2010, pp. 36-37.

[26] See Sussman 2014, p. 242.

[27] The Code of Ethics for Arbitrators in Commercial Disputes, American Bar Association/American Arbitration Association, 2004, available at https://www.americanbar org/content/dam/aba/migrated/dispute/commercia l_disp utes.authcheckdam.pdf (20 June 2019).

4. The Ex Parte Communications in the Arbitration Between Croatia and Slovenia

On 4 November 2009, the Prime Ministers of Croatia and Slovenia signed the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia (hereinafter "the Arbitration Agreement") by which Croatia and Slovenia (hereinafter "the Parties") submitted their maritime and land boundary dispute to arbitration.[28]

Pursuant to Article 1 of the Arbitration Agreement, the Parties established an Arbitral Tribunal in early 2012. The Parties agreed to appoint Judge Gilbert Guillaume (France), former President of the International Court of Justice, as the President of the Tribunal, and to appoint Professor Vaughan Lowe (United Kingdom) and Judge Bruno Simma (Germany) as arbitrators. In addition, Croatia appointed Professor Budislav Vukas (Croatia) as arbitrator and Slovenia appointed Dr. Jernej Sekolec (Slovenia) as arbitrator. The Permanent Court of Arbitration acted as Registry in the arbitration.

Article 3(1) of the Arbitration Agreement tasked the Arbitral Tribunal to determine: "(a) the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia; (b) Slovenia's junction to the High Sea; and (c) the regime for the use of the relevant maritime areas."

Following the first procedural meeting on 13 April 2012, the Parties exchanged three rounds of written pleadings. According to the Tribunal, the Parties included with these pleadings nearly 1500 documentary exhibits and legal authorities, as well as over 250 figures and maps.[29] Oral hearing was held from 2 to 13 June 2014, and following the hearing, the Tribunal commenced its deliberations.

Meanwhile, as reaction to two public statements concerning the possible outcome of the arbitration made by the Slovenian minister of Foreign Affairs on 7 January 2015,[30] and 22 April 2015,[31] Croatia sent to the Tribunal a letter on 30 April 2015, in which Croatia expressed deep concerns over both statements, which could be construed as implying that one of the Parties to the proceedings may have an informal channel of communication with the Tribunal that may compromise the arbitration procedure and its outcome.[32] Moreover, Croatia requested confirmation that the Parties continue to be bound to "refrain from any actions or statements which might intensify the dispute or jeopardize the work of the Arbitral Tribunal", as required by Article 10(1) of the Arbitration Agreement.

In rensponse to the Croatian letter, Slovenia informed on 1 May 2015 "that Slovenia has no information concerning the outcome of the arbitration, nor any 'informal channel of communication with the Tribunal', and has not sought 'to bring pressure on the Tribunal in any way.'"[33]

On 5 May 2015, the Arbitral Tribunal sent a letter to both Parties in which the Tribunal expressed serious concerns to the suggestion that one Party would have been privy to confidential information related to Tribunal's deliberations.[34] The Tribunal also recalled the duty, incumbent on the

[28] See 2009 Arbitration Agreement.
[29] See Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 10 July 2015, available at https://pcacases.com/web/sendAttach/1308 (20 June 2019).
[30] The minister was reported to have stated that he "had talks in The Hague last year... And I made it very clear to the Arbitral Tribunal that if they do not fulfil this task–we in Slovenia shall consider that the Arbitral Tribunal has not executed its mandate. Because the contact with the high seas has not been determined..." See http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-pusic-to-mr-pulkowski-pca3004201 5.pdf (20 June 2019).
[31] The minister stated: "According to the information that I have, which is very much unofficial, as well as on the basis of a feeling that our legal team has, being composed of the world's best renowned scholars of the law of the sea, we are somehow optimistic in a way that the Arbitral Tribunal will determine that contact with the high seas." Ibid.
[32] Ibid.
[33] See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 12, para. 69.
[34] For the text of the Tribunal's letter see Tribunal Letter to Parties, Permanent Court of Arbitration, 5 May 2015, available at http://www.pcacases.com/web/sendAttach/1307 (20 June 2019).

arbitrators and the Parties, in Section 9.1 of the Terms of Appointment, that "the Parties shall not engage in any oral or written communications with any member of the Arbitral Tribunal ex parte in connection with the subject matter of the arbitration or any procedural issues that are related to the proceedings". Finally, the Tribunal concluded that it was confident that no information about the likely outcome of any aspect of the arbitration had been disclosed.

However, on 22 July 2015, first Serbian newspapers Kurir and Newseek Srbija, and then Croatian newspaper Večernji list, published transcripts and audio files of two telephone conversations between Dr. Jernej Sekolec, the arbitrator appointed by Slovenia and Ms. Simona Drenik, Agent of Slovenia.[35] The conversations had occured on 15 November 2014 and 11 January 2015, after the conclusion of the hearing, during the deliberations of the Tribunal. The recordings revealed Dr. Sekolec's disclosure of confidential information about the deliberations of the Tribunal and likely outcome of the arbitration to Slovenia's Agent.[36] Further, the recordings also revealed discussion of how to influence the other arbitrators to rule in Slovenia's favour.[37] Finally, the recordings indicate that Dr. Sekolec had received documents from Ms. Drenik so he could use them in his discussion with other arbitrators as his own notes.[38]

There is no doubt that communication described above between the arbitrator appointed by Slovenia and Agent of Slovenia without the presence of the Croatian representative represent ex parte communication. Moreover, it is not difficult to conclude that these ex parte communications are prohibited.[39] Article 6(5) of the Arbitration Agreement is more than clear – "the proceedings are confidential".[40] In addition, Article 10(1) of the Arbitration Agreement requires "both Parties to refrain from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal".[41] The PCA Optional Rules, pursuant to which the arbitration was conducted, provide in Article 15(3) that ex parte communication is not allowed.[42] Finally, Section 9.1 of the Terms of Appointment, signed by Croatia, Slovenia and the Arbitral Tribunal, provides that "the Parties shall not engage in any oral or written communications with any member of Arbitral Tribunal ex parte in connection with the subject matter of the arbitration or any procedural issues that

[35] For transcripts of parts of their conversations, translated from Slovenian into English, see Ministry of Foreign and European Affairs of the Republic of Croatia, Excerpts from Recordings of Conversation Between Dr. Jernej Sekolec, Member of the Arbitral Tribunal, and Ms. Simona Drenik, Agent of the Republic of Slovenia, 2015, available at http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-excerpts-from-recordings-betweendrse kolec-and-mr-drenik-14082015.pdf (20 June 2019).

[36] Excerpt from Recording 1:

"Jernej Sekolec: About the division of the Bay, a bigger part, a smaller part, we do not yet have a solution there. At one point, it was mentioned 1/4 to 3/4, but then the President (Judge Gilbert Guillaume, President of the Arbitral Tribunal) on more occasions mentioned 2/3, 1/3.

Simona Drenik: Yes.

Jernej Sekolec: Then, the line which would delimit the territorial sea would run from that point on the base line…

Simona Drenik: Yes.

Jernej Sekolec: …of the Bay, where that line… In the worst example, it should not go below 1/3." Ibid, p. 1.

[37] Excerpt from Recording 2:

"Simona Drenik: How about, I am thinking, what if one day you got together with Bruno (Judge Bruno Simma, Member of the Arbitral Tribunal)? With Simma.

Jernej Sekolec: Listen, I agreed to meet with Bruno for dinner at his home, in any case.

Simona Drenik: Aha, great! And, you know, you give him one or two (murmur), say, OK, you know 'I looked at this, so you know, I think…' Not that you would give him 500 arguments. But you say 'I think, look at this...' He is not just anybody. Maybe he will then present it, but if you present it, he will look at it, Guillaume (Judge Gilbert Guillaume, President of the Arbitral Tribunal) I mean. But if Simma says 'Oh, it seems to me, we could look at this again'. " Ibid, p. 12.

[38] Excerpt from Recording 1:

"Simona Drenik: You know, I could prepare that for you. But, one thing is that it would be good for all those documents that they are sent so that you brought along your computer.

Jernej Sekolec: Yes. I have a file. Simona Drenik: And then we. And then on your computer we save a file, and just transfer the documents, you know, the text. That is just so that afterwards you are recorded as the author of the file.

Jernej Sekolec: I understand, I understand, yes, yes.

Simona Drenik: If not, then it is nobody, or afterwards, someone there could find out that I am the author of the file. If I just opened the file with the key like on my computer, and transfer it to you into a new file, for each effectivité, we open a new one on your computer and save it, that is the best way, it would be good to do it that way.

Jernej Sekolec: Yes, alright. (…)" Ibid, pp. 7-8.

[39] See also L. W. Newman, D. Zaslowsky, *When Arbitrators Stray: Ex Parte Communications*, New York Law Journal, 25 September 2015, available at http://nysbar.com/blogs/ResolutionRoundtable/When%20Arbitrator s%20Stray.pdf (20 June 2019).

[40] Art. 6(5) of the 2009 Arbitration Agreement.

[41] Ibid.

[42] Art. 15(3) of the PCA Optional Rules.

are related to the proceedings".[43] It is important to note that Ms. Drenik`s actions, which was at the time acting in her official capacity as Agent for her country, are attributable to Slovenia under international law.[44] In other words, Slovenia has violated provisions of the Arbitration Agreement, the PCA Optional Rules and the Terms of Appointment.

5. Consequences of the Ex Parte Communications

5.1. Events Following the Public Disclosure of the Ex Parte Communications

On 23 July 2015, the day after the publication of the recordings, Dr. Sekolec and Ms. Drenik resigned from their posts. On the same day, the Tribunal invited Slovenia to appoint an arbitrator to replace Dr. Sekolec, and noted that "once reconstituted, the Tribunal intends to resume its deliberations in the present arbitration without delay".[45] However, by letter to the Tribunal, dated 24 July 2015, Croatia stated that "the most fundamental principles of procedural fairness, due process, impartiality and integrity of the arbitral process have been systematically and gravely violated, to the prejudice of Croatia" and that "the entire arbitral process has been tainted".[46] Accordingly, in the same letter Croatia asked the Tribunal to suspend the proceedings with immediate effect.[47] In response to the Croatian letter, in its letter to the Tribunal, dated 27 July 2015, Slovenia did not agree that "the Tribunal should suspend the arbitration proceedings" or "that the entire Arbitral process has been tainted".[48] The next day, on 28 July 2015, Slovenia appointed Judge Ronny Abraham, President of the International Court of Justice, as a new arbitrator.

It soon became apparent that the Parties had completely opposing views regarding the continuation of the arbitration process. Moreover, at its Extraordinary Session of July 29th 2015, the Croatian Parliament unanimously passed the Ruling on the obligation of the Government of the Republic of Croatia to begin the procedure of termination of the Arbitration Agreement.[49] Accordingly, on 30 July 2015, by *note verbale* the Ministry of Foreign and European Affairs of the Republic of Croatia informed Slovenia of Croatian intention to terminate the Arbitration Agreement because Slovenia has engaged in one or more material breaches of the Arbitration Agreement.[50] Slovenia was also informed that "as of the date of the notification Croatia ceased to apply the Arbitration Agreement".[51] On the same day, Professor Vukas, member of the Arbitral Tribunal appointed by Croatia, resigned, stating that the reason for his resignation were "the numerous acts of Mr Sekolec, arbitrator appointed by Slovenia, and Ms Simona Drenik, the Agent of Slovenia, which have violated the basic principles of a fair arbitration proceeding".[52] Pofessor Vukas added that "the resignation of Mr Sekolec and Ms Drenik cannot rectify the detriment they have caused to the arbitration proceeding".[53] On 31 July 2015, Croatia informed the Tribunal that it "cannot further continue the process in good faith", and about its intention to terminate the Arbitration Agreement due to fact that the arbitration

[43] See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 44, para. 175.

[44] See I. Brownlie, *Principles of Public International Law*, 7th edn., Oxford University Press, Oxford 2008, pp. 446-454; M. N. Shaw, *International Law*, 7th edn., Cambridge University Press, Cambridge 2014, p. 572; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights,* Advisory Opinion, 1999 ICJ Rep. 62, at 87, para. 62; Report of the International Law Commission on the work of its fifty-third session, 23 April – 1 June, 2 July – 10 August 2001, General Assembly Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10), pp. 40-43.

[45] See Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 23 July 2015, available at http://www.pcacases.com/web/sendAttach/1310 (20 June 2019).

[46] See http://www.mvep.hr/files/file/dokumenti/arbitraza/en/150820-letter-from-fm-pusic-to-mr-pulkowski-pca-24072015.pdf (20 June 2019).

[47] Ibid.

[48] See Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 28 July 2015, available at https://pcacases.com/web/sendAttach/1313 (20 June 2019).

[49] Ruling on the obligation of the Government of the Republic of Croatia to begin the procedure of termination of the Arbitration Agreement, Official Gazzete of the Republic of Croatia, No. 85/2015.

[50] Republic of Croatia, Ministry of Foreign and European Affairs, Note No. 3303/2015, Zagreb, 30 July 2015, available at http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-note-verbale-no-3303-2015-(to-the-republic-of-slovenia).pdf (20 June 2019).

[51] Ibid.

[52] The text of Vukas resignation is available at http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-resig nation-of- judge-vukas-30072015.pdf (20 June 2019).

[53] Ibid.

process as a whole had been compromised to such an extent that Croatia was confident that the arbitration process could not continue in this or any similar form.[54]

It did not take long to wait for a new turn in the arbitration process. Just a week after he was appointed by Slovenia, Judge Abraham, member of the Arbitral Tribunal, resigned. Judge Abraham informed the Tribunal that he had agreed to his appointment in the hope that this "would help restore confidence between the Parties and the Arbitral Tribunal and to allow the process to continue normally, with the consent of both Parties".[55] However, having realized that "the current situation cannot meet that expectation", Judge Abraham considered that it was "no longer appropriate" for him to serve as arbitrator.[56]

On 13 August 2015, Slovenia informed the Tribunal that it had objected to Croatia's purported unilateral termination of the Arbitration Agreement and stated that the Tribunal had the power and the duty to continue the proceedings as it would otherwise be open to any party wishing to delay or prevent the making of an arbitral award to frustrate an arbitration agreement.[57] In addition, Slovenia informed the Tribunal that it will refrain from appointing a member of the Tribunal to replace Judge Abraham and requested the President of the Arbitration Tribunal, Judge Guillaume, in exercise of his powers under Article 2(2) of the Arbitration Agreement, to appoint a member of the Arbitration Tribunal.[58]

Finally, on 25 September 2015 the Tribunal was reconstituted. The President of the Arbitration Tribunal, Judge Guillaume, appointed H.E. Mr. Rolf Einar Fife (Norway) to succeed Judge Abraham, and Professor Nicolas Michel (Switzerland) to succeed Professor Vukas.[59] Following the reconstitution, the Tribunal informed the Parties about its intention to consider the Parties' positions carefully, including in respect of the effect of Croatia's stated intention to terminate the Arbitration Agreement and in respect of the possible implications for the present proceedings of the events reportedly underlying Croatia's decision.[60]

5.2. Croatia's Unilateral Withdrawal from the Arbitration

Croatia explained the rationale for the unilateral withdrawal from the arbitration in the letters sent to the Tribunal and Slovenia. According to Croatia, the ex parte communications between Dr. Sekolec and Ms. Drenik revealed that the most fundamental principles of procedural fairness, due process, impartiality and integrity had been systematically and gravely violated, to the prejudice of Croatia.[61] Furthemore, Croatia emphasized that Dr. Sekolec had had numerous conversations, dinners, and written communication with other members of the Tribunal, and with members of the PCA staff, during more than 13 months after the closing of written proceedings and oral hearings.[62] In Croatia's view, it was not possible for the other members of the Tribunal, or the PCA staff, to distinguish between the arguments and "facts" presented by Slovenia through Arbitrator Sekolec,

[54] Croatia stated: "Croatia has entered into the arbitration process *bona fide* and with full confidence in the work of the Arbitral Tribunal, its Members and technical staff. This confidence was violated to the level that Croatia cannot further continue the process in good faith." For the text of Croatia's letter to the Tribunal see http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-pusic-to-mr-pulkowski-pca-310720 15.pdf (20 June 2019).
[55] Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 5 August 2015, available at https://pcacases.com/web/sendAttach/1389 (20 June 2019).
[56] Ibid.
[57] Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 19 August 2015, available at https://pcacases.com/web/sendAttach/1403 (20 June 2019).
[58] Ibid. Art. 2(2) of the Arbitration Agreement provides: "Each Party shall appoint a further member of the Arbitral Tribunal within fifteen days after the appointments referred to in paragraph 1 have been finalised. In case that no appointment has been made within this delay, the respective member shall be appointed by the President of the Arbitral Tribunal."
[59] Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 25 September 2015, available at https://pcacases.com/web/sendAttach/1468 (20 June 2019).Ibid.
[60] Ibid.
[61] See Note No. 3303/2015 (2015).
[62] Ibid.

and those developed solely by Arbitrator Sekolec on his own.[63] Thus, Croatia argued that no reasonable person would conclude that the actions that had occurred may not had influenced other actors in the arbitration process.[64] As a consequence the entire arbitral process had been tainted and compromised, such that the mechanisms available within the Arbitration Agreement and means at the disposal of the Arbitration Tribunal could not repair the far-reaching and irreversible damage that has been done.[65] Finally, Croatia concluded that its confidence in the work of the Tribunal was violated to the level that it could not further continue the process in "good faith".[66]

Legal analysis of the ex parte communication between Dr. Sekolec and Ms. Drenik confirms, without any doubt, the violation of the fundamental principles of the arbitration process, including due process, procedural fairness, impartiality and independence in the arbitration between Croatia and Slovenia. However, in order to understand the gravity of the violation of the fundamental principles of the arbitration process by Dr. Sekolec and Ms. Drenik, it is necessary to know the importance and the role that the said principles have in rendering a fair and just award in the arbitral proceedings.[67]

The concept of due process in international arbitration is derived from the general principles of law and as such constitutes the cornerstone of international arbitral process.[68] Moreover, due process is considered as a core or foundation of all other procedural rules. [69] Although there is no no generally accepted definition of due process, there is general agreement about its key constituent elements. Thus, the concept of due process encompasses the right to notice, the right to be heard (the right to present case), the right to equality (the equality of arms),[70] and the right to an independent and impartial tribunal.[71] Therefore, due process in international arbitration can be described as a shield which protects essential procedural rights of the parties in the arbitration process.

Further, procedural fairness, one of the principles that emanates from due process, has become the most important atribute of the arbitration process. According to a survey conducted among attorneys and their clients in international commercial arbitrations an overwhelming majority of survey participants ranked a fair and just result as the single most important attribute of the process.[72] Moreover, fair and just result was nearly twice as important as the next ranked attribute.[73]

Finally, one of the most fudamental principles of international arbitration is independence and impartiality of arbitrators, i.e. every arbitrator must be and remain independent and impartial of the parties. Although 'independence' and 'impartiality' are two distinct concepts, they are strongly interrelated, and therefore they should be viewed as two sides of the same coin.[74] Independence refers to the relationship between an arbitrator and one of the parties. It is generally considered that independence is more an objective concept because it has nothing to do with an arbitrator's state of mind.[75] On the other hand, impartiality refers to bias of an arbitrator. Thus, impartiality is

[63] Ibid.
[64] For the text of Croatia's letter to the Tribunal see http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-pusic-to-mr-pulkowski-pca-31072015.pdf (20 June 2019).
[65] See Note No. 3303/2015 (2015).
[66] For the text of Croatia's letter to the Tribunal see http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-pusic-to-mr-pulkowski-pca-31072015.pdf (20 June 2019).
[67] See M. Ilic, *Croatia v. Slovenia: The Defiled Proceedings*, Arbitration Law Review, Vol. 9, 2017, pp. 360-371.
[68] See also C. T. Kotuby, *General Principles of Law, International Due Process, and the Modern Role of Private International Law*, *D*uke *J*ournal of *C*omparative *&* *I*nternational *L*aw, Vol. 23, 2013, p. 426; L. Reed, *Ab(use) of due process: sword vs shield*, Arbitration International, Vol. 33, 2017, p. 365.
[69] M. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration*, 2nd edn., Oxford University Press, Oxford 2010, p. 4.
[70] The principle of equality of arms was first developed by the European Court of Human Rights (ECtHR). According to the ECHR, the principle of equality of arms implies that each party must be given the reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. See *Dombo Beheer B.V. v. The Netherlands* (App. no. 14448/88) ECtHR (1993), p. 9.
[71] See also F. Fortese & L. Hemmi, *Procedural Fairness and Efficiency in International Arbitration*, Groningen Journal of International Law, Vol. 31, 2015, p. 111; Kurkela & Turunen 2010, p. 2; Reed 2017, p. 366; D. J. A. Cairns, *Oral Advocacy and Time Control in International Arbitration*, in (A. J. Berg, van den (Ed.), Arbitration Advocacy in Changing Times, Kluwer Law International, Alphen aan den Rijn 2011, p. 187.
[72] R. W. Naimark & S. E. Keer, *International Private Commercial Arbitration: Expectations and perceptions of Attorneys and Business People*, International Business Lawyer, Vol. 30, No. 5, 2002, pp. 203-205.
[73] Ibid.
[74] See also J. Jenkins & S. Stebbings, *International Construction Arbitration Law*, Kluwer Law International, Alphen aan den Rijn 2006, p. 151.
[75] A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, 4th edn., Sweet & Maxwell, London 2004, paras. 4-55.

considered a subjective and more abstract concept than independence because it involves primarily a state of mind. [76]

All the above mentioned principles have been implemented in the rules of the major international arbitral institutions,[77] as well as in the soft law rules of arbitral institutions and bar associations.[78] This only confirms the essential importance that the said principles have in international arbitral proceedings and rendering a fair and just award. Moreover, the said principles can be found in the Arbitration Agreement and the PCA Optional Rules, pursuant to which the arbitration was conducted. Thus, Article 4 of the Arbitration Agreement states that the Tribunal applies international law, equity and the principle of good neighbourly relations in order to achieve "a fair and just result".[79] In addition, the Arbitration Agreement in Article 6(5) provides that "the proceedings are confidential".[80] Confidentiality is closely related to independence and impartiality, and they together form an integral part of procedural fairness, i.e. due process. Further, the PCA Optional Rules also emphasize arbitrator independence and impartiality,[81] as well as requirement for procedural fairness, i.e. equality of the parties in the proceedings and a full opportunity of each party to present its case.[82] Finally, Section 3.4 of the Terms of Appointment specifies that the "members of the Arbitral Tribunal are and shall remain impartial and independent of the Parties".[83]

It is interesting to note that the Tribunal has also recognized the importance and duty to protect the procedural rights of both Parties in the dispute.[84] According to the Tribunal, procedural fairness includes the right to an impartial and independent judge, which is of paramount importance.[85]

Thus, considering severity of the violation of the fundamental principles in the arbitration process, which caused the ex parte communications between Dr. Sekolec and Ms. Drenik, to the prejudice of Croatia, but also the vital national interests of Croatia, Croatia's unilateral withdrawal from the arbitration was the only logical decision at that moment. However, despite Croatia's unilateral withdrawal from the arbitration, the question of a possible legal remedy in the given case remained still open.

International practice provides rare cases that are similar to the present one. Still, there are two cases where a similar situation occurred. In the first case, the *Buraimi Oasis Arbitration (Saudi Arabia v. United Kingdom)* of 1955, sheikh Yousuf Yasin, the arbitrator appointed by Saudi Arabia, was in the continuous communication with the legal representatives of the Saudi Arabia.[86] After the ex parte communications were disclosed, three of the five arbitrators resigned.[87] Since it was not possible to reconstitute the tribunal, the arbitration was abandoned.[88] The second case is the *Victor Pey*

Casado et al. v. Chile case in which Mr. Leoro Franco, the arbitrator appointed by Chile, provided Chile with a partial draft of the decision on jurisdiction prepared by the president.[89] The arbitrator resigned, and the new one was appointed.[90] After the tribunal was reconstituted, the proceedings

[76] Ibid.
[77] See arts. 6(7) and 17(1) of the UNICTRAL Arbitration Rules (2014); arts. 11(1) and 22(4) of the ICC Rules of Arbitration (2017); arts. 13(1) and 20(1) of the ICDR International Arbitration Rules (2016); arts. 11.1, 13.1 and 13.5 of the Administered Arbitration Rules of the Hong Kong International Arbitration Centre (2013); arts. 13.1 and 19.1 of the Arbitration Rules of the Singapore International Arbitration Centre (2016); arts. 22 and 37(b) of the WIPO Arbitration Rules (2014); Rule 6(2) of the Arbitration Rules of the ICSID (2006); arts. 5.4, 14.4, 14.5 of the LCIA Arbitration Rules (2014).
[78] Guideline 1 and 27 of the IBA Guidelines on Party Representation in International Arbitration (2013); Rule 3.1 of the IBA Rules of Ethics for International Arbitrators (1987); Canon I-IX of the AAA/ABA Code of Ethics for Arbitrators (2004).
[79] Art. 4 of the 2009 Arbitration Agreement.
[80] Ibid, art. 6(5).
[81] Arts. 6(4) and 9-12 of the PCA Optional Rules.
[82] Art. 15(1) of the PCA Optional Rules clearly states that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case".
[83] *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 44, para. 175.
[84] Ibid, at 56, para. 227.
[85] Ibid.
[86] See Goy 1957, pp. 195-197.
[87] See A. Ross, *Poisoned Waters: Croatia's Stance on the Sekolec Scandal*, Global Arbitration Review, Vol. 10, 2015, p. 13
[88] Ibid.
[89] *Victor Pey Casado and President Allende Foundation v. Republic of* Chile, ICSID Case No. ARB/98/2, Award of 8 May 2008, at 15-17, paras. 34-43.
[90] Ibid.

continued and an entirely new round of written submissions was made on the jurisdictional issues.[91]

Unlike the *Buraimi Oasis* case in which the tribunal was not reconstituted, in the *Victor Pey Casado et al. v. Chile* case the tribunal was successfully reconstituted after the ex parte communications were disclosed. Therefore, Slovenia referred to the *Victor Pey Casado et al. v. Chile* case where the tribunal was reconstituted and the proceedings continued despite previous ex parte communications.[92] Although the *Victor Pey Casado et al. v. Chile* case and the present case are similiar, they are also different. Thus, in the *Victor Pey Casado et al. v. Chile* case the ex parte communications encompass only the exchange of a drafted tribunal decision on jurisdiction between the party-appointed arbitrator and its appointing party. On the other hand, in the arbitration between Croatia and Slovenia, apart from the exchange of documents, the ex parte communications between Dr. Sekolec and Ms. Drenik encompass disclosure of confidential information about the deliberations of the Tribunal and the likely outcome of the arbitration to Slovenia's Agent, as well as discussion of how to influence the other arbitrators to rule in Slovenia's favour. Moreover, in a period of thirteen months after the end of the oral hearings Dr. Sekolec had numerous conversations, dinners, and written communications with other members of the Tribunal.[93] Although such contacts between members of the Tribunal are common during deliberations, they enabled Dr. Sekolec to act *de facto* as an Agent of Slovenia, and thus influence the formation of the views of other members of the Tribunal regarding the final settlement of the Parties' dispute to the prejudice of Croatia. Ilic also correctly notes that the remaining members of the Tribunal "would mentally retain any form of ex parte information or strategies conveyed by Sekolec".[94] In addition, thanks to the "informal channel of communication with the Tribunal", Slovenia gained access to confidential information related to the Tribunal's deliberations, including arbitrators' views on certain facts and arguments, and thus achieved a strategic procedural advantage over Croatia. Therefore, it is hard to imagine that the replacement of the member of the Tribunal who was involved in the ex parte communication, as it was done in the *Victor Pey Casado et al. v. Chile* case, can be a sufficient remedy to repair the grave damage that has been done to the arbitral proceedings in the present case. In other words, all members of the Tribunal who were influenced by the ex parte communications were supposed to be replaced in order to ensure the procedural prerequisites for the continuation of the proceedings. However, even then the question remains of the success of conducting such proceedings whose award, because of legal and political connotations, would hardly be accepted and implemented by both Parties. Moreover, Croatia warned that "no award issued under these legally and ethically completely compromised proceedings could be considered as effective, authoritative or credible" and thus "such an award could never be implemented, or enforced, and consequently, any effort to continue arbitration would be futile and counterproductive".[95] Therefore, termination of the proceedings by the Tribunal, pursuant to Article 34(2) of the PCA Optional Rules,[96] was probably the best solution for the present case. Finally, in a similiar situation, in the *Buraimi Oasis* case, due to grave procedural violations caused by ex parte communications and a sensitive political context, the arbitral proceedings were abandoned.

5.3. Termination of the Arbitration Agreement

On 30 July 2015, by *note verbale* Croatia notified Slovenia that, in accordance with Article 60(1)

[91] Ibid.
[92] See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 29, 31, paras. 119, 123.
[93] Ibid, at 17, para. 80.
[94] See also Ilic 2017, p. 376. Croatia also stated that "no reasonable person would conclude that the actions that have occurred may not have influenced other actors in the arbitration process". For the text of Croatia's letter to the Tribunal see http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-pusic-to-mr-pulkowski-pca-31072015.pdf (20 June 2019).
[95] See Permanent Mission of the Republic of Croatia to the United Nations, No. 55/2016, New York, 16 March 2016, available at http://www.mvep.hr/files/file/dokumenti/arbitraza/en/160330-nv-pm-croatia-no-55-2016.pdf (20 June 2019).
[96] Article 34(2) of the PCA Optional Rules provides: "If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection."

of the Vienna Convention on the Law of Treaties, "it is entitled to terminate the Arbitration Agreement".[97] Accordingly, pursuant to Article 65(1) of the Vienna Convention Croatia proposed to terminate forthwith the Arbitration Agreement.[98] In addition, Croatia explained that reason for the termination of the Arbitration Agreement was a material breach of the Arbitration Agreement by Slovenia. Thus, Croatia stated that Slovenia had violated Article 6 of the Arbitration Agreement, which provided confidentiality of the proceedings, as well as Article 10 of the Arbitration Agreement, which obliged the parties to "refrain from any action or statement which might jeopardize the work of the Arbitral Tribunal".[99] In Croatia's view, these provisions were "essential to the accomplishment of the object and purpose of the Arbitration Agreement" and therefore their violation constituted material breach of the Arbitration Agreement within the meaning of Article 60(3) of the Vienna Convention.[100] Finally, Croatia informed Slovenia that "as of the date of the *note verbale* it ceased to apply the Arbitration Agreement".[101]

However, Slovenia objected to Croatia's purported unilateral termination of the Arbitration Agreement. In Slovenia's view, "it was not open to one Party to invoke a material breach as a ground for terminating the Arbitration Agreement".[102] In addition, Slovenia added that there had been no material breach within the meaning of the Vienna Convention since a violation did not make the accomplishment of the object and purpose of the Arbitration Agreement impossible.[103] It was more than obvious that the Parties took on completely diametrically opposed views regarding the validity of the purported termination of the Arbitration Agreement.

The dispute that arose between the Parties regarding the validity of the purported termination of the Arbitration Agreement by Croatia in fact encompasses two distinct issues: a) the right of Croatia to invoke a material breach as ground for terminating the Arbitration Agreement pursuant to Article 60(1) of the Vienna Convention; b) the existence of a material breach of the Arbitration Agreement by Slovenia within the meaning of Article 60(3) of the Vienna Convention.

In order to answer these questions, it is necessary first to look at the Vienna Convention on the Law of Treaties whose parties are Croatia and Slovenia. Pursuant to Article 60(1) of the Vienna Convention "a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part".[104]

However, Slovenia argued that paragraph 4 of Article 60 prevents Croatia to invoke paragraph 1 of Article 60. Namely, paragraph 4 of Article 60 provides that paragraph 1 of Article 60 is "without prejudice to any provision in the treaty applicable in the event of a breach".[105] In Slovenia's view, the Arbitration Agreement contained such provisions (Article 3(4) and Article 6(2)), and thus Article 60(1) of the Vienna Convention could not be invoked by Croatia.[106]

First, despite Slovenia's claim, Article 3(4) of the Arbitration Agreement refers exclusively to the disputes regarding the interpretation of the Arbitration Agreement and as such does not prevent a Party of the Arbitration Agreement to invoke Article 60(1) of the Vienna Convention. Second, Article 6(2) of the Arbitration Agreement refers to the PCA Optional Rules which in Article 21(1) confers upon the Tribunal the power to settle disputes between the parties regarding "the jurisdiction with respect to the existence or validity of the arbitration agreement".[107] In other words, the

[97] See Note No. 3303/2015 (2015). For the text of the Convention see 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.
[98] See Note No. 3303/2015 (2015).
[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 33, para. 129.
[103] Ibid, at 34, para. 135.
[104] Art. 60(1) of the 1969 Vienna Convention on the Law of Treaties.
[105] Ibid, art. 60(4).
[106] See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 51, para. 205.
[107] Art. 21(1) of the PCA Optional Rules.

Tribunal has the power to determine the validity of the termination of the Arbitration Agreement by Croatia.

Nevertheless, textual analysis of the relevant provisions of the Arbitration Agreement, as well as of the PCA Optional Rules, in particular Article 21, reveals that there is no prescribed procedure in the event of a material breach. Consequently, in the absence of clear normative guidance, it can be concluded that Article 60(4) of the Vienna Convention does not refer to provisions which could prevent the application of Article 60(1) in the event of a material breach.

It still remains to answer the question whether there was a material breach of the Arbitration Agreement by Slovenia under Article 60(3) of the Vienna Convention. Pursuant to Article 60(3) there are two types of a material breach. Accordingly, Article 60(3) defines a material breach as: (a) a repudiation of the treaty, or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.[108]

The Vienna Convention does not define the term 'repudiation', but it is considered that repudiation "encompass all means by which a party intends to relieve itself unlawfully from its obligations under a treaty".[109] International practice provides rare examples of application of Article 60(3)(a). However, in its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the International Court of Justice (ICJ) found that South Africa, by rejecting to fulfill its treaty obligations, had disavowed the Mandate, i.e. it had repudiated it.[110] In the present case, Slovenia did not reject to fulfill all its treaty obligations, as it was case with South Africa. While South Africa has consistently refused to apply the provisions of the treaty, in fact it rejected a treaty as a whole, Slovenia has violated some of the provisions of the Arbitration Agreement. Moreover, after disclosure of the ex parte communications, Slovenia has argued that the Arbitration Agreement continues to apply.[111] In addition, Slovenia has also expressly recognised its continuing obligations under the Arbitration Agreement.[112] Although Slovenia did not repudiate the Arbitration Agreement within the meaning of Article 60(3)(a) of the Vienna Convention, violations of the Arbitration Agreement by Slovenia may still constitute a material breach under Article 60(3)(b) of the Vienna Convention.

A textual analysis of Article 60(3)(b) reveals that 'any' violation of a provision essential to the accomplishment of the object or purpose of the treaty constitutes a material breach.[113] Consequently, the intensity or gravity of the breach does not have any impact on the existence of a material breach.[114] On the contrary, the decisive criterion for determining the existence of material breach is the nature of the provision that has been violated. Pursuant to Article 60(3)(b) that provision must be 'essential'. However, Article 60 does not provide explanation of an 'essential provision'. As in the case of paragraph 3(a), examples of application of paragraph 3(b) are rare in international practice. In the *Namibia* case, the ICJ explicitly recognized "the right of a party to treaty to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship".[115] Accordingly, the ICJ found that South Africa had violated precisely those provisions and thus caused a material breach under Article 60(3)(b) of the Vienna Convention.[116] Fifteen years later, in 1986, in the *Military and Paramilitary Activities*

[108] Art. 60(3) of the 1969 Vienna Convention on the Law of Treaties.
[109] See P. Reuter, Introduction To The Law Of Treatise, Pinter Publishers, London 1989, 161. See also M. M. Gomaa, Suspension or Termination of Treaties on Grounds of Breach, Martinus Nijhoff, Leiden 1996, p. 26; B. Simma & C. J. Tams, Reacting against treaty breaches, in D. B. Hollis (Ed.), *The Oxford Guide to Treaties,* Oxford University Press, Oxford 2012, p. 583.
[110] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 16, at 47, para. 95.
[111] See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 53, para. 214.
[112] Ibid.
[113] See also Simma & Tams 2012, pp. 583-584.
[114] Ibid.
[115] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 16, at 47, para. 95.
[116] Ibid.

in and against Nicaragua case, the ICJ also found that certain United States activities constituted a material breach of the 1956 Treaty of Friendship, Commerce and Navigation between United States and Nicaragua. The ICJ first identified object and purpose of the 1956 Treaty – effective implementation of friendship in the specific fields provided for in the Treaty.[117] Then, the ICJ found that the direct attacks on ports, oil installations, as well as the mining of Nicaraguan ports undermined the whole spirit of the 1956 Treaty and deprived it of its object and purpose.[118] On the other hand, the ICJ took the view that the acts of economic pressure did not constitute an act calculated to defeat the object and purpose of the 1956 Treaty.[119]

Turning, then, to the present case, it is necessary first to consider the object and purpose of the Arbitration Agreement. A useful guideline in determining the object and purpose of the Arbitration Agreement represents a view of the ICJ in the *Case Concerning the Arbitral Award of 31 July 1989*. The ICJ then stated that an arbitration agreement has "very specific object and purpose: to entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits".[120] Accordingly, the object and purpose of the Arbitration Agreement, pursuant to its Articles 3(1) and 4, was the settlement of the maritime and land boundary dispute between the Parties in accordance with the rules and principles of international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result.[121] In addition, pursuant to Article 9 of the Arbitration Agreement, the object and purpose of the Arbitration Agreement was the continuation of the negotiations regarding Croatia's access to the European Union.[122]

Given that one of the objects and purposes of the Arbitration Agreement was achieved – the continuation of negotiations regarding Croatia's access to the European Union, the question remains whether violations of the Arbitration Agreement by Slovenia have defeated the remaining object and purpose of the Arbitration Agreement.

There is no doubt that the ex parte communication between Dr. Sekolec, the arbitrator appointed by Slovenia and Ms. Simona Drenik, the Agent of Slovenia, in the arbitration between Croatia and Slovenia violated the fundamental principles of the arbitration process, including due process, procedural fairness, impartiality and independence. Moreover, the ex parte communications are completely incompatible with "the principle of good neighbourly relations". Therefore, using the words of the ICJ in the *Nicaragua* case, activities of Slovenia "undermined the whole spirit" of the Arbitration Agreement directed to the settlement of the maritime and land boundary dispute between the Parties in accordance with the rules and principles of international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result. It is difficult to understand that such grave violations of the fundamental principles of the arbitration process do not constitute an act calculated to defeat the object and purpose of the Arbitration Agreement since those principles are essential to the integrity of the arbitral process and the achievement of fair and just result. Accordingly, Slovenia's actions, i.e. the ex parte communications constitute a material breach of the Arbitration Agreement under Article 60(3)(b) of the Vienna Convention since they defeated the object and purpose of the Arbitration Agreement.[123] Otherwise, the neglect of grave violations of the fundamental principles of the arbitration process and diminishing their key role in rendering fair and just award would bring into question the meaning of arbitration as a means of settling disputes.

[117] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 1986 ICJ Rep. 14, at 136-137, para. 273.
[118] Ibid, para. 275.
[119] Ibid, para. 276.
[120] *Case Concerning Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 1991 ICJ Rep. 53, at 70, para. 49.
[121] See arts. 3(1) and 4 of the 2009 Arbitration Agreement.
[122] Art. 9 of the Arbitration Agreement provides: "(1) The Republic of Slovenia shall lift its reservations as regards opening and closing of negotiation chapters where the obstacle is related to the dispute; (2) Both Parties shall refrain from any action or statement which might negatively affect the accession negotiations."
[123] See also Ilic 2017, pp. 373-374.

5.4. Jurisdiction of the Tribunal

The first question which arose after Croatia's unilateral withdrawal from arbitration and announced termination of the Arbitration Agreement was whether the Tribunal had jurisdiction regarding the Croatian request for termination of the Arbitration Agreement.

Croatia expressed the view that the Tribunal was without competence to express any views as to the requirements for the termination of the Arbitration Agreement since the Arbitration Agreement contained no provision with regard to the settlement of disputes arising in relation to the validity and effect of the Arbitration Agreement.[124]

On the other hand, Slovenia argued that the Tribunal was competent to decide on Croatia's claim that it was entitled to terminate the Arbitration Agreement.[125] In support of its claim, Slovenia submitted that a tribunal's inherent power to decide upon challenges to its own jurisdiction was a firmly established general principle of international law (*la compétence de la compétence*).[126] In addition, Slovenia explained that the principle applied unless it was expressly excluded and that the principle was expressly provided for in Article 21 of the PCA Optional Rules, which were applicable in the arbitration between Croatia and Slovenia by virtue of Article 6, paragraph 2 of the Arbitration Agreement.[127]

It is obvious that the Parties were in disagreement as to whether the Tribunal had jurisdiction regarding the Croatian request for termination of the Arbitration Agreement. To answer this question, it is necessary first to answer whether the Tribunal had jurisdiction to determine its own jurisdiction (*la compétence de la compétence* in French or *Kompetenz-Kompetenz* in German). According to the principle of *la compétence de la compétence* every judicial body has the power to determine its own jurisdiction.[128] This power is incidental, i.e., it is incidental jurisdiction to decide whether the substantive jurisdiction exists.[129]

A look at the history of international arbitration reveals that the question whether the tribunal has jurisdiction to determine its own jurisdiction arose for the first time in the *Betsey* case in 1796. The two commissioners in the *Betsey* case took the view that the tribunal had the power to decide on its own jurisdiction.[130] After the *Betsey* case, the principle *la compétence de la compétence* has been applied in a number of arbitrations, and in some arbitrations the principle was expressly acknowledged. In 1884, in the *Le More* case, the tribunal decided on its jurisdiction,[131] while in 1900, in the *Guano* case between Chile and France, the tribunal stated that "la doctrine et la jurisprudence sont unanimes pour admettre que les Tribunaux internationaux apprécient eux-mêmes leur compétence sur la base du Compromis lié entre les Parties".[132] In 1911, in the *Walfish Bay Boundary* case between Germany and Great Britain, the tribunal similarly stated that "it is a constant doctrine of public international law that the arbitrator has powers to settle questions as to his own competence by interpreting the range of the agreement submitting to his decision the questions in dispute".[133] Moreover, in 1928, in the *Rio Grande Irrigation and Land Company Ltd* case, the tribunal took the stance that in every legal tribunal "there is inherent power, and indeed a duty, to entertain, and,

[124] See Croatia's letter to the Tribunal, available at http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-pusic-to-mr-pulkowski-pca-31072015.pdf (20 June 2019).
[125] See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, para. 102.
[126] Ibid.
[127] Ibid, para. 104.
[128] See L. Boisson de Chazournes, *The Principle of Compétence de la Compétence in International Adjudication and its Role in an Era of Multiplication of Courts and Tribunals*, in: M. Arsanjani, J. Cogan & S. Weissner (Eds.), Looking to the Future: Essays in Honor of W. Michael Reisman, Martinus Nijhoff, Leiden 2010, pp. 1028-1029; I. F. I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction*, Martinus Nijhoff, The Hague 1965, pp. 25-26.
[129] See Amerasinghe 2011, p. 32; Shihata 1965, pp. 7-8.
[130] Amerasinghe 2011, p. 26.
[131] Ibid, p. 25.
[132] *Affaire du Guano (Chili v. France)*, Awards of 20 January 1896, 10 November 1896, 20 October 1900, 8 January 1901, and 5 July 1901, 15 RIAA 77, at 100.
[133] *The Walfish Bay Boundary Case (Germany v. Great Britain)*, Award of 23 May 1911, 11 RIAA 263, at 307, para. LXVII.

in proper cases, to raise for themselves, preliminary points going to their jurisdiction to entertain the claim. Such a power is inseparable from and indispensable to the proper conduct of business. This principle has been laid down and approved as applicable to international arbitral tribunals".[134] In 1933, in the *Sabotage cases*, before the American-German Mixed Claims Commission, Umpire Owen J. Roberts stated that "the Commission is competent to determine its own jurisdiction by the interpretation of the Agreement creating it. Any other view would lead to the most absurd results".[135] A few years later, in 1940, in the *Société Radio-Orient* case, the tribunal said that "attendu qu'en en dehors des cas où les Parties en sont convenues autrement, tout tribunal d'arbitrage international est juge de sa propre compétence".[136]

The *compétence de la compétence* of international tribunals was also expressly recognised by the Permanent Court of International Justice (PCIJ) and the ICJ. In the *Interpretation of the Greco-Turkish Agreement of 1 December 1926*, the PCIJ, in regard to the question of the powers of the Mixed Commission, stated that as a general rule, any body possessing jurisdictional powers had the right in the first place itself to determine the extent of its jurisdiction and that questions affecting the extent of the jurisdiction of the Mixed Commission must be settled by the Commission itself without action by any other body being necessary.[137] In the *Nottebohm case*, the ICJ recognised a rule consistently accepted by general international law in the matter of international arbitration, i.e. that "in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction".[138] In the *Case Concerning the Arbitral Award of 31 July 1989*, the ICJ again recognised the power of international arbitral tribunals to determine its own jurisdiction citing its pronouncment in the *Nottebohm case*.[139]

Finally, the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case clearly stated that "this power, known as the principle of '*Kompetenz-Kompetenz*' in German or '*la compétence de la compétence*' in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its 'jurisdiction to determine its own jurisdiction'. It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done."[140]

The principle *compétence de la compétence* has been incorporated into a number of international treaties. It was incorporated into Article 73 of the Hague Convention for the Pacific Settlement of International Disputes of 1907,[141] as well as into Article 36(4) of the Statute of the PCIJ,[142] and later into Article 36(6) of the Statute of the ICJ.[143] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) is also one of the treaties in which the principle was incorporated.[144] Thus, Article 41(1) of the ICSID Convention provides that the Arbitral Tribunal shall be the judge of its own competence.

There is no doubt that the principle of *compétence de la compétence* has became generally accepted by international law and practice.[145] Moreover, according to the prevailing view, the power to

[134] *Rio Grande Irrigation and Land Company, Ltd. (Great Britain) v. United States*, Award of 28 November 1923, 6 RIAA 131, at 135-136.
[135] *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases)*, Decision of 15 December 1933, 8 RIAA 160, at 186.
[136] *Affaire de la Société Radio-Orient (États du Levant sous mandat français contre Égypte)*, Award of 2 April 1940, 3 RIAA 1871, at 1878.
[137] *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)*, Advisory Opinion, 1928 PCIJ Reports, Series B, No 16, at 20.
[138] *Nottebohm Case (Preliminary Objections) (Liechtenstein v. Guatemala)*, Judgment, 1953 ICJ Rep. 111, at 119.
[139] *Case Concerning Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 1991 ICJ Rep. 53, at 68-69, para 46.
[140] *Prosecutor v. Duško Tadić*, ICTY Case No. IT-94-1-AR72, Decision of 2 October 1995, para. 18.
[141] See 1907 Convention for the Pacific Settlement of International Disputes, available at https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf (20 June 2019).
[142] See 1920 Statute of the Permanent Court of International Justice, 6 LNTS 380.
[143] See 1945 Charter of the United Nations, 1 UNTS XVI.
[144] See 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159.
[145] See *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)*, Advisory Opinion, 1928 PCIJ Reports, Series B, No 16, at 20; *Nottebohm Case (Preliminary Objections) (Liechtenstein v. Guatemala)*, Judgment, 1953 ICJ Rep. 111, at 119; *Case Concerning Arbitral Award of 31 July 1989 (Gui-*

determine its own jurisdiction is inherent in every international arbitral tribunal, unless excluded by agreement of the parties (*clause contraire*).[146] Therefore, although the Arbitration Agreement between Croatia and Slovenia does not explicitly provide power of the Tribunal to decide on its jurisdiction, the Tribunal has the inherent power to determine its jurisdiction. Furthemore, Article 6(2) of the Arbitration Agreement provides that "unless envisaged otherwise, the Arbitral Tribunal shall conduct the proceedings according to the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States". Thus, the PCA Optional Rules in Article 21(1) provide that "the arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement".

Finally, the Tribunal's jurisdiction is confirmed in Article 65 of the Vienna Convention on the Law of Treaties, entitled "Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty".[147] Article 65 of the Vienna Convention, in paragraph 4 clearly states that "nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes". It is indisputable that Article 65(4) of the Vienna Convention refers precisely to Article 21(1) of the PCA Optional Rules which is, in accordance with Article 6(2) of the Arbitration Agreement, in force between the Parties to the dispute.

Otherwise, if a dispute concerning the request of one of the parties for termination of the arbitration agreement constitutes a new dispute between the parties, which is outside the jurisdiction of the tribunal, there would be the possibility that any party to the arbitration unilaterally prevent the tribunal in rendering the award by raising the request for termination of the arbitration agreement. A similar stance was taken by the tribunal in the *Abyei arbitration* when it correctly noted that "without a principle of Kompetenz-Kompetenz, any form of third party decision in international law could be paralyzed by a party which challenged jurisdiction".[148]

5.5. Partial Award

Although Croatia did not participate in the further proceedings after its unilateral withdrawal from the arbitration, on 30 June 2016, the reconstituted Tribunal rendered a Partial Award regarding the legal consequences of the ex parte communications in the arbitration between Croatia and Slovenia.[149] The Tribunal decided that: (a) the Tribunal had jurisdiction to decide whether Croatia, acting under Article 60(1) of the Convention, had validly proposed to Slovenia to terminate the Arbitration Agreement and had validly ceased to apply it; (b) Slovenia had breached the provisions of the Arbitration Agreement, but the breach did not defeat the object and purpose of the Agreement; (c) Croatia was not entitled to terminate the Agreement under Article 60(1) of the Vienna Convention; (d) the Arbitration Agreement remained in force; (e) the breach would not affect the Tribunal's ability, in its new composition, to render a final award independently and impartially; (f) the arbitral proceedings pursuant to the Arbitration Agreement would continue.[150]

First, the Tribunal acted properly when it confirmed its jurisdiction with regard to the Croatian request for the termination of the Arbitration Agreement.[151] The Tribunal based its decision on the

nea-Bissau v. Senegal), Judgment, 1991, ICJ Rep. 53, at 68-69, para 46. See also Amerasinghe 2011, p. 32; Boisson de Chazournes 2010, pp. 1034-1035.

[146] See *Rio Grande Irrigation and Land Company, Ltd. (Great Britain) v. United States*, Award of 28 November 1923, 6 RIAA 131, at 135-136; *Prosecutor v. Duško Tadić*, ICTY Case No. IT-94-1-AR72, Decision of 2 October 1995, para. 18. See also Ralston 1929, pp. 47-48.

[147] Art. 65 of the 1969 Vienna Convention on the Law of Treaties.

[148] *The Government of Sudan/The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, PCA Case No. 2008-07, Final Award of 22 July 2009, at 175, para. 499.

[149] See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016.

[150] See Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 30 June 2016, available at https://pcacases.com/web/sendAttach/1785 (20 June 2019).

[151] See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 40-41, para. 167.

principle *compétence de la compétence* as well as on Article 21(1) of the PCA Optional Rules in which this principle is incorporated and which, in accordance with Article 6(2) of the Arbitration Agreement, obliges the Parties to the dispute.[152] In addition, the Tribunal correctly noted that its jurisdiction is also confirmed in Article 65(4) of the Vienna Convention on the Law of Treaties which refers precisely to Article 21(1) of the PCA Optional Rules.[153]

However, the Tribunal incorrectly found that Slovenia's actions did not constitute a material breach of the Arbitration Agreement under Article 60(3)(b) of the Vienna Convention, i.e. in the Tribunal's view the ex parte communications did not defeat the object and purpose of the Agreement.[154] Namely, the Tribunal was convinced that remedial action it had taken, and, the accordingly secured procedural balance between the Parties rendered the continuation of the proceedings and the accomplishment of object and purpose of the Arbitration Agreement possible.[155] As correctly noted by Ilic, the Tribunal placed too much weight on finality as the main goal of arbitration.[156] On the other hand, the Tribunal completely downplayed the importance and the role that the fundamental principles of the arbitration process have in rendering a fair and just award in the arbitral proceedings. Therefore, the object and purpose of the Arbitration agreement must be considered in its entirety, and not partially as the Tribunal did. Pursuant to Article 3(1) and 4 of the Arbitration Agreement, the object and purpose of the Arbitration Agreement was "the settlement of the maritime and land boundary dispute between the Parties in accordance with the rules and principles of international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result".[157] Consequently, in addition to the settlement of the boundary dispute, the object and purpose of the Arbitration Agreement was also the application of the fundamental principles of the arbitration process in resolving the dispute and achieving a fair and just result. Considering that the fundamental principles of the arbitration process are essential to the integrity of the arbitral process as well as the achievement of fair and just result, it is difficult to understand the reasoning of the Tribunal that Slovenia's violations of those principles did not constitute an act calculated to defeat the object and purpose of the Arbitration Agreement.

Furthermore, the Tribunal misjudged that there was no obstacle to the continuation of the proceedings under the Arbitration Agreement.[158] In the Tribunal's view, the Tribunal was properly recomposed and "no doubt has been expressed as to the indepence or impartiality of the recomposed Tribunal".[159] This view of the Tribunal is unacceptable considering that Croatia clearly expressed doubts in the remaining members of the Tribunal.[160] Moreover, as it was explained before, it is difficult to understand that the remaining members of the Tribunal were not influenced by Dr. Sekolec who acted as *de facto* an Agent of Slovenia with the task of influencing the formation of the views of other members of the Tribunal regarding the final settlement of the Parties' dispute to the prejudice of Croatia.[161] Accordingly, the Tribunal's view that the views expressed by Dr. Sekolec in prior deliberation meetings were of no relevance for the work of the Tribunal in its new composition can hardly be acceptable.[162] Therefore, contrary to the claims of the Tribunal, the Tribunal was not properly recomposed considering that the remaining original members of the Tribunal (Judge Guillaume, Professor Lowe and Judge Simma), who were directly influenced by Dr. Sekolec and the ex parte communications, were not replaced.

[152] Ibid.
[153] Ibid, paras. 165-166.
[154] Ibid, para. 225.
[155] Ibid.
[156] See Ilic 2017, p. 372.
[157] Arts. 3(1) and 4 of the 2009 Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia. See also *Case Concerning Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 1991 ICJ Rep. 53, at 70, para. 49.
[158] See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 49, para. 196.
[159] Ibid.
[160] See Croatia's letter to the Tribunal, available at http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-pusic-to-mr-pulkowski-pca-31072015.pdf (20 June 2019).
[161] See also Ilic 2017, p. 376.
[162] See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 48, para. 193.

Finally, although the Tribunal correctly determined that the two documents presented by Dr. Sekolec during deliberations did not contain any arguments or facts not already presented in the Parties' pleadings,[163] it disregarded other aspects of the ex parte communication like disclosure of confidential informations about the deliberations of the Tribunal and likely outcome of the arbitration to Slovenia's Agent, as well as discussion of how to influence the other arbitrators to rule in Slovenia's favour. Considering the strategic procedural advantage that Slovenia gained through access to confidential information on the Tribunal's deliberations as well as Slovenian influence on Tribunal members through dr. Sekolec, it can be concluded that remedial action taken by the Tribunal did not establish a procedural balance between the Parties that was necessary for the continuation of the proceedings.

5.6. Events Following the Render of the Final Award

On 19 June 2017, the Arbitral Tribunal announced that it would render its award in the Croatian-Slovenian border dispute on 29 June 2017.[164] A few days later, on 21 June 2017, in its reaction to the Tribunal's announcement, the Croatian Prime Minister Andrej Plenkovic stated that following the decision of the Croatian Parliament, the arbitral decision was unacceptable.[165] At the same time, on the 25 June 2017, the Croatian President Kolinda Grabar Kitarovic said that "international arbitration is irreversibly compromised and that Croatia, in accordance with Article 60 of the Vienna Convention on the Law of Treaties, will not accept any decision of the Arbitral Tribunal because it is no longer part of that process nor will it allow the implementation of its decisions whatever they are".[166] On the other hand, on 22 June 2017, the Slovenian Prime Minister Miro Cerar expressed his satisfaction that the Arbitration Tribunal had completed its work and repeated that Slovenia would respect the Tribunal's decision.[167]

Finally, on 29 June 2017, the reconstituted Tribunal rendered its Final Award regarding the territorial and maritime dispute between the Republic of Croatia and the Republic of Slovenia.[168] Pursuant to Article 7(2) of the Arbitration Agreement the Final Award is binding on the Parties and constitutes a definitive settlement of the dispute.[169] In addition, same Article, in paragraph 3, provides that the Parties shall take all necessary steps to implement the award within six months after the adoption of the award.[170] Thus, within the prescribed six-month deadline, the Slovenian Parliament, on 27 November 2017, adopted a package of laws necessary for the implementation of the arbitral award.[171] However, Croatia maintained its position that it will not accept the arbitral award and that it will not allow its implementation.

Given that the bilateral talks between the two countries that followed after the Arbitral Tribunal rendered its Final Award, including those between Prime Ministers Plenkovic and Cerar on 12 July 2017 and 19 December 2017, ended in a stalemate on the arbitral award and the final settlement of the border dispute, on 16 March 2018 Slovenia brought the matter before the European Commission under Article 259 of the Treaty on the Functioning of the European Union (TFEU)

[163] Ibid, para. 224.

[164] Permanent Court of Arbitration, Press Release, Arbitration Between the Republic of Croatia and the Republic of Slovenia, The Hague, 19 June 2017, available at https://pcacases.com/web/sendAttach/2160 (20 June 2019).

[165] The Croatian Prime Minister Plenkovic stressed: "We will not be bound by it nor under international law not following the decision and notifications that we perform. We remain open to addressing open border issues, but not in the way that is done in the context of a process that was irreversibly contaminated and compromised, not with the guilty of the Croatian side, but the other side." See https://vlada.gov.hr/vijesti/predsjednik-vlade-zahvaljujem-vatrogascima-i-vojnicima-na-nevjerovatnoj-hrabrosti-u-zauzdavanju-velikih-pozara/21871 (20 June 2019)

[166] The Croatian President Grabar Kitarovic also added: "However, we are ready to start negotiations immediately and therefore I use this opportunity to invite Slovenia to the negotiating table. I believe that we must show the maturity and ability to resolve this issue on a bilateral basis." See http://predsjednica.hr/objava/2/3/1645 (20 June 2019).

[167] See http://www.vlada.si/en/prime_minister/news/a/pm_cerar_welcomes_support_for_honouring_arbitration_r uling_946/ (20 June 2019).

[168] See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Final Award of 29 June 2017.

[169] Art. 7(2) of the 2009 Arbitration Agreement.

[170] Ibid, art. 7(3).

[171] Slovenian Parliament adopted four laws, including Act on Keeping Records on the National Border with the Republic of Croatia. See Official Gazette of the Republic of Slovenia, No. 80, 2017.

for an alleged violations of European Union law.[172] In Slovenia's view, specific infringements of European Union law have occurred due to the Croatian rejection of the arbitral award and its implementation.[173] Therefore, bringing the matter under Article 259 of the TFEU before the European Commission was the first Slovenian step toward filing an infringement action against Croatia before the Court of Justice of the European Union (CJEU).[174] Accordingly, each country has used the opportunity provided in Article 259(3) of the TFEU to submit their own case and their observations on the other Party's case both orally and in writing before the European Commission. The European Commission had a three month period starting from the date on which the matter was brought before it to deliver a reasoned opinion, but it did not do so. Although the Commission did not deliver a reasoned opinion within the prescribed period, the absence of such opinion was not an obstacle for Slovenia to bring the matter before the CJEU.[175] Finally, on 13 July 2018, pursuant to Article 259(4) of the TFEU, Slovenia filed a lawsuit against Croatia before the Court for an alleged violation of European Union law.

However, the fact that the European Commission did not deliver a reasoned opinion may be indicative of the outcome of the proceedings between Croatia and Slovenia before the CJEU considering that one of the main tasks of the Commission is to monitor the application of European Union law.[176] Moreover, as "the Guardian of the Treaties", the European Commission has an option of commencing infringement proceedings under Article 258 of the TFEU whenever it considers that a Member State has breached European Union law.[177] Consequently, the Commission has commenced hundreds of infringement proceedings before the CJEU against Member States and most of them ended in the Commission's favor. For example, in 2016 the Court gave 28 judgments under Article 258 of the TFEU, of which 23, i.e. 82% were in the Commission's favour.[178] On the other hand, infringement proceedings between Member States under Article 259 of the TFEU are very rare. So far, there was only five cases in which one Member State launched infringement proceedings under Article 259 of the TFEU against another Member State before the CJEU.[179] Nevertheless, the reason for the Slovenian lawsuit against Croatia before the CJEU is more than clear. Namely, although an arbitral award is final and legally binding upon the parties,[180] in the present case there are no legal mechanisms that can force Croatia to accept and implement the arbitral award of the Tribunal. Unlike arbitration award, decisions of the CJEU can be enforced.[181] Therefore, Slovenia is trying, on the basis of a CJEU judgment, to "force" Croatia to implement the arbitral award of the Tribunal.

[172] See Consolidated version of the Treaty on the Functioning of the European Union, *OJ 2012 C 326/47 (hereinafter TFEU).*

[173] See http://www.vlada.si/en/projects/arbitration/ (20 June 2019).

[174] Art. 259(2) of the TFEU provides: "Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission."

[175] Art. 259(4) of the TFEU provides: "If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court."

[176] See art. 17 of the Consolidated version of the Treaty on European Union**,** OJ 2012 C 326/13.

[177] Art. 258 of the TFEU provides:

"If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

[178] European Commission, Monitoring the application of European Union law 2016, Annual Report, COM(2017) 370 final, Brussels, 6 July 2017, p. 26.

[179] See *Case 141/78, France v. United Kingdom*, [1979] ECR 02923; *Case 388/95, Belgium v. Spain*, [2000] ECR *I-03123*; *Case 145/04, Spain v. United Kingdom*, [2006] ECR I-7917; *Case 364/10, Hungary v. Slovakia* [2012] ECLI:EU:C:2012:630 (GC Oct 16, 2012); *Case C-591/17, Austria v. Germany* [2019] ECLI:EU:C:2019:504 (GC Jun 18, 2019).

[180] See Shaw 2014, p. 762.

[181] Art. 260(2) of the TFEU provides: "(...) If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it."

6. Conclusion

Ex parte communications in an important arbitration concerning border dispute between Croatia and Slovenia have given rise to a situation without precedent in the history of international arbitration. So far, telephone conversations between Dr. Sekolec, the arbitrator appointed by Slovenia and Ms. Simona Drenik, Agent of Slovenia, have resulted in numerous consequences and with them related legal issues that have precedential value in international adjudication. There is no doubt that Slovenia has systematically and gravely violated provisions of the Arbitration Agreement, the PCA Optional Rules and the Terms of Appointment which were applicable in the arbitration between Croatia and Slovenia. Moreover, it is indisputable that the fundamental principles of the arbitration process, including due process, procedural fairness, impartiality and independence have been violated in the arbitration between Croatia and Slovenia to the prejudice of Croatia.

Given the essential importance that those principles have in the international arbitral proceedings and rendering a fair and just award, the vital national interests of Croatia, and the sensitive political context of the arbitration, Croatia's unilateral withdrawal from the arbitration was only possible decision at that moment.

Although Dr. Sekolec resigned and the Tribunal was recomposed, it was not sufficient remedy to repair the grave damage that has been done to the arbitral proceedings. Namely, remedial action taken by the Tribunal did not establish a procedural balance between the Parties that was necessary for the continuation of the proceedings because the remaining original members of the Tribunal, who were directly influenced by Dr. Sekolec and the ex parte communications, were not replaced. Accordingly, taking into account legal and political connotations of the ex parte communication, for which the acceptance and implementation of the arbitral award by both Parties were unlikely, the proceedings should have been terminated. However, in its Partial Award regarding the legal consequences of the ex parte communications the Tribunal misjudged that there was no obstacle to the continuation of the proceedings.

In addition, although the Tribunal acted properly when it confirmed its jurisdiction with regard to the Croatian request for the termination of the Arbitration Agreement,[182] it incorrectly found that Slovenia's actions did not constitute a material breach of the Arbitration Agreement under Article 60(3)(b) of the Vienna Convention.[183] According to the Tribunal, the ex parte communications did not defeat the object and purpose of the Arbitration Agreement.[184] From the reasoning of the Tribunal it can be concluded that the Tribunal completely downplayed the importance and the role that the fundamental principles of the arbitration process have in the accomplishment of the object and purpose of the Arbitration Agreement, i.e. it disregarded that those principles are essential to the integrity of the arbitral process as well as the achievement of fair and just result. Therefore, Slovenia's actions, i.e. the ex parte communications constitute a material breach of the Arbitration Agreement because they defeated one of the objects and purposes of the Arbitration Agreement – the settlement of the maritime and land boundary dispute between Croatia and Slovenia in accordance with the rules and principles of international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result. Accordingly, Croatia was entitled to terminate the Arbitration Agreement under Article 60, paragraph 1 of the Vienna Convention.

Despite the above mentioned facts, the Tribunal rendered its binding Final Award regarding the territorial and maritime dispute between Croatia and Slovenia. Soon after that, the situation has become absurd. Croatia, bound by the previous decision of its Parliament, has refused to accept and implement the arbitral award which is unexpectedly favorable for Croatia. On the other hand,

[182] See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA Case No. 2012-04, Partial Award of 30 June 2016, at 40-41, paras. 165-168.
[183] Ibid, at 55, para. 225.
[184] Ibid.

Slovenia filed lawsuit against Croatia before the CJEU with the aim to make Croatia accept and implement the arbitral award which is, ironically, unfavorable for Slovenia. At the time of writing this article there was no sign of the final settlement of the border dispute between the two countries, but one thing is for sure – there is still no end in sight to the consequences of the ex parte communications in the arbitration between Croatia and Slovenia.

Which is the Lie: The Mask, or my Face? The Theory of Lex Mercatoria, an 'Autonomous'International System in Disguise

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Commerce and trade are fundamental activities of our society. The moment we started trading with each other was so impactful, that the author considers it the most important revolution in the history of mankind. Time flew by, and as our society and existence developed and reached more sophisticated forms, trading developed accordingly and became more and more elaborate and interdependent, thus more complex as well. The power keeping balance in society is law itself, therefore, in order to keep trading activities under control, there was a need for a specific branch of law administering trade, which, by time, became more and more international. One of the essential questions regarding that specific branch of law was the problem of its sources – if there are solutions, we need to find their origin and implement them, and if there isn't any, we need to come up with these solutions. One possibility was an idea which emerged centuries ago, probably drawing its influence from Roman law[1]*. Lex Mercatoria – the law of the merchants. It is highly contested nowadays whether it is a medieval myth or a commonly accepted system, but the debate slowly loses its relevance. The Law Merchant is a frequently used governing law in international commercial contracts, and also functions as an instrument for settling disputes through arbitration. It is a body of law that emerged from an idea of rules made by merchants for merchants. Let us think about blockchain – a technology highly decentralized –, and we understand the need behind the result. International business is a cooperative game, and the states are progressively interfering players in it. It is not so appealing to play the game by the rules created by certain players themselves. But do we have better alternatives? Lots proclaim that Lex Mercatoria can be one, but after more than 50 years we still do not know how it should work. Is it a list or a method? A method or a list?*

Keywords: Lex Mercatoria, sources of international business law, sources of international commercial law, commercial arbitration, list method, functional method, European Union, rule of law, commercial litigation, soft law, transnational Law.

As it was stated by Louis XIV of France "*[Je] mettrais plutôt toute l'Europe d'accord que deux femmes"*.[2] More than 300 years ago, we slowly reached the point where European countries did not need more conciliation. The creation of the European Union was arguably the success of the last century for the continent. But as time passes, new legal challenges arise, and as the initial and controversial affirmation of Louis XIVlost its relevance, we are still not sure which side of an inequation can be reserved for most of these challenges. One of those can be considered the problem of Lex Mercatoria.[3] Probably, the international business community can follow the pattern of the EU,

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[1] See the article by Professor Donahue arguing strongly against any link of Lex Mercatoria with Roman Law. Donahue, Charles Jr., *Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica* Chicago Journal of International Law: Vol. 5: No. 1, Article 5, 2004, p. 22.

[2] Honoré Gabriel Riqueti, comte de Mirabeau, *Esprit de Mirabeau*, éd. F. Buisson, 1804, vol. 1, p. 246. [„I could sooner reconcile all Europe than two women."]

[3] In that article I used the expressions 'transnational law', 'Law Merchant', 'general principles of international trade' and 'Lex Mercatoria' interchangeably. See Gyula, Fábián, *Nemzetközi Jog*. Editura Hamangiu, Bucharest, 2018. p. 3; About Lex Mercatoria generally see Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999), para. 1443 et seq. Jan Hendrik Dalhuisen, *The New Lex Mercatoria:*

which means a certain degree of integration, but it still remains a question whether the international business community and sovereign states can be reconciled sooner, or the affirmation of Louis XIV can no longer be stated. Hence, this article aims to argue beside the former.

If we regard the economic point of view as the starting point and take into account e.g. the *magnum opus*[4] of Adam Smith, we come to the conclusion that with international commerce, at the end of the day, everyone is better off. However, to guarantee the equity, transparency and sustainability of international commercial transactions, there is a need for regulations and provisions governing international trade. A significant part of these regulations are the so called '*lois de police'*[5]and *jus cogens*[6] international imperative norms. Even though they are international economic law norms, they also regulate international commerce, these public norms are of reduced effect due to the private nature of international commercial law. As it is widely acknowledged, it is a characteristic of the private law domain that everything which is not expressly forbidden should be allowed, accepted, or at least tolerated. Therefore, the principle of party autonomy sets forth that the contracting parties are free to agree upon an applicable law[7], a law which might be elaborated by a sovereignty (*lex loci*), by an international organization, or one that might be created through other means, such as consuetudo, which is the process of how legal acts become accepted as usages.

If we return to our initial perspective and focus on the validity and efficacy of commercial transactions, the finality of the law-making process should be, beside others, the creation and elaboration of a legal system which cumulatively guarantees the lowest possible burden for the economic agents and the sanctioning possibilities needed to enforce it[8]. Such systems were created over the centuries, but there is one which remained functional even after more than five hundred years. Or did it? Lex Mercatoria, or otherwise the 'Law Merchant', is a body of commercial law and customary commercial law[9] elaborated by practitioners and scholars to establish 'best practices' for international commercial transactions, also recognized by arbitral tribunals if the given conditions are met[10]. Lex Mercatoria went through its own evolution, and even though it reincarnated in the 20th century,[11] it lost its widespread application and became the subject of doctrinal disputes. In the case of Lex Mercatoria, there is no middle passage – it is either vehemently criticized, or assessed as an important and globally accepted body of regulations. It is questionable though, if the abovementioned finality can be obtained with the assistance of Lex Mercatoria.

By taking into account potential perspectives[12]of Lex Mercatoria and the possible counterarguments for the deficiencies acclaimed by the doctrine, the article intends to clarify certain potential issues with respect to the Law Merchant. In the first part, the nature and evolution of the Law Merchant is detailed furtherly. The second part focuses on the main question to be answered – how can Lex Mercatoria be a functioning legal system? We are all aware that the Merchant is used in practice either as a list or a method. Both views have proponents, arguments and counter-arguments, but if the debate will not be settled once and for all, it can impede the evolution of a source

An Emerging Challenge to Legal Systems in Cross-Border Transactions, 2016.
Available at SSRN: https://ssrn.com/abstract=2871354 or http://dx.doi.org/10.2139/ssrn.2871354 (13. September 2019).

[4] Smith, Adam, and Edwin Cannan. *An inquiry into the nature and causes of the wealth of nations*. London: Methuen, 1922.

[5] Gimenez-Corte, Cristián, *Lex Mercatoria, International Arbitration and Independent Guarantees: Transnational Law and HowNation States Lost theMonopoly of Legitimate Enforcement*. Transnational Legal Theory, Volume 3, Number 4, 2012, p. 349.

[6] Gyula, Fábián, op. cit. p. 5; Keith Highet, *Enigma of the Lex Mercatoria*, 63 Tulane Law Review 613 (1988-1989), p. 626;

[7] Alina Oprea, *Observaţii privind principiul autonomiei voinţei* în *dreptul internaţional privat al contractelor*, Revista română de drept privat, Nr. 5/2012.

[8] See Martin P. Golding, *Philosophy of Law, Pearson,1975. pp. 6-17., regarding enforceability as a criteria for the existence of a legal system.*

[9] Guilhelm Julia, *Lex Magica: A Lex Mercatoria Reflection*, 37 Thomes Jefferson Law Reveviw 125, 2014, pp. 125-126.

[10] Orsolya, Tóth, *Applying the Lex Mercatoria in Arbitration: The search for a „Natural Connection*, in New Horizons of International Arbitration, Issue 5, Moscow, 2019,p. 168 et seq. Carmen Tamara Ungureanu, *Lex Mercatoria in International Trade Contracts*, 62 Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi Stiinte Juridice 5 (2016), p. 9 et seq. About choice of court agreements and enforceability against third parties, see Alina Oprea, *Regards sur opposabilité à l'égard des tiers des conventions attributives de juridiction dans les litiges internationaux*, Perspectives of Business Law Journal, Volume 5, Issue 1, November 2016 p. 33-46.

[11] Francesco Galgano, *The New Lex Mercatoria*, *Annual Survey of International and Comparative* Law, *No*. 2, 99, 1995,; Clive Schmitthoff, The *unification of the law of international trade law* collected in Cheng (ed) Clive Schmitthoffs Select Essays on International Trade Law, 1988, pp. 170-171; Michael Pryles, *Application of the Lex Mercatoria in International Commercial Arbitration*, 31 University of New South Wales Law Journal, No. 319, 2008, p. 319;Ross Cranston, *Theorizing Transnational Commercial Law*, 42 Texas International Law Journal 597, 2007, p. 603.; Francesco Galgano, *Globalizáció a jog tükrében – A gazdaság jogi elemzése*, Fordította: Metzinger Péter, HVG-ORAC, Budapest, 2006,p. 58.

[12] Bhupinder S. Chimni, *Third World Approach to International Law - A Manifesto, Brazilian Journal of International Law*, No. 15, 2018, p. 42 et seq.

of international business law. Therefore, the second part asks the question: which one is the lie? The third part presents arguments for the application of transnational rules in international commercial arbitration (hereinafter 'ICA' or arbitration) in lack of a governing law, and assesses certain disputed areas where it would be advisable to rethink the old rule and perspective. The fourth part discusses the potential application of Lex Mercatoria by national courts andcertain flaws to berepairedif that practice becomes widespread, as proposed by Professor Petsche[13]. The fifthpart raises potential questions in relation to the future of the Merchant, and presents international economic and political processes having the potential to be beneficial or disruptive in the long run.

During the last 70 years Lex Mercatoria became a myth between theorists. As professor N. Hatzimihail stated in an article, it is just like the Arlésienne known through the proverbs: a concept recognized and mentioned by everyone from the international commercial community, and met only by a few of us[14]. Even if some of us met it, we do not know it's true identity. We might have seen the mask, we might have seen the face. But have we seen the Merchant itself?

1. The Stage is Set – The Short History and Nature of the Merchant

1.1. About the Artist – How does Lex MercatoriaLook Like?

First, it has to be noted that the author is currently discussing the 'new Lex Mercatoria', as known by the majority of the doctrine. With all due respect to the authors who devoted a part of their research for the topic of the medieval Lex Mercatoria, the debate of the issue is not a subject of the current article, and therefore the author restricts itself to make the necessary references. The old Lex Mercatoria was the subject of a debate about its mere existence, with its numerous proponents, who continuously presented the Merchant as a universally applicable law accepted and commonly used in Europe and exerting a major influence over medieval commerce, e.g. Schmitthoff[15] or Goldschmidt[16]; on the other hand, with all of their opponents and doctrinal voices who argue against or demonstrate that there are some inconsistencies or deficiencies in the theory of a medieval Lex Mercatoria, such as Professor Kadens[17], Professor Donahue[18], or Professor Cordes[19].

The debate is seemingly settled with the conclusion that the old Lex Mercatoria did not exist, or at least not in the way we think about it and about international trade law. A particular view which states that the dispute is largely mischaracterized and misunderstood, and that its research and the perspective from which medieval trade is conceived is just as the 'Telephone' game, the interpretation of the interpretations, is the article of Professor Sachs[20]. As Professor Cordes states, "But this discovery does not bear any fruits for the discussion about the future of international trade law. The question whether an old Lex Mercatoria existed 350 or 700 years ago can do little to influence the outcome of a dispute about the theoretical basis and practical value of a 21st century law of merchants as a separate body of law which is not linked to any domestic law."[21] Even though some au-

[13] Markus Petsche, *The Application of Transnational Law (Lex Mercatoria) by Domestic Courts*, Journal of Private International Law,10:3, 489-515, 2014, DOI: [10].5235/17441048.10.3.489.
[14] Hatzimihail, Nikitas Emmanuel, *The Many Lives - And Faces - Of Lex Mercatoria: History as Genealogy in International Business Law*. Law and Contemporary Problems, Vol. 71, No. 3, Summer 2008, p. 169.
[15] Schmitthoff, Clive M., The Unification…, op. cit. pp. 206-207.
[16] James Goldschmidt, *Handbuch des Handelsrechts*, 2nd ed., 1864, pp. 242-243 *apud* Whitman, James, *Commercial Law and the American Volk: A note on Llewellyn's German Sources for the Uniform Commercial Code*, Yale Law Journal, 97, 1987, p. 165.
[17] Kadens, Emily, *The Myth of the Customary Law Merchant*, Texas Law Review, Vol. 90, 2012.
[18] Charles Donahue Jr., Medieval and Early..., op. cit.
[19] Albrecht Cordes: *The search for a medieval Lex mercatoria*, Oxford University Comparative Law Forum 5, 2003. uclf.iuscomp.org (13 September 2019).
[20] Sachs, Stephen E., *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant'*. American University International Law Review, Vol. 21, No. 5, 2006, pp. 685-812.
[21] Albrecht Cordes, op. cit.

thors built up their theory of the new Law Merchant having as a premise its existence rooted in the Middle Ages, their thought process was not totally erroneous. We shall see, that what they wanted to highlight is that the idea itself certainly existed, and there were certain forms of trade usage and merchant-made norms.

What we label as 'New Lex Mercatoria' became widespread knowledge in the legal sphere during the twentieth century, when some of the most impactful proponents[22] presented it and argued besides its use in international commercial arbitration. But the doctrine was not unanimous, as lots of scholars criticized it. To illustrate this issue, the article of Professor Cuniberti[23] has to be mentioned, and the three theories proposed by it. However, first it would be worth mentioning the findings of the Professor, who, when analysing ICC Data, discovered that a governing law was chosen in 80-85% of the cases, and only in 1-2% of the cases had the chosen governing law a non-national character[24]. To see whether the findings still persist, the author summed up the statistics of the ICC for 2017 and 2018. The application of non-national law was requested in 1.8% of the total cases in 2017, while this number was 2% in 2018. However, only in 85-90% of the cases was a governing law chosen by the parties. Transnational law was used sometimes automatically, or arbitrators reached it through contractual terms or by the parties' agreement, as stated[25]. The phenomenon of choosing general principles of international trade might have appeared in other years too.

It should be mentioned that these data only include contracts which were brought to ICC arbitration for dispute settlement, therefore, it does not illustrate completely the presence of Lex Mercatoria in commerce, since tribunals such as the London Court of International Arbitration, the Vienna International Arbitrational Court, the Arbitration Institute of The Stockholm Chamber of Commerce, etc. are not part of the ICC Structure.

However, apart from this empirical data collection, there are other surveys made to monitor the intention of potential parties of international commercial contracts to choose the Merchant as governing law. A survey[26] carried out by the Institute for Transnational Arbitration, even though with a relatively low amount of responses, had the following result regarding the UNIDROIT Principles and Lex Mercatoria: "The responses for the UNIDROIT Principles are: 6.3% always use them, 12.7% do so regularly, 46% use them occasionally, and 34.9% have never used them. The responses for Lex Mercatoria and similar notions come close: 3.2% always use them, 15.9% do so regularly, 49.2% use them occasionally, and 31.7% have never used them."[27]The sample is mostly representative with respect to geographical areas, and it may suggest that the number of contracts in which the governing law is Lex Mercatoria or similar is higher than 1 or 2%. This idea might be supported by a survey[28] carried out by Professor K. P. Berger and the Center for Transnational Law (CENTRAL Institute) with a 29.6% return rate, which found that more than one third of the selected professionals was aware of transnational law, and the number was rising to 42% with respect to ICA. Additionally, in relation to its use in the future, 440 respondents out of 639 were positive or neutral, and only slightly less than 20% rejected the idea to consider using it in their future affairs. [29]

[22] Clive Schmitthoff – *International Business Law: A New Law Merchant*, Current Law and Social Problems, University of Toronto Press, No. 2, Current Law and Social Problems, 1961, p. 129 et seq.; Berthold Goldman –*Frontièresdu Droit et Lex Mercatoria*, 13 Archives de Philosophie du Droit 1964, at 177 et seq.;Tudor Popescu, Le Droit du Commerce International: *Une Nouvelle Tache pour les Legislateurs Nationaux ou une Nouvelle "Lex Mercatoria"?*, in: UNIDROIT (ed.), New Directions in International Trade Law, 2 Vols., New York 1977, at 21 et seq.; Aleksander Goldstajn, *The New Law Merchant*, 12 Journal of Business Law, 1961, at 12 et seq.For an overview of Lex Mercatoria theories, see Frank Baddack, *Lex Mercatoria: Scope and application of the Law Merchant in Arbitration*. LL.M. thesis, University of the Western Cape, 2005, p. 22 et seq.

[23] Cuniberti, Gilles, *Three Theories of Lex Mercatoria*, Columbia Journal of Transnational Law, Vol. 52, No. 1, 2013; University of Luxembourg Law Working Paper No. 2013-1.

[24] Ibid.

[25] ICC Dispute Resolution 2018 Statistics, at www.iccwbo.org/dr-stat2018 (9 September 2019).

[26] http://arbitrationblog.kluwerarbitration.com/2014/06/06/results-of-the-survey-on-the-use-of-soft-law-instruments-in-international-arbitration/(13 September 2019).

[27] Ibidem.

[28] As a part of the program entitled „*The Role of Merchants, their Lawyers and their Arbitral Tribunals in the Evolution and Development of Transnational Commercial Law*".

[29] Ibid.

The three theories mentioned by Cuniberti are illustrating the scepticism and the conservativism of positivists or 'traditionalists': Drahozal's signalling theory of Lex Mercatoria[30], an agency theory of Lex Mercatoria[31], and a Production cost theory of Lex Mercatoria[32]. Apart from that, a considerable part of the doctrine rejects the idea of transnational law and private governance[33]. First, there was a debate about the existence of the lex and whether it can be considered an autonomous legal system[34]. Then there were questions raised about the content of the Merchant, and about the potential methodology to be used to determine that content. Since the doctrinal opinions are that divergent, and during that half century everything and even the contrary of it was stated about Lex Mercatoria, the author considers it sufficient to take into account the fact that it exists (which is not a subject of doctrinal dispute nowadays). Even though it might seem like the emperor's new clothes[35], it is used frequently in arbitral settlements and international commercial contracts – and it definitely exists at least as an idea or principle guarding international business law.

One relevant question answered by Professor Michaels is whether Lex Mercatoria is 'state law' or 'non-state law'. The author argues that in case of foreign law, a state does not recognises the law of another state based on some "metaphysical concept of law" or inherent power of it, but simply due to a system of international comity. He concludes that the Law Merchant transcends the distinction between the two, it is rather 'non-political', and it is not "law without a state" – it is "law beyond the state"[36]. Such a perspective enables us to think creatively about the law.

Its content and the much wanted 'autonomy' of a legal system are depending on the methodology we use[37]. During the years, individuals wanted to demonstrate that their solutions are the ones offering autonomy and ensuring functionality. But is there anything more important than the concept of autonomy? For the methodological contexts, usually there are two possibilities: the list or the functional method. However, before settling the discussion, we need to put Lex Mercatoria into the international legal and economic framework.

1.2. About the Stage – Globalization, Multinational Companies and More

There is an undeniable and major change in the circumstances of international trade compared to the situation in the sixties, or to the period of time when Lex Mercatoria first started to be applied

[30] Christopher R. Drahozal, *Contracting Out of National Law*: An Empirical Look at the New Law Merchant, 80 Notre Dame Law Review 523, 2005, p. 549 et seq. The article, with all due respect, disregards only one thing: that scientific activity and research is the mean how someone becomes an expert or a professional of any given field. Also, it might be that the change of pacing of our society is there as on behind the academic interest for the topic – with globalisation, and with multi-national companies operating with budgets higher than of some countries', the evolution and the future of commercial dispute resolution – in the increasingly complex economic setting - might be a focal point of international commercial law. Even if the theory would be true, there is nothing 'unethical' in scientific activity – which might not be an impression of the signaling theory. See also 32. Emmanuel Gaillard, General Principles of the Law in International Commercial Arbitration— Challenging the Myths, World Arbitration & Mediation Review, Volume 5, No. 2, 2011. p. 170 et seq.

[31] Cuniberti, op. cit. p. 406 et seq. The theory does not give enough emphasis to two things: first of all, discretion is one of the underlying ideas behind arbitration. If the parties select arbitration, they want their dispute solved by experts of the given field, in our case of commercial law, and they want the best, most equitable solution. The arbitrators are allowed requested by these parties to solve a case based on a law or transnational law because they are the most well-prepared actors to choose which governing law is able to give the most equitable solutions for the arising problems and which rule-set is the most well adapted. On the other hand, that is one of the reasons why the parties choose arbitration –they can escape either national proceedings and domestic laws, or because they trust the experience of arbitrators in setting the right framework for the problem. Also, that practice of choosing 'Lex Mercatoria' in case of no governing law is rarely contested by the parties. Commercial agents would not accept such thing if it would not benefit them one way or another.

[32] Cuniberti, op. cit. pp. 424 et seq. ICC is a business organization, not a charitative body, therefore, it should not raise any suspicions if they offer a service – in our case, elaborating Model laws, etc. – and hope a compensation for that service. Also, through the application of 'Lex Mercatoria' the production cost might decrease, but the ICC has a much easier way to solve that problem – just include arbitration clauses in their model laws, and if they do not violate ordré public, the production cost decreased, since they do not need to take other laws into account anymore. Therefore, it seems for the author that there are more plausible explanations for that phenomenon.

[33] See, among others, Paul Lagarde, *Approche Critique de la Lex Mercatoria* in: Fouchard/Kahn/Lyon-Caen (eds.), Le Droit des Relations Économiques Internationales, Études offertes à Berthold Goldman, Paris 1982; Frederick Alexander Mann, *Lex Facit Arbitrum in International Arbitration*, in Liber Amicorum for Martin Domke (1967), at 157 et seq.; Keith Highet, op. cit.; Ian F. Turley, *Lex Mercatoria: Quo Vadis*, Journal of South African Law, 1999, p. 454 et seq..

[34] Mazzacano, Peter J., *The Autonomous Nature of the Lex Mercatoria.* 16 Vindobona Journal of International Commercial Law and Arbitration 2012. pp. 81-82.; Karimi, Mohammad and Kashani, Javad and Nassiran, Dawood, *'Lex Mercatoria' as an Independent Legal System* (October 23, 2016). Available at SSRN: https://ssrn.com/abstract=2857888(13 September 2019) p. 14 et seq.

[35] Keith Highet, op. cit. p. 616.

[36] Michaels, Ralf, The *True Lex Mercatoria: Law Beyond the Stat*e. Indiana Journal of Global Legal Studies, Vol. 14, No. 2, 2008; Duke Law School Public Law & Legal Theory Paper No. 220. p. 461 et seq.

[37] See Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?* Arbitration International, Volume 17, Issue 1, 2001, p. 65 et seq.; Cf. Berger, Klaus Peter. *The Creeping Codification of the New Lex Mercatoria*. Alphen aan den Rijn: Kluwer Law International, 2010, p. 115 et seq.

by arbitral tribunals[38]. It is enough to think about trade liberalization[39] incentives such as the World Trade Organization and its activities, or the deeper integration in the European Union, to realise that commercial flows which are better structured are handled by clustering business enterprises[40] with the assistance of increasingly complex global logistics,[41]offering more and more opportunities[42] and internationalizing businesses in the same time[43]. The other side of the coin is that these international transactions are frequently internalized within a multinational company or a single firm[44]. It is also worth mentioning that through information technology advancements the production is increased and the barriers ahead of international contracting are reduced to a minimum[45].

Multinational companies are one of the key elements of international trade. Most probably we are all familiar with comparisons between multinational companies and states[46]. It is interesting to see that for example Walmart, with 2.2 million employees in 2018,[47] has a higher scarcity in manpower than countries such as Slovenia or Latvia. On the other hand, Apple's worth is only topped by 16 countries[48]. Also, it is questionable whether the growth of these multinationals is as limited as it is in the case of countries. However, sooner or later the multinationals engage in economic activity between each other. The question is, if they do so, will they accept the private rules made by states, or will they try to push private and corporate governance[49] to the maximum extent?[50] Companies are also bound by the law, and it is not possible for them to avoid the applicability of any state-made rule, even if they would try.

On the other hand, arbitration is becoming more and more popular[51], and compared to the situation fifteen years ago, it became institutionalized, well-known and universally accepted by the members of the international business community.[52] Furthermore, there are promising steps towards the acceptance of transnational law by domestic courts, and the enforcement of arbitration awards remained uncontested in the majority of the cases.[53] To sum it up, it is not that challenging to see that the environment is a favourable soil for the need of private governance.

2. The Curtain Rises – Analysis of the Two Theories

The answer to 'which is the lie?' is not that obvious. Both the 'mask' and the 'face' are representing a part of the owner's true identity. The solution most probably is not just a decision between the two theories, but an analysis of their advantages and deficiencies.Therefore, the author will first analyse

[38] See Ross Cranston, *Theorizing Transnational Commercial Law*, Texas International Law Journal 42, 2007, about legal circumstances under globalization and a potential implementation of transnational commercial law. About legal pluralism and changes under Globalization, see Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, Sydney Law Review, Vol. 29, 2007.

[39] Passaris, C. E. (2006), *The Business of Globalization and the Globalization of Business*. Journal of Comparative International Management, 9(1). p. 7 et seq.

[40] Porter, M.E. (1998). *Clusters and the New Economics of Competition*. Harvard Business Review. 76: 77-90.

[41] https://www.supplychain247.com/article/study_shows_global_logistics_is_becoming_more_complex_nine_key_trends (13 September 2019).

[42] Passaris, C. E., op. cit. p. 16.

[43] Schaffer, Richard, Filiberto Agusti, and Lucien J. Dhooge. *International Business Law and Its Environment*. 10E, Cengage Learning, 2018, p. 2.

[44] Passaris, C. E., op. cit. p. 17.

[45] Idem, p. 238.

[46] https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7#revenues-from-el-corte-ingls-were-just-ahead-of-libyas-gdp-5(13 September 2019).

[47] "Walmart 10-K Report FY 2019" January 31, 2019.

[48] https://globalnews.ca/news/4367056/apple-1-trillion-market-cap/(13 September 2019).

[49] About an interesting case of Corporate Governance see Szalay, Gábor, *The impact of the lack of transparency on corporate governance: A practical example*. Corporate Law & Governance Review, vol 1, Issue 2, 2019. http://doi.org/10.22495/clgrv1i2p2. Also, about governance, transnational power and new constitutionalism, see A. Claire Cutler, *The Judicialization of Private Transnational Power and Authority*, Indiana Journal of Global Legal Studies, No. 25., 2018, p. 61 et seq.

[50] See Dunning, John H., and Sarianna M. Lundan. *Multinational Enterprises and the Global Economy. Cheltenham*, UK: Edward Elgar, 2008 p. 665 et seq. and p. 707 et seq. for a detailed view over the interaction of multinational companies and governments. Also, see Stephen J. Ware, *Private Ordering and Commercial Arbitration: Lasting Lessons from Mentschikoff*, 2019 J. Disp. Resol. 1 (2019) p. 3 et seq about private ordering.

[51] Várady T., *Választottbírói semlegesség és pártatlanság a XXI. Században*. In: Nochta Tibor, Fabó Tibor MM, editor. Ünnepi Tanulmányok Kecskés László Professor 60. Születésnapja Tiszteletére. Pécs: Pécsi Tudományegyetem Állam- és Jogtudományi Kara; 2013. pp. 561-562. For the presentation of transnational arbitration, see Mert Elcin, *Lex Mercatoria in International Arbitration: Theory and Practice*, Doctor of Law thesis, European University Institute, 2012, p. 23 et seq.

[52] Gábor Szalay, *A Brief History of International Arbitration, Its Role in the 21st Century and the Examination of the Arbitration Rules of Certain Arbitral InstitutionsWith Regards to Privacy and Confidentiality*, Analele Universității de vest din Timișoara, Seria Drept, Nr. 2, 2016, pp. 14-16.

[53] Some considerations about enforcement can be found in Angelika Emmerich-Fritsche, *Die Lex Mercatoria als transnationales Handelsrecht und Weltgesellschaftsrecht*, in: Alfred Holzer-Thieser/Stefan Roth (Ed.), Festschrift für Harald Herrmann, Versicherungsrecht – Finanzmarkt und Freiberufsrecht im Wandelwirtschaftsrechtlicher und rechtsökonomischer Analysen, 2011, p. 303-322.

the two theories separately, and then settle the dispute in the concluding remarks of this section by presenting a hybrid solution, which tries to keep most of the advantages the two methods have.

2.1. The Face Behind the Mask - Lex Mercatoria as a List

One of the first appearances of the list is an article written by Lord Justice Mustill,[54] who created a list of 20 principles said to constitute the Lex. He concluded that in such form it is incomplete and it „seems rather a modest haul"[55]. Therefore, a part of the doctrine rejected the idea of the list, because it was seemingly dysfunctional. It is extraordinarily challenging to create a list covering every possible detail of an international commercial relation, such as the formation of contracts, performance, causes making the contract void, potential penalties, hardship, or even topics which are not met that frequently, for example anticipatory repudiation[56].

However, there are attempts to create norms which can regulate contracts, alone or as a soft-law norm together with state-law. Some of the attempts to be mentioned are the Unidroit Principles of International Commercial Contracts, the 'Lando Principles' – The Principles of European Contract Law, The Common Frame of Reference or the Trans-Lex Principles. The latter is becoming the flagship of the list method – it is a list consisting of 143 Principles as of September, 2019 and the additional commentaries, materials, jurisprudence, etc. needed to help practitioners to apply the abstract norms to the given case. These principles are collected by the CENTRAL Institute[57] as part of the „Creeping Codification"[58] lead by Professor K. P. Berger.

The list method was and remains the most suitable solution as the methodology of the Lex – it offers the possibility of structuralization, has adaptability among its features, owing to the fact that a list such as the Trans-Lex Principles can be easily updated and modified to fulfil the needs of practitioners and arbitrators, moreover, it takes the least amount of inconvenience to modify. The icing on the cake in having the list as a methodology in case the parties choose the Law Merchant as the applicable law is that it can guarantee substantive neutrality[59].Apart from that, a list, even though it contains abstract provisions in the forms in which it is the most frequently elaborated, is the solution which by supplementary materials make the norms predictable enough for the ones applying them. However, the last condition of an *'ordre juridique'* might lack, and that is the completeness of a list. Even though it is highly adaptable, in case the matter of the dispute is not regulated or mentioned, the list's potential ceases to exist. It can also have additional sources[60], but without a rule for the arbitrators the practice can result in divergent decisions. That is one thing to be averted.

Even though Professor Berger states that the existence of a 'ready-made' system is not a *sine qua non* condition of application[61], we have other deficiencies with respect to the list. One such thing is the lack of continuity in jurisprudence.[62] It is common ICC practice that some cases are published, but the author considers it only a minor part of the Lex Mercatoria case law. Therefore, in the lack of underlying decisions and analysis it is quite challenging to build the list further, keep the balance between over-regularization, modify the elements which are rejected by arbitral practice and adapt the rules in accordance with commercial customs. Commercial customs are hard to discover in

[54] Mustill, Michael, *The New Lex Mercatoria: The FirstTwenty-fiveYears*, Arbitration International 1988, at 110 et seq.
[55] Ibid. at 114.
[56] See, Kyle Winnick, *International Commercial Arbitration, Anticipatory Repudiation, and the Lex Mercatoria*. Cardozo Journal of Conflict Resolution, Vol. 15, 2014, p. 853 et seq.
[57] See *Central List of Principles, Rules and Standards of the Lex Mercatoria*, in: CENTRAL (ed.), Transnational Law in Commercial Legal Practice, 1999.
[58] Berger, Klaus Peter, op. cit. p. 250 et seq.
[59] About the concept of 'substantive neutrality', see Markus A. Petsche, *International Commercial Arbitration and the Transformation of the Conflict of Laws Theory*, 18 Mich. St. U. Coll. L. J. Int'l L., 2010, p. 472 et seq. Also, about the specific needs of international commerce see p. 469 et seq., Cf. Gilles Cuniberti, op. cit, p. 388.
[60] See Yıldırım, Ahmet Cemil. *Solid, Liquid and Gas Forms of the New Lex Mercatoria: How DoThey Operate in Practice?*, Uluslararası Ticari Tahkim Ve Yeni Lex Mercatoria, 2014, about the potential sources of the Merchant. Frank Baddack, op. cit. p. 54 et seq.
[61] Berger, Klaus Peter, op. cit. p. 117.
[62] For a general overview of international arbitration case law, see Gary Born, *International Arbitration: Cases and Materials*, Wolters Kluwer, Second ed., 2015. For considerations about Lex Mercatoria, see pp. 1019-1020.

arbitration as most cases remain unpublished,[63] but that issue shall be the subject of future studies. The list might be the face in our case – or is it just another mask?

2.2. Is it Really the Mask? – Lex Mercatoria as a Method of Decision-Making

The main proponent of the functional method is Professor Gaillard, who devotes articles which are as concise as impactful.[64]As an approach, it is an entirely different and probably more 'arbitration-tailored' way to determine the content of the Merchant. The presented argument states that the codification of the Lex in the form of a list is just a 'Mustillian misunderstanding'[65], and the correct methodology uses the Lex as a way of decision-making rather than a list or from the traditional choice-of-law process. The possible solution found by Gaillard functions as a comparative law method, in which the arbitrators have to find an applicable transnational rule and settle the dispute in accordance with it.

The search for the transnational rule should function as a comparative analysis of the relevant rules of laws selected by the parties or considered as pertinent by the arbitrators. The result is the most widely accepted rule, but the support for that rule „need not be unanimous"[66]. As the Professor states it, "The whole aim of transnational rules is not to diminish the role of national laws, but rather to *avoid having solutions that have not received sufficient support in comparative law prevail* [emphasis added] over solutions more generally accepted in the international community. This is perfectly in keeping with the intentions of parties who provide for the resolution of their disputes through the application of general principles, rather than national laws upon which they are unable to agree."[67] Furthermore, the method has, as one of its sources, other precedents of arbitral case law, but that is just one of its kind, it does not rely on jurisprudence.

The process of a decision-making method is further detailed in another context by Langen[68], who concludes that the last step is the tailoring of a proper transnational rule to the issues where the difference between the national systems is irreducible. The potential transnational rule might be the result of a middle ground or a reference to general principles of law.[69] Another doctrinal voice, Rubino-Sammartano argues for the utilization of *tronc commun*.[70]

The only question to ask is whether this methodology works according to the *ratio legis*. As a result, we get a transnational rule which is accepted by most of the relevant legal systems, and which has the most amount of support. The question is: do the parties aim for such thing when choosing the Lex as governing law? The essence of the Law Merchant lies in private governance and in the idea according to which state-made rules cannot be as suitable for the regulation of international commercial contracts and international commercial activities as the principles of international law and the rules and norms created by the '*societas mercatorum*' and its codification by different institutions. Even though these customs and principles are codified if they are beneficial for trade activity, there is a significant time gap or lagging before it gets accepted by a state, or before it gets accepted by the majority of the states. Therefore, the author suggests that with respect to the functional method, we risk to lose possible legal innovations or development realised by the merchant society or by non-governmental institutions. Even though the arbitrators take into account other

[63] Which is an advantage, but might be a concern for transparency too, see Gábor Szalay. *Arbitration and Transparency: Relations Between a Private Environment and a Fundamental Requirement*. Slovenian Arbitration Review. Vol. 6, Issue 1 (2017) pp. 17-34. For an analysis of the arbitration rules of certain arbitral institutions located in Central and Eastern Europe, see Gábor Szalay, "A brief history…", p. 16 et seq.

[64] E. Gaillard, "A Legal system…", op. cit.; Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*. ICSID Review: Foreign Investment Law Journal. 10, no. 2, 1995.

[65] Ibid. p. 224.

[66] Ibid. p. 228.

[67] Ibid. p. 229.

[68] Langen, Eugen, *Transnational Commercial Law*, A.W. Sijthoff, 1973.

[69] Idem, p. 221 et seq.

[70] Rubino-Sammartano, Mauro, *International Arbitration Law and Practice*, Kluwer Law International, 2nd rev. ed., 2001.

sources outside of state law, they are in search of the most commonly accepted rule which leaves no room for development of the existing rules. It is questionable whether with that methodology the arbitrator will choose the rule considered the most pertinent, which might have no comparative law support, or the one which gets the most support through the comparative law analysis. A decision-making process up to a challenging decision.

It is hard to create precedent of arbitral case law, since these decisions are rarely published. Therefore, it leaves room for inconsistencies on a case-by-case basis. Without guidelines from already settled disputes, there will always be concern about the content of transnational law, since the selection of applicable rule should be uniform in similar cases – such as in cases where the parties do not choose a governing law, or when they choose e.g. general principles of law applicable in Western Europe.[71]

Also, as it is stated by Goode, "No doubt it is possible after the event for an arbitrator, armed with all the relevant facts, to identify a rule of the Lex Mercatoria applicable to the case in hand. It is quite another *to extrapolate from this ex post identifiability the ex ante ability to determine that the [L]ex [M]ercatoria would be suitable as a governing law* [emphasis added] for a dispute that has not yet arisen and the nature of which may be difficult, if not impossible, to foresee"[72]. Therefore, even if the functional method would be unquestionable during its utilization by the arbitrators, it is highly questionable if the counsels of the parties not knowing the potential breaches and disputes arising from the contractual relationship, not having a clear and accessible arbitral case law will choose transnational rules to govern instead of a national law, which, if not tailored to international transactions, is at least easier to utilize, because most of the rules receive judicial interpretation.

2.3. Which is the Lie? – A Hybrid Solution

As a conclusion, drawing from the two different theories regarding the methodology to select the content of transnational law, none of the two is without considerable deficiencies. But, as it is stated hereinabove, for Lex Mercatoria to work in the long-term as a suitable governing law for the parties of any contractual relationship, there is a need to settle that dispute. The desire for predictable norms governing the contract means that transnational law can only remain the governing law choice of parties if they do not need to be concerned by such things as whether the arbitrator prefers to use the Lex as a list or as a method.

As we have seen, the list confers the structured character and the predictability needed, but its completeness will always be subject of disputes, while the functional method might be complete, through the fact that the comparative law analysis puts complete national legal systems under scrutiny. However, with regard to predictability, due to the abovementioned, we cannot affirm the lack of any problem. Therefore, a decision between the two theories is not that simple, and it comes hand in hand with both advantages and disadvantages. But why do we need to decide? Why do we think that a list and the functional method are mutually excluded? Maybe the actual lie was that we have to choose between these two. What the author suggests, is that the future methodology of Lex Mercatoria should be the combination of both, a method consisting of the utilization of the list and the comparative law analysis.

But for a hybrid-solution to function, keeping the advantages of the initial solutions and escaping their disadvantages, every element must be in place. Professor Berger states regarding the methodology of the Merchant and its balance-keeping between equity and codified written law that "[t]he application of the N[ew] L[ex] M[ercatoria] in practice therefore always oscillates between two

[71] Ibid. p. 230.
[72] Goode, Roy. *Rule, Practice, And Pragmatism In Transnational Commercial Law*, International and Comparative Law Quarterly 54, no. 3 (2005): p. 539.

extreme positions without ever reaching either"[73]. However, that oscillation is not the only one the Merchant has to fulfil. In order to function sustainably in international commercial contracts and activities, Lex Mercatoria needs also to oscillate between the two proposed methods – the functional decision-making and the 'creepingly' evolving list.

First of all, as it is highlighted above, one of the most concerning problems is that the main user of the Lex gives little to no feedback of it. Since arbitral case law remains undisclosed, the '*rationes decidendi'* cannot form a body, and therefore the rule making process is with little to no *praetorian* influence. As it is found by some authors through an international survey, the parties choosing arbitration rely while making that choice on the following characteristics of arbitration: neutrality, enforceability of the decisions under the New York Convention, confidentiality, the experience of the arbitrators in a certain area, the lack of appeal, and ultimately time-saving and cost-saving.[74] It is yet to be determined, if there is an existing solution which confers these advantages, but also offers the possibility of a system where the decision-making process and the selection of the best possible solutions for cases not codified or regulated can influence the codification and elaboration of rules and sets of norms, and *vice versa*.

The basis of the method should be a shift in institutional practice of arbitrational tribunals. The argument that Lex Mercatoria as a system lacks predictability can remain that harsh because most of the legal practice in connection with the Merchant remains confidential, and therefore the results of the doctrinal disputes and the advancements as well as the arising problems and errors through arbitration remain undiscovered and hardly have any impact on the lists. However, it is totally understandable that parties who choose to settle their disputes through arbitration prefer their confidentiality, as every bit of information can be used in case of disputes which are as technical as arbitration proceedings.[75] Also, the fact that the majority of the awards are not published[76] means that most of the parties are protected from interventions of any state or any governmental organization, due to the fact that e.g. there is an increased of number of arbitral awards in a given field. The confidentiality of arbitration is one of its fundamental characteristics, and with a change in that the system would never be the same.

Or would it? Besides the abovementioned agency theory, the author can present another theory of transnational law, the 'third party good faith theory'. Through that, the author suggests that the parties to an arbitration with Lex Mercatoria selected ex-ante or automatically as the governing law are legally interested in the continuous development and crystallization of the arbitral jurisprudence, and the motive behind the nondisclosure of the awards might be institutional. Having in mind that the most problematic part of the Merchant is the lack of predictability, and that most of the parties using Lex Mercatoria might be slightly less reluctant for its application in other contractual affairs, they have a direct legal interest to have that issue solved. However, it might be too much to ask from the parties to accept the publishing of their awards for the greater good.

But is it needed to publish these awards entirely? The only part able to provide benefits is the argumentation used to decide the given legal dispute. Therefore, institutions could easily clear every detail regarding the parties, reducing factual information to a minimal extent (only the nature of the agreement e.g. a sale, a factoring, a leasing etc. and the provenience of the parties – only to determine the possible choices regarding the governing law of the relationship). In relation to legal

[73] Berger, Klaus Peter, op. cit. p. 269.
[74] Christian Bühring-Uhle, Lars Kirchoff, Gabriele Scherer, *Arbitration and Mediation in International Business*, Kluwer, II. Kiadás, 2006, pp. 106-108.
[75] See Váradi T., op. cit. p. 562. Also, for procedural aspects of transnational law and arbitration, see Luke R. Nottage, *The Procedural Lex Mercatoria: The Past, Present and Future of International Commercial Arbitration*. Sydney Law School Research Paper No. 06/51; CDAMS Discussion PaperNo. 03/1E. December 1, 2006. Available at SSRN: https://ssrn.com/abstract=838028 or http://dx.doi.org/10.2139/ssrn.838028(13 September 2019). Also, for the presentation of IBA as a rule-maker, see David Arias, S*oft Law Rules in International Arbitration: Positive Effects and Legitimation of the IBA as a Rule-Maker*, 6 Indian Journal of Arbitration Law No. 6., 2018, p. 29 et seq. About the relation of ISDS procedures and arbitration see András Kecskés, Barnabás Ferenc, *International Commercial Arbitration and the ISDS procedures*, JURA, vol 24, 1, 2018, pp. 280-288.
[76] It must be noted that there are several journals publishing arbitral decisions, but these are only some decisions from a vast arbitral practice. The personal view of the author is that for a functioning Lex Mercatoria there is a need for the possibility to know that practice more in detail.

disputes, the main concern subject to publication would be every argumentation regarding why Lex Mercatoria should be applied, and concerning every dispute and rule determined through the utilization of a list or the comparative law method. Such publication keeps the parties relatively unidentifiable and offers to arbitral case law the much-needed direction of doctrinal disputes and arbitral practice heading towards the same direction.

Therefore, if the parties might have a direct legal interest and do not lose their confidentiality, it is probably just a trend not to publish, and therefore it is easily reversible. Arbitral case law not just gives the basis of a hybrid solution which can function without the presence of the flaws of the two theories and provide predictability in case of Lex Mercatoria, but could solve the issue of international commercial usages too – mainly the fact that it is not so incontestable whether a given commercial practice is a custom, or can be handled as a usage.

The hybrid theory should contain the main methodological instruments of both the list and the method, but it should be more than the sum of its parts. The common utilization of the two was already highlighted by Professor Berger, who argues that cross-fertilization can happen through the use of the list by international arbitral tribunals.[77] Also, it is pointed out that the 'Creeping Codification' has as an advantage the fact, that its elaboration will never be finished, but it will rather follow the international arbitral practice and the trends and practices of the international commercial flow.[78] But the over-regularization and the rigidity caused by it shall be prevented. As it is stated by Zumbansen, "for [L]ex [M]ercatoria the *point need not be a fully-fledged codification*, which were to repeat the juridification experiences of the Nation State. Indeed, transnational law does not and cannot directly follow the path of the materialization experiences that so far have taken place in the Nation State accompanying its development from the rule-of-law…".[79]The two different theories are suitable in different situations, which means that each theory might be considered as the starting point of the solution-setting depending on the legal dispute. The hybrid theory shall have as a priority the application of the solutions characterized by wide acceptance in trade customs, or usages, and domestic provisions which can make the case pertain its balance between a pure equity or a pure codification decision. If the dispute can be solved by the utilization of rules and the accompanying comparative law materials, related cases, and pertinent interpretations, the arbitrators should use the list, but with an ex-post comparative law analysis with a test in equity. The innovation or advancements in legal systems can be measured in some sort through an equity test, and therefore whenever the ex-post analysis of the solutions accepted by the parties of the Arbitration results in an unfavorable result through equity, it should be a strong sign of an outdated solution of the list.

The author considers that the use of the theory does not create any additional burden in the case of the arbitrator – due to the fact that if the arbitrator is using the comparative method, there is a need for a comparative legal analysis, and if the list is used, there is a need to analyse the given solution and ensure its reasonability. Therefore, the hybrid method would guarantee a long-term functionality of Lex Mercatoria practice.

In that regard, the publication of '*ratio decidendi'* is crucial. The combination of the two methods in that case has as a result rules which are primarily created by the international community, or have a support in the majority of relevant national laws, while also fulfill an equity criteria.

If the list does not contain any rule regarding the dispute, there is a need for the functional method to solve the problem and a comparative law analysis. However, the comparative law analysis should be finished with an ex-ante equity test, to guarantee the quasi-general acceptance and

[77] Berger, Klaus Peter, op. cit. p. 267 et seq.
[78] Idem, p. 268. However, that evolutive codification is present in other lists or model contracts as well, such as INCOTERMS, or FIDIC Contracts, but that can also be the case in relation with Unidroit Principles, which are updated over time, even though its modification requires a formal initiation within the work groups.
[79] Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, European Law Journal, Vol. 8, No. 3, 2002, p. 427.

support of the given norm as well as the pace-keeping with international commerce and with the incentives for private governance, through the equity criteria. The methodology determined by Professor Berger has as a starting point "[t]he process of adding a principle or rule starts with a concrete legal problem"[80], and the Professor continues that "[t]he corresponding legal principle or rule is then developed on the basis of the functional comparative methodology, i.e. using a topical, problem-oriented comparative approach"[81].

The only thing to be modified is the way how selected transnational rules of arbitral practice become accepted principles of Lex Mercatoria. For that case, to avoid supra-regularization of Lex Mercatoria, the elaboration of lists should happen only through principle-like provisions, since very special and technical rules can hardly be enacted, as well as their application and the exact content of the rule is controlled by the factual information and the details of the case. Such provisions under the label of the Merchant can limit arbitrator-discretion, but through the limitation of that, the balance between equity and codification will be damaged in a way that general principles of trade law lose one essential trait – the fact that parties choose it as a governing law to avoid the 'harsh' procedural and substantial technicalities of national laws.

To sum up, the author concludes that the methodologies can only function appropriately when combined, but the common utilization of the two demands stronger possibilities for case law reference, which can only be achieved through an institutional paradigm-shift. The hybrid solution makes the Lex Mercatoria an evolving and complete system[82], where there is a potential solution for every legal dispute, but that open-ended list shall be handled cautiously in order to avoid the situation where the number of potential candidates rises in a manner which diminishes the efficiency of the Lex – and a part of that efficiency was due to the discretion and often equity-based attitude of the arbitrators.

3. Our Performance Begins – Additional Arguments for the Use of Lex Mercatoria in Lack of a Governing Law

As it was mentioned above, there is a common but disputed[83] arbitral practice, that in case if there is no governing law selected by the parties to an arbitration for an international commercial relation, the arbitral tribunal shall choose a transnational law to settle the dispute. As it is stated under ICC rules, the arbitrators can determine the applicable law directly.[84] If they do not argue besides the application of any national law, there is no need to consider such things as e.g. the 'implied negative choice'[85] of the parties. The question is, whether the application of general principles of trade law is detrimental, since it is a disputed issue. Or the characteristics of the Lex can make that decision justified and beneficial?

In a situation where parties coming from different jurisdictions do not choose a governing law, the solution of the dispute through any of the two's national law would be contrary with substantive neutrality.[86] In that case, why would the utilization of a third state's law be any better than a list or a model law elaborated and published by a non-governmental organization? In that case, the third state's sovereignty is the reason why some would support the application of its law, but that cannot

[80] Berger, Klaus Peter, op. cit. p. 283.
[81] Ibid.
[82] The analysis is made only from the point of view of the legal norm. Based on what we regard as a legal system, there are other criteria to be fulfilled as well.
[83] For the view of an English barrister, Anthony Connerty, *Lex Mercatoria: Is it Relevant to International Commercial Arbitration?* Yildrim/Eskiyörük (eds.), International Commercial Arbitration and the New Lex Mercatoria, 2014, p. 120 et seq. For a detailed review of arbitral agreements and the governing law, see Alan Scott Rau, *The Agreement to Arbitrate and the 'Applicable Law*. American Review of International Arbitration (Forthcoming); Available at SSRN: https://ssrn.com/abstract=2954109 or http://dx.doi.org/10.2139/ssrn.2954109 (13 September 2019).
[84] Orsolya Tóth, op. cit. pp. 167-168.
[85] Ibid. p. 166.
[86] Markus A. Petsche, International Commercial..., op. cit.

be a pertinent argument. Sovereignty shall not mean that alegal order has a priority in application,

or that the legal dispute can be settled properly by the applicable legal provisions of that third state. The legal order which should be applied is the one which regulates the issue with the most specificity, keeping in mind the features of international trade.[87]

'Par in parem non habet imperium.' If we think about that, it is controversial to have a national legal order have 'sovereignty' over an international body of law claimed to be autonomous by a considerable part of the doctrine. To illustrate this, we can think about a dispute where one of the parties is a state or its institution. In that case, would any state accept the other state's rules to be applied? If none of the parties are state actors, the problem remains the same – since states are also parties in international commerce, why should the national law of a party be considered more convenient and fitting than a body of law elaborated by agents having at least no direct interest in international commercial dealings?

Of course, as it is noted by Tóth, "*the arbitrator's scepticism* towards the [L]ex [M]ercatoria may *distract the conflict of laws process*[emphasis added]."[88] Therefore, there is a need for a solution to ensure the application of the Merchant in such occasions, which is in the interest of the parties, due to the fact that its contents can be more and more easily determined due to doctrinal advancements, and that content is a custom-made body of law having as its scope international commercial contracts and transactions. One such way is a broader understanding of Lex Mercatoria and its methodology by arbitration practitioners, which can be greatly influenced by a more elaborate arbitration case law.

4.Shall we Dance – Shall a National Court use Lex Mercatoria as a Main Source?

The use of Lex Mercatoria can be considered established in international commercial arbitration. Even though when the Merchant shall apply is subject to disputes, it is ensured that if the parties choose it as a governing law for their contract, then the arbitral tribunal will solve the dispute accordingly. However, commercial litigation seems to reject the idea of applying mainly transnational rules during the proceedings. Professor Petsche offers a detailed view about the domestic courts' inability to apply transnational law, stating that "The application of non-national or transnational law [under the Rome I Regulation[89]] is excluded"[90], and also detailing the rules used in the United-States.[91] It is considered by the Professor, that even limited exceptions, such as the possibility for the parties to incorporate rules of transnational origin into their contract, conclude in a more complicated legal relationship, mainly because transnational rules and domestic provisions regarding international commercial contracts and international commercial relations share similarities regarding their scope and nature, and that overlap will cause inconsistencies in the application of these incorporated rules, thus it will be determined by the court which of these contravenes the law that is selected to decide the legal problems.[92]

On the other hand, "[t]he basic function of transnational law is to provide parties with an independent, comprehensive set of norms that governs all legal issues arising out of their transac-

[87] See for example Goode, Roy. "Usage and Its Reception in Transnational Commercial Law." International and Comparative Law Quarterly, vol. 46, no. 1, 1997, p. 13. et seq, arguing for the fact that international trade usages can be specific as well,
[88] Orsolya Tóth, op. cit. p. 171.
[89] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations.
[90] Markus Petsche, „The application...", op. cit. p. 493. About the same issue, see Symeonides, Symeon, *Party Autonomy and Private-Law Making in Private International Law: The Lex Mercatoria that Isn't.* Festschrift für Konstantinos D. Kerameus, Ant. N. Sakkoulas & Bruylant Publishers, 2009, pp. 1397-1423.
[91] Ibid. p. 494.
[92] Ibid. pp. 497-498.

tion."[93]Therefore, their incorporation in the contract, even if the general principles of international trade will only be utilized during interpretation, makes things more sophisticated, and therefore such provisions can hardly, if at all take advantage of transnational rules, and the self-regulatory nature of Lex Mercatoria.

Some jurisdictions accept these rules and Petsche also argues for the application of transnational rules by domestic courts, and highlights the inappropriateness of criticism[94], illustrating that there are no valid objections[95] against the allowance of the application of 'rule of law'[96] and non-state elaborated bodies of law. The two possible objections of opponents worth mentioning, and also in need of further detailing are the views according to which courts can only apply domestic law,[97] and the application of transnational rules would undermine the appellate review system.[98]

With respect to the appellate review system, it is commonly known that domestic courts handle foreign law as a matter of fact, and not as a law[99]. The problem of the appellate review can arise on an international level, which is the need for a body or an organization to be the last word regarding the interpretation and application of the Merchant. Since one of the '*raison d'etre*' of Lex Mercatoria arbitration is the possibility to settle disputes by the rules and principles which have the most support on an international level, a misinterpretation by these on a state-level can result in parallel jurisprudence and appearance of the *forum shopping*[100]. Moreover, a hybrid theory can only be used in case of arbitration or special jurisdictions, since an equity-test is not easily executable by a judge outside of a Common law jurisdiction. In case of the Vienna Convention on Contracts for the International Sale of Goods[101], it is highlighted by some authors that the lack of uniform application[102] makes the CISG less effective, with some even stating that the background problem is that the CISG is not a jurisdiction.[103] If Lex Mercatoria will ever be widely applied by domestic courts, probably we will face the same problem. Also, the problems caused by non-uniformity can influence the functioning of the whole system, therefore, considering cases where Lex Mercatoria figures are most often solved through arbitration, it is a dilemma whether the minor part of the dispute settlement solved by transnational law makes the risk worth it.

In connection with the other one, which has as a premise that courts only apply domestic law, Petsche identifies a key problem, "that a contract needs to be governed by a particular domestic law because it cannot exist in a legal 'vacuum'."[104] What the author considers as essential in that discussion is the economic criteria of an international commercial contract. From that point of view, the theory of international commercial contracts might be reassessed, since it is quite improper to decide the validity of a contract based on the rules of a state, while in the majority of cases one of the states might have direct economic or financial interest. International investment treaties are considered as the solution against these potential abuses, but these treaties do not offer protection with respect to a significant part of international commercial law. Therefore, that objection should not be accepted, and there is a need for the reconsideration of validity analysis based on a single substantive law.

[93] Ibid.
[94] Ibid. p. 508 et seq.
[95] Ibid. p. 511 et seq.
[96] For the distinction between law and 'rule of law', see Michał König, *Non-State Law in International Commercial Arbitration*, Polish Yearbook of International Law, No. XXXV, 2015, p. 269 et seq.
[97] Ibid. p. 512.
[98] Ibid. pp. 514-515.
[99] Ibid.
[100] Francesco Galgano, Globalizáció, op. cit. pp. 85-88.
[101] 1980, United Nations Convention on Contracts for the International Sale of Goods
[102] Jan M. Smits, *Problems of Uniform Sales Law – Why the CISG May Not Promote International Trade*. Larry A. Di Matteo (ed*.),* International Sales Law: A Global Challenge, Cambridge 2014; Maastricht European Private Law Institute Working Paper No. 2013/1; Glavanits Judit: *How Do You Mean It, CISG? Applying The CISG More "21st Century"-Way*, In: Modernizing International Trade Law to Support Innovation and Sustainable Development: Proceedings of the Congress of the United Nations Commission on International Trade Law.Vienna, Ausztria, 2017.07.04-2017.07.06; Glavanits Judit: *A Bécsi Egyezmény magyar és nemzetközi joggyakorlata – kérdések és kétségek között*, In: Glavanits Judit, Rigó Erika, Szakály Zsófia, Wellmann Barna Bence, A nemzetközi adásvételi szerződések joggyakorlatának aktuális kérdései. Széchenyi István Egyetem Deák Ferenc Állam- és Jogtudományi Kar, 2017.
[103] Smits, Jan M., 2014, p. 609 et seq.
[104] Markus Petsche, „The application...", op. cit. p. 512.

5. The Show Never Ends – The Future of the Merchant

This section shall function only as a quick outlook on international trade law, and some events having major influence on its development. The current state of globalization (and the political debates resulting in trade wars), Brexit and certain decisions of the Court of Justice of the European Union (CJEU) can drastically change the setting of commercial law on the European Union level.

Probably, the most important is the process of rethinking the role of the economy and trade law in the globalized world. On the one hand, Professor Garcia argues that our social space "is a global market society is perhaps the most controversial characterization of the three, but in my view this is what the convergences outlined above point to."[105] On the other hand, due to certain political debates between leading economies, there is a constant decline of free-trade and common protectionist practices,[106]and that affects all of us. The decline in free-trade can cause economic agents to increase their trading activity within the framework of customs unions and common markets, and that infra-economic trade is often regulated from the perspective of trade law, meaning that these processes can appear hand-in-hand with a decreased utilization of general principles of trade law in international commercial contracts.

On a European Union level, probably the most important issue is Brexit. As it stands now, at the moment when this article is written, the United Kingdom will leave at 31st of October, and even though the prime-minister is obliged to avoid a no-deal situation, things can still go both ways. The United Kingdom leaving the European Union might be an ante-room for a period during which deeper economic and political integration can be achieved. This can be relevant from the perspective of Lex Mercatoria as well, since transnational law is frequently opposed by common law authors, and the most important proponents, with few exceptions, are all coming from civil law countries. Maybe this will mean that a potential acceptance of its utilization on the European Union level has one barrier less to pass?

Furthermore, the Achmea case, Case C-284/16 and its ulterior effect on the jurisprudence of the CJEU will be a watershed in the acceptance of arbitration and, indirectly, in the use of the Merchant. The case concluded that a provision of the bilateral investment treaty ('BIT') "ha[d] an adverse effect on the autonomy of EU law", and that "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States". Even though the case refers to an arbitration agreement in a BIT, it is questionable whether based on that case the acceptance of intra-EU arbitration in private dealings will remain untouched, or the autonomy of the EU will also have an effect on that form of dispute settlement. This question is yet to be asked, but it is an issue outside the context of the present article, and therefore the author restricts to make the necessary references.[107]

6.This Stage is Beneath my Talent, but I Shall Elevate It – Conclusions

It is no longer disputed that the application of Lex Mercatoria is beneficial for the parties, and can enhance the substantive neutrality and fairness of an international business transaction, as well as the settlement of potential disputes arising from it. However, it is not utilized to its full potential, and even after some 70 years of its 'renaissance' there are still fundamental questions regarding its

[105] Frank Garcia, *Rethinking Trade Law in an era of Trump and Brexit*, Sorbonne Student Law Review, Vol.1, No.1, 2018, p. 118 et seq.
[106] Melchior, Arne. *Free Trade Agreements and Globalisation: In the Shadow of Brexit and Trump*. 2018. <https://doi.org/10.1007/978-3-319-92834-0>.
[107] Pohl, Jens Hillebrand, *Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?*, European Constitutional Law Review 14, no. 4 (2018): 767–791; Hess, Burkhard, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*. MPILux Research Paper 2018 (3), March 30, 2018; Nagy, Csongor István, *Intra-EU Bilateral Investment Treaties and EU Law after Achmea: 'Know Well What Leads You Forward and What Holds You Back'*. German Law Journal, Vol. 19, No. 4, 2018, pp. 981-1016; Lee, Janice, T*he Empire Strikes Back: Case Note on the CJEU Decision in Slovak Republic v. Achmea BV*, Contemporary Asia Arbitration Journal, Vol. 11, No. 1, May 2018, pp. 137-152.

application, methodology and place in international commercial law.

This article mainly assessed the methodology of transnational law. In the internationalizing world where private governance is not just a desire, but tends to become a reality, the reluctancy to non-state law shall become obsolete, since it is the legal framework which can adequately and wholly regulate and control the international commercial field. In international arbitration the Law Merchant is often excluded, due to the fact that its content is hard to define. But is it really? The article tries to debunk that claim with the presentation of a hybrid solution which contains the most important instruments of both the list and the functional method. However, a solution such as initial perspectives cannot be efficient without proper arbitral case law. In that sense, the article argues for a broader publication practice of arbitral rationale and argumentation. It has to be reaffirmed that this shall only concern legal problems and their solutions, the confidentiality of the arbitral proceedings shall be left 'untouched'.

Apart from the methodology, the paper focused on the elaboration of additional arguments in favour of the *'voie direct'* as well as with the potential application of transnational law by domestic courts. Knowing the problems what the CISG is facing, it is questionable whether that eventual application can solve problems of the parties, and if that need implies an answer from the states. However, such a measure shall be carried out with due prudence. Finally, the article mentioned some events which can determine whether or not the Law Merchant will be more widely accepted in the future.

There is one more question to be answered: which one of the methodologies is a lie? The answer is both – and none. In the current form: both, because none of them can give a proper answer regarding the exact content-setting of a transnational rule, not just during an arbitration, or in the long run, but combined. In the current form also neither, as both contain instruments and elements which contribute to the creation of an autonomous law system, and a body of law which can appropriately govern international commercial dealings. The international stage is much beneath of the talent, potential, and usefulness conferred by Lex Mercatoria. Although, to elevate it, there is a need for cross-fertilization not just between the situation of comparative law and certain lists, but between the needs of economic agents, the findings of doctrinal researchers and the arbitrators and judges (possibly with an increasing number in the future). It is a long way to go, but even Louis XIV, if he lived some 300 years later, would say that *'Je m'envais, mais la Lex Mercatoria demeurera toujours.'*

Investment Dispute Settlement in the Building of CPEC and its Impact on the Neighboring Region

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The settlement of disputes amongst the investors and the nations in which they are set up is a key part of investment assurance under International Investment Agreements (IIAs). The majority of IIAs contain arrangements concerning investor-state dispute settlement (ISDS). Despite the fact that they had shaped some portion of IIAs for over 40 years, it was just in the most recent decade that the international investors started using these ISDS mechanisms as models of resolution and settlement of disputes under the IIAs. The ISDS movement amid the most recent decade has produced a considerable number of cases touching upon key procedural and substantive parts of investment law, in this way encouraging the improvement of a law that, is probably going to advance later on. The paper comprises of four main sections. Firstly, it analyzes the major developments as regards the available mechanisms for investment dispute resolution, from diplomatic protection to bilateral investment treaties and ISDS mechanism. Secondly, it refers to the ISDS mechanism as a most suitable arrangement for the resolution of investment disputes, discussing its suitability by comparing it to other available mechanisms. Thirdly, it focuses on the BITs and FTAs Model of China with Pakistan and other countries, in order to see the specific method mentioned therein to find provisions and procedures to be utilized for the ISDS mechanism. Fourthly, it considers the CPEC Agreement and its prospects for China and Pakistan, in addition to the building of a multilateral treaty context in the South-Asian Region similar to the type of integration of North-American countries through the NAFTA Agreement.

Keywords: Investment Dispute Settlement; China-Pakistan BITs; CPEC; South-Asian Region Integration; NAFTA

1. Introduction

Regardless of whether a country conducts investment, trade or commercial activity in another country, it is necessary to ensure that such investment, trade or business is legal and lawful through developed mechanisms. Provisions for such legal measures have to be found between such nations' Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs). Bilateral investment treaties and free trade agreements are international agreements between the two countries/economies that provide guidelines which restrict governments' treatment of other countries/economies. Al-

most 2,400 BITs and similar accreditation bodies around the world include investment chapters in the free trade agreements such as the Energy Charter Treaty,[1] the China-Pakistan Free Trade Agreement and the Bilateral Investment Treaty, the China Pakistan Economic Corridor (CPEC) and other similar agreements. The basic principles required for such measures are deep-rooted, clearly defined parts of the International Investment Law that requires the governments in the investment markets not to be segregated from domestic or third-country investors; to provide for the cost of investing by the investors to be reasonable, fair and provide adequate protection.[2]

In any case, the operation of the dispute settlement mechanisms in investment and trade agreements is not the same. Since the latter only contains dispute settlement between states, therefore, this method of dispute settlement is considered to be a controversial remedy as it often requires the losing party to change the terms of the agreement such as the laws, control and additional tax rates. While the former *i.e.* bilateral investment treaties provide protection associated with the firm, and the breach of commitment will affect individual commitments. Bilateral investment agreements allow foreign investors to understand the possible ways through which he/she can bring a suit directly against the government in charge of default, by a mechanism called the 'investor-state dispute settlement' or ISDS.[3] For such disputes, the solution is usually a review or retrospective in nature. That is after a breach of the treaty, the ISDS authorities cannot ask the state to change its laws and controls, instead, it allows for compensation to be given to the investor by the government in charge of the default.

Since ISDS is a generally compliant method of investment dispute settlement, nations consent to such arrangements so as to set out standard procedures when foreign organizations contribute on their domain, for instance, by building processing plants. ISDS empowers the investors from one country to bring a suit or claim particularly against the country in which they have contributed before through an arbitration tribunal in case of any dispute relating to the investment. To prove the existence of breach of a certain term of an investment agreement is necessary for the investor to bring a claim against the other party. For example, an investment agreement would often say that an administration can control or 'confiscate' (for example, nationalize) an investment because it gives investors a satisfactory remuneration or compensation. If a country seizes investment or passes new laws to make the existing ones worthless (for example, it suddenly prohibits products manufactured by factories owned by foreign investors) and provides for no compensation at all, the investors can use ISDS to bring claims against that country directly, thereby asserting the fact that the violation of the terms of the expropriation in the agreement has occurred and they can demand adequate compensation.

2. Background

In accordance with customary international law, the State may recover the damages caused by the host country to its country through the implementation of reconciliation or diplomatic protection, which may include indemnity and/or restitution. In spite of this protection, and the employment of no coercive means, states may establish ad hoc commissions and arbitral tribunals to arbitrate claims that include treatment by host countries of foreigners and their property, through a legal method known as a 'State-State dispute settlement' (SSDS). A good example of this practice is the Iran-United States Claims Tribunal and the US-Mexico Commission of Inquiry. Nevertheless, these arrangements have been limited to the treatment of foreign investors in the past, and now ISDS allows investors to bring claims against the host states directly, without having to rely on the

[1] 1998, Energy Charter Treaty (ECT), 2080 UNTS 95, 34 ILM 360 (1995).
[2] R. Dolzer & M. Stevens, *Bilateral Investment Treaties,* 1st Edition, Kluwer Law International, The Hague 1995, pp. 103-108.
[3] J.W. Salacuse, *The Law of Investment Treaties*, 2nd Edition, Oxford University Press, Oxford 2015, pp. 655-661 .

previous SSDS mechanism.

Until now, legal protection of foreign direct investment under international law has been covered by more than 2750 bilateral investment treaties (BITs), multilateral investment treaties, specifically the Energy Charter Treaty and various free trade agreements (such as the North American Free Trade Agreement) that include special investment chapters in them. By the end of the 1980s and the mid-1990s, most of these treaties were challenged in the courts by investors claiming settlement of disputes which began in the late 1990s under such treaties or agreements.[4]

Most of these legal instruments make substantial guarantees to foreign investors, including 'reasonable and fair treatment', 'full insurance and security', 'free exchange of means', the privilege not to directly or in a roundabout way expropriate without adequate remuneration and access to the ISDS to the host country in order to redress the violation of the treaty obligations. Outstandingly, just foreign investors can sue states under investment agreements, since states are the parties to the dispute, and no one but states can be held at risk to pay injuries for the breach of that agreement. States have no such right to bring a unique claim against a foreign investor under such agreements, again in light of the fact that investors are not parties to the agreement and in this way cannot be in breach of it. The current China-Pakistan BIT and CPEC agreement likewise contain an 'intersection clause' requiring aggrieved parties to pick either a nearby court or ICSID arbitration to determine the investment dispute where the matter cannot be settled within six months.

3. The Investment Dispute Settlement Mechanism in General

3.1. Available Mechanisms for Investment Protection

In accordance with customary international law, the State may, by assurances of conciliation, recover the damages caused by the host country to its State or the establishment of an ad hoc commission and an arbitral tribunal to settle claims, including those dealing with foreigners and their property. At present, legal protection for foreign direct investment under international public law is through a system of more than 2750 bilateral investment treaties (BIT), multilateral investment treaties, most importantly, the Energy Charter Treaty,[5] the Free Trade Agreements, North American Free Trade Agreements (NAFTA) that contain chapters of investment protection. The larger part of these legal instruments provide substantial legal protection to foreign investors, including the privilege of 'fair and equitable treatment', 'comprehensive protection and security', 'free exchange of means', the privilege not to directly or in a roundabout way expropriate without adequate remuneration and access to the ISDS to the host country in order to redress the violation of the treaty obligations. The current China-Pakistan BIT and CPEC agreement likewise contain an 'intersection clause' requiring aggrieved parties to pick either a nearby court or ICSID arbitration to determine the investment dispute where the matter cannot be settled within six months.

3.2. The Emergence of the Investor-State Dispute Settlement Mechanism: From Diplomatic Protection to Bilateral Investment Treaties

It is a fundamental principle of public international law to protect foreign property. Disputes between States coming in light because of claimed infringement of a national's property rights can be

[4] J. Nakagawa, *Multilateralism and Regionalism in Global Economic Governance*, 1st Edition, Routledge, UK 2012, pp. 1-6.
[5] T.W. Wälde, *Investment Arbitration under the Energy Charter Treaty-From Dispute Settlement to Treaty Implementation*, Arbitration International, Vol. 12, No. 4, December 1996, pp. 429-466.

followed to the end of the eighteenth century. In the post colonization era, it was witnessed that the European empires ensured their business interests in foreign lands either through imperial submissions or by way of surrendering. Without these, the foreign investment disputes were worldwide disputes between the home State and the host State in light of political assurance or diplomatic protection, which was the customary method for getting redress for the injury caused by the breach of international law. According to customary international law, the State may, through the implementation of diplomatic protection, maintain the damage done by the host country to its country, which may include compensation, consular activities, negotiations, intercession, legal and arbitral proceedings, severance of political relations, and economic pressure. In spite of the provision of diplomatic protection and the lack of coercive means, States may also establish ad hoc commissions and arbitral tribunals to mediate cases (State-State dispute settlement-SSDS), including foreign national treatment and their property. An outstanding example of this is the Iran-United States Claims Tribunal and the US-Mexico Claims Commission. In the *Mavromatis Case,*[6] the Permanent Court of International Justice stated that "the State has, as an elementary principle of international law, right to protect its subjects, when injured by acts contrary to international law committed by another State, that are not accessible through ordinary channels."[7]

The first investor-state arbitration under a BIT occurred in 1987 (ICSID Case No ARB/87/3),[8] and the reports suggest that prior to this most of the investment disputes that referred to the international tribunals were either brought in pursuance to contractual agreements by the private parties or were state-to-state arbitrations. Two advancements related to the development of investor-state dispute resolution from diplomatic protection consist of; i) the foundation of discussions or negotiations for direct cases, and ii) the development in the utilization of dispute settlement mechanisms as provided under the common treaties (breach of which could be sought after either in the international forums or local courts).[9] Prior to this, the investment disputes had been dealt under the provisions of the Treaty of Friendship, Commerce and Navigation (FCN Treaty) amongst developed and developing countries.[10]After World War II, the developed countries started using new sorts of settlements. These incorporated Investment Guarantee Agreements (IGA) and the Investment Protection Agreements (IPA). While the previous settlements resorted to the investment protection and subrogation, the new settlement dealt with investment protection alone. The FCN Treaty, IGA, and IPA are aggregately known as Bilateral Investment Treaties. However, these treaties were limited to the treatment of foreign investors on retrospective basis whereas modern ISDS allows investors claims against states in general and on a prospective basis.[11]

3.3. ISDS and Other Dispute Resolution Procedures

The ISDS is an essential element of the credibility of the State's efforts to strengthen its commitments in international investment agreements. In fact, bilateral investment treaties providing international arbitration - about 33 percent of the total, based on large-scale treaty investigations – allow the private implementation of these commitments. If a State is deemed to be in breach of its investment commitments, the injured investor may receive monetary compensation or another form of remedy. In principle, the availability of such treatment has enabled countries to respect their investment treaty commitments.

[6] *Mavrommatis Palestine Concessions (Greece v. U.K.)*, PCIJ, Judgment of 30 August 1924, 1924 PCIJ Series A, Judgment No. 2, at 12.
[7] D. Gaukrodger & K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment 2012/03, OCED Publishing, France 2012, http://dx.doi.org/10.1787/5k46b1r85j6f-en (10 April 2017).
[8] C.H. Schreuer, *The ICSID Convention: A Commentary*, 2nd Edition, Cambridge University Press, Cambridge 2009, pp. 71-1258.
[9] K. Qingjiang, *Bilateral Investment Rule-Making: BITs or FTAs with Investment Rules?*, The Journal of World Investment & Trade, Vol. 14, No. 4, January 2013, pp. 638-645.
[10] UN Conference on Trade and Commerce, *Investor-State Dispute Settlement and Impact on Investment Rule making,* New York-Geneva 2007, https://unctad.org/en/Docs/iteiia20073_en.pdf (12 April 2017).
[11] S. Miller & G.N. Hicks, *Investor-State Dispute Settlement – A Reality Check*, Rowman & Littlefield, Lanham 2015, pp. 17-19.

Likewise, the ISDS is also an executive procedure that sets out consistency and strategy to pay compensation in the instances of violation of investment commitments. International Investment Systems (IIAs)[12] and other global archives have three components that are unique to other countries. First, the legal premise of the ISDS is complex and volatile, while other large numbers of dispute resolution instruments are bound in all treaty frameworks. Second, the ISDS's power enables the private investor to make claims to States (depending on the various prerequisites set out in the various investment plans) and can provide important monetary awards. Thirdly, the institutional building of the ISDS has greatly attracted commercial arbitration (such as ad hoc, party-appointed arbitration groups, emphasizing speed, and alike).

The unique structure of the international dispute settlement framework has been strengthened through a more rigorous review of the three prominent and strongly used dispute resolution mechanisms developed by the (i) International Investment Law, (ii) World Trade Organization (WTO), and (iii) European Convention on Human Rights. The dispute settlement component of these three international law institutions was extensively reviewed and it was founded that each institution had a different dispute resolution framework compared to the ISDS mechanism. Under ISDS, investors can access the proceedings directly. Private parties are also allowed to enter the European Convention on Human Rights. In the WTO, only the WTO party can put forward the case. In the case of ISDS, investors seek financial (monetary) compensation in large numbers but are seeking temporary measures that require the respondent to do or not to do something. The WTO DSU does not award any damages. The only final remedy or compensation is the right of the country to withdraw the conflict with the WTO measures. For the European Convention on Human Rights, the most important treatment is mostly declaratory, but may also include 'fair remuneration' of honor. Moreover, ISDS awards review depending upon the forum proposed during the first dispute and can include ICSID abrogation methods (abrogation procedures) or national courts, usually for the sole purpose of prohibiting review of legal errors. On the contrary, all parties have the opportunity to make progress on the legitimate issues of the WTO, about 70% of the panel reports are appealed; leading to the appellate proceedings and circulation of the appellate decision to the member states within 90 days.[13]

4. China's Bits Serving as Models for the ISDS Mechanism Under CPEC

4.1. China-Pakistan BITs

China signed the 'Preferential Trade and Investment Agreement' (PTIA)[14] with Pakistan in 2006, which is the fundamental 'bilateral agreement' between the two countries. It covers trade and investment, as well as other monetary sectors. This PTIA serves to be the China's main BIT-compliant investment aid to Pakistan that provides a framework of rules for higher legal insurance amount to the investors than the earlier bilateral investment agreement concluded between both the countries in 1989. For Pakistan, the PTIA (Part 9) contains every standard provision for the second generation of bilateral investment treaties negotiated with developing countries. These include a definition of investment and the investor; admission clause; fair and equitable treatment; national and MFN treatment; confiscation; free exchange of assets; and ISDS. For China, the PTIA provides an opportunity to learn how to resolve complex financial commitments to reduce the tax on the trade of goods and incorporate the principles of management and investment.

[12] http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration (12 April 2017).
[13] https://euobserver.com/economic/130297 (12 April 2017).
[14] A. Berger, *Investment Rules in Chinese Preferential Trade and Investment Agreements – Is China Following the Global Trend towards Comprehensive Agreements?*, German Development Institute (DIE), Germany 2013, https://www.die-gdi.de/uploads/media/DP_7.2013.pdf (23 April 2017).

As a "rising star" of free trade agreements, China began a regional track, first with their own specific administrative regions e.g. Hong Kong, Macao, Pakistan and other friendly countries for the purposes of negotiations, because China has been on good regional track with Pakistan.[15] In this regard, the China-Pakistan Free Trade Agreement (FTA)[16] is a noteworthy understanding marked between both the nations that were concluded in 2006 and entered into force in July 2007. It likewise accommodates or facilitates investment security and arrangement for ISDS component if there should be an occurrence of an investment dispute. Trade volume in light of the agreement between the two states was $13 billion in 2013. A Second Phase agreement is at this moment being negotiated among China and Pakistan as CPEC, which will cut down obligations further and also institutionalize distinctive trade techniques.

4.2 China BITs Concerning Other Countries

The Chinese BIT program, since its inception in 1982, has experienced three periods and three generations of BITs, as shown in Table 1 below.[17] It should be noted, however, that although each generation of BITs characterized a given period, there could be BITs of different generations coexisting in a given period.

China's Bilateral Investment Treaties of Different Generations			
Generation	***Method***	***Year***	***Model***
First generation	Of Restrictive Methods	The 1980s – 1998	· Takes the European BIT as a model · No, or limit national treatment · Only the number of ISDS levy compensation
Second generation	Of Legalization Method	1998 – continuing	· Take the European Bilateral Investment Treaty as a model State treatment by the state · Law of (developing country) or non-compliance measures (developed countries) · Complete ISDS
Third generation	Similar to the NAFTA method	2007 – continuing	· (Partly) modeled on the NAFTA approach · Fair and equitable treatment in accordance with customary international law · MFN and national treatment "in like circumstances" · MFN treatment not extended to ISDS · Pre-establishment MFN treatment · Free transfer of funds exceptions in the case of a financial crisis.

The most comprehensive Bilateral Investment Treaty China concluded to date was with Canada in September 2012. The arrangements that began in 1994 in Canada depend on the Canadian Model

[15] X. Jun, *The ASEAN-China Investment Agreement: A Regionalization of Chinese New BITs*, SSRN Electronic Journal, June 2010, https://www.researchgate.net/publication/228174208_The_ASEAN-China_Investment_Agreement_A_Regionalization_of_Chinese_New_BITs (20 April 2017).
[16] 2006, China Pakistan Free Trade Agreement (FTA).
[17] J. Chaisse, *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy*, Oxford University Press, Oxford 2019, pp. 431-434.

Treaty, which was completely different from the China Model Treaty. The contents of the Canadian Bilateral Investment Treaty have been in compliance with the Canadian Model Treaty since 2004 and incorporated into international minimum standards; implementation of necessities; open protection of the environment or money related to the general situation; direct preconditions; and point by point ISDS rules. All of these creative solutions have now been incorporated into the past China Bilateral Investment Treaties. According to China's bilateral investment treaties from the late 1990s, all Chinese PTIAs have adopted far-reaching ISDS provisions and, in accordance with Chinese practice, in the case of national treatment, in accordance with non-applicable measures. New Zealand, Peru, and ASEAN are in the search for PTIA with China, which has made Chinese PTIAs relatively significant. However, in terms of market access, China is reluctant to supplement any subsidies compared to bilateral investment treaties.[18]

4.3. Provision for ISDS in Agreements

The present Model BIT between China and Pakistan regulating investor-state dispute settlement contains an 'intersection provision' requiring the aggrieved parties to choose either a nearby court or ICSID arbitration[19] to determine the dispute where the matter cannot be settled within a period of six months. If ICSID arbitration is chosen, the state party may require the investor to experience the local administrative review procedures before turning to ICSID. It should be noticed that this 'fork-in-road' clause has been considerably treated lightly in some of China's later BITs, *e.g.* the Germany BIT stipulates that a disputing party may withdraw a dispute from a domestic court and submit it to international arbitration. This BIT additionally makes it clear that the domestic review procedure is an obligatory condition before German investors can depend on ICSID, despite the fact that such measures shall be taken within a period of three months at the maximum. As indicated above, earlier arrangements of the Chinese Model BIT provided extraordinary preference to the specially appointed ad hoc arbitration, not ICSID arbitration, as China endorsed the ICSID Convention late in 1993. Starting then, China started to recognize ICSID arbitration for AOC dispute alone until 20 July 1998 when the Barbados BIT was agreed upon[20] and China recognized non-AOC disputes to the ICSID arbitration as well.

The ISDS procedure begins by informing the host Government of the formalities of the existence and nature of treaty breaches. In fact, the next stage required by each bilateral investment treaty is a 'cooling-off' period for of minimum 3 months to a maximum of 6 months, through negotiations, consultations or other means to determine the matter of the disputing party. In the meantime, foreign investors can obtain strategic support from their own specific government, but once claiming to continue ICSID arbitration, the investor's government is prevented from claiming any other available remedies on his behalf (different frameworks are not expressly disallowed by the investor's government but the attitude of non-discrimination has become the standard).

Investment disputes can be brought by the organization and the general public. In all cases, the investment court is composed of three referees or arbitrators. As with most arbitration, these three arbitrators are chosen on the following basis; one is authorized by the investor, second one is authorized by the state, the third one is chosen by the party or its designated judge or by the named expert, related to the rules applicable to the dispute.[21]

Where the parties to the dispute do not consent or agree to the appointment of the arbitrators, then such appointment is assigned to the executive officials usually at the World Bank, the International

[18] J.F. Zimmerman, *Inter-State Disputes,* New York Press, USA 2006, pp. 155-175.
[19] M.J. Moser, *Dispute Resolution in China*, Juris Publishing Inc., USA 2012, pp. 237-408.
[20] H. Jo & H. Namgung, *Dispute Settlement Mechanisms in Preferential Trade Agreements: Democracy, Boilerplates, and the Multilateral Trade Regime*, Journal of Conflict Resolution, Vol. 56, No. 6, May 2012, pp. 1041-1068.
[21] M. Sornarajah, *The International Law on Foreign Investment*, 3rd Edition, Cambridge University Press, Cambridge 2010, pp. 236-305.

Bureau of the Permanent Court of Arbitration or a private chamber of commerce. The power is vested in them to make the final decision as to the appointment of arbitrators in order to settle the dispute.[22]

5. CPEC Agreement in Multilateral Treaty Context and its Impact on the South Asian Region

5.1. Prospects of CPEC

From a strategic viewpoint, the corridor will bring quite significant benefits to China as after completion, it will expand the number of trade routes between China and other regional countries. China imports 60 percent of its oil from the Middle East and 80 percent of that is transported to China through the long, expensive, and dangerous piracy-rife maritime Malacca Strait route through South China, East China, and Yellow Seas. At present, transportation of energy through the Strait of Malacca takes around 45 days, which could be effectively compressed to less than 10 days if done by means of Gwadar port as it gives the most ideal land and ocean courses for this reason. In this way, Gwadar-Xingjian course can fill in as a contrasting option to the Malacca Straits for the transportation of energy which will meet the needs in short time. It will likewise empower China to import energy and find new markets for its products in Central Asia, Africa, and the Middle East.[23]

CPEC has the opportunity to revive Pakistan's monetary structure, especially through the upgrading of the badly struck energy sector, by cultivating a more compelling energy network.[24] In case the CPEC turns into an advancement corridor for the greater part of Pakistan it will create employment opportunities, reduce poverty, maintain lawfulness by connecting with youth in business exercises and enhance the financial standpoint and pointers.[25] Fortifying the feeble connections between Pakistan's domestic trade and its fares ought to support for both the fares and investment, and promote advancement in goods and administrations. The majority of this would essentially expand the nation's GDP and have a multiplier impact on tax collection other than spending on social sector alone, for example, training, wellbeing and basic necessities of the people.[26] In this specific situation, the CPEC could even add to enhancing security in Pakistan, in a roundabout way through motivating forces for regional soundness and better relations with India, and specifically through development opportunities for Baluchistan and Khyber Pakhtunkhwa.[27] Such a perfect situation is in no way, shape or form ensured the CPEC cannot just alleviate a portion of the primary obstructions thwarting Pakistan's financial improvement but it can additionally increment its officially substantial foreign obligation i.e. external debt. More noteworthy transparency is fundamental to permit a vivid profit-gain investigation that at present is unrealistic. The State Bank's Governor has openly requested subtle transparency elements in the structure of the CPEC's arrangements, which are fundamental to satisfying his obligation as the boss of the nation's macroeconomic security.

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[22] N. Horn & S. Kröll, *Arbitrating Foreign Investment Disputes*, Kluwer Law International, The Hague 2004, p. 147.
[23] R.E. Grumbine, *China's Emergence and the Prospects for Global Sustainability*, American Institute of Biological Sciences, Vol. 57, No. 3, March 2007, pp. 249-255.
[24] T. Zimmerman, *The New Silk Roads: China, the U.S., and the Future of Central Asia, Centre on International Cooperation*, New York University, October 2015, http://cic.nyu.edu/publications/new-silk-roads-china-us-and-future-central-asia (30 April 2017).
[25] A. Shoukat & K. Ahmad & M. Abdullah, *Does Infrastructure Development Promote Regional Economic Integration? CPEC'S Implicationa for Pakistan*, http://www.pide.org.pk/psde/pdf/AGM32/papers/Does%20Infrastructure%20Development%20Promote%20Regional%20Economic%20Integration.pdf (25 April 2017).
[26] F. Shaikh & Q. Ji & Y. Fan, *Prospects of Pakistan–China Energy and Economic Corridor*, Renewable and Sustainable Energy Reviews, Vol. 59, No. C, June 2016, pp. 253-263 .
[27] World Bank Group, *Global Economic Prospects: Heightened Tensions, Subdued Investment,* World Bank Publications, USA 2019, http://www.worldbank.org/en/publication/global-economic-prospects (30 April 2017).

5.2. Impact of CPEC and Challenges in Making South Asia an Integrated Region

In the coming years, CPEC, a mega game-changer project, will significantly change the general geopolitical scene of Asia and can reshape the monetary perspective of the states in the region.[28] It is likely that the entire region will benefit from this passage as this investment can bolster monetary activities, increase trade linkages, redesign particular joint effort, deliver new budgetary open entryways, and increment socio-cultural accessibility among people in the district. The execution of this comprehensive investment would bring economic and financial opportunities that can change the destiny of the regional states that are required to go into multilateral settlement commitments keeping in mind the end goal to help their economies and give investment security and dispute settlement systems in that.[29] Along these lines CPEC has a more prominent local and financial incentive as it would give chance to every regional actor to make South Asia a consistent coordinated region.[30] In spite of the fact that there exist many focal points for upgrading financial joint effort and setting up local interconnection, to put the possibility of CPEC into the truth is as yet confronting a few difficulties. The disparate and clashing interests of some regional and additional regional actors are a danger to the development and accomplishment of CPEC. Since the declaration of CPEC, the territorial situation has as of now changed as some nations have started to see the investment with critical eyes and as a string to their advantage, which can frustrate the tranquil and peaceful nature of the investment.[31]

Afghanistan has tremendous significance in the geostrategic calculus of Pakistan and China, as it is considered to be a connecting link among other sub areas of Asia. Hence, peace and stability in Afghanistan are of crucial significance for Pakistan and China as well as for the security of the entire area.[32] Due to the Central Asian States (CARs) key geo-strategic location and their lavishness in oil and gaseous petrol assets with significant repositories in Uzbekistan, Kazakhstan, and Turkmenistan, all regional and international states – including Pakistan and China – are eager to get into nearer association with these states. For CARs, the majority of the five landlocked nations wish to access the ocean and broaden their energy channels which the CPEC project or corridor can satisfy. The corridor can likewise help in bringing colossal open doors for the CARs in the monetary fields. For the transportation of their characteristic energy assets, CARs can be encouraged with exchange and pipeline courses by Pakistan; and their products can be easily sent out to the Middle East and European states by means of Gwadar Port.[33] At first, the corridor faced resistance from Iran, which was thought to be in opposition and working with India to build its Chabahar port.[34] However, at the end of September 2015, Iran[35] has considered CPEC's cooperation options, which aims to increase availability through road and rail systems to expand the scope of trade and transportation.

Another country that seems to hinder the possibility of CPEC is the United Arab Emirates (UAE). Dubai port is a major part of the UAE economy. Once the Gwadar port is fully operational, it will specifically affect the Dubai port, which could lose 70% of the business area. In addition, the relationship between Pakistan and the UAE has recently been affected by Israel's refusal to launch a struggle against the rebellion in the UAE and Saudi Arabia allied with Yemen. These components incite the UAE to find new important partners in conflict with Pakistan. India is an obvious choice.

[28] M.H. Khan, *Geopolitics of CPEC*, Defence Journal, Vol. 20, No. 3, October 2016, pp. 69-75.
[29] J. Chaisse & P. Gugler, *Expansion of Trade and FDI in Asia: Strategic and Policy Challenges*, Routledge, The Hague 2009, pp. 23-284.
[30] A. Malik, *What CPEC Means for South Asia: It Fundamentally Alters Pakistan's Alignment, Sundering Its Link To The Subcontinent*, The Times of India, November 2016, http://blogs.timesofindia.indiatimes.com/toi-edit-page/what-cpec-means-for-south-asia-it-fundamentally-alters-pakistans-alignment-sundering-its-link-to-the-sub-continent/ (28 April 2017).
[31] K.M. Butt & A.A Butt, *Impact of CPEC on Regional and Extra- Regional Actors*, Journal of Political Science, Vol. 32, August 2015, pp. 23-24.
[32] H. Jo & H. Namgung 2012.
[33] S. Sial, *The China-Pakistan Economic Corridor: An Assessment of Potential Threats and Constraints*, 2014,http://www.academia.edu/13018116/The_ChinaPakistan_Economic_Corridor_an_assessment_of_potential_threats_and_constraints (27 April 2017).
[34] A. Arif, *Gawadar and Chabahar: Implications for the Region,* Institute of Strategic Studies, 2016, http://issi.org.pk/wp-content/uploads/2016/06/Final-Issue-brief-Areeba-dated-07-6-2016.pdf (28 April 2017).
[35] A. Arif, *CPEC: Prospects for Pak-Iran economic relations*, Institute of Strategic Studies, 2016, http://issi.org.pk/wp-content/uploads/2016/05/Final-Issue-brief-Areeba-dated-18-5-2016.pdf (20 April 2017).

Nevertheless, the UAE should understand the ground reality that its opposition to the CPEC project, especially the development of Gwadar port would not last long. In the future, if the UAE is interested in land and development in Gwadar, this can bring great benefits to the UAE as well. If UAE sides with India, this will affect its relations with Pakistan in the future.[36]

Although there are many favorable conditions for the improvement of financial coordination efforts in the region, yet CPEC is considered to be an important factor in the establishment of territorial interconnection. The differences and conflicting interests of some regional actors are the risks for developing and completing CPEC.[37] These are basically the United States and India as an important rival to the implementation of CPEC because it will hurt the Indo-US overwhelming Indian Ocean hegemony. For India[38], CPEC implies that China might have the high ground in the Arabian Sea as it will have complete control over the Strait of Hormuz through Gwadar's seaport. This will probably affect India's trade route. Thus, the expanding vital connection between the two nations as CPEC is a noteworthy worry for India – the transcendent energy of South Asia, which is unmistakably resentful about the arrangement of CPEC and has unequivocally voiced its resistance.[39]

With the continuous existence of conflicts in the region, the United States support in the favor of CPEC project would bear significant impact on CPEC as well as China, itself. By giving China the financial power in the region, the United States can use its expanding economic dependence, with the assistance of China to solve some of the key issues in the region, such as terrorism and fanaticism. In any case, it is not possible to disregard the guidelines for the current session of international politics, which are of interest, and change as geopolitical conflicts change.[40]

The deep and useful associations of Pakistan and China are most likely to overcome the difficulties brought about by regional conditions.[41] The best way to overcome some regional difficulties and inefficiencies is to make the trouble makers understand that CPEC will not only strengthen Pakistan's financial condition situations but also contribute towards the financial uplift of the entire region. In order to soften CPEC's opponents, China and Pakistan need to participate in external political initiatives, should improve negotiations and improve the overall understanding of regional countries. By looking at the vision of each of the key partners, CPEC can stimulate the financial situation, change the economic range of the entire region, and would help achieve the direct benefits out of this opportunity.[42]

5.3. A Multilateral Treaty Context in the South Asian Region akin to NAFTA

At the beginning of the 21st century, globalization was occurring very fast. Through a real network of expansion, the ideas incapable of becoming a reality have shifted the pattern of global collaboration from reciprocity to multilateral cooperation. As a result, the financial channel around the world has risen, often providing huge profits to the developing countries. The EU and the North American Free Trade Area are the main examples of this phenomenon of globalization.[43] In terms of consolidation, there are some areas where South Asia is considered to be the world's least integrated region. China has announced a two-pronged strategy based on the idea of opening up to

[36] S. Pande, *Sino-Pak Strategic Relationship: Implications for India*, Autumn, 2015, http://www.claws.in/images/journals_doc/1942499114_Sino-PakStrategicRelationship.pdf (25 April 2017).
[37] M. Abid & A. Ashfaq, *CPEC: Challenges and opportunities for Pakistan*, Journal of Pakistan Vision, Vol. 16, No. 2, 2015, pp. 142-169.
[38] A. Singh, *Chinese Corridors and their Economic, Political, Implications for India*, 2016, https://therearenosunglasses.wordpress.com/2016/06/08/life-or-death-economic-corridors-for-pakistan-and-india/ (20 April 2017).
[39] A. Ranjan, *The China-Pakistan Economic Corridor: India's Options*, Institute of Chinese Studies (ICS), 2015, http://www.icsin.org/uploads/2015/06/05/31e217cf46cab5bd9f15930569843895.pdf (29 April 2017).
[40] McBride, *Building the New Silk Road*, Council on Foreign Relations, 2015, https://www.cfr.org/backgrounder/building-new-silk-road (29 April 2017).
[41] S. Sial 2014.
[42] O. Alam, China-Pakistan Economic Corridor: Towards a New Heartland, 2015, http://blogs.lse.ac.uk/southasia/2015/11/16/china-pakistan-economic-corridor-towards-a-new-heartland/ (22 April 2017).
[43] P. Dumberry, *The NAFTA Investment Dispute Settlement Mechanism and the Admissibility of Amicus Curiae Briefs by NCOs*, Estudios Socio-Jurídico, Vol 4, No. 1, Jan./June 2002, pp. 58-82.

the west; i) through landlocked countries (new Silk Road) and ii) through waters (21st century Maritime Silk Road).[44]

An outstanding case of creating a multilateral treaty context in the South Asian Region through ISDS mechanism, for around two decades, is Chapter 11 of the North American Free Trade Agreement (NAFTA).[45] Chapter 11 allows corporations or individuals to sue Mexico, Canada or the United States for compensation when actions taken by their governments (or by those for whom they are responsible at international law, such as provincial, state, or municipal governments) violate international law.[46] This is considered to be roughly the same as the dispute resolution system under the CPEC agreement, which makes these agreements quite similar in this sense. The North American Free Trade Agreement (NAFTA)[47] is a multilateral treaty agreement that incorporates an unbiased, rule-based dispute resolution mechanism to affirm the legitimacy and consistency of North American business's involvement in commercial practices. Under this Agreement, a NAFTA party's company can communicate and contribute based on the knowledge of the guidelines to ensure reasonable treatment and to establish ways to solve the problem fairly when an unusual event occurs. Today, NAFTA parties apply and communicate most of the clear and deep-rooted guidelines from NAFTA and the World Trade Organization.[48]

As NAFTA has united the NAFTA countries (Canada, the United States, or Mexico) into one uniform region for any sorts of investment dispute resolution. Same can be inferred and implied under the CPEC agreement. Once CPEC is implemented, it will have an impact on its region or countries along its route, thereby increasing the likelihood of developing regional or multilateral settlements between different countries in the area of investment and dispute resolution of such investment. In this sense, the NAFTA is a major case for multilateral negotiations in South Asian countries where the main aim is to develop the Silk Road Economic Belt (SREB)[49] by developing a vast network of infrastructure. It will link Eurasia to East Asia, South Asia, and Central Asia. Chinese President Xi Jinping announced the Silk Road plan, reported investment of about 40 billion US dollars to create the Silk Road framework and upgrade the network. In this case, Pakistan's geopolitical position makes it more advantageous than other countries by providing a platform for the SREB plan through the implementation of the China Pakistan Economic Corridor).[50]

6. Conclusion

The multidimensional CPEC investment is a fiscally viable arrangement that can serve as a means to connect the entire Asian region to make it more coordinated and economically united in the 21st Century. It will establish the framework of a financial center in South Asia where nations will put and change the BIT setting into multilateral treaty context keeping in mind the end goal to secure their investment and provide safe ISDS mechanism to resolve future investment disputes. That is to say, the provision of a mechanism bore with reasonableness and due process. For instance, if the host government breaches international investment law, the investor secures a chance for dispute settlement that provides him/her with relief and any influence from the potential host state. In order to apply a unified investment dispute settlement mechanism across the entire South-Asian Region, NAFTA provides the main example for accomplishing this objective, thus, paving the way for ISDS mechanism to provide as a good alternative for settling investment disputes.

[44] K.L. Oelstrom, *A treaty for the future: The Dispute Settlement Mechanisms of the NAFTA*, Law and Policy in International Business, Vol. 25, 1993, p. 783.
[45] C.H. Brower II & J.J. Coe & W.S. Dodge, *NAFTA Chapter Eleven Reports*, Kluwer Law International, The Hague 2006, pp. 671-681.
[46] D.S. Macdonald, *Chapter 11 of NAFTA: What are the Implications for Sovereignty*, Canada-United States Law Journal, Vol. 24, 1998, p. 281.
[47] 1994, North-American Free Trade Agreement (NAFTA), 32 I.L.M. 289 & 605 (1993).
[48] J.H. Bello & A.F Holmer, *NAFTA, Law and Business Review of the Americas*, Kluwer Law International, 2001, pp. 589-602.
[49] McBride 2015.
[50] Y. Zahid & T.M. Butt & M. Riaz, *China-Pakistan Economic Corridor: Myth and Realities*, Science International Lahore, Vol. 28, No. 4, July-August 2016, pp.267-271.

Although there are many favorable conditions for the improvement of financial coordination efforts, it is also an important factor in the establishment of territorial interconnection. The differences and conflicting interests of some regional and non-regional actors are risks for completing the vision behind CPEC.[51] These are basically the United States and India, both are viewed as potential rivals to the implementation of CPEC because it will hurt the Indo-US hegemony over the Indian Ocean. At first, the CPEC project also faced resistance from Iran, which was believed to be an opponent and working in collaboration with India to build its Chabar port. In any case, at the end of September 2015, Iran made a turn considering an alternative to investment in CPEC with the aim of increasing cooperation by expanding the scope of trade and transportation through the availability of road and railway systems.

The deep and useful associations of Pakistan and China are most likely to conquer the difficulties brought about by regional conditions. The best way to meet some of these challenges, like the regional hegemony, is to make the opponents understand that CPEC will not only strengthen Pakistan's monetary situations but also contribute to the financial return of the entire region. In order to soften CPEC's opponents, China and Pakistan need to participate in external political initiatives, should improve negotiations and improve the overall understanding of regional countries. In order to express the vision of the Chinese Communist Party, it is very important to cooperate consciously and target territorial personnel to make them a partner, not an enemy. Both Pakistan and China should accept the arrangements reached with the different partners rather than avoid the arrangements and that will help in achieving entrepreneurship, peace and progress. By looking at the vision of each of the key partners, CPEC can stimulate the financial situation, change the economic range of the entire region, and would help achieve the direct benefits out of this opportunity. CPEC has the opportunity to revive Pakistan's monetary structure, especially through the up gradation of the energy sector.

Supposedly if CPEC turns into reality, the corridor for the greater part of Pakistan it will create employment opportunities, reduce poverty, maintain lawfulness by connecting with youth in business exercises and enhance the financial standpoint and pointers. Fortifying the feeble connections between Pakistan's domestic trade and its fares ought to support for both the fares and investment, and promote advancement in goods and administrations. The majority of this would essentially expand the nation's GDP and have a multiplier impact on tax collection other than just worrying to spend on social sector mostly like the wellbeing and fundamental necessities of the people. In this specific situation, the CPEC could even add to enhancing security in Pakistan, in a roundabout way through motivating forces for regional soundness and better relations with India, and specifically through development opportunities for Baluchistan and Khyber Pakhtunkhwa.

Such a beneficial situation ensures in every way, shape or form that CPEC cannot only just remove a portion of the primary obstacles thwarting Pakistan's financial improvement but it can additionally increment its substantial foreign obligations *i.e.* external debt. More importantly, transparency in implementing this mega project is the key to provide clear profit and gain examination that at present is non-existent. The State Bank's Governor has openly asked for strict application of transparency in the implementation of the CPEC's project, and this satisfies his obligation as the head of the nation's macroeconomic sector. To overcome any issues between the developed and undeveloped regions of Pakistan, thorough measures shall be taken to uplift the socio-economic sectors of the Pakistani society.[52]

[51] Butt & Butt 2015.
[52] Reuters, *Pakistan should be more Transparent on $46 Billion China Deal: SBP*, The Express Tribune, 2015. https://tribune.com.pk/story/1004177/cpec-needs-to-be-more-transparent-sbp/ (23 April 2017).

In addition, the 'One Belt - One Road (OBOR)'[53] initiative is considered to be part of Chinese pursuit of carrying out economic projects worldwide. This project bears significant socio-economic impact upon Pakistan through the implementation of CPEC, that is presumed to be part of the OBOR passage. The CPEC in turn is believed to bring positive socio-economic results for the entire South-Asian region.

[53] The Institute of Strategic Studies, *One Belt and One Road: Impact on China-Pakistan Economic Corridor*, http://issi.org.pk/one-belt-and-one-road-impact-on-china-pakistan-economic-corridor/ (23 April 2017).

Electronic Commerce in the Gaming Industry. Legal Challenges and European Perspective on Contracts through Electronic Means in Video Games and Decentralized Applications

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The present paper explains the need in the application of electronic commerce regulations to the so-called in-game purchasing activity in video games, particularly, purchase of intangible items, where such game is commoditized, focusing on the legislation of the European Union. It examines in detail the various applications of European regulations to the issues connected to the gaming industry in the European Union - gambling regulations, geo-blocking, data protection, smart contracts validity and enforcement, virtual currencies regulation in the scope of contractual law, and shows a possible way to adapt the national legislation of the Member States and European legislation in order to secure electronic commerce in the gaming industry. The present paper analyses gaps in existing legal procedures, stresses the necessity of new legal models in order to regulate the purchase of intangible items in video games and decentralized applications and underlines the importance of amendments to current European legislation with particular focus on new developments of Create, Retrieve, Append, Burn technology and commoditized video games in order to protect consumer rights and the free movement of digital goods and to accomplish the Digital Single Market Strategy of the European Union.

Keywords: video games, Blockchain, smart contract, electronic commerce, decentralized applications

1. Introduction

Since 1961, when MIT student Steven Russel created the first-ever video game "Spacewar", which inspired the creation of such popular video games as "Asteroids" and "Pong",[1] technology went much further. Nowadays almost every electronic device has access to the Internet and both online and offline video games. Moreover, with the development of Create, Retrieve, Append, Burn technology (hereinafter - CRAB) many platforms such as NEO,[2] Ethereum[3] or Zilliqua became available,[4] allowing users to create crypto assets and operate them by smart contracts. Together with the creation of CRAB platforms, a new kind of business was born – decentralized applications (or dapps)[5] and decentralized organizations (or DAO)[6], which allow users to conclude different kind

[1] Ramos, A. López, L. et al., *The Legal Status of Video Games: Comparative Analysis in National Approaches*, World Intellectual Property Organization, p.7, available at: http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf (24 October 2018).
[2] Official description of NEO platform, available at: https://neo.org/, (4 October 2018).
[3] Official description of Ethereum platform, available at: https://www.ethereum.org/, (4 October 2018).
[4] Official description of Zilliqua platform, available at: https://zilliqa.com/, (4 October 2018).
[5] Ranking of dapps, available at: https://www.stateofthedapps.com/rankings, (4 October 2018).
[6] Ethereum White Paper, available at: http://blockchainlab.com/pdf/Ethereum_white_paper-a_next_generation_smart_contract_and_decentralized_application_platform-vitalik-buterin.pdf, (10 October 2018).

of B2C and B2B contracts through electronic means from distributed exchange, as with the IDEX dapp,[7] or fact-checking platforms such as the Decentralized News Network dapp,[8] to breeding crypto pets as collection items or for sale, like in the Crypto Kitties dapp,[9] or creating your own universe to trade planets and spaceships like in the 0xUniverse dapp.[10]

Together with the technological development and the new ways of concluding the contract being available, electronic commerce (here and after - "e-commerce") in gaming industry became more sophisticated involving smart contracts, digital assets and a purchase of intangible virtual items. However, there is no common regulation and even a common view in the European Union on the status of so-called crypto currency, smart contracts and CRAB platform. At the same time, most of European e-commerce regulations are focused only on traditional online shopping. Therefore, the present paper will focus on legal challenges arising with the application of existing e-commerce regulations to the gaming industry.

E-commerce transactions in gaming industry can involve significant amounts of money. For example, in the Entropia Universe video game, "Club Neverdie" - an item costed 635,000 U.S. dollars, in "Second life" game, a virtual city of Amsterdam - an item costing 50,000 U.S. dollars was sold to the consumers[11]; in the Dota 2 video game, a player spent 38,000 U.S. dollars for an "Ethereal Flames Pink War Dog" item.[12] In 2011 the most expensive video game item ever – virtual planet Calypso – was sold for 6 million U.S. dollars in the Entropia Universe video game[13]. A digital photo of a red rose created in a CRAB platform was sold for 1 million U.S. dollars on Valentine's Day.[14] In the CryptoKitties dapp players have spent around 6 million U.S. dollars for collectible items.[15]

E-commerce in the gaming industry shows significant turnover, however, there are no specific e-commerce rules which can be adopted to CRAB gaming applications and intangible items purchase in video games. At the same time, most of the existing e-commerce regulations cannot be applied due to the specific features of certain games, as will be shown further. Therefore, considering the significance of transactions in the video game industry as regards the purchase of intangible items, there is an urgent need to adopt existing rules in order to protect consumer rights in the gaming industry and to secure the Digital Single Market policy of the EU. Present paper will analyze some legal challenges arising in connection with current e-commerce rules and will show possible ways to amend the rules regulating e-commerce in connection to video games and decentralized applications.

2. Electronic Commerce: European Legal Framework as regards the Gaming Industry

E-commerce can be defined as electronic business activity[16], which is based on the exchange of tangible and intangible goods and services through electronic communication and can take various shapes – from the online delivery of digital content to public procurement.[17] The notion of e-com-

[7] Official description of IDEX dapp, available at: https://idex.market/eth/aura, (4 October 2018).
[8] Official description of DNN dapp, available at: https://dnn.media/, (4 October 2018).
[9] Official description of CryptoKitties dapp, available at: https://www.cryptokitties.co/, (4 October 2018).
[10] Official description of 0xUniverse dapp, available at: https://0xuniverse.com, (4 October.2018).
[11] News Report, *Top 10 Most Expensive Virtual Items In Game Ever Sold*, GadgetRoyal, 2018, available at: https://www.gadgetroyal.com/top-10-most-expensive-virtual-items-in-game-ever-sold/, (24 October 2018).
[12] News Report, *Top 10 Most Expensive Virtual Items In Game Ever Sold*., n. 11
[13] News Report, *Top 10 Most Expensive Virtual Items In Game Ever Sold*., n. 11.
[14] Yurieff, K., *Crypto-artwork of a rose sells for $1 million*, CNN, 2018, available at: https://money.cnn.com/2018/02/14/technology/crypto-art-valentines-day/index.html, (24 October 2018).
[15] Cheng, E., *Meet CryptoKitties, the $100,000 digital beanie babies epitomizing the cryptocurrency mania*, CNBC, 2017, available at: https://www.cnbc.com/2017/12/06/meet-cryptokitties-the-new-digital-beanie-babies-selling-for-100k.html, (24 October 2018).
[16] Kalinauskaite, A., *E-commerce and Privacy in the EU and the USA*, LL.M. Paper, Ghent University, Master of Advanced Studies in European Law Ghent, 2012, p.5, available at: https://lib.ugent.be/fulltxt/RUG01/001/892/218/RUG01-001892218_2012_0001_AC.pdf, (24 October 2018).
[17] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, COM (97) 157 final, 1997, p. 8.

merce changes over time in connection with technological development and spreads both for B2B and B2C transactions[18]. In fast changing world of technologies, unfortunately, legal norms are not able to change so fast. Therefore, nowadays not all existing e-commerce rules can fit to the conclusion of the contracts through code with automatically execution (CRAB platforms' based smart contracts) or to purchase of intangible virtual items in exchange for virtual money, for example.

Information society services are considered the main subject of e-commerce activity and defined as services provided at a distance (without the actual presence of the representatives of the parties in the same place, if the contact is direct, or even with actual presence in the same place of the consumer and supplier, if the contract is made through intermediary platform[19]) through electronic means (with the usage of any application, software, Internet of Things[20]) for remuneration (not only directly, but also indirectly with the income a seller receives from advertisement[21] or shared personal data[22]) and at the request of the recipient[23].

From the first sight it can seem that in video games after receiving access to the audiovisual software (on tangible medium or through online streaming) the relationship between the consumer and supplier are limited to the "Terms of Service" or "End User License Agreement", and every other transaction inside the video game is not regulated by e-commerce rules, however, this is only partially true, such approach is possible only to not commoditized video games.

Firstly, let us have a look at the definition of information society services adopted in the EU. In video games, the user has to log in to create an account, thus demand a service, the video game is a software, thus, it fits the condition of electronic means, the services are given at distance without the actual presence of parties, only their avatars) and remuneration for services are paid by electronic transfer of money in a standard sense or by virtual tokens, exchanged for money in advance. Therefore, operations inside the video game, including the purchase of intangible items fall under the definition of information society services under the E-Commerce Directive[24].

In decentralized applications, the user has to create a virtual identity to receive an encrypted personal key and to request a service already offered to the general public (all virtual users of a specific CRAB community or Blockchain) through CRAB platform, thus, using electronic means, without the actual presence for a remuneration in virtual tokens. Therefore, transactions made through a CRAB platform fall under the scope of information society services under the E-Commerce Directive.

E-commerce transactions are operated through electronic communication (direct and via intermediaries) with the usage of online platforms or specific software. However, there is no official legal definition of online platform in the prism of e-commerce activity, but some authors stress that it is necessary to adopt one, which will cover marketplace online platforms, online shopping mall, online intermediaries, search engines and comparison tools[25]. Current suggested classification of online platforms cannot fit all possible technological innovation and does not include gaming platforms, as talking about e-commerce most of the people (and, as will be shown further, the European legislator) think about online shopping of tangible goods, however, fast technological development

[18] Kalinauskaite, p.5., n.16.
[19] Lodder, A.R., *European Union E-Commerce Directive - Article by Article Comments*, Guide to European Union Law on E-Commerce, Vol. 4. Update from 2016 of the 2001 version, published in EU Regulation of E-Commerce. A Commentary Elgar Commentaries series, 2017, p. 24, available at: https://ssrn.com/abstract=1009945, (26 October 2018).
[20] Lodder, p.24., n.19.
[21] Sotiris Papasavvas v Fileleftheros Dimosia Etaireia Ltd and Others, Case C-291/13, CJEU, 11 September 2014.
[22] Lodder, p. 24., n.19.
[23] Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 217, 1998, Art. 1.
[24] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1–16, Art. 2.
[25] Policy recommendations on the role of online platforms in the e-commerce sector, Ecommerce Europe, 2016, p.4, available at: https://www.ecommerce-europe.eu/app/uploads/2016/04/Ecommerce-Europe-Online-platforms-Position-Paper-April-2016.pdf, (24 October 2018).

makes available a variety of different online platforms not only for online shopping of tangible goods but also intangible goods and digital services, including the video game industry and smart contracts in decentralized applications.

At the current stage, there is a lack of respective legislation and doctrine in order to protect consumer rights, to prevent unfair competition, to determine liable persons, to secure internet transactions and to maintain European standards concerning the free movement of capital and goods in the area of digital content supply, especially in gaming industry.

2.1. Electronic Commerce in Video Games. Legal Challenges and European Perspective

Generally, video game providers bind their users with so-called "Terms of Service" or "End User License Agreement", which regulates not only the behavior of the user in the game, but in many cases as well grants transfer of intellectual property rights for items created by the user in the game and all property rights outside of the game for virtual objects purchased in the game by the user.[26]

Some authors argue that virtual reality issues should not be governed by the law at all, as players use video games to escape from reality[27], or that they have to be governed solely by contract law (by the "End User License Agreement"), not by the property law, because property law in the virtual world can only lead to confusions, as some activities which are considered illegal in the "real world" are allowed in the virtual world (e.g. robbery or the destruction of virtual property).[28] Even following a contract law view, the legal regulations governing the contract law, including ones on unfair terms and consumer protection, should be applied both to "End User License Agreements" and to agreements where the virtual world interacts with the "real world" (i.e. virtual items purchased for money in the traditional sense). On the other hand, following property law logic, the player can claim remuneration for the damages to the player's virtual property only in case where such damages occurred not by virtual events in the game but by "real life" events, for example an error in the code or breach in security of the video game.

Nowadays virtual property rights are managed within the framework of intellectual property rights protection[29], however, in some countries video game players can protect rights relating to virtual property in "real world" courts. For example, in China a player whose virtual property was stolen by a hacker obtained remedies from the respective video game company in an amount equal to 1,210 U.S. dollars as a result of a court decision[30] and a Chinese insurance company launched an insurance program in order to protect virtual property in video games.[31] In the EU such practice is absent and the player can claim damages only on the base of the contract (if prescribed in the End User License Agreement) to its intellectual property.

On conditions usually prescribed in the "Terms of Service" agreement, the developers can by their own consideration delete purchased property or exclude players from the game.[32] In a case where a player spends 6 million U.S. dollars for a virtual item (as in the example discussed above), facing

[26] Volanis, N., *Legal and policy issues of virtual property*, Katholieke Universiteit Leuven, Int. J. Web Based Communities, Vol. 3, No. 3, 2007, p.334, available at: https://www.law.kuleuven.be/citip/en/archive/copy_of_publications/91206-volanis2f90.pdf, (28 October 2018).

[27] Nelson, J.W., *The Virtual Property Problem: What Property Rights in Virtual Resources Might Look Like, How They Might Work, and Why They Are a Bad Idea*, McGeorge Law Review, Vol. 41, 2010, p.309, available at: https://www.mcgeorge.edu/documents/publications/MLR4104_Nelson_ver_09_FINAL.pdf, (2 November 2018).

[28] Cifrino, C.J., *Virtual Property, Virtual Rights: Why Contract Law, Not Property Law, Must be the Governing Paradigm in the Law of Virtual Worlds*, Boston College Law Review, Vol. 55, Issue 1, 2014, p. 264, available at: https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3354&context=bclr, (28 October 2018).

[29] Fairfield, J., *Virtual Property*, Boston University Law Review, Vol. 85, Indiana Legal Studies Research Paper No. 35, 2005, p. 1050, available at: https://ssrn.com/abstract=807966, (02.11.2018); Gong, J. Z., *Defining and Addressing Virtual Property in International Treaties*, Boston University J. SCI. & TECH. L., Vol. 17, 2015, p.20, available at: https://www.bu.edu/jostl/files/2015/02/Gong_Web_171.pdf, (02 November 2018); Simon Stein, J., *The Legal Nature of Video Games – Adapting Copyright Law to Multimedia*, Press Start, Vol 2, No 1, 2015, p.44, available at: https://press-start.gla.ac.uk/index.php/press-start/article/view/25/11, (03 November 2018).

[30] News Report, *Online gamer in China wins virtual theft suit*, CNN, 2003, available at: http://edition.cnn.com/2003/TECH/fun.games/12/19/china.gamer.reut/, (2 November 2018).

[31] News Report, *China's first 'virtual property' insurance launched*, China Daily, 2011, available at: https://kotaku.com/5818906/china-launches-virtual-property-insurance, (2 November 2018).

[32] News Report, *China's first 'virtual property' insurance launched*, n. 31.

the risk of being deleted from the game, the risk of non-delivery of the item or the destruction of the item due to events in the game can be considered as a violation of consumer rights and e-commerce regulations. For example, in the Eve Online video game, one virtual space battle caused by the delay of the payment in "real worl" money by one player required to protect his spaceship resulted in an estimated loss of 300,000 U.S. dollars for different consumers.[33]

Therefore, in order to protect consumer rights, those video games, which do not allow commoditization of virtual items should be governed solely by the "Terms of Service" agreement, with the possibility to test such agreement on the subject of the unfairness of the standard terms. However, for the video games, which allow the purchase of virtual intangible items for the "real life" money, relevant e-commerce, consumer protection and property law rules should be applied in cases where the virtual world interacts with the "real world".

At the same time, to apply e-commerce rules to the mentioned transactions, legislation should be amended, considering the specific nature of virtual agreements. Nowadays there is no relevant specific regulation in the European Union considering the purchase of intangible digital content, however, there are some movements in that direction. For example, the new Digital Content Directive, regulates issues connected with the supply of digital content, which is not represented on a tangible medium, by the traders to the consumers[34] and provides the maximum level of harmonization.[35]

Considering the issues in the gaming industry, the Digital Content Directive can influence the sale of intangible items in video games. Generally, the main sellers of virtual items in video games are companies operating in the video games industry, however, players can also sell their own "second hand" items, including loot boxes, to other players at their own price (for example, in the video game Counterstrike Global Offensive this option is possible[36]) or to bet on inside game monster races (like in the Lineage II video game[37]) and there is no regulation (except gambling regulation discussed further, which does not regulate all gambling issues in video games) of such digital content operations.

Separately from the abovementioned draft directive, some Member states already have specific regulation on the supply of digital content (the UK[38]), as well as regulations on particular issues arising in the gaming industry. One of such regulated areas is the issue connected to the gambling regulation on the sale of loot boxes, which attracted the attention of many legislators in the EU. According to a decision by the Belgium Gaming Commission, loot boxes, which are boxes in video games with random content purchased by a player for "real life" money, are considered as a violations of gambling legislation.[39] The Netherlands Gaming Authority considers transferable loot boxes, which can be sold by players to other players, as illegal and as falling under the gambling regulation.[40] The UK Gambling Commission stated, that loot boxes, which are not allowing the player to receive a "real life" money outside of the game for such loot box, do not fall under

[33] News Report, *Eve Online virtual war 'costs $300,000' in damage*, BBC News, 2014, available at: https://www.bbc.com/news/technology-25944837, (28 October 2018).
[34] Briefing EU Legislation in Progress on Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, 2015/0287(COD), 2016, p.2, available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581980/EPRS_BRI%282016%29581980_EN.pdf, (28 October 2018).
[35] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, PE/26/2019/REV/1, OJ L 136, 2019, art. 2.
[36] New Report, *Valve Disables Item Trading for Dutch 'Counter-Strike' Players, Making Their Expensive Gun Skins Worthless*, Motherboard, 2018, available at: https://motherboard.vice.com/en_us/article/3k4wk3/valve-disables-item-trading-for-dutch-counter-strike-players-making-their-expensive-gun-skins-worthless, (28 October 2018).
[37] Methenitis, M., *Internet Gambling Regulation Present and Future: Technology Outpaces Legislation as the MMORPG Problem Emerges*, 2005, p.16, available at: https://ssrn.com/abstract=987056, (2 November 2018).
[38] Consumer Rights Act, 2015, Art. 16, available at: http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted, (26.10.2018); Briefing EU Legislation in Progress, p.1; Mac Sithigh, D., *Multiplayer Games: Tax, Copyright, Consumers and the Video Game Industries*, European Journal of Law and Technology, Vol. 5(3), (2014, p.10, available at: https://ssrn.com/abstract=2545887, (3 November 2018).
[39] News report, *Video game loot boxes declared illegal under Belgium gambling laws*, BBC News, 26 April 2018, available at: https://www.bbc.com/news/technology-43906306, (28 October 2018).
[40] Press release, *A Study by the Netherlands Gaming Authority Has Shown: Certain Loot Boxes Contravene Gaming Laws*, The netherlands Gaming Authority, 2018, available at: https://dutchgamesassociation.nl/wp-content/uploads/2018/04/Press-release-Certain-loot-boxes-contravene-gaming-laws.pdf, (28 October 2018).

the gambling regulation[41]. Therefore, the commoditization of video games leads to the necessity to adopt certain norms, including norms on B2B transactions inside video games and video game specific gambling regulations.

Another issue which will be addressed by the Digital Content Directive is the conformity of the digital content to the contract.[42] Considering current legislation, according to the Consumer Rights Directive, the consumer who expressed prior consent to the supply of online digital content loses his right of withdrawal from the contract if the performance has begun.[43] Therefore, current legislation does not protect the consumer in cases where the digital content (i.e. an intangible item in a video game) does not meet the expectation of the consumer, or in cases where the item is damaged due to an error in the code, in case such a virtual item was transferred to the player or to the player's avatar.

According European Commission research, European consumers have suffered the loss in the range of 9-11 billion Euros as a result of not being able to receive the remedies following digital content supply transactions.[44] To solve this issue, the new Digital Content Directive introduces some requirements for digital content conformity, for example, the supplied digital content's quality is supposed to be in conformity with the most recent version of that content[45]. However, such a requirement is practically not possible to be applied to the purchases of a specific "skin", an intangible weapon or a virtual planet in a video game. In this case, the operator of the video game has to obtain the player's consent for every such purchase where it is hard to determine whether the content can be considered in conformity with the most recent version or not.

At the same time, some EU Member States have already regulated digital content supply and the rules on the conformity of such digital content. For example, in the UK (the only Member state which regulated digital content area with the respect to consumer protection[46]) the consumer has the right to withdraw from digital content supply contract, right to demand replacement or repair, if such content does not fit a purpose, is not in a satisfactory quality or is not relevant to the previous description[47]. The abovementioned Digital Content Directive follows up the UK regulation. With the new directive, the consumer will have the right to withdraw from the contract of a digital content supply in the case of non-conformity of digital content, if such non-conformity influence main performance features of the digital content, particularly, its accessibility, continuity and security[48].

Geo-blocking regulation is another issue which is relevant for the gaming industry. Most of the video games both online and offline host the significant number of international uses, purchasing intangible items cross-border. In the EU, Germany has the biggest gaming market[49], however, there are no specific regulations to protect video games' users. In this case, the geo-blocking issue becomes important for all players. Recently new Regulation addressing geo-blocking was adopted in the EU, however, the rules regulating equal access to digital services and forbidding geo-blocking in EU do not apply to audiovisual and copyrighted content[50], which leaves video games and any

[41] News Report, *Loot boxes within video games*, the UK Gambling Commission, 2017, available at: https://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Loot-boxes-within-video-games.aspx, (28 October 2018).
[42] Briefing EU Legislation in Progress, p.5., n. 34.
[43] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304, 22 November 2011, Art. 16, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32011L0083, (26 October 2018).
[44] Digital Contract Rules. Proposals Aiming to Harmonise Rules for the Sale of Digital Content and Online Purchases for all 28 EU countries, Facts and Figures, available at: https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/digital-contract-rules_en, (28 October 2018).
[45] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, PE/26/2019/REV/1, OJ L 136, 2019, art. 6.
[46] Briefing EU Legislation in Progress, p.1. n. 34.
[47] Consumer Rights Act, 2015, Art. 16, 19., n. 38.
[48] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, PE/26/2019/REV/1, OJ L 136, 2019, Art. 12.
[49] The gaming Industry in Germany. Fact Sheet, GTAI, Iss. 2016/2017, p.1, available at: http://www.gtai.de/GTAI/Content/EN/Invest/_SharedDocs/Downloads/GTAI/Fact-sheets/Business-services-ict/fact-sheet-gaming-industry-en.pdf, (28 October 2018).
[50] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I, 02 March 2018, p. 1–15, 2018, Art. 1.

online streaming services behind the scope of the mentioned directive.

Considering the abovementioned, the new Digital Content Directive cannot solve all problems arising during intangible items purchase in video games, therefore, there is an urgent need to adopt current European legislation with the respect to gaming industry (non-conformity of virtual goods, unfair terms, geo-blocking, gambling rules) and, particularly, to specify the area of influence of e-commerce rules on inside video game transactions, if such video game is commoditized.

2.2. Electronic Commerce in Decentralized Applications. Legal Challenges and European Perspective

Differently from video games, where the main purpose is still gaming and e-commerce is a side benefit, in decentralized applications, e-commerce based on smart contracts is the main activity and gaming is a side benefit for users. Therefore, there is an urgent need to adopt European legislation in order to secure legal enforceability of smart contract, determine the status of virtual currency in the EU and to provide actual possibility for the free movement of digital goods in the EU.

Considering the e-commerce regulation applicable to decentralized applications, there are several specifications which need to be considered by the legislator. To operate on the CRAB technology based decentralized applications the user has to create a digital identity (anonymous digital identity with personal encrypted key) and digital assets (crypto tokens).[51] Therefore, the main weak point considering e-commerce in decentralized application is the absence of any regulations on digital currency and smart contracts.

Considering virtual currencies' regulations, in the EU still no common legal rules to determine the legal status of virtual currencies exist – as money, as property or as financial instrument. However, there are some movements in this direction. According to the Virtual Currency Schemes published by the European Central Bank, Bitcoin (or other analogical CRAB technology-based tokens) cannot be defined as "electronic money" in the scope of the Electronic Money Directive[52], because in this context electronic money is just a different form of traditional money, but with Bitcoin system traditional money are exchanged for Bitcoins[53], therefore, the European Central Bank considers Bitcoins as a digital representation of a monetary value, which can be used as an alternative to established money variations .[54]

The most innovative step in this field at the EU level was taken in the Anti Money Laundering Directive by adopting the definition of digital currency. According to the mentioned directive the digital currency is "a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically".[55] However, with such definition it is still unclear in which legal frames can be put digital currencies and transactions with such currencies from the contract law perspective - barter agreement (if to consider Blockchain currencies as a property), purchase agreement (if money) or investment activity (if defined as financial instrument). At the same time, some currencies, such as NEO, are not used as the means of

[51] Official description of NEO platform, n. 2.
[52] Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, OJ L 267, 10 October 2009, Art. 2.
[53] Virtual Currency Schemes, European Central Bank 2012, available e at: http://www.ecb.europa.eu/pub/pdf/other/ virtualcurrencyschemes201210en.pdf, (24 October 2018).
[54] Virtual currency schemes – a further analysis, European Central Bank, 2015, p.4, available at: https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemesen.pdf, (30 October 2018).
[55] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156, 19 June 2018, Art. 1.

exchange now, but the situation might change in the future,[56] therefore, the definition adopted by the Anti Money Laundering Directive is not sufficient to solve all legal challenges arising with the digital currencies widespread.

The Member states also are trying to regulate this issue, however, the approaches are very different. According to the Norwegian Tax Authority, Bitcoins are treated as a capital property for tax-related purposes[57]. The Norwegian Director General of Taxation stated that Bitcoin does not fall under the usual money or currency definition.[58] In the same way, authorities of Denmark underlined that Bitcoin cannot be considered an official currency for tax and VAT purposes, as Bitcoin is not regulated by an authorized authority in the global market, nor by any central bank and cannot be withdrawn from circulation.[59] In the Netherlands, according to case-law, Bitcoin is considered as "transferable value"[60], which is a very innovative step which common European regulations on Bitcoin and other crypto currencies could consider.

Therefore, in the EU there is no concrete legislation on the legal definition of CRAB based virtual currencies from the contract law perspective, however, some European institutions follow the opinion that CRAB based currencies are not money in a traditional sense and do not fall under the electronic money definition. However, considering that CRAB based currencies are exchanged for "real life" money, they should be defined as a commodity, property or transferable value for legal purposes.

Considering smart contracts' regulations, according to the E-Commerce Directive, Member states have to ensure that their legal system allows the contracts concluded by electronic means[61]. However, there is no subsequent regulation on smart contracts and there are still issues with legal validity and legal enforceability of CRAB based smart contracts. Such situation, basically, violates the relevant provision of the mentioned Directive.

Some countries have already started to amend legislation to ensure legal validity and legal enforcement of smart contracts. In Arizona law (USA), the definition of smart contract, which describes smart contract as an event-driving program, was adopted[62], moreover, the law prescribes that a smart contract cannot be denied in legal effect only because it is not realized in traditional contract form.[63] In the EU, France is one of the most progressive state considering CRAB relevant legislation, which defines CRAB (or Blockchain) as shared electronic registration technology.[64] The UK government also provides legal research on possible amendments in legislation to regulate CRAB based smart contracts[65] and develops a new strategy to use CRAB technology to store and analyze digital evidence during court proceedings in the UK.[66]

[56] Houben R. and Snyers A., *Cryptocurrencies and blockchain. Legal context and implications for financial crime, money laundering and tax evasion*, Study Requested by the TAX3 committee, 2018, p. 74, available at: http://www.europarl.europa.eu/cmsdata/150761/TAX3%20Study%20on%20cryptocurrencies%20and%20blockchain.pdf, (30 October 2018).

[57] News report, available at: http://www.skatteetaten.no/no/Radgiver/Rettskilder/Uttalelser/ Prinsipputtalelser/Bruk-av-bitcoins--skatte--og-avgiftsmessige-konsekvenser/, (23 October 2018).

[58] Webb, S., *'Bitcoin isn't real money': Norwegian government refuses to recognize digital currency*, Dailymail, 16 December 2013, available at: http://www.dailymail.co.uk/sciencetech/article-2524672/Bitcoin-isnt-real-money-Norwe gian-government-refuses-recognise-digital-currency.html, (23 October 2018).

[59] Skatterådet #SKM2014.226.SR, 25 March 2014, available at: http://www.skat.dk/ skat.aspx?oId=2156173&vId=0, (20 October 2018).

[60] ECLI:NL:RBAMS:2018:869, C/13/642655 FT RK 18.196, 14 February 2018, available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:869, (24 September 2018).

[61] Directive on Electronic Commerce, Art. 9, n. 24.

[62] Blemus, S., *Law and Blockchain: A Legal Perspective on Current Regulatory Trends Worldwide*, Revue Trimestrielle de Droit Financier, 2017, p.13, available at: https://ssrn.com/abstract=3080639, (09 October 2018).

[63] Jaccard, Gabriel, *Smart Contracts and the Role of Law*, 2018, p.20, available at: https://ssrn.com/abstract=3099885, (09 October 2018).

[64] Blemus, S, p.12., n. 62.

[65] UK Law Commission, Annual report 2017-18, no. 379, 2018, p.10, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727386/6.4475_LC_Annual_Report_Accounts_201718_WEB.PDF, (04 October 2018).

[66] Balaji A., *How we're investigating Digital Ledger Technologies to secure digital evidence*, Her Majesty's Courts and Tribunals Service, 2018, available at: https://insidehmcts.blog.gov.uk/2018/08/23/how-were-investigating-digital-ledger-technologies-to-secure-digital-evidence/, (10 October 2018).

The Maltese regulatory authority is one of the most innovative ones in the area of CRAB based contracts. According to the Maltese Virtual Financial Assets Act, smart contract is defined as "*means a form of technology arrangement consisting of -(a) a computer protocol; or (b) an agreement concluded wholly or partly in an electronic form, which is automatable and enforceable by computer code, although some parts may require human input and control and which may be also enforceable by ordinary legal methods or by a mixture of both*".[67] Moreover, Maltese legal framework leave a room for flexibility towards new emerging technologies and provides legal regulation to possible innovative digital solutions in the Innovative Technology Arrangements and Services Act[68].

Therefore, Malta is the most innovative jurisdiction towards adapting legal framework to new technological possibilities and there is an urgent need for adopting legal regulations to ensure legal validity and legal enforceability of CRAB based smart contracts in all other Member states of the European Union.

It is not only the legal enforceability of valid smart contracts can be an open question considering decentralized applications, but also the performance of a legally not valid contract. For example, the issue of legal capacity can arise during the transaction based on CRAB smart contracts, as smart contracts have no means to test the legal capacity of the parties - most of the transactions are anonymous and operated with a usage of a personal crypto key[69]. Therefore, the weak point of the legal validity, possible nullity and legal enforceability of a CRAB based smart contract can be the legal incapacity of a party.[70]

Moreover, as in smart contracts the execution is done automatically, there is no possibility for a party to breach the contract[71] and there is no possibility to undo an executed smart contract[72], thus, any dispute (possible only post factum[73]) cannot restore the rights to the same condition, as it was before the execution. Therefore, invalidity of a contract with a legally incapable person can only be proven post factum after the contract performance, which leaves room – a need – for the development a legal mechanism of restitution and dispute resolution regulations.

Considering the absence of regulation of smart contracts, not only the enforceability of CRAB based smart contracts, but also certain specific legal issues should raise the attention of the international community, for example, consumer protection issues in smart contracts from the perspective of a standard form contract. According to EU law, the standard term is described as a terms which was not individually negotiated by the parties, drafted in advance by a trader for several transactions involving different parties and the weaker party did not, therefore, had a chance to influence such term and its consequences, particularly in the context of a pre-formulated standard contract[74]. CRAB based smart contracts are basically unilateral acts – one party places an offer on a CRAB platform and another party accepts this offer or not.[75] Such unilateral acts can raise a question on the unfairness of the terms, however, the mechanism to protect consumer rights and enforce such rights in smart contracts is still to be developed, as there are no contract terms in the traditional sense, only an offer and a code to execute such offer.

[67] The Virtual Financial Assets Act, 2018, available at: http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=29079&l=1, (30 October 2019).
[68] Innovative Technology Arrangements and Services Act, 2018, available at: http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12874&l=1, (30 October 2019).
[69] Werbach K. and Cornell N., *Contract Ex Machina*, Duke Law Journal, Vol.67, 2017, p.371, available at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3913&context=dlj, (4 October 2018).
[70] Jaccard, G., p.23, n. 63.
[71] Werbach K. and Cornell N, p.332, n. 67.
[72] Werbach K. and Cornell N, p.333, n. 67; Grundmann, S. and Hacker, P., *Digital Technology as a Challenge to European Contract Law – From the Existing to the Future Architecture*, European Review of Contract Law, 2017, p.22, available at: https://ssrn.com/abstract=3003885, (9 October 2018).
[73] Raskin, M., *The Law and Legality of Smart Contracts*, Georgetown Law Technology Review 304/2017, 22 September 2016, p. 322, available at: https://ssrn.com/abstract=2959166, (4 October 2018).
[74] Council Directive 93/13/EEC on unfair terms in consumer contracts, OJ L 95, 05 April 1993, art. 3; Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM/2011/0635, 11 October 2011, art. 2; Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), 08 February 2007, article I:109; UNIDROIT Principles on International Commercial Contracts, 2016, article 2.1.19.
[75] Werbach K. and Cornell N., p.343, n. 67.

Another issue, which can arise in connection with CRAB based gaming platforms, is its relation to data protection legislation. According to CRAB technology characteristics, operating on a Blockchain platform the new users are joining a Blockchain network and in order to proceed with a Blockchain transaction, it should be verified by all previous blocks in the chain, so by previous owners or certain token or data.[76] At the same time, due to its technical characteristics, Ethereum Blockchain (where most of the decentralized gaming applications are operating) is always on, it is impossible to turn it off or to remove any block.[77] On the other hand, according to the General Data Protection Regulation (GDPR) the data subject has to have the right to restrict or erase personal data[78], however, considering the mentioned characteristics of CRAB platforms, it is impossible for decentralized application based on CRAB technology to comply with the GDPR. Compliance is possible only if personal data on Blockchain will be stored off chain or via the usage of hashing[79] – however this technology is still in development.

Considering the foregoing, there is an urgent need to amend already existing European regulations (for example the GDPR), to develop national legislation, which will establish legal enforceability to smart contracts, as prescribed in the E-Commerce Directive, and to adopt common European rules on virtual currencies and smart contracts legal framework in order to protect consumer rights and to secure Digital Single Market in gaming industry in the EU.

3. Conclusions

As can be understood from the European regulations connected to e-commerce and digital content, the legislator focuses more on traditional means of e-commerce, such buying tangible things online (online shopping platforms) and the supply of intangible content which can be distributed on tangible medium (software, e-books, music), however, other means of e-commerce connected to the purchase of intangible items, particularly in the gaming industry, concluding smart contracts on CRAB platforms, transaction based on virtual currency, Internet of Things or cloud data are left beyond the scope of any existing regulations. Therefore, there is an urgent need in adopting European regulations to the technological progress in order to protect consumer rights, to secure the free movement of digital goods and Digital Single Market strategy in the EU.

Considering the issues connected to video games, such games which do not allow commoditization of virtual items should be governed solely by the "Terms of Service" agreement, but with the possible assessment of such agreements on the subject of standard unfair terms. However, for video games where the purchase of virtual intangible items for money in a traditional sense is permitted by the code, the e-commerce rules, consumer protection rules, geo-blocking regulations and other relevant "real world" legislation should be applied.

Considering the issues connected to decentralized applications, there is an urgent need to regulate the status of virtual currencies from the perspective of contract law, to provide legal enforceability to smart contracts on the national and the EU level and to amend the GDPR in order to secure the existence of CRAB platforms in the EU, to protect consumer rights and to maintain free movements of digital goods in the gaming industry in the EU.

[76] Houben R. and Snyers A., p. 33, n. 56.
[77] Houben R. and Snyers A., p. 33, n. 56.
[78] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 127, 2016, Art. 15, 17.
[79] GDPR & blockchain. Blockchain solution to General Data Protection Regulation, GrantThornton, p. 6, available at: https://www.grantthornton.global/globalassets/___spain___/links-ciegos/otros/gdpr--blockchain.pdf, (30 October 2018).

More specifically, the following issues need to be addressed by lawmakers:

- Customer protection during the purchase of intangible virtual items in exchange for "real world" money in video games and for virtual tokens in decentralized applications – regulation is needed regarding the right of withdrawal from the contract in case of non-conformity and errors in the code;
- Regulation on B2B contracts on the resell of purchased goods and loot boxes, where the game platform acts as an intermediary platform;
- Adaptation of the rules of the GDPR to secure the existence of CRAB based platforms in the EU;
- Implementation of geo-blocking prohibition rules as regards the video game industry;
- Rules on the legal status of virtual property purchased in a gaming platform for a "real life" money;
- Determination of a legal framework for transactions with virtual currencies (i.e.: Bitcoin, Ether): barter, purchase or investment activity;
- Disputes resolution regarding issues arising connected with smart contracts on CRAB platforms.

The Participation of all Children in the Standard-Setting and Monitoring Work of International Organizations

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The United Nations Convention on the Rights of the Child declares that every child who is capable of forming his or her own views has the right to express those views freely in all matters affecting them, whereas the views of the child should be given due weight in accordance with the age and maturity of the child. The standard-setting and monitoring procedures of international organizations are not exempted: a simple interpretation of Article 12 on the right to be heard explicitly demonstrates that this includes the international level as a setting where children should participate in decision-making. This paper discusses that the right, the opportunity, the space, the means and the support to participate should be provided for all children in decision-making procedures of international organizations.

Keywords: child participation, right to be heard, vulnerable children, international organization, United Nations, Council of Europe, European Union

1. Introduction

The protection and promotion of children's rights had been on the agenda of international organizations well before it was articulated in an international treaty, namely the United Nations Convention on the Rights of the Child. This instrument is ground-breaking since it recognizes children as rights-holders, a position that has been subsequently confirmed in the practice of the United Nations Committee on the Rights of the Child. This approach served as a basis to open public participation for children and involve them in decision-making procedures affecting their lives directly with the following guarantees: children's view should be given due weight during the decision-making process and they should be provided with follow-up on how their views were considered and how they affected the outcomes of the decision-making procedure.

Despite the roots in international human rights treaties and the rich literature on child participation in policy-making procedures, the involvement of children in disadvantaged or vulnerable situations is a less researched topic. The aim of this paper is to focus specifically on how the participation of all children can be ensured in the standard-setting and monitoring work of international organizations. Although more and more international organizations involve children in their work, I am going to refer only to the framework and practice of the United Nations, the Council of Europe and the European Union. The model used to discuss the requirements for the participation of children in disadvantaged or vulnerable situations is developed based on the approach of the Council of Europe: the right, the opportunity, the space, the means and the support to participate should be provided for all children. This model also makes it possible to look at child participation from the perspective of an international organization, which can be considered as an audience, an identifi-

[1] The author paid a short study visit to Geneva, Switzerland, hosted by Child Rights Connect and supported by the Campus Mundi Scholarship.

able body with the responsibility to listen, according to the Lundy's model on child participation.[2]

1.1. Theoretical Framework: Child Participation and the Principle of Equal Treatment

According to *Lansdown*, despite the fact that child participation is a widely used term, there is "considerable lack of clarity about what is actually meant by participation in the context of children's rights".[3] In relation to the activities and work of international organizations, child participation should be understood in accordance with their own standards and interpretation, therefore the relevant instruments and policies of the United Nations, Council of Europe and the European Union are referred below.

The term 'child participation' is not explicitly mentioned by the UN Convention on the Rights of the Child but it is firmly based on Article 12, the right to be heard. This provision requires state parties to assure that every child, who is capable of forming his or her own views, has the right to express those views freely in all matters affecting them, including in judicial and administrative proceedings and that the views of the child be given due weight in accordance with their age and maturity. The UN Committee on the Rights of the Child adopted a General Comment interpreting Article 12, they recognized that particular groups of children, including children belonging to marginalized and disadvantaged groups, still face barriers in the realization of their right to be heard.[4] Furthermore, the UN Convention on the Rights of People with Disabilities established that children with disabilities also have the "right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right".[5]

The Recommendation of the Committee of Ministers of the Council of Europe defines child participation as a process where children and young people under the age of 18 "have the right, the means, the space, the opportunity and, where necessary, the support to freely express their views, to be heard and to contribute to decision making on matters affecting them, their views being given due weight in accordance with their age and maturity".[6] The current Council of Europe Strategy for the Rights of the Child - covering the period between 2016 and 2021 - sets as one of the five priorities the participation of all children.[7]

The Treaty on the European Union stipulates that the organization is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, therefore it should promote the protection of children as well.[8] The Charter of Fundamental Rights of the European Union, that concerns EU institutions and Member State authorities applying EU law, declares that children can express their views freely on matters which concern them and that their views shall be taken into consideration in accordance with their age and maturity.[9] Currently there is no over-arching EU strategy for children in force, however, the EU Youth Strategy is seen to be applied to young people aged 15 to 30.[10]

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[2] Lundy, Laura: *'Voice' Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child*, British Educational Research Journal, Vol. 33., 2007, pp. 937.
[3] Lansdown, Gerison: *The realisation of children's participation rights – Critical reflections*. In: A Handbook of Children and Young People's Participation (editors: Barry Percy-Smith, Nigel Thomas), Routledge, London 2011. p.11.
[4] 1989 UN Committee on the Rights of the Child, General Comment No.12. CRC/GC/2003/5. 2003. para. 12.
[5] 2006 UN Convention on the Rights of People with Disabilities Article 7(3).
[6] Recommendation of the Committee of Ministers of the Council of Europe on the participation of children and young people under the age of 18, Section 2.
[7] Council of Europe Strategy for the Rights of the Child, para. 37-40.
[8] Treaty on the European Union, Article 2 and 3(3).
[9] Charter of Fundamental Rights Article 24(1).
[10] Exploring what the EU can do to promote and support the participation of children in decision-making. Supporting document to the Bucharest EU Children's Declaration, Eurochild, 2019. pp. 3. available at https://www.eurochild.org/fileadmin/public/01_Communications/Press_Release/Experts__supporting_document_on_Child_Participation.pdf?utm_source=email&utm_campaign=First_ever_EU_Childrens_Summit_paves_way_for_future_of_Europe_debate&utm_medium=email (12 October 2019).

In order to involve all children, the principle of equal treatment should be applied in child participation by connecting two general principles of the UN Convention on the Rights of the Child: the right to be heard (Article 12) and the prohibition of discrimination (Article 2). The Convention requires states to respect and ensure the rights of children within their jurisdiction without any kind of discrimination and to take appropriate measures to protect them from discrimination. This positive obligation was re-affirmed by the UN Committee on the Rights of the Child in its General Comment No. 5.

> "This non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures. […] Addressing discrimination may require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes. It should be emphasized that the application of the non-discrimination principle of equal access to rights does not mean identical treatment."[11]

The Recommendation of the Council of Europe Committee of Ministers also sets down the principle of non-discrimination, furthermore, it emphasizes that "particular efforts should be made to enable participation of children and young people with fewer opportunities, including those who are vulnerable or affected by discrimination, including multiple discrimination."[12] Within the framework of the European Union, Article 21 of the Charter of Fundamental Rights establishes the prohibition of discrimination on any ground that should apply to child participation, too.

1.2. Definition of Children in Vulnerable Situations

The Preambles of the UN Convention on the Rights of the Child recognizes that children live in difficult conditions in every country and they need special consideration. The anti-discrimination clause of the Convention is open-ended but particularly mentions as prohibited grounds the child's, and his or her parent's or legal guardian's: race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth.[13] Specific provisions are dedicated to the protection of children deprived of his or her family environment (Article 20), refugee or asylum seeking children (Article 22), children with disabilities (Article 23), children belonging to a minority group (Article 30), child victims (Article 39) and children in conflict with law (Article 40). In addition, the Committee on the Rights of the Child adopted several General Comments on the rights of a particular group of children under the Convention such as children in the context of migration (No. 22) and unaccompanied and separated children (No. 6), children in street situations (No. 21), indigenous children (No. 11), children in conflict with law (No.10.), children with disabilities (No.9.), children in early childhood (No. 7) and children affected by the HIV/AIDS epidemic (No. 3).

The current Council of Europe Strategy for the Rights of the Child sets as a priority to provide equal opportunities for all children and combat discrimination.[14] The Strategy addresses the situation of children in vulnerable situations such as children with disabilities, children in all forms of alternative care, children on the move or otherwise affected by migration, children from minorities, Roma children, LGBT and intersex children. The Council of Europe has adopted several recommendations in relation to the situation and rights of children in vulnerable situations.[15]

[11] 1989 UN Committee on the Rights of the Child, General Comment N.o.5. CRC/GC/2003/5. 2003. para. 12.
[12] Recommendation of the Committee of Ministers of the Council of Europe on the participation of children and young people under the age of 18, Section 2.
[13] 1989 UN Convention on the Rights of the Child Article 2(1).
[14] Council of Europe Strategy for the Rights of the Child, Para. 26-36.
[15] E.g. Committee of Ministers Recommendation on the rights of children living in residential institutions (CM/Rec(2005)5), Committee of Ministers Recommendation on deinstitutionalisation and community living of children with disabilities (CM/Rec(2010)2), Committee of Ministers Recommendation on children's rights and social services friendly to children and families (CM/Rec (2011)12), Committee of Ministers Recommendations on the access of young people from disadvantaged neighbourhoods to social rights (CM/Rec(2015)3), Council of Europe Guidelines on child-friendly justice, Council of Europe Guidelines on child-friendly healthcare, Council of

The European Commission proposed a common European framework to tackle child poverty and social inclusion in its Recommendation on "Investing in children: breaking the cycle of disadvantage".[16] While underpinning the importance to fight against discrimination faced by children and their families on all grounds particularly those related to sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, the Commission requested the Member States to "focus on children who face an increased risk due to multiple disadvantage such as Roma children, some migrant or ethnic minority children, children with special needs or disabilities, children in alternative care and street children, children of imprisoned parents, as well as children within households at particular risk of poverty, such as single parent or large families".[17]

The study on the "Evaluation of legislation, policy and practice on child participation in the European Union" addressed the situation of children who are considered vulnerable European-wide or due to the specific circumstances of the individual countries. Significant barriers have been identified to the participation of children belonging to the Roma minority, migrant children, children with special needs or disabilities, children growing up in institutional care and homeless children, mostly due to social exclusion, the stigma associated with their status or situation and limited or lack of access to education and other resources.[18] The mapping study of the EU on Roma children found that although guidelines on child participation and safe-guarding are available, these are not applied in case of the involvement of Roma children, which is rare in any case.[19] The Participation Experiences and Empowerment for Roma youth project (PEER) was featured as a good practice that aimed at strengthening the participation of young Roma, among others by developing training materials (with the involvement of Roma young people).[20]

In this study, vulnerable children as a term is used to refer to all these groups of children in order to attempt to cover as widely as possible the children who might encounter barriers in practicing their right to be heard, but whenever it is relevant, the needs of particular groups or examples are discussed, too.

2. Requirements of Participation of all Children

2.1. The Right to Participate

The legal basis of participation of all children is the right to be heard or the right to participation declared by law in conjunction with an open-ended non-discrimination clause and the obligation to take positive measures. Participation should be defined as a horizontal principle in specific legislation concerning the situation and rights of vulnerable children, too, otherwise, governments cannot be held accountable if they fail to realize children's right to participation. In the context of international organizations, similar codification would arguably ensure the effective and meaningful participation of all children. Despite this, it is still not a common practice among international organizations or bodies to establish children's right to participation and its framework in internal regulations, rules of procedures or working methods.

The United Nations bodies refer to Article 12 of the UN Convention on the Rights of the Child and the General Comment No. 12 of the UN Committee on the Rights of the Child that has identified

Europe Guidelines on child-friendly justice, Recommendation of the Congress of Local and Regional Authorities on the social reintegration of children living and/or working on the streets.

[16] Commission Recommendation 2013/112/EU of 20 February 2013. Investing in children: breaking the cycle of disadvantage. OJ 2013 L 59.

[17] Ibid. Part 1.

[18] Day, Laurie, Percy-Smith, Barry, Ruxton, Sandy, McKenna, Katharine, Redgrave, Katy, Young, Tricia: *Evaluation of legislation, policy and practice on child participation in the European Union (EU) - Research Summary*. European Commission, 2015. p. 16.

[19] Byrne, Kevin, Szira, Judit: *Mapping of reserach on roma children in the European Union (2014-2017).* European Commission, 2018. p. 75.

20 Website of the project is available at http://www.peeryouth.eu/ (10 October 2019).

the international level as a setting where children can exercise their right to be heard. It is highlighted in the General Comment that "the Committee welcomes written reports and additional oral information submitted by child organizations and children's representatives in the monitoring process of child rights implementation by States parties".[21] In accordance with this, the Committee on the Rights of the Child adopted specific working methods for child participation at the monitoring of the Convention[22] and at the Day of General Discussion.[23]

Other UN monitoring bodies have not adopted similar documents to date, but children have taken part in the monitoring of the International Convention on the Elimination of all form of Discrimination against Women, Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of all forms of Racial Discrimination and in the Universal Periodic Review on an occasional basis. Child participation in these monitoring mechanisms was actually triggered by a previous successful engagement with the UN Committee on the Rights of the Child. For example, the girls of Nepal prepared the first-ever girl-led report for the UN Committee on the Elimination of Discrimination against Women[24] and children in Albania submitted the first children's contribution to the Universal Periodic Review of Albania[25] following a report on the implementation of the UN Convention on the Rights of the Child in their respective countries. The participation of children with disabilities in the monitoring of the UN Convention on the Rights of People with Disabilities could be established on the basis of Articles 7 and 33(3) of the Convention and the Committee on the Rights of Persons with Disabilities specifically referred to children with disabilities in its General Comment clarifying states' obligations under Article 33(3),[26] nevertheless, children with disabilities have not yet engaged with the Committee. Strengthening and enhancing the effective functioning of the human rights treaty body system is currently under discussion at the UN,[27] this would be a good opportunity to take into account the cross-sector dimension of child participation and mainstream it throughout the monitoring systems.[28] The UN Minority Forum also recommended for states to involve young people belonging to minority groups in decision-making procedures, including at international level. [29]

The Committee of Ministers of the Council of Europe instructed the Secretary General to encourage the participation of children in the standard-setting, cooperation and evaluation activities of the organization and to invite the relevant steering committees, advisory and consultative bodies as well as monitoring mechanisms to take all these recommendations addressed to states into consideration in their own respective work.[30] For the time being, there are no specific organizational rules or working methods for the participation of children in any of the activities of the organization, however where child participation does take place, they usually refer to Article 12 of the UN Convention on the Rights of the Child and to Article 9 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) in relation to the implementation and monitoring of this Convention.[31]

[21] 1989 UN Committee on the Rights of the Child, General Comment No.12. CRC/GC/2003/5. 2003. para. 131.
[22] Working methods for the participation of children in the reporting process of the Committee on the Rights of the Child. CRC/C/66/2. 2014.
[23] Working methods for the participation of children in the days of general discussion of the Committee on the Rights of the Child. CRC/C/155. 2018.
[24] Girl-Led Report on the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) Nepal, Girls of Nepal, Date of Submission: 1 October 2018, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCSS%2fNPL%2f32588&Lang=en (2 October 2019).
[25] Stakeholder report on Albania Submitted by Child Led Groups "Voice 16+" and Peer Educator's Group with the support of Save the Children and World Vision, Universal Periodic Review 19th session, September 2013, available at https://albania.savethechildren.net/sites/albania.savethechildren.net/files/library/UPR%20submission%2016%2009%202013_Review%20of%20Albania_3.pdf (06 October 2019).
[26] UN Committee on the Rights of Persons with Disabilities, General Comment No. 7. on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention. CRPD/C/GC/7. 2018.
[27] Strengthening and enhancing the effective functioning of the human rights treaty body system, Resolution adopted by the General Assembly on 9 April 2014, A/RES/68/268.
[28] *Optimizing the UN treaty body system, Academic Platform Report on the 2020 review*, Geneva Academy, 2018, p. 22.
[29] Report of the Special Rapporteur on minority issues on recommendations made by the Forum on Minority Issues at its tenth session on the theme "Minority youth: towards inclusive and diverse societies". A/HRC/37/73. 2018. para. 48.
[30] Recommendation of the Committee of Ministers of the Council of Europe on the participation of children and young people under the age of 18. Preamble.
[31] Guidelines for Child participation in the monitoring of the Lanzarote Convention, available at https://rm.coe.int/guidelines-for-implementation-of-child-participation-in-the-2nd-monito/16808a3956 (2 October 2019).

In case of the European Union, Article 24 (1) of the Charter of Fundamental Rights provides for child participation and is the reference for European institutions and Member States when they are implementing EU law. The European Commission proposed for the Member States to put in place mechanisms that promote children's participation in decision-making that affects their lives, support the involvement of all children in existing participation structures particularly children from disadvantaged backgrounds, including in the implementation of the recommendations in question.[32] In addition, they recommended that children should be involved in the running of public services and consulted on the drafting of relevant policies in mechanism adopted to their age.[33]

2.2. The Opportunity to Participate

The declaration of the right to be heard is an essential but not sufficient requirement for meaningful and sustainable child participation, legislative, policy and practical measures need to be put in place to establish both the right and the opportunity.[34] Both the UN Committee on the Rights of the Child and the relevant literature emphasize that child participation should not be an ad-hoc, one-off event but it should be understood as a process that is well-structured in time and place and constitute an integral part of a decision-making procedure affecting the life of children. One of the principles of child participation is accountability that means children will get a feedback about how their opinions were considered and how they eventually affected the decision itself, furthermore, children are involved in the follow-up activities such as the implementation and monitoring of the decisions taken. The opportunity to participate means that there are several entry points for children to get involved in the decision-making process including in the course of implementation and the follow-up of the decision.

Nevertheless, the quantity and quality of opportunities available for children to participate in decision-making procedures tend to be characterized by the social, political and economic situation of the country concerned, where children in vulnerable or disadvantaged situations may face even more challenges. Therefore, the UN Committee on the Rights of the Child emphasized that states "shall take adequate measures to assure to every child the right to freely express his or her views and to have those views duly taken into account without discrimination"[35], this covers the obligation to prevent and tackle discrimination in order to enable children from vulnerable and marginalized groups to participate on equal basis with other children.

The importance of providing opportunities in relation to particularly vulnerable groups of children has been highlighted as well. The UN Committee on the Rights of the Child stressed that children with disabilities "should be represented in various bodies such as parliament, committees and other forums where they may voice views and participate in the making of decisions that affect them as children in general and as children with disabilities specifically".[36] The UN Forum on Minority Issues proposed that states use quotas to ensure that minority youth are adequately represented in their national and local institutions including municipalities and schools.[37] The study on the "Evaluation of legislation, policy and practice on child participation in the European Union" concluded that the access of Roma children to child and youth councils should be promoted and widened.[38] In some countries, children living in childcare institutions are entitled to set up their own child government in order to advocate for their rights; if child participation is meaningful in such settings it

[32] 2013/112/EU: Commission Recommendation of 20 February 2013, Investing in children: breaking the cycle of disadvantage, Chapter 3.
[33] Ibid. Chapter 2.3.
[34] Lansdown, Gerison: *The realisation of children's participation rights – Critical reflections*, p. 14.
[35] UN Committee on the Rights of the Child, General Comment No.12. CRC/GC/2003/5. 2003. para. 75.
[36] UN Committee on the Rights of the Child, General Comment No. 9. CRC/C/GC/9. 2007. para. 37.
[37] Report of the Special Rapporteur on minority issues on recommendations made by the Forum on Minority Issues at its tenth session on the theme "Minority youth: towards inclusive and diverse societies" para. 49.
[38] Day, Laurie et al.: *Evaluation of legislation, policy and practice on child participation in the European Union,* pp. 16.

can have a great impact on the life of all children living in the institution.[39]

The Guidelines „Engaging Children with Disabilities in Decisions Affecting their Lives" prepared by UNICEF states that the opportunities for the participation of children with disabilities should be the same as for all other children and the already existing forums should be made accessible for children with disabilities.[40] Nevertheless, separate or dedicated opportunities are also necessary because on such occasions children can have the space to discuss and develop arguments in relation to issues that are specific to their life and situation, but these opportunities should never exclude or substitute inclusive participation. „Children with disabilities should always be offered the choice as to whether they want separate spaces for participation. They should never be forced to go because it is the only option available to them."[41]

The UN Committee on the Rights of the Child stresses that participation should be voluntary, the child has the right not to exercise the right and the choice can be withdrawn at any moment.[42] The right to be heard is not only an individual right but should apply to the group of children including minority children and children with disabilities.[43] Nevertheless, when children are involved as a homogeneous group, every child who is a member of that group should be invited to participate and given the choice, especially in cases when established groups are involved such as children living in the same childcare institutions or children living in neighbouring or the same villages in rural areas.

The question arises in relation to what topics children should be involved in regard to decision-making procedures of an international organization. At the time of the drafting of the UN Convention on the Rights of the Child, there was an initiative to decide on the particular topics and issues children can give their opinion about but eventually they decided to define it widely and ensure children are heard in relation to every decision affecting their lives. Still, children should be consulted on topics relevant for their life and should be given the opportunity to identify such topics by themselves.[44] An international organization makes decisions on issues relevant for all children or to a specific group of children.

In case of a decision related to children in general, children in vulnerable situations should be provided access to the child participation process without discrimination on any ground, furthermore, their participation should be supported by further measures including the establishment of a homogeneous group of children for consultation, if needed. Since non-discrimination is a general principle of the UN Convention on the Rights of the Child, it should be included in every decision or standard related to children but in order to apply it in practice, all provisions should be scrutinized from the point of view of children who might face discrimination. Decision-makers need to put aside prejudices against particular group of children, for example that children in disadvantaged situations have no access to internet or smart devices therefore that there is no need to consultant them on standards about the practice of their rights and protection in the digital environment or that boys cannot fall victim of sexual abuse so they cannot contribute to related monitoring procedures. It can be considered as good practice the inclusive children's reports submitted to the UN Committee on the Rights of the Child,[45] moreover, the Council of Europe involved several groups of vulnerable children in the drafting of the Recommendations of the Committee of Ministers to member States on Guidelines to respect, protect and fulfil the rights of the child in the digital environment.[46]

[39] E.g. in Hungary, see Act 31 of 1997 on Child protection, 37.§.
[40] Duncan, Barbara: *Take us seriously! - Engaging Children with Disabilities in Decisions Affecting their Lives,* UNICEF, 2013. pp. 12-14.
[41] Ibid. p. 17.
[42] UN Committee on the Rights of the Child, General Comment No.12. CRC/GC/2003/5. 2003. para. 16.
[43] Ibid. para. 9.
[44] Ibid. para. 134.
[45] Recent example is *the Hungarian Children's report to the UN Committee on the Rights of the Child – How do you see it?* Hintalovon Foundation, 2019. available at https://hintalovon.hu/sites/default/files/howdoyouseeit_eng.pdf (16 October 2019).
[46] *It's Our World: Children's views on how to protect their rights in the digital environment.* Council of Europe, 2017, available at https://rm.coe.int/it-s-our-world-children-s-views-on-how-to-protect-their-rights-in-the-/1680765dff (11 October 2019).

When an international organization is monitoring the situation of a specific group of children or working on a decision related to this specific group, children belonging to this group should be definitely consulted even if their participation requires special measures or allocation of additional resources compared to general child participation processes. In accordance with this approach, the UN Committee on the Rights of the Child involved children in street situations in the drafting of the General Comment on the rights of children in street situations,[47] the Council of Europe consulted unaccompanied asylum-seeking children on the topic of age assessment during the drafting procedures of guidelines for member states.[48] Nevertheless, flexible approach should be used concerning the composition of child participation groups with specific characteristics, like it happened in the case of the first-ever girl-led report for the UN Committee on the Elimination of Discrimination against Women where 17,2% of the Nepali children participating were actually boys that made possible to include also how boy perceived girls rights issues in Nepal.[49] The Council of Europe also had consultations with mixed groups of Roma and non-Roma children in three countries in order to develop the child-friendly version of the Dosta! campaign.[50] Furthermore, intersectionality should be an organizing principle in case of the involvement of children in vulnerable or disadvantaged situations. The participation of children with disabilities as a vulnerable group should be carefully referred to because they cannot be considered as a homogeneous group, as it is reflected in the pattern of civil society organizations of and for people with disabilities as many of them focus on advocacy for one particular group.

The best interests of the child is a factor that also has to be considered also in child participation, therefore, it might happen that it is in the best interest of a child to be absent from a child participation process organized by an international organization. This can be the case when the topic of the consultation or the attributions of the vulnerable group to which the children belong to, might make them a target of intimidation or reprisal in their home country or in their micro-environment. Similarly, if domestic law prescribes the consent of the parents or care-givers as a condition to participation but the child cannot obtain or does not want to seek that, it is in the best interest of the child that the organizers comply with the laws protecting them.

2.3. The Space to Participate

Children cannot practice their right to be heard if their the freedom of expression, freedom of thought and conscience, freedom of religion or freedom of assembly is not well protected and respected. All these freedoms and rights are provided for in the UN Convention on the Rights of the Child and can be subject to limitations prescribed by law which are necessary to protect a legitimate aim such as the rights or reputations of others, national security, public order, public health or morals.[51]

At this point, it is worth referring to child participation models in the literature. *Hart* created the "ladder of participation" model to serve as a beginning typology for thinking about children's participation in projects.[52] Hart classified as genuine participation when young people and adults share the decision-making (8th rung), when young people lead and initiate action (7th rung), when in an

[47] Consulting with children on the call for written submissions. The Consortium for Street Children, 2016, available at https://www.streetchildren.org/resources/consulting-with-children-on-the-call-for-written-submissions/ (11 October 2019)

[48] *We are children, hear us out! Children speak out about age assessment Council of Europe Report on consultations with unaccompanied children on the topic of age assessment*. Council of Europe, 2019, available at https://rm.coe.int/we-are-children-hear-us-out-children-speak-out-about-age-assessment-re/16809486f3 (10 October 2019).

[49] Girl-Led Report on the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) Nepal, Girls of Nepal, Date of Submission: 1 October 2018. Annex II, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCSS%2fNPL%2f32588&Lang=en (10 October 2019).

[50] Based on child consultations in Albania, Hungary and Spain during the course of 2017, the Council of Europe developed two videos to share the antigypsysm message of the Dosta! campaign with children, available at https://www.coe.int/en/web/roma-and-travellers/dosta-child-friendly-campaign (09 October 2019).

[51] 1989 UN Convention on the Rights of the Child Articles 13, 14, 15.

[52] Hart, Roger: *Children's Participation: From Tokenism to Citizenship*, UNICEF, 1992. p. 9.

adult-initiated process the decision-making is shared with young people (6th rung), when young people are consulted and informed (5th rung) and when young people assigned and informed (4th rung). According to him, models of non-participation are when young people are tokenized (3rd rung), when they serve just as decoration (2nd rung) or they are manipulated (1st rung).

According to *Lansdown*, without evaluation, "it is not possible to engage in any critical appraisal of what is being done in the name of participation or, indeed, of whether it is actually impacting on the lives of children".[53] She classified child participation at three different levels depending on the point where children got involved and the level of their involvement. In a consultative process, the adults seek the opinion of the children in order to obtain information about their life and experiences and based on that they improve legislation, policies or services. This process is led and managed by adults and the decision-making procedure is not shared with the children. Collaborative participation provides for a higher level of partnership as children can be actively engaged in any stage of the process and the decision-making can be shared between children and adults. The third level is child-led participation when children can initiate and lead the process, the adult's contribution is restricted to the provision of support to achieve their objectives. This can happen if "children are afforded the space and opportunity to identify issues of concern, initiate activities and advocate for themselves."[54] There is no strict line between the different categories, the form of participation is to be adjusted to the situation and it can evolve during the process itself.

Provision of space to participate means that children can freely express their opinions, both in terms of the content and the format. Children can freely articulate the content if the adults do not manipulate or influence them but they are only present to provide adequate and necessary support. Children can express their views in any format which is suitable, expressive and natural for them, it does not have to be "adult-friendly". The UN Committee on the Rights of the Child, stated that "full implementation of Article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences."[55] This General Comment was adopted following research showing that children can express themselves from the youngest age but not necessarily verbally. The Committee also expressed that children with disabilities should be provided with whatever mode of communication they need to facilitate the expression of their views.[56] The Lanzarote Committee followed a similar practice in its Methodology to involve children in the monitoring of the Convention.[57] The freedom to choose the form of their expression is of crucial importance especially in cases involving younger children as well as children belonging to vulnerable or disadvantaged groups to ensure that the procedure is inclusive.

The authors of "The mapping of research on Roma children in the European Union" found that the barrier to genuine and meaningful participation for Roma children in social research is that they are not provided space to form and express their views, the adults tightly control the research and they restricts real opportunities for children to speak their mind.[58] The Guide for Professionals developed in the PEER project therefore emphasized "it is important to try not to lock young people into existing arrangements, instead start with young people's ideas and draw on existing resources as may be appropriate".[59] This can similarly happen to children in any vulnerable situation when they are not perceived as children first and foremost but as persons in a vulnerable or disadvantaged situation. International organizations can avoid such situations by providing clear guidance for the adults facilitating the participation on how to create the appropriate space for children to express

[53] Lansdown, Gerison: *The realisation of children's participation rights – Critical reflections,* p. 20.
[54] Ibid.
[55] UN Committee on the Rights of the Child, General Comment No.12. CRC/GC/2003/5. 2003. para. 21.
[56] UN Committee on the Rights of the Child, General Comment No. 9. CRC/C/GC/9. 2007. para. 37.
[57] Guidelines for Child participation in the monitoring of the Lanzarote Convention available at https://rm.coe.int/guidelines-for-implementation-of-child-participation-in-the-2nd-monito/16808a3956 (18 September 2019).
[58] Byrne et al.: *Mapping of reserach on roma children in the European Union (2014-2017)*, p. 79.
[59] Percy-Smith, Barry et al.: *Supporting the Participation and Empowerment of Young Rom,* Presa Universitara Clujeana, 2016. p. 18.

their views. It is also vital that some form of child-friendly information, that is adapted to the age, gender, culture and maturity of the children participating, is also provided to properly inform the children taking part about the international organisation and the participation process itself.

2.4. The Means to Participate

The means necessary for meaningful participation include on one hand the material resources, and on the other hand child-friendly information that is prerequisite of informed involvement of children. An international organization should provide these means if it involves children in their standard setting or decision-making procedures including resources and information that is adapted to children in vulnerable or disadvantaged situations.

In accordance with Article 13 of the UN Convention on the Rights of the Child, the right to freedom of expression incorporates the right to information, furthermore, Article 17 prescribes that children shall have "access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health". This applies to the implementation of Article 12, hence mass media also have a role in providing children with information and to empower them to practice their right to participation as well. Article 29 recalls that the aims of education foster the development of the child's personality, talents, mental and physical abilities as well as the respect for human rights and fundamental freedoms. The Recommendation of the Council of Europe Committee of Ministers states that it is the requirement of meaningful and genuine participation to provide children with all relevant information and offered adequate support for self-advocacy appropriate to their age and circumstances, including information about "the scope of their participation, including the limitations on their involvement, the expected and actual outcomes of their participation and how their views were ultimately considered".[60]

Article 17 of the UN Convention on the Rights of the Child explicitly mentions the linguistic needs of the child who belongs to a minority group or who is indigenous in relation to the information provided by mass media which is closely connected with the cultural, religious and linguistic rights of minority and indigenous children.[61] The UN Committee on the Rights of the Child stressed on several occasion that the states should raise awareness about thr UN Convention on the Rights of the Child and its principles, among others, by providing translation into minority and indigenous languages and that the mass media has an important role in this.[62]

"The mapping of research on Roma children in the European Union" found that the review of child participation methodologies should consider the use of social media and new technologies, referring to the PEER project that discovered the potential in the use of ICTs as a mean to facilitate Roma children's participation in research and advocacy.[63] The Forum on Minority Issues proposed that states reach out to minority youth in decision-making processes, for example by the use of "youth-friendly tools such as online platforms and social media which can also contribute to achieve greater transparency in such processes".[64]

The UN Convention on the Rights of Persons with Disabilities recalls the freedom to seek, receive and impart information and ideas for persons with disabilities, including children with disabilities, who should receive information addressed to children "in accessible formats and technologies ap-

[60] Recommendation of the Committee of Ministers of the Council of Europe on the participation of children and young people under the age of 18, Section II - Principles.
[61] 1989 UN Convention on the Rights of the Child Article 30.
[62] *Implementing Handbook for the Convention on the Rights of the Child*, UNICEF, 2007, p. 224.
[63] Byrne et al.: *Mapping of reserach on roma children in the European Union (2014-2017)*, p. 76.
[64] Report of the Special Rapporteur on minority issues on recommendations made by the Forum on Minority Issues at its tenth session on the theme "Minority youth: towards inclusive and diverse societies". para. 48.

propriate to different kinds of disabilities in a timely manner and without additional cost".[65] Access to information in accessible format for children with disabilities enables them to participate in society on an equal basis with other children and to influence decisions affecting their life. According to the UN Committee on the Rights of the Child, "children with disabilities should also be provided with the appropriate technology and other services and/or languages, for example Braille and sign language, which would enable them to have access to all forms of media, including television, radio and printed material as well as new information and communication technologies and systems, such as the Internet".[66] Therefore communication cannot be a barrier to the participation of children with disabilities.[67]

As we have seen, the right to information is acknowledged in case of children in vulnerable situations but in practice several challenges might arise. First, information should be available in a child-friendly manner, this extends not only to the UN Convention on the Rights of the Child and other closely related children's rights topics but also to thematic conventions and issues relevant to children belonging to a particular vulnerable group. Second, child-friendly information about children's rights in general as well as about the rights of specific groups should be prepared in an accessible format, tailor-made to the needs of the target group and in a language which is gender inclusive and which the children can understand including Braille and sign language. Therefore, if we want to combine both the content and the right format of child-friendly information, it might open up the room for endless variations, for example, an asylum-seeker girl with a hearing impairment belonging to a minority group would need information about children's rights, the asylum procedure and her rights therein, the rights of children with disabilities, rights of minority children and the rights of the girl child, in sign language or written format if she can read and in a language she can understand, preferably her mother tongue, even if it is a minority language.

The United Nations and its agencies have several good practices when it comes to child-friendly versions of international human rights conventions[68] and the development of child-friendly information on various topics and procedures. [69] These have proved to be an important tool to support governmental and non-governmental organizations when implementing child participation in the field. The Council of Europe published an information booklet and poster about children's rights in general in 28 languages, including in Basque language,[70] resources about sexual violence against children also exist in several minority languages, for example the "Kiko and the Hand" is available in Arabic, Basque, Catalan, Galician and Romani language.[71] Several tools have been developed about the rights of children and young people in care including booklet, leaflet and poster to facilitate communication between the child and social workers, these have been translated into several languages, too.[72]

There are few examples of child-friendly versions of thematic human rights treaties and most

[65] 2006 UN Convention on the Rights of People with Disabilities Article 21(a).
[66] UN Committee on the Rights of the Child, General Comment No. 9. CRC/C/GC/9. 2007. para. 37.
[67] Duncan, Barbara: *Take us seriously! - Engaging Children with Disabilities in Decisions Affecting their Lives.* pp. 11.
[68] Recent example is Child-friendly Convention on the Rights of the Child by UNICEF and Child Rights Connect https://weshare.unicef.org/CS.aspx?VP3=SearchResult&STID=2AMZIFJJXAUY (12 October 2019), Child-friendly poster: Convention on the Rights of the Child by Plan International https://plan-international.org/child-friendly-poster-convention-rights-child (12 October 2019), the Speak up for your rights – child-friendly version of the UN CRC Optional Protocol on the communication procedure by Child Rights Connect https://www.childrightsconnect.org/wp-content/uploads/2015/08/OP3_CF_Leaflet__En_FINAL.pdf (12 October 2019) and the Child-Friendly Text UN Disability Convention by UNICEF https://www.unicef.org/Child_friendly_CRPD.pdf (12 October 2019).
[69] For example child-friendly version of The Global Survey on Violence against Children https://resourcecentre.savethechildren.net/library/global-survey-violence-against-children-2011-child-friendly-version (10 October 2019), the United Nations Secretary-General's Study on Violence against Children Adapted for Children and Young People https://www.unicef.org/violencestudy/pdf/Study%20on%20Violence_Child-friendly.pdf (11 October 2019), Fairy Tales for a Fairer World https://sdgstorybook.com/ (09 October 2019) and the Frieda and the Sustainable Development Goals https://issuu.com/unpublications/docs/frieda_2018 (10 October 2019).
[70] All language formats are available at the Council of Europe website. https://www.coe.int/en/web/children/i-have-rights-you-have-rights-he/she-has-rights-...#{%2212444981%22:[1]} (2 October 2019).
[71] Kiko and the Hand – A children's book, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168068b068b (2 October 2019) and TV spot https://www.coe.int/en/web/children/kiko-and-the-hand (2 October 2019), „Tell Someone you Trust" – Brochure http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048bb6e (2 October 2019) and TV spot http://www.coe.int/en/web/children/tell-someone-you-trust (2 October 2019).
[72] "Children and young people in care – Discover your rights!" booklet, leaflet and poster available at https://www.coe.int/en/web/children/alternative-care (2 October 2019).

of them are developed by non-governmental organizations working on national or local level. Child-friendly information about children's rights and specific topics tailor-made to the needs of a specific vulnerable group which might have communication barriers is even more rare. The Faroese umbrella organization, MEGD developed the child-friendly version of the UN Convention on the Rights of Persons with Disabilities in three different formats: the text is available in a booklet, in a video via sign language interpretation and in a podcast.[73] The child-friendly versions of the UN Convention on the Rights of the Child have been translated into many languages, which can easily be accessible to children belonging to minority groups which has a kin-state, but there is no information available in any language in child-friendly format about the UN Convention on the Elimination of all forms of Racial Discrimination or the UN Declaration the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

From the perspective of an international organization, children involved in a particular decision-making procedure should be informed about the general aim and framework of the organization and its relevant bodies in order to fully understood their role and the impact of the decision to be taken. In 2019, at a conference organized by the Council of Europe, non-governmental organizations have highlighted the challenges of providing such information are partly due to the lack of child-friendly information available at international level.[74] The European Union has a compilation of games and resources on the website "Kids' corner"[75] giving a great overview of their work, on contrast only a few resources are available about the United Nations, these have been developed by different actors.[76]

In relation to the material resources necessary to implement child participation, the physical environment of child consultations is of crucial importance. Children with disabilities should be provided with an accessible environment and all the activities planned should be accessible for them. Since children with disabilities are not a homogenous group and some children might have more than one impairments, the method to involve them should be fully adjusted to the needs of the children concerned in order to overcome all the barriers which impede or limit their participation. While choosing the venue, it should be taken into account whether children from disadvantaged background or children living in rural areas would have access, if not, how would it be possible to ensure their participation? Facilitators should consider whether a change of venue would be necessary. All these factors are equally applicable to child participation organized by international organizations.

2.5. The Support to Participate

Article 5 of the UN Convention on the Rights of the Child stipulates that the parents and caretakers are entitled and obliged at the same time to provide guidance for the child about the exercise of their rights under the Convention in a manner consistent with his or her evolving capacities. Accordingly, the child is the subject of the rights, he or she can exercise or enjoy these rights, the adults should only provide support adjusted to the needs and evolving capacities of the child to make them able to exercise their rights to the fullest extent.[77] Although this provision originally aimed to strengthen the role of the family and reduce the need for state intervention in the private life of the family, it can serve as a parallel in all spheres of life where adults are responsible for the care, education and development of a child.

[73] The child-friendly package is available on the website of the NGO: https://megd.fo/lukka (2 October 2019).
[74] Strengthening civil society participation in the implementation and monitoring of the Lanzarote Convention Conference Report, Children's Rights Division, Council of Europe, 2019. pp. 12, available at https://rm.coe.int/report-international-ngo-conference-8-9april-2019-strasbourg-final/1680966285 (12 October 2019).
[75] Available at https://europa.eu/kids-corner/disclaimer/index_en.htm (12 October 2019).
[76] E.g. the video "United Nations explained" developed by CBC Kids News https://www.youtube.com/watch?v=SaAmfiJtV4I (11 October 2019) or the video "C'est quoi, l'ONU ?" developed by 1 jour, 1 question, https://www.youtube.com/watch?v=zL90M4yD_jY (11 October 2019).
[77] Lansdown, Gerison: *The realisation of children's participation rights – Critical reflections,* p. 13.

Lundy and *McEvoy* in a study argued that child participation from the children's rights perspective does not limit an adult's contribution to simply assisting children to express their views freely but also extends to assisting them in the formation of their views. Children are seen as experts of their own lives but we cannot expect them to have a predefined opinion on all children's rights related issues, especially if they have not encountered a given topic before. The authors emphasised that children should be assisted to form their opinions. Since children should be involved in decision-making procedures affecting their lives, it is the role of adults to provide support to ensure that children are informed instead of excluding children who do not have appropriate knowledge of a given topic. Here we can refer to the need for child-friendly information since one of the main conclusions of the study is that children are able to express their own perspective more confidently and comprehensively on an issue if they are well-informed about them.

The adults facilitating the process of children participation should ensure the respectful and safe environment for all children. The adults should treat children with respect and give them space to initiate, design and implement their ideas. Children in vulnerable or disadvantaged situations are more likely to experience exclusion or discrimination, therefore they need special and dedicated attention to be empowered and confident. The adult facilitators should be prepared to work with specific groups of children and to satisfy their needs, and to have the right attitude, understanding and skills. *Lansdown* mentioned an example of necessary measures for meaningful participation is to provide pre- and in-service training on the rights of children for all professionals working with and for children.[78]

A safe environment also means that the professionals working with children minimize the risk of violence, exploitation or any negative consequence of the children's participation including informing children about the right to protection and available remedies including where to turn to for help. The minimization of risks is of particular importance in cases involving children in vulnerable situations who may need an advanced level of protection of their privacy and personal data, such as children under or applying for international protection or children living in institutions or foster care who are subject to special protective measures. The international organizations can request anonymity in participatory process, the UN Committee on the Rights of the Child[79] and the Lanzarote Committee[80] did so in the course of the monitoring of the implementation of their respective conventions, by providing guidance to facilitators that children participating in the development of the reports should not be identifiable by their name or photo.

3. Conclusions

The United Nations Convention on the Rights of the Child declares that every child who is capable of forming his or her own views has the right to express those views freely in all matters affecting them, and that the views of the child should be given due weight in accordance with the age and maturity of the child. The standard-setting and decision-making procedures of international organizations are not exempted: a simple interpretation of Article 12 on the right to be heard explicitly demonstrates that this includes the international level as a setting where children should participate in decision-making. Accordingly, international organizations should provide the right, the opportunity, the space, the means and the support needed for the participation of all children.

[78] Ibid. p. 14.
[79] Working methods for the participation of children in the reporting process of the Committee on the Rights of the Child. CRC/C/66/2. 2014. para. 13.
[80] UN Committee on the Rights of the Child, General Comment No.12. CRC/GC/2003/5. 2003. para. 134.

In order to establish the legal framework of participation for all children, states should codify the right to be heard in conjunction with an open-ended non-discrimination clause and the obligation to take positive measures. Similarly, international organizations or bodies can establish children's right to participation and requisite frameworks in their internal regulations, rules of procedures or working methods, instead of cross-references and interpretation of provisions of international human rights instruments. For the time being, only the UN Committee on the Rights of the Child has provided detailed Guidelines on child participation, other international organizations and bodies engage with children without an established comprehensive internal framework, providing guidance on an ad hoc basis. Inspiration could even come from non-governmental organizations, some of which have drafted and published their own guidelines on child participation in order to ensure a meaningful and transparent procedures.

Children in vulnerable and disadvantaged situations should be provided with the opportunity to take part in the decision-making procedures of international organizations concerning children's rights in general and the rights and situation of any particular group of children. In accordance with the principle of non-discrimination, children from vulnerable groups should have access to the mainstream participatory processes on an equal basis with other children, if necessary, supported by positive measures. In case of monitoring the situation of a specific group of children or working on a decision related to this specific group, children belonging to this group should be systematically consulted even if their participation requires special measures or the allocation of additional resources compared to general child participation processes. If separate or dedicated child participation is justified, the composition of the group should be carefully and flexibly considered because diversity might enhance the outcomes of the process in some cases.

Provision of space to participate is of crucial importance on an international level as well. When children are consulted by international organizations, they should be given the space to freely express their opinions, both in terms of the content and the format. It happens often that vulnerable children are not perceived as children first and foremost but as persons in a vulnerable situation which might pave the direction of the consultation on any topic with them. If children are not encouraged or limited to use "adult-friendly" formats to their contributions, younger children as well as children belonging to vulnerable or disadvantaged groups can also engage in an inclusive procedure.

International organizations should provide the means necessary for participation such as the material resources including the physical environment and the child-friendly information. The latter is a prerequisite for the informed involvement of children and it has even more significance in cases of international organizations because many times children are consulted in the member states by intermediary actors like non-governmental organizations or ombudspersons for children. The professionals facilitating the consultations are not staff members or necessarily experts in the practice or case-law of a particular international organization, therefore the international organizations should develop or support the development of child-friendly resources about their own work, procedures or instruments. Few good examples are currently available of child-friendly information about topics relevant for specific groups of children in a format accessible for children who might face language barriers. There is a significant room for improvement with regard to the provision of child-friendly information about the general framework of international organizations and thematic human rights instruments including information in a format that is accessible and adequate for groups of vulnerable children such as minority and migrant children, children with disabilities and younger children.

Regardless of whether a staff member of an international organization or an employee of a non-governmental organization facilitates child consultations, the professionals should be prepared, trained

and instructed to be able to provide the necessary and adequate support to the children. Children should be assisted to form and express their views in a respectful and safe environment where the risk of violence, exploitation or any negative consequence of their participation are minimized. The best interests of the children and the protection of their privacy, especially of those coming from a vulnerable or disadvantaged background, should never be balanced against the interest of the organization, not even for campaign or propaganda purposes.

Professionals who have facilitated consultations with children for international organizations have reported that children felt like their opinions and thoughts do matter and that they can really make a difference with positive impact on their lives. The facilitators emphasised that children – even from vulnerable backgrounds - were empowered in the process, their self-esteem and self-confidence was raised and they had been trained on how to advocate for their own rights.[81] The consequent implementation of the principle of equal treatment to the participation of children in decision-making procedures of international organizations – as discussed in this paper - would assure that vulnerable and disadvantageous children are given the opportunity to affect the decisions that concern them, and furthermore, to enjoy the positive impact of such participation on the development of their personality and evolving capacities on equal basis with other children.

[81] See: It's Our World: Children's views on how to protect their rights in the digital environment. Council of Europe, 2017. pp. 17 available at https://rm.coe.int/it-s-our-world-children-s-views-on-how-to-protect-their-rights-in-the-/1680765dff (12 October 2019).

In Need of an Extended Research Approach: The Case of the 'Neglected African Diaspora' of the Post-Communist Space

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This paper seeks to extend the academic discussion and research of the global African diaspora by drawing attention to Africans living in post-Communist spaces. So far, both literature and foreign policies of countries of the former Eastern Bloc hardly ever made mention of this 'neglected diaspora'. First, the paper underscores the relevance of specific research connected with African communities across Central and Eastern Europe, as well as present-day Russia. Second, it introduces the history, motivations, background and contemporary situation of the marginal but growing African population in Hungary. It will show how finally the Hungarian government implements a pragmatic foreign policy (partly) on Africa and African development co-operation. In this effort, it considers Africans who either had obtained a university degree before 1989 at a Hungarian university, or came to the country during the democratic rule, as true bridges: they can foster newly defined relations. The place, role and potentials of these African migrants in the unique Hungarian migration environment will also be discussed. Increased illegal migration flows towards the European Union via the Serbian–Hungarian border region of the Schengen Zone in the first half of 2015 and the policies the Hungarian government introduced in the wake of this unprecedented push makes the discussion even more topical, in particular, as of early April 2019, a government "Africa Strategy" was also published.

Keywords: African migrations; global African diaspora; Africans in Hungary; Hungarian foreign policy towards Africa, Africa Strategy

1. Introduction

1.1. Opening Thoughts on the African Diaspora

"One of the accepted criteria of the study of the African Diaspora is the necessity of its focus on African and African-descended peoples."[2]. The new political, social and economic realities of our increasingly globalized interpolar world have direct effects on international migration. Considering migratory trends and tendencies from the opposite angle, migration is truly a profound feature of the global context, which is best characterized by the accelerated pace of all types of movement. As Zeleza[3] rightly points out, "two critical developments" can be isolated. "First, the diversification of

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[2] G. A. Chambers. Mapping the Study of the African Diaspora: Classic Trends, New Themes, and Disciplinary Approaches, in, R. K. Edozie, G. A. Chambers & T. Hamilton-Wray (Eds.), New Frontiers in the Study of the Global African Diaspora, Michigan State University Press, East Lansing, 2018, pp. 23-33.

[3] P. T. Zeleza: Contemporary African Migrations in a Global Context, African Issues, No. 1, 2012, pp. 9-14.

sending and receiving countries has been growing. Second, skilled migration has assumed greater importance in relation to both the actual flows" and to migration policies at all levels. "African immigrants are now part of the transnational communities that can be found in virtually all regions of the world."[4]. The diasporas of Africans represent a major aspect of both international migration and the international relations of the continent. As Taylor underlines, "the very existence of the diasporas are now seriously considered by African states (and international development agencies) as important developmental assets."[5] Not only because of the remittances that flow back into the economies of their home countries, but also as they possess the potential of building bridges in bi- and multilateral terms between their sending countries and their chosen new countries. A number of governments of receiving countries think in this way and are pressured to foster policies that on the one hand encourage the integration of migrants, as well as contribute to mutually beneficial economic, industrial and other investment deals, together with health service-related, educational or cultural projects. They tend to emphasize a 'triple-win' scenario, in which both the sending and receiving countries (the old and new homelands), as well as the migrants themselves can cultivate gains. Although there are still some more traditional perceptions that argue that "the influence of diaspora groups aggravates conflict in their home countries as they either directly or indirectly support the conflict of parties in terms of logistics or, in particular, finances", there has been an emerging other view that "sees diaspora groups as having the potential to reduce conflict […] foster[ing] democratization processes, contribut[ing] to positive economic development in their home country". [6]

Yet another group of governments tend to see migrants as threat to national identity, and therefore, support anti-immigrant policies. To be able to study and understand the African diaspora is to research on migration in general, and to study global African migrations in particular. As Chambers underlines, "contemporary political and global economic realities have brought Africans in the diaspora into more contact and communication with each other than ever before",[7] which confirms the very nature and existence of transnational identities in the global arena. These transnational African migrant communities are not only a developmental assets for countries of origin, but also mean numerous opportunities of geopolitical positioning for countries of destination. Although Chambers is right that: "While most of the discourse on the African diaspora has centered on the Americas and the African continent, there is a growing interest in the Indian Ocean region",[8] basically nothing is said about the diaspora communities of Africans across post-Soviet countries. It is absolutely valid to include them in a wider academic discourse, as "the legacy of the African Diaspora in these places [too] further exposes the global scope of the dispersal".[9] As in any case, migration flows in different phases and streams result in the creation of a diaspora. In comparative terms, in the course of history, different regions have experienced different flows and streams, thus, it makes sense also to look at the intensity and dynamics of the development of certain African diasporas in distinct areas. According to Palmer, in general terms, "diasporic communities possess a number of characteristics. Regardless of their location, member of a Diaspora share an emotional attachment to their ancestral land, […] tend to possess a sense of 'racial', ethnic, or religious identity that transcends geographic boundaries, to share broad cultural similarities, and sometimes articulate a desire to return to their original homeland."[10] Among the heterogeneous African diaspora communities we will use the term diaspora throughout the paper as defined by Oucho: "to denote people – usually of African descent – residing outside Africa, or within Africa in countries other than their own, as citizens and permanent or temporary residents, engaging in circulation as well as

[4] M. O. Okome: African Immigrant Relationship with Homeland Countries, in: J. A. Arthur et al. (Eds.), Africans in Global Migration. Searching for Promised Lands, Plymouth, Lexington Books, 2012, pp. 199-224.
[5] I. Taylor: The International Relations of Sub-Saharan Africa, New York, Continuum, 2010.
[6] L. Laakso & P. Hautaniemi (Eds.): Diasporas, Development and Peacemaking in the Horn of Africa, London, Zed Books, 2014.
[7] G. A. Chambers. Ibid. p. 29.
[8] G. A. Chambers. Ibid. p. 31.
[9] G. A. Chambers. Ibid.
[10] C. A. Palmer: Defining and Studying the Modern African Diaspora, Africology: The Journal of Pan African Studies, Vol. 11, No. 2, January 2018, p. 216.

transnational lifestyles."[11] This will be applied to the not-so-known African communities living in Central and Eastern European countries.

1.2. Setting the Scene for the Hungarian Case

In 2015, the government of Hungary took some convincing steps in order to revitalize relations with Sub-Saharan Africa by launching its 'Opening to the South' foreign policy chapter. In order to achieve this, it is open to target the still relatively minor, but occasionally vocal community of immigrants and the main civic organizations that either the immigrants themselves established and manage, or are in contact with them due to various legal questions and general representation (these latter ones are Hungarian NGOs with a profile and expertise on migrants' rights). In its brand new initiative published on April 2, 2019, the Hungarian government published a 22-point "Africa Strategy", which in a number of instances, clearly calls for more cooperation with both a circle of partner countries as well as their citizens.

While Hungary has been experiencing the pushing flow of irregular migrants, it also needs to get prepared for more foreign citizens choosing its territory to settle in the forthcoming decades. In fact, it needs to solve the burning demographic issue of a shrinking population, and therefore become ready for accommodating different people with different cultural and linguistic backgrounds.[12] The former "emigration country" – as Sik and Zakariás[13] referred to it – with a traditionally very low record of internal migration is now seen as a transition country to get into the Schengen Zone of the European Union by illegal migrants from some Western Balkans countries (Kosovo, for instance) and Near Eastern countries (Syria and Iraq especially), as well as Northern Africa (or Sub-Saharan Africa via Northern African and Mediterranean routes). While this particular issue has been basically the most burning one for the country, the topic of Hungarians leaving the motherland and emigrate to other EU member states (among others) is hardly mentioned in political communication and heard in public discourse.

One of the questions this paper attempts to answer is whether or not and to what extent Hungary, being a comparatively "closed country" in Central Europe's migration map has been managing certain aspects of international migration both from the perspective of its society and with regard to government policies. The research presented here hypothesized that younger generations are more open to the presence of immigrants and their participation in everyday life, which is an inevitable condition on the road of a more integrative society. The paper also visits the question of government policy aspirations in terms of the relevance of connecting longer-term strategic goals to the engagement and contribution of different diaspora in Hungary – in our case, the Hungarian African communities in light of a dynamic 'global opening' in foreign policy.

The paper opens with a first section taking a closer look at the unique features of Hungary from an international migration perspective. It then moves to discuss African immigration to Hungary using primary research results from the last couple of years, an output of the projects the author and his research team managed to compile. Interview excerpts will illustrate the set of arguments, followed by a summary of a questionnaire on Hungarian youth perceptions about African immigrants. The chapter also highlights the foreign policy dimension that can be useful for a future comprehensive immigration policy (which is still missing at the moment), with particular relevance to the ongoing implementation of a new Hungarian policy of 'global opening' to the ever so globalized world. The

[11] J. O. Oucho: African Diaspora and Remittance Flows: Leveraging Poverty?, in A. Adepoju (Ed.), International Migration within, to and from Africa in a Globalised World, NOMRA, Sub-Saharan Publishers, Accra, 2010, p. 140.
[12] Prime Minister Viktor Orbán in his latest address to the nation (évértékelő=annual national report) on 10 February 2019, launched a new public policy to upgrade the birth rate of the country by encouraging women to give birth to more children, and therefore, meeting some pressing demands for balancing the currently shrinking population. Immigrants are not the solution, the prime minister referred to, but the method he proposed.
[13] E. Sik & I. Zakariás: Active Civic Participation of Immigrants in Hungary. Country Report prepared for the European research project POLITIS, Oldenburg, Interdisciplinary Center for Education and Communication in Migration Processes, 2005, p. 6.

prospects for a Hungarian Africa policy will also be sewn into the line of thoughts presented. The chapter finally offers a conclusion and indicates some further steps of continued research.

2. Hungary is Not a Country of Destination for Many

Although international migration has always been a characteristic feature throughout its history since the foundation of the Hungarian state in the first years of the eleventh century, migration as an issue in post-socialist Hungary has been considered as "a diaspora and security problem and mostly viewed as part of foreign policy rather than economic policy."[14] No doubt, with regard to labor market issues, for a call for a more economy-focused approach is valid, however, understanding migration in the global era needs an interdisciplinary approach. When arguing for integration of any kind, historic, social, ethnic, linguistic, cultural and foreign relations and human rights considerations have to be taken into account for a comprehensive migration policy. This prerequisite is even more articulated when we accept the valid observation of Castles and Miller[15] that "novel forms of interdependence, transnational society and bilateral and regional cooperation are rapidly transforming the lives of millions of people and inextricably weaving together the fates of states and societies." In addition, policy-making in the field first draws our attention to the obvious issue of security, then, to how useful the given migrant can be for the economy of the receiving country intending to regulate migration flows.

As Juhász notes, the first wave of immigration to Hungary – including "scribes, foreign merchants, artisans, and agricultural settlers" – was "primarily motivated by economic considerations, as well as King Stephen the First's (1000–1038) positive attitude towards immigration."[16] Since the 1880s for about a hundred years, Hungary had been an emigration country: "between 1881 and 1900, 370,000 people emigrated to America. In the 15 years that preceded the First World War the total number of emigrants reached 1.4 million."[17] The Treaty of Versailles signed with Hungary after the world war in the Grand Trianon Palace of Versailles on June 4, 1920, resulted in the loss of more than two thirds of its original territories (72 percent) and 64 percent of the total population of the country (21 million), due to Hungary's alignment with the defeated central powers led by Germany. Coupled with the consequences of "large-scale forced resettlement movements" after the Second World War, "as a result of all these changes, on the one hand an ethnically highly homogeneous population was created on the territory of modern Hungary, on the other hand an ethnically mixed population with considerable Hungarian minorities emerged in the countries surrounding Hungary"[18]. The total number of Hungarians living beyond the borders of the country, the Hungarian diaspora is about 5.2 million, out of which 2.6 million ethnic Hungarians can be found in Hungary's present-day neighbors (most of them, about 1.5 million in Romania), 1.8 million in North America (most of them, about 1.5 million in the USA), and the rest all across the world.

With the Soviet bloc disintegrating at the end of the 1980s, Hungary had to face a substantial inflow of refugees and asylum seekers from the neighboring countries, but mainly from Romania and former Yugoslavia as a result of the ongoing conflicts and war on their territories. This migratory push then turned into another flow of migrants with economic and study purposes from the same countries surrounding Hungary. "The annual number of immigrants between 1988 and 1991 ranged between 23,000 and 37,000, and about 80 percent of them were ethnic Hungarians from Romania, Ukraine and Yugoslavia."[19]

[14] Á. Hárs & E. Sik: *Hungary*, in E. Hönekopp & H. Mattila (Eds.), Permanent or Circular Migration? Policy Choices to Address Demographic Decline and Labour Shortages in Europe, Budapest, International Organization for Migration, 2008, p. 73.
[15] S. Castles & M. J. Miller: The Age of Migration. International Population Movements in the Modern World, New York, The Guildford Press, 1998. p. 1.
[16] J. Juhász: Hungary, in T. Frejka (Ed.), International Migration in Central and Eastern Europe and the Commonwealth of Independent States, New York, United Nations, 1996, p. 69.
[17] J. Juhász, Ibid. p. 70.
[18] Á. Hárs & E. Sik, Ibid. p. 73.
[19] Á. Hárs & E. Sik, Ibid. p. 74.

One of the most unique features of Hungary's migration scene derives from the above tendencies, the country's historic heritage and geographic location: "the overwhelming majority of immigrants are from neighboring countries and mostly have an ethnic Hungarian background."[20] Therefore, Hungarian society at large does not really have experience on a greater scale with people of far-away lands and cultures, which the population considers different "enough" from the majority society, as they had got used to receiving immigrants of European origin – mainly from the larger Hungarian cultural context. These immigrants speak no different language than the one the citizens of the motherland do, i.e. Hungarian. Up until the end of the first decade of the twenty-first century the proportion of the immigrant population – that is "foreigners who stay in the country over a year"[21] – compared with the native population shows a stable 1.5 to 2 percent according to the statistics of the Hungarian Central Statistical Office (HCSO) on an annual basis.[22] This is considered as rather low in a country with a total population of 9.778 million, according to the 2018 HCSO data. Since 1981 Hungarian population has been steadily decreasing (see Figure 1 for the last 15 years). "The fall in the population number due to natural decrease was somewhat moderated by the positive net international migration in the last two and a half decades. However, in the last decade, immigration surplus could compensate only less than half of the natural decrease."[23] Since the breakout of the 2015 'refugee crisis', the Hungarian government favors a strictly anti-immigrant policy, with nation-wide campaigns including slogans such as "If you come to Hungary, you must respect our culture!", or "If you come to Hungary, you cannot take away the jobs of the Hungarians!". As Drinóczi and Mohai underlines: "The billboard campaign and the 'national consultation' were successful political tools used to make the Hungarian population fearful of migration, or at least develop increasingly negative attitudes thereto due to economic and security reasons."[24]After the latest landslide victory of his party at the national elections in April 2018, Prime Minister Viktor Orbán clearly stated that: "We want that Hungary remains the land of Hungarians, the country of the 'magyars'".

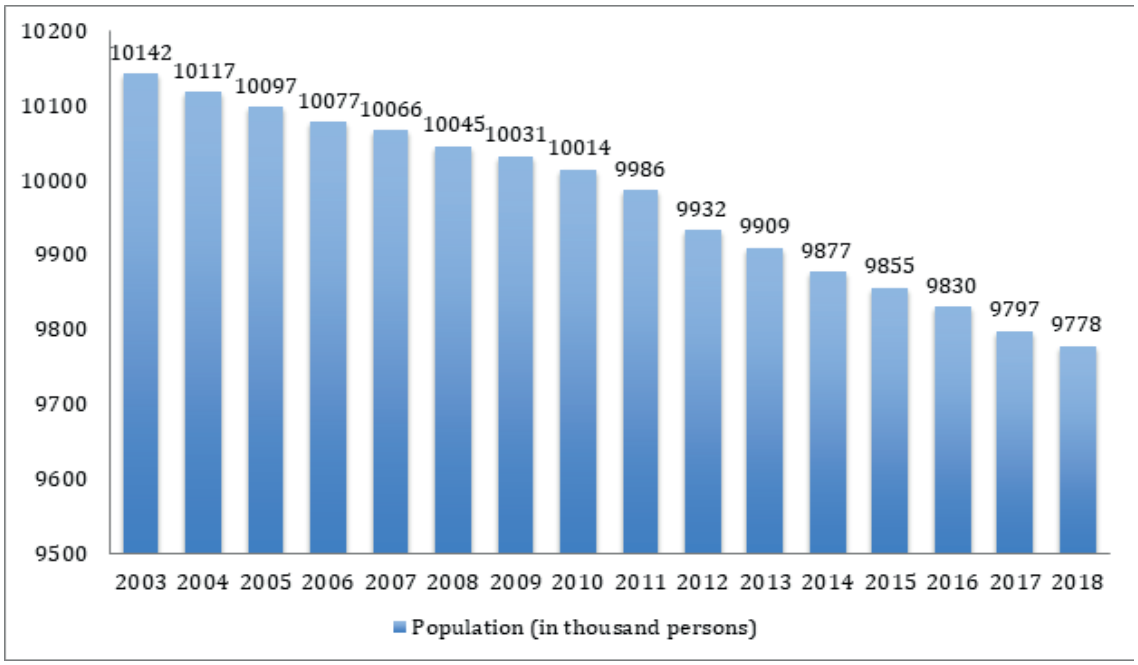

Figure 1. Demographic Changes in Hungary between 2003 and 2018

Source of data: Hungarian Central Statistical Office

[20] A. Kováts & E. Sik: Hungary, in: A. Triandafyllidou & R. Gropas (Eds.), European Immigration. A Sourcebook, Aldershot, Ashgate, 2007, p. 158.
[21] A. Kováts & E. Sik, Ibid. p. 159.
[22] The *International Migration Outlook 2012* of the OECD also confirms this figure. See OECD (2012: 236).
[23] G. Vukovich et al. (Eds.): Population Census. 1. Preliminary data, Budapest, Hungarian Central Statistical Office, 2012, p. 7.
[24] T. Drinóczi & Á. Mohai: Has the Migration Crisis Challenged the Concept of the human Rights of Migrants? The Case of Ilias and Ahmed v. Hungary, in E. Kuzelewska, A. Weatherburn & D. Kloza (Eds.), Irregular Migration as a Challenge for Democracy, Intersentia, Cambridge, 2018, pp. 99-100.

Hungary's ageing and shrinking society, however, may also need immigrants – similarly to other European countries. However, in the last three years the number of legal immigrants (mainly foreigners who stay in the country for over a year, but also labor migrants who come for shorter periods) has not been on a painful increase. When the stock of this community of foreign nationals is looked at closely, for instance as in 2018, according to the figures provided by the Hungarian Central Statistical Office, most of the migrants came from Europe (64.4 percent), while 27.6 percent were from Asia (44.5 percent of the Asians are Chinese), 3.6 percent from America (57.3 percent of the Americans are from the U.S.A.), 3.6 percent from Africa, and 0.4 percent from Australia and Oceania.[25]

With regard to illegal migration, as Kováts and Sik note about the tendencies of the first years of the new millennium that: "most undocumented immigrants are weekly or monthly commuters from the neighboring countries [working] in the seasonal sectors (agriculture, construction) of the informal economy."[26] Concerning refugees and asylum seekers, 2015-16 tendencies indicated an ever so heavy push on the borders Hungary shares with Serbia in the south and with Ukraine in the north – apart from the constant push on Italian, French, Spanish or British EU-borders. These are borders of the Schengen area of the European Union (EU), meaning the external border of the community, and therefore, here border control is the most comprehensive. Those member states – thus Hungary, too – with external EU borders had to face more challenges in recent years. The 2013 data of Eurostat, the statistical office of the European Union, showed that the number of those asking for asylum in the EU has risen by 50 percent compared with the year before. "The number asking for asylum has increased almost ten-fold compared to last year: some 17,000 by the end of October."[27] As the article of EUrologus on the news portal index.hu of November 12, 2013 also suggested that experts can only guess why it is Hungary where such a huge increase had happened.[28] As of August 2015, more than 100,000 people reached Hungary, which was statistically the highest number ever. It seemed rather obvious that more people traveling from the Near East and North Africa decided to take the "Balkans Route" via Turkey, Greece, Romania, and even more Serbia, ending in Hungary. However, these migrants did not consider Hungary as their country of destination, but more as a transit territory toward Austria and Germany, and even farther towards the Western parts of the old continent. Hungary can still be considered not a "major destination for international migrants".[29] According to a recent study investigating the refugee situation in Hungary offered a conclusion that: "Factors such as income, unemployment, trade or aid did not influence asylum-seekers in their choice of Hungary, nor did the increasing harshness of the Hungarian border, at least until the end of 2015, when the government started building a fence and significantly increased patrols along the border, nor in 2016."[30] The authors of the study agreed with other scholars that many of these asylum-seekers "despite lodging their applications in Hungary, most likely view it as a transit country along their route."[31] As for the numbers from the African continent especially, already in 2017, Hungarian authorities reported that out of a total number of 3,397, 2,532 people arrived in Hungary (comparing sending countries from where at least 5 persons arrived) representing 11 countries: the majority from North Africa, mainly from Algeria (710), Algeria (1,033), Egypt (218) and Tunisia (67). (Hungarian Statistical Office, 2017) Others from Sub-Saharan African territories included: Somalis (331), Ethiopians (32), Nigerians (83), as well as people from Sierra Leone (7), Mali (14), Cameroon (15) and Sudan (22).[32]

[25] Central Statistical Office: Foreigners in Hungary according to continents, countries and gender, as of January 1 of the given year, from 1995, Hungarian Central Statistical Office, 2013. http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_wnvn001a.html?476

[26] A. Kováts & E. Sik, Ibid. p. 163.

[27] Politics.hu: Hungary struggles with huge rise in asylum demands. Politics.hu. November 15, 2013, http://www.politics.hu/20131115/hungary-struggles-with-huge-rise-in-asylum-demands/

[28] Index.hu: Robbanás előtt a Magyar menekülthelyzet [Exploding refugee situation in Hungary], Index.hu, 2013, http://index.hu/kulfold/eurologus/2013/11/12/robbanas_elott_a_magyar_menekult-helyzet/

[29] OECD: International Migration Outlook 2012, Paris, OECD, 2012.236.

[30] A. Tétényi, T. Barczikay & B. Szent-Iványi: Refugees, not Economic Migrants – Why do Asylum-Seekers register in Hungary?, International Migration, Special Issue, November 2018. pp.15-16.

[31] A. Tétényi, T. Barczikay & B. Szent-Iványi, Ibid. p.16.

[32] See: https://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_wnvn002b.html (30 October 2019).

3. Africans in Hungary

The situation was different before the democratic changes of the early 1990s – though not substantially different. As one of the 'closed countries' of the Eastern Pole of the Cold War, being a satellite of the Soviet Union, Hungary did receive thousands of foreigners during the 1970s and 1980s, among which young people undertaking university studies and holding state scholarships from the friendly Hungarian state represented several African countries. When searching for academic pieces in the scholarly literature on migration from Africa to Central and Eastern European countries (CEECs), one can hardly find anything specific to set off from. The pool scarcely covers this system of connections; it is indeed a neglected area of migration research. Most articles speak about African migration to Europe in a historical perspective, but hardly ever make mention of the former Soviet bloc, and this cannot be explained with the seemingly obvious reason of the substantially larger numbers having migrated to the more Western European states (many of them former colonizers) in the course of the centuries. One of the most frequently quoted papers about Africans in Hungary is Larry Olomoofe's book chapter from 2001, which the present discussion also uses mainly because of its original sociological observations, which underline the findings of the research led by the author of the current chapter with his team between 2009 and 2013.[33] Another important and highly relevant piece is the summary of the first results of another ongoing research in Russia led by Dmitri Bondarenko at the Institute for African Studies of the Russian Academy of Sciences. We could not agree more with Bondarenko et al. in pointing out that "without taking migrations to Russia [and to the post-socialist countries of Central and Eastern Europe] into serious account any research on migration processes and their consequences at the European (or wider) level would be *a priori* incomplete and imperfect."[34]

Concerning the geographical distribution of African immigrants in Hungary, the majority can be found in Budapest, the country's political, financial and cultural center. In 2009 this meant about 65 percent of the total African community, in 2010 the figure was almost the same, 61 percent, and it has not substantially changed ever since. The second largest group is about 12-15 percent of the total African immigrant population staying in the Northern counties of the country. Almost all of the Africans live in larger urban settlements, mainly in the bigger university towns or in their agglomeration. As for the total numbers, Figure 2 shows the tendencies between 2001 and 2018. Up until 2000 there had been an increase of African inbound migration with over 2,600 people at its peak in 1998. Figure 3 then compares the number of Africans with the total number of foreigners in the country between 2003 and 2018.

[33] I. Tarrósy: African Immigrants in Hungary: Connection with the New National Foreign Policy, Society and Economy, No. 2, 2014, pp. 285-305.
[34] D. M. Bondarenko, E. A. Googueva, S. N. Serov & E. V. Shakhbazyan: *Postsocialism Meets Postcolonialism: African Migrants in the Russian Capital*, Anthropological Journal of European Cultures, No. 2, 2002, pp. 87-105.

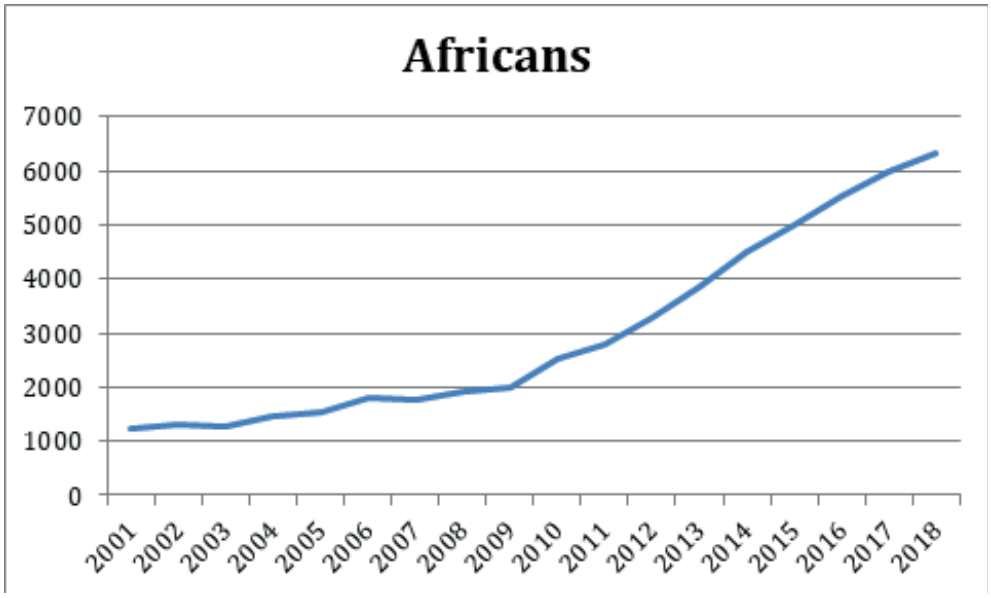

Figure 2. Number of Africans in Hungary between 1995 and 2018

Source of data: Hungarian Central Statistical Office

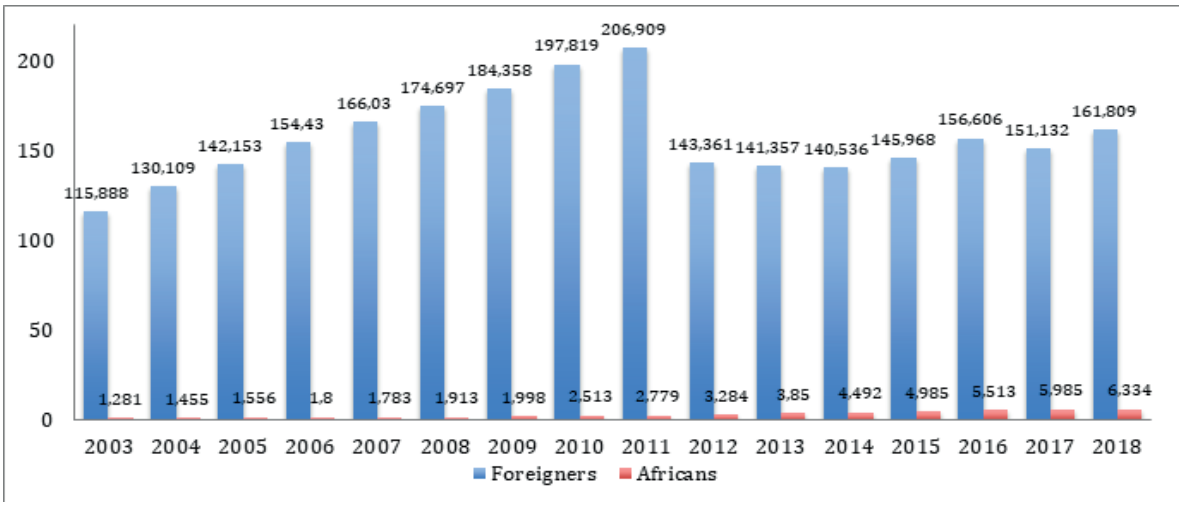

Figure 3. Number of Africans in Hungary in Light of Total Number of Foreigners between 2003 and 2018

Source of data: Hungarian Central Statistical Office

When looking at the countries of origin of legal African migrants in Hungary, a very colorful picture can be drawn as almost all the countries of the continent are represented. As Figure 4 indicates that the majority of the Africans who were staying in Hungary between 2009 and 2010 were from

countries of North Africa. The real figure of this group of Africans was above 40 percent both in 2009 and 2010. As for the most populous nation in Hungary, Nigeria led the list with more than 730 people in 2010. If the goals of migration are examined, out of the total immigrant population officially requesting residence permit during the first nine months of 2012 and the same period in 2013 respectively, 921 and 1,040 Nigerians stated study-related purposes, which meant 10 percent of the total number in the study-related category (altogether 8,927 and 10,400 respectively).[35] With regard to gender statistics, more than two-thirds of all the African migrants were male. In 2017, 20.54 per cent of the African immigrants came from Nigeria and the rest from various African countries.[36]

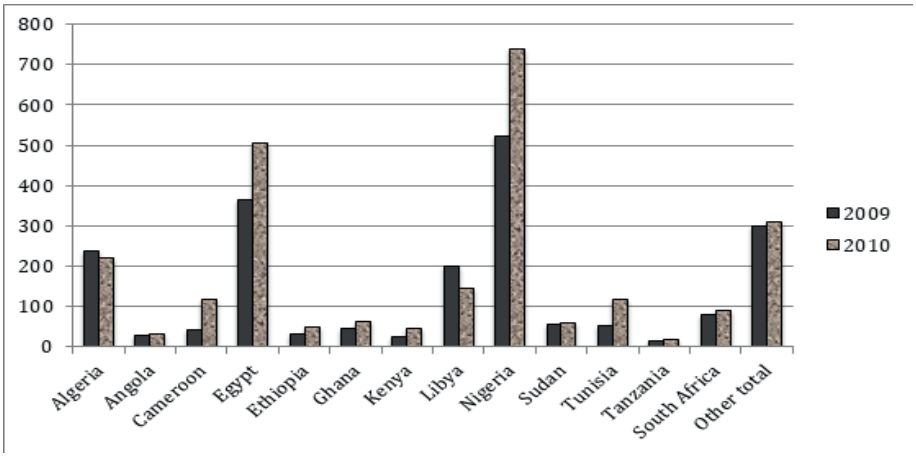

Figure 4. African Immigrants According to Countries of Origin, 2009–2010

Source of data: Hungarian Central Statistical Office

Supporting again Bondarenko et al., similarly to the situation in Russia and other post-Soviet states, "Nigerians are surely most advanced in the sphere of 'diaspora building'"[37] in Hungary as well. Analyzing the African population in the Hungarian capital from the perspective of distinct African identities and potential conflicts, Olomoofe points out that "regional differences, i.e. 'inter-state', and internal ethnic/tribal differences, i.e. 'intra-state', are relegated to a minor position in the daily interactions".[38] It is relevant to talk about a 'community' of Africans also in Budapest, with the obvious inter-state and intra-state differences among its nationals.

As a major sector of activities, the civil sector offers the opportunities for creating a community of black people. A 2011 IDResearch survey also confirmed that legal African migrants in Hungary are active in the cultural and NGO sectors, and they take part in humanitarian and philanthropic activities – for example, make efforts to fundraise (either in financial or in-kind terms, or both) for schools, orphanages in different African countries (mostly their countries of origin). France Mutombo, a Congolese-born Adventist pastor with a Hungarian wife has been one of the most active Africans in the country.[39] For more than 15 years he has been running the NGO Foundation for Africa, with which he manages a school and an orphanage in Kinshasa, Democratic Republic of the Congo.[40] He also arrived in Hungary to earn a university degree in the 1990s, and has become

[35] Based on the statistics of the Office of Immigration and Nationality (2013). http://www.bmbah.hu/statisztikak.php.
[36] Hungarian Central Statistical Office, 2018. http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_wnvn001a.html?476
[37] D. M. Bondarenko, E. A. Googueva, S. N. Serov & E. V. Shakhbazyan, Ibid.
[38] L. Olomoofe: Africans in Budapest: an emerging subculture?, in: P. Nyíri et al. (Eds.), Diasporas and Politics, Budapest, MTA PTI, Centre for Migration and Refugee Studies, 2001, p. 63.
[39] The interview with France Mutombo was published in the Hungarian African Studies journal in 2009, see. "France Mutombo", *Afrika Tanulmányok* 3(2), p. 56-62.
[40] I. Tarrósy: It Can Also Be Done from Central Europe – Hungarian Humanitarian Involvement in the Democratic Republic of the Congo, CIHA Blog May 4, 2013, http://www.cihablog.com/it-can-also-be-done-from-central-europe-hungarian-humanitarian-involvement-in-the-democratic-republic-of-the-congo/.

a well-known African across the country showing a positive example to the Hungarian society at large about the substantial contributions and impact immigrants can make in their chosen new home country and beyond.

Drawing upon Olomoofe, the idea of a community of black people in Budapest "is constructed by 'outsiders', which hints at the existence of a racial/ethnic discourse, similarly to that about the Roma, within which black people are placed by the locals." He argues that, "although many of these people have not encountered explicit racist behavior, implicit experiences of racism force Blacks together, creating a sense of solidarity."[41] All this was affirmed by many of the interviewees of an IDResearch project. Teddy Eyassu, for instance, an Ethiopian with a PhD in International Relations from Corvinus University of Budapest was attacked by skinheads in 1992 – two years after he had arrived in the country. The case was taken to court, and Teddy asked the judge to pardon those who beat him up. After the incident he developed friendship with the former attackers. In his interview,[42] Teddy recounted the following story:

> *You can see other instances when Africans are offended still today. Two-three weeks ago, for example, one of the students who came to study in Budapest with a scholarship told me that he went to a pub with some friends. They saw a company there who was talking about them, which they did not understand because of their very limited Hungarian, but suddenly they heard them saying 'néger, néger' [meaning nigger]. Some members of that group had their cigarettes half smoked, then, threw the rest onto the shirt of one of the African boys. One of the attackers held a chair above his head intending to have a fight using it, and they all cried 'monkey, monkey'. […] There are atrocities, but you cannot generalize. This is truly not a feature of Hungarian society at large.*

The term 'néger' is commonly used for black people, and as Olomoofe rightly underlines, "is perceived as neutral by most people."[43] It is in the Hungarian language, most probably deriving from centuries-long non-experience and knowledge about black people in general, that it does not have the negative connotation black people attach to it. This negative connotation is rather attached to the word 'nigger', which is also used in the language, but that is a very offensive term.

Among other factors, the "attitude of the natives does turn out a significant factor of migrants' adaptation / non-adaptation"[44], and for any successful integration from both sides open-minded and inclusive attitudes and perceptions are desirable. A well-known media personality, Sorel-Arthur Kembe, who has appeared on numerous TV channels either as an actor in soap operas, or a reporter in talk shows, is a son of a Congolese father (from Congo-Brazzaville) and a Hungarian mother. His father also migrated to Hungary for study purposes in 1973, and as opposed to many of his classmates who returned to their home country, he stayed and established his family. In an interview with the journal *Afrika Tanulmányok*, Sorel recalled his feelings about the atrocities he had experienced at the early 1990s: "I went through an interesting character development those days. First, I was afraid of the skinhead fellows, then, became angry with them, finally, I turned into unconcerned and rather impassive about them."[45]

Most scientific views on contemporary Hungarian society, which is considered as ethnically homogeneous – apart from a rising percentage of the Roma, which is the largest ethnic minority in the country – seriously calculate with xenophobia in the context of immigration. "Homogeneity and closedness are partly the explanation of the stable and relatively high level of xenophobia which

[41] L. Olomoofe, Ibid.
[42] Also published in the Hungarian African Studies journal in 2009: "Tadesse Eyassu." *Afrika Tanulmányok* 3 (3-4), p. 42.
[43] L. Olomoofe, Ibid.
[44] D. M. Bondarenko, E. A. Googueva, S. N. Serov & E. V. Shakhbazyan, Ibid. p.12.
[45] Interjú: Kembe Sorel-Arthur sportoló, műsorvezető, színész. *Afrika Tanulmányok* 5(3), p. 82, 2011.

has increased after the fall of Communism."[46] As Hárs and Sik report, "time series analysis of the level of xenophobia shows that one third of the Hungarian population would close Hungary's borders (open xenophobes). […] The opposite group ("super-liberals") is rather small (3%). The third group ("realists") contains approximately two-thirds of the Hungarian population and has always been the dominant group."[47]

Sliman Ahmed from Mauritania, who as a former socialist state scholarship holder obtained his degree in Engineering from the Budapest University of Technology in 1976, has always had a very positive view. As one of the most active NGO leaders being the president of the Sahara Foundation, he says he has a lot of Hungarian friends and supporters.

> *I can only say positive things. Hungarians are hospitable and helpful. I saw Africans speaking only in English and asking for help in the street, the Hungarian they approached was using his arms and legs just to offer help in showing the requested direction. […] If I ever return to Mauritania for good I will certainly bring along with me this Hungarian mentality and culture.*[48]

"To us, Hungary is our second home and irrespective of the fact that we were not born here, we live here, we have our families here, and we have exactly the same problems as our Hungarian friends," comments on his identity Josephat Rugaika, President of the Hungarian Society of Tanzanians.[49] The young NGO with its experienced management – President Rugaika came to Hungary in 1975 to earn a university degree in Chemical Engineering – wants to build on the embracing attitude that was prevailing in the 1970s among the African migrants of the time. "There were different student associations for Kenyan, Ugandan and Tanzanian students, but we came together often to celebrate as a big family. This has not changed a thing; today we act in the same way. We consider, for instance, the Kenyans as our brothers and sisters".[50]

Many of the Africans who got their university education during the 1970s, 1980s and 1990s married Hungarians, and established their families in Hungary. Some of them draw our attention to another linguistic peculiarity, the outdated term 'félvér' (half-blood), which is still in use when referring to their children. Raymond Irambo, working today as an electrical engineer, who arrived in Hungary as another state scholarship holder from Congo-Brazzaville in 1982 feels that the Hungarian term possesses a negative connotation, in particular how it was used in kindergarten, as he remembers how the teachers uttered it when talking about his children. The majority of second-generation African-Hungarians prefer being called 'white coffee' to 'half-blood'. Irambo's children think their father is the coffee, their mother is the milk, and they are these two in one.[51]

4. Foreign Policy of 'Global Opening'[52], the Potential for an 'Africa Policy'[53], Hungarian Africans and the Government's "Africa Strategy"

A rather self-confident step toward the implementation of a 'global opening' to the rapidly changing world was taken by the Hungarian government taking office in 2010. A new position of 'Deputy State Secretary for Global Affairs' was established within the Ministry of Foreign Affairs, underscoring the strong intention to bring about changes in foreign policy and to reposition Hungary on the world map. A strategic document got green light after the Hungarian Presidency of the Council

[46] E. Sik & I. Zakariás, Ibid.
[47] Á. Hárs & E. Sik, Ibid. p.101.
[48] Excerpt from the interview published in Afrika Tanulmányok, see:. "Interjú Szliman Ahmeddel, a Szahara Alapítvány vezetőjével." *Afrika Tanulmányok* 4(2): 64, 2010.
[49] A. T. Horváth: Interjú Josephat Rugaikával, a hazánkban élő tanzániaiak doyenjével [Interview with Josephat Rugaika, the doyen of Tanzanians in Hungary], Afrika Tanulmányok, No. 3, 2012, p. 40.
[50] A. T. Horváth, Ibid. p.38.
[51] For more about Raymond Irambo and other Africans in Budapest see: J. Lángh: Budapesti afrikaiak [Africans in Budapest], Afrika Tanulmányok, No. 3, 2011, pp. 70-77.
[52] I. Tarrósy & Z. Vörös: Hungary's Global Opening to an Interpolar World, *Politeja*, No. 2, 2014, pp. 139-162.
[53] I. Tarrósy & P. Morenth: Global Opening for Hungary – New Beginning for Hungarian Africa Policy, *African Studies Quarterly*, No. 1-2, 2013, pp. 77-96.

of the European Union was handed over to the forthcoming Troika-member Poland for the second half of 2011. In one of the most important foreign policy strategies since the political regime change, the Hungarian state clearly argues for a policy of 'opening' to the increasingly global and transnational world. It fosters the strategic decision about Hungary's redefined stance on the 'East', including China, Russia and Central Asia, as well as the Middle East, but also on sub-Saharan Africa. In light of both a progressively evolving global 'actorness' of the EU on the supranational level and reaffirmed cooperation with the Visegrád countries, pursuing a stronger representation of regional interests, Hungarian foreign policy has a new perspective.

Within this context, Hungary wished to formulate its "own" 'Africa policy' – as one can be assured reading the policy document of global opening.[54] Good reputation and a wide network of personal contacts in many countries of Africa can certainly contribute to successful implementation, if the approach goes further beyond official government rhetoric. Those young Africans who arrived in Hungary during the 1960s, 1970s and 1980s with scholarships from the Hungarian state represent "an unbreakable link between our country and the continent," according to the introductory text of the Budapest Africa Forum held between June 6-7, 2013, celebrating the 50th anniversary of the foundation of the Organization of African Unity (OAU), predecessor of the African Union (AU). These individuals – who, as Hungarian graduates with partial Hungarian identities, or at least with the feeling of attachment to their former alma maters and Hungarian culture, also bearing the knowledge of the local language – can function as "ambassadors" to foster bilateral ties. The policy of global opening has a definite intention to do this by admitting that "Hungary needs to review how to address the problems arising from the short-comings of our network of representations in Sub-Saharan countries," and underlining that more diplomatic representation is needed for success.[55] On October 29, 2013, State Secretary Péter Szijjártó informed the Hungarian News Agency MTI that Hungary reopened its embassy in Abuja.[56] Today, the country operates 6 embassies across Sub-Saharan Africa. The latest it opened was in Luanda, Angola, where after more than three decades the Hungarian Prime Minister finally intended to pay a visit at the end of March 2019.[57] Despite serious diplomatic efforts, the bilateral meeting did not materialize, instead, the Primes Minister visited Cape Verde.

Hungary has a positive image in numerous African countries from two angles: first, it did not take part in Africa's exploitation as a colonial power in a direct way (of course, it cannot escape from being part of the imperialist project as part of the Austro-Hungarian Monarchy), second, with many of its former products, such as the Ikarus buses or Hajdu washing machines, and even the Elzett locks and the streamlined diesel rail cars of the Ganz company can hold extra credits for refining and redefining relations. A good combination of utilizing 'nostalgic' feelings both of university studies and products, the resident African diaspora in Hungary representing many nations, together with a strengthened and extended network of diplomatic representations as part of a coherent and consistent government policy, is the ingredients of success in the long run. All these, however, need to be coupled with direct and immediate commitments (as in the case of the Libyan crisis) as an EU and NATO members state.

Hungary has several serious and direct security policy and geopolitical concerns and interests, as far as migration, peacekeeping or NATO duties are taken into account. In the spring of 2013, the Hungarian government took part in the French-led military operation 'Serval' in Mali with experts of the Hungarian Armed Forces.[58] Also for Sub-Saharan African refugees, Hungary can be a poten-

[54] Ministry of Foreign Affairs of Hungary: Hungary's Foreign Policy after the Hungarian Presidency of the Council of the European Union, Budapest, 2011, http://www.kormany.hu/download/e/cb/60000/foreign_policy_20111219.pdf.
[55] Ministry of Foreign Affairs of Hungary, Ibid. p. 48.
[56] See: http://www.kormany.hu/en/prime-minister-s-office/news/hungary-reopened-its-embassy-in-abuja (30 October 2019).
[57] See: https://hirtv.hu/hirtv_gazdasagi_hirei/szijjarto-tobb-magyar-vallalat-is-beruhazasokat-hajthat-vegre-angolaban-2478193 (30 October 2019).
[58] HVG: Magyarok Maliban: megjelent a kormányhatározat [Hungarians in Mali], HVG, 2013 http://hvg.hu/itthon/20130308_Magyarok_Maliban_megjelent_a_kormanyhatar

tial target-country (in hypothetical terms rather, as long as more extended diaspora linkages offer better solutions in other countries across Europe). Organized crime, international terrorism, AIDS and tropical diseases can all reach Hungary, too. Therefore, to contribute effectively to the stability of the region and to reduce poverty in the long run is Hungary's best interest, while at the same time, presents a crucial moral obligation as well.

One of the most heated contemporary debates in the European Union is related to the ongoing refugee crisis. It is rather for internal (national) political gains to label asylum-seekers as 'illegal economic migrants', however, the entire issue of increased international migration needs to be taken seriously, but holistically, with all its complexities. "As long as there is violence in the respective countries of origin, asylum-seekers will continue to apply for refugee status in Hungary [too]."[59] Concerning any future Hungarian Africa policy, the migrant communities and the diaspora-related ties in general certainly need to be revalued in the coming years. As an additional element, building up future connections, soft power can play a role also in the case of Hungary. Education and research are key factors in the reshaping of Hungary's African presence, which can be a basis for further cooperation in the long run. Bilateral educational, cultural, and scientific agreements have been of great importance for Hungary for decades. The new Stipendium Hungaricum[60] public scholarship programme, thus represents one of the most significant tools for the pragmatic foreign policy of Hungary and for the evolving Africa policy as well. It is basically a revitalisation of the scholarship programme of the immediate Socialist past. It was presented that a number of African countries Hungary's relations had become loose after the regime change, but according to the government, these are "easy to rebuild, as nowadays young people [from] Africa [...] who have done their studies in Hungary keep good and extremely pleasant memories of the country and are more than ready to engage in cooperation."[61] By developing the Stipendium Hungaricum programme as a soft-power tool, Hungary's main goal is to be able to develop economic relations and increase its economic strength. At the Hungarian embassies, special commercial auxiliaries and experts have been pursuing targeted activities to increase the volume of trade. The MNKH Hungarian National Trading House Cls. is also responsible for the development of economic opportunities. Moreover, further important actors of the foreign-economy government machinery, such as the Hungarian Export-Import Bank Ltd. (Eximbank), the Hungarian Export Credit Insurance Company Ltd. (MEHIB), and the Hungarian Investment Promotion Agency (HIPA) also back these efforts.

As of April 2, 2019, the Hungarian government published its 22-point "Africa Strategy", which first and foremost is an export-oriented approach towards Sub-Saharan Africa. It also deals with other types of involvement ranging from continued participation in peacekeeping operations to providing an increasing number of scholarships to African students, to international development projects in the fields of water management, infrastructure development, cyber security and health sector-related technological contribution – to name a few.[62] Although this is definitely an important list of direct and concrete involvement activities, which can strengthen Hungary's commitments to African development, too, more obvious policies and actions are needed to reach out to the African diaspora living in the country and get them on board to intensify bilateral and multilateral relations with the respective African countries.

[59] A. Tétényi, T. Barczikay & B. Szent-Iványi, Ibid. 16.
[60] See: http://studyinhungary.hu/study-in-hungary/menu/stipendium-hungaricum-scholarship-programme (30 October 2019).
[61] Országgyűlés Külügyi Bizottsága [Committee on Foreign Relations of the Hungarian Parliament], 2015, 7.
[62] See in detail: Government of Hungary: About the Africa Strategy [Az Afrika stratégiáról], A Kormány 1177/2019. (IV. 2.) Korm. határozata az Afrika stratégiáról, in, Magyar Közlöny, No. 56., 2019.04.02., pp. 1861-1864.

5. Conclusions

"From the 1950s through the 1980s," as Kane and Leedy phrase, "migration [from Africa] to Europe followed the historical connections between colonial powers and their former colonies."[63] It is, however, not only because of, as they suggest, "the tightening of immigration laws in France and Britain at the end of the 1980s" that "migrants (especially refugees) began to land in countries without any colonial ties to their countries of origin." As this paper has argued, the major political relations of the bipolar world did influence the migration of Africans toward the Eastern bloc of Europe and the Soviet Union from the 1960s up until the 1990s. Agreeing with Bondarenko et al., "in the global scale the coming of the postsocialist and postcolonial worlds in such a direct touch with each other makes clearer the complex and contradictory nature of globalization,"[64] and that of international migration as part of it.

Hungary offers a unique case for migration research. The country's rather closed (due to the former socialist era among others) and homogenous society did not accumulate experience and knowledge about foreigners from faraway lands, for instance, from China, Vietnam, or sub-Saharan African countries. However, with the change of the political system at the end of the 1980s, the country has been encountering different flows of foreign nationals – but most of the immigrants are from Europe, and with a Hungarian ethnic background from neighboring countries. Not only the majority population, but also institutions of Hungarian public administration need to become more prepared for new groups of immigrants. This is of prime importance as the push of irregular migration, especially refugees and asylum seekers since 2015 has grown along the Schengen borders of the country (about half of its 1,400 mile-long national border). Apart from this new push, however, and as opposed to false perceptions, Hungary is still not a target for immigrants; rather a transit country. Besides, it is again an emigrant country – similarly to some previous historic periods. Recent figures show that "the proportion of adult Hungarians working abroad or choosing to live in foreign countries has tripled in the past two decades".[65] Hungary again is "losing its best and brightest".[66]

As many have said already what Kofi Annan formulated as: "there can be no doubt that European societies need immigrants," the majority of whom are "industrious, courageous and determined. […] They are not criminals. They are law-abiding. They do not want to live apart. They want to integrate, while retaining their identity."[67] African immigrants in Hungary are no different from this. Although there are no exact figures about their professional composition, from surveys and NGO activities (mainly events and reports) it can be stated that a large group of them are well educated and highly qualified, many of them holding university degrees. Through their personal and organizational networks – as they are active in the NGO sector – they can make valuable contributions to Hungarian society, as well as to the development of bilateral connections and cooperation between their sending countries and the chosen new home country, in particular, to the success of the foreign policy of 'Global Opening' with its newest chapter on 'Southern Opening'. The case of Budapest proves how they have constructed a 'black community', and as Olomoofe observes, a "distinct 'Black Budapest sub-culture'."[68] Even the government intends to approach and activate them to help build bridges as part of this new foreign policy doctrine.

The education of young people and efforts to include relevant information about international migration and the immigrants themselves in school curricula in the long run can be a key to clearer

[63] A. Kane & T. H. Leedy: African Patterns of Migration in a Global Era. New Perspectives, in: A. Kane & T. H. Leedy (Eds.), African Migrations. Patterns and Perspectives, Bloomington, Indiana University Press, 2013, p. 2.
[64] D. M. Bondarenko, E. A. Googueva, S. N. Serov & E. V. Shakhbazyan, Ibid. p. 17.
[65] Politics.hu: Survey finds number of Hungarians mulling emigration tripled since regime change." Politics.hu, 2013b http://www.politics.hu/20130221/survey-finds-number-of-hungarians-mulling-emigration-tripled-since-regime-change/
[66] Z. Dujisin: Hungary Losing Its Best and Brightest, Inter Press Service, May 23, 2013, http://www.ipsnews.net/2013/05/hungary-losing-its-best-and-brightest/.
[67] K. Annan: Migrants can help rejuvenate Europe, Financial Times, January 28, 2004.
[68] L. Olomoofe, Ibid.

understanding of the complexities of migration, and to successful integration.

All these are especially relevant, as the Hungarian government has been firmly advocating a country without immigrants in the future.

Regulation on Unjustified Geoblocking: A Hardly-Existing Market Facing a Hardly-Existing Challenge?[1]

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The article presents a hypothesis that the scope of the regulation on unjustified geoblocking and its provisions address the challenges which had been previously identified under the term geoblocking to only a very limited extent. It can be interpreted as the result of the semantic shift concerning what is understood as geoblocking, which can be observed in European Union documents, leading to the exclusion of copyright protected content from the scope of the regulation. The article shows this process and the consequences of adopting such a limited approach towards geographic discrimination within the digital single market for the provisions of the regulation on unjustified geoblocking. Moreover, the article presents the alternative to the anti-geoblocking regulation, namely the provisions of the regulation on cross-border portability of online content services in the internal market. It shows how the concept of portability may actually create borders in the digital single market instead of removing them. The article concludes with a section which focuses on considering whether a regulation on geoblocking might be perceived as a tool to combat hardly-existing obstacles to a hardly-existing European digital single market.

Keywords: geoblocking, portability of digital content, digital single market

1. Introduction

The presence of the term 'geoblocking', or 'geo-blocking' – as both forms appear in the European Union documents and legal acts – can be quite easily traced back. It emerged no sooner than in a 2012 Communication from the Commission *On content in the Digital Single Market*,[2] only to disappear for three years, and return in a number of documents in 2015. Since then, it seems to have paved its way through the EU law. The number of EU documents which mention the term 'geo-blocking' peaked in 2016, with 51 acts mentioning it.[3] In the same year unjustified geoblocking achieved a status of a phenomenon which was proposed to be regulated by what, two years later, became the regulation 2018/302 on unjustified geoblocking (hereinafter the regulation on unjustified geoblocking).[4]

The concept of implementing a regulation on unjustified geoblocking may be perceived as the acknowledgment of the significance of avoiding discrimination on the basis of nationality in the Internet within the EU. However, even though geoblocking certainly became an inherent element of discourse surrounding the realization of the digital single market for Europe, the actual understanding of this term in EU law is still debatable. On the one hand, from the legal perspective, it has

[1] The research was financially supported by the grant for young researchers on the Faculty of Law and Administration of the University of Warsaw.
[2] European Commission, *Communication from the Commission. On content in the Digital Single Market*, COM/2012/0789 final.
[3] Calculation on the basis of eur-lex.europa.eu repository.
[4] EP and Council Regulation 2018/302, OJ 2018 L 60I/1.

to be noted that the regulation itself does not define geoblocking. Therefore, its precise meaning has to be interpreted from the provisions of the regulation. On the other hand, from the perspective of the common understanding of this term, geoblocking practices usually refer to the situation when a customer cannot access certain content due to the copyrights related restrictions.

The clash between these two perspectives on the meaning of the term geoblocking could be illustrated by a brief promo-video realised as a part of the campaign promoting the regulation on unjustified geoblocking. It was meant to present obstacles which are experienced by the customers trying to purchase goods from other member states. The MEP and rapporteur on the geoblocking regulation, Róża Thun, prepared and published a video showing a customer trying to purchase a ring. Every click on a website is answered with a pop-up window. The information on the screen says that the price is higher for the customer from his country, that access to the website and the payment method are unavailable from his location etc.[5] Finally, the customer somehow manages to order a ring. However, he is forced to pick up his order in other member state, due to delivery limitations. The MEP comments: 'This is exactly this infelicitous geo-blocking'. In the light of what is the usage of the term geoblocking in its common understanding, it seems reasonable to ask: but is it, really?

The video illustrates a problem which seems to have appeared between the first time the term geoblocking emerged in EU documents, and the moment in which the regulation on geoblocking was adopted: what seems to have disappeared in the process of regulating unjustified geo-blocking is the initial – and still the common – meaning of this term. It is hard to say if the customer from the video is actually satisfied with the fact that he managed to order the selected item, or is dissatisfied with the fact that he has to drive to another member state to pick it up. However, as the video certainly shows, a semantic shift has emerged in terms of understanding what geoblocking practices are. Between the first appearance of the term in EU documents and the adoption of the regulation of unjustified geoblocking, the process of defining practices of geographical discrimination seems to lead to the removal from the scope of their definition the feature most commonly associated with geoblocking issue, namely the access to digital copyright protected content.

In the article I present a hypothesis that the scope of the adopted regulation and its provisions only to a very limited extent address the challenges which had been previously identified as geoblocking. For this reason, their impact on the creation of the digital single market seems to be questionable. In order to present my argument, in the second section of the text, I show how the meaning of the term geoblocking has been changed and what are the consequences of adopting an approach such as the one implemented in the regulation on geoblocking. In the second section I present the scope of the obligations which were implemented in the regulation on unjustified geoblocking. In the third section, I attempt to present the regulation 2017/1128 on cross-border portability of online content services in the internal market (hereinafter the regulation on cross-border portability)[6] as an alternative means to approach geoblocking practices. I will illustrate how the solution adopted in this regulation may actually create borders in the digital single market, instead of removing them. The article ends with a concluding section in which I try to consider whether a regulation on geoblocking might be perceived as a tool to combat hardly-existing obstacles in the hardly-existing European digital single market.

[5] Róża Thun, 'Zakupy w internecie - Róża Thun #geoblokowaNIE' (Youtube, 11 December 2016) https://www.youtube.com/watch?v=rPgc8qy6muU (30 November 2018.

[6] EP and Council Regulation 2017/1128, OJ 2017 L 168/1.

2. Geoblocking: Meaning Lost While Regulating?

This section of the article aims to present the process in EU documents and law, by which the initial meaning of the term 'geoblocking' has changed. When it first appeared in the Commission's communication *On content in the Digital Single Market*, it was used as an example of practices which impede cross-border access to content and the portability of services. The examples which were directly mentioned in the Communication were cloud-computing, cloud-stored content and services linked to these technologies. Moreover, the Communication referred to licensing and its territorial character:

'Both multi-territory and single territory licensing is possible, depending on the sector, the service provider and the rights holder. However, distribution of content is often limited to one or a few Member States (e.g. using geo-blocking), with service providers (online platforms) or rights holders electing to impose cross-border sales restrictions'.[7]

The term geoblocking appears in the Communication as a description of set of tools which are used in order to limit the distribution of content. Evoking geoblocking in the context of territorial licensing indicated its link to copyright protected works. It seems reasonable: intuitively and on the basis of an average internet-user experience, geoblocking practices occur when searching for foreign content on Youtube. The communication names online platforms as service providers and rights holders as subjects responsible for imposing geographical restrictions. This stresses the perspective which was initially adopted on the phenomenon of geoblocking as linked to the customer's experience of limited accessibility of creative content.

However, this intuitive meaning of geoblocking was changed when the Commission put e-commerce under scrutiny by, among others, ordering research which was supposed to define the forms and scale of geoblocking in the digital single market. Research was summed up by a study almost 200 pages-long; *Mystery shopping survey on territorial restrictions and geo-blocking in the European Digital Single Market*.[8] The report refers to copyrights once, as the authors claim that: 'Since geo-blocking in digitally delivered media content can usually be justified by copyright, the study focused only on tangible goods and online services to be used offline'.[9]

Taking into consideration the fact that initially geoblocking is mentioned in strict relation to delivering digital content and to territorial licensing, it seems suspicious to up front resign from the analysis which would actually consider these aspects of the phenomenon. Technically, as presented in the next section, the challenges of conflicting interests between the rights holders and consumers in terms of limiting access to copyright protected content were addressed by a separate regulation on cross-border portability (analysed below). It does not change the fact, that focus on tangible goods and services available offline seems to be not an obvious choice when conducting preliminary research on geoblocking, which was supposed to support creating an evidence-based regulation.

What have been subjected to the research were the practices, which have become a new meaning of the term 'geoblocking'. Firstly, the denial of access to a website to which the customer sought an access when shopping online. Secondly, automatic re-routing, when a customer is without his or her consent redirected to another version of the website. Thirdly, changing the terms and conditions which refer to the transaction on the basis of the customers location. Last but not least, changing prices depending on the customer's location. Those categories have been translated into a research issues, namely practices related to access (including denial of access and automated rerouting), reg-

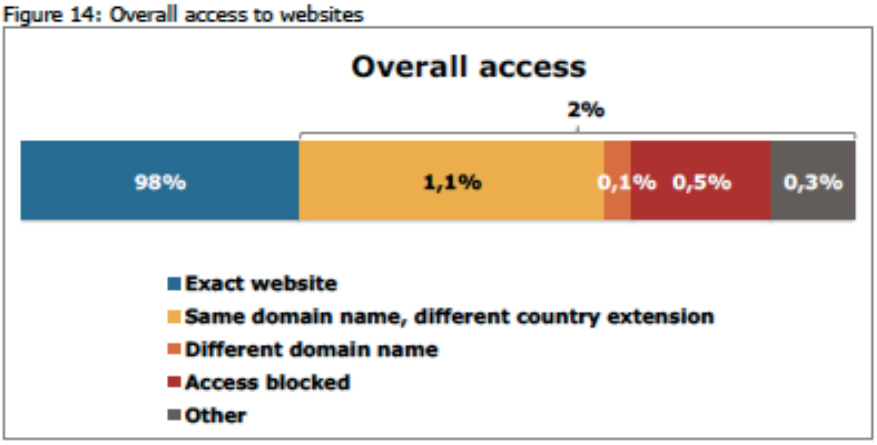
[7] European Commission, *Communication from the Commission. On content in the Digital Single Market*, COM/2012/0789 final.
[8] GfK Belgium PS for European Commission, *Mystery shopping survey on territorial restrictions and geo-blocking in the European Digital Single Market. Final Report*, Luxembourg 2016.
[9] Ibid, p. 9.

istration, delivery and payment. Such distinctions between the subsequent steps which take place during the transaction seem to be problematic, as *e.g.* problems with registration were often caused by providing a delivery address in a foreign country. Therefore, it seems not obvious whether they should be classified as a separate issue, or maybe a challenge which results from the limited number of countries to which a retailer sales his or her goods. However, the classification introduced in the report is the one which has been repeated in the report from the European Commission's sector inquiry into e-commerce:

'However, it is frequently not possible for consumers to make cross-border online purchases because retailers refuse to sell to customers abroad, for example by blocking access to websites, re-routing customers to websites targeting other Member States or by simply refusing to deliver cross-border or to accept cross-border payments. These measures are known as "geo-blocking"'.[10]

What is also striking in the report – except for the way that geoblocking was defined and therefore, what was subjected to the research – is how collected data is presented. The charts are often structured as though they were meant to exaggerate the presence of discriminatory geoblocking practices ongoing on the internal market. The chart below illustrates a peculiar choice considering the scale which has been implemented for data visualization. Even though the overall result of the survey, which relates to access to websites, indicate that not more than 2% of websites could not have been instantly accessed by users from the locations indicated by the researchers[11], a disproportionally long part of the chart represents this result. When screening the report, one may get an impression, that collected data unambiguously show dramatic level of unjustified discrimination of customers from other member states on a European digital market.

Figure 14: Overall access to websites



Source: Q11 - Please RIGHT CLICK on the website link and open it in a new INCOGNITO tab. If you are not sure how to open an incognito tab, please refer to the briefing instructions. When you clicked on this link, were you sent to the exact website? N = 10537, weighted data

Print screen from the GfK Belgium PS for European Commission,

Mystery shopping survey on territorial restrictions and geo-blocking in the European Digital Single Market. Final Report, Luxembourg 2016, p. 48

Moreover, if one was to trust if not the charts, but the numbers presented in the above-described mystery-shopping survey, we may be disappointed with the actual frequency of some of what is described as geoblocking practices. Over 98% of the websites could be accessed without any sub-

[10] European Commission, *Report from the Commission to the Council and the European Parliament. Final report on the E-commerce Sector Inquiry*, Brussels, 2017, COM (2017) 229 final, p. 12.

[11] As explained in the report, the command to open the website in an incognito tab was a precautious measure to block any other sources of the customer's location iden-tification except the location indicated by IP number selected through the VPN usage.

stantial problems,[12] 92% of websites do not require the user to register prior to purchase,[13] 5% of the websites showed higher price for cross-border purchases prior to the registration, and 13% of the websites showed higher prices for cross-border purchases after the registration.[14] What appears to be the most common and simultaneously serious problem are delivery restrictions: 26.4% of pages did not offer delivery except within the country of the retailer.[15]

It shows that the way of presenting the outcomes of the research is not irrelevant. Especially in this case, the impact of the study on the shape of regulation on unjustified geoblocking is very clear. The approach adopted in regulation on unjustified geoblocking strongly resembles the conclusions of the study *Mystery shopping survey on territorial restrictions and geo-blocking in the European Digital Single Market* as it addresses discrimination in regard to access to interfaces (Art. 3), certain elements of discriminatory practices in regard to access to goods and services (Art. 4) and discrimination for reasons related to payment (Art. 5). While not providing the legal definition of geoblocking, its scope illustrates what is understood by this term. Interestingly, it mentions copyright protected works, as a potential subject of broadening the scope of regulation on unjustified geoblocking due to a planned review which is supposed to take place by 23 March 2020.

It may be noted that the meaning of the term 'geoblocking' on the one hand is understood as a broader range of situations than it seemed initially. According to the regulation on unjustified geoblocking it includes practices which may occur in e-commerce considering both goods and services. Due to the inclusion in the regulation provision on the obligatory review in regard to a possible broadening of the scope of the regulation to the services, the main purpose of which is, providing an access to copyright protected works, it seems that the initial meaning of the term is not entirely lost. On the other hand, it must be stressed that the term has not been initially used to describe the practices, which it does now. Already by 2013, a study *Discrimination of Consumers in the Digital Single Market* described: 'three practices which discriminate against groups of consumers are common: refusal to sell, automatic re-routing, and the unjustified application of different terms and conditions'.[16] However, they were not described as geoblocking. Still, the regulation on unjustified geoblocking may have a very limited impact on those phenomena as well as on the retailers' willingness to participate in cross-border e-commerce: from the perspective of the entrepreneur, it seems not to facilitate conducting business on international scale. It actually imposes more obligations for traders who would like to open their economic activities to customers from other member states, which are described in detail in the following section.

3. The Missing Pieces in the Regulation's on Unjustified Geoblocking Provisions

The actual scope of customers' rights (or: sellers' obligations) which are implemented in the regulation on unjustified geoblocking is quite limited. Firstly, according to Art. 3 of the regulation on unjustified geoblocking, the trader is obliged to ensure that the customer is not blocked in terms of accessing the website of the retailer and that the customer is offered access to the version of the website that he or she was seeking access to (no automatic re-routing).[17] This means that *e.g.* when a customer from Slovakia wants to access the German version of the website, there should occur no automatic re-routing to the Slovakian version.

Secondly, as stated in Art. 4 of the regulation, the retailer should not apply different general conditions of access to goods or services, for reasons related to a customer's nationality, place of resi-

12 GfK Belgium PS for European Commission 2016, p. 48.
13 Ibid, p. 77.
14 Ibid, p. 102.
15 Ibid, p. 113.
16 European Union, *Discrimination of Consumers in the Digital Single Market*, 2013, IP/A/IMCO/ST/2013-03, p. 27.
17 EP and Council Regulation 2018/302, OJ 2018 L 60I/1, Art. 3.

dence or place of establishment in three cases enumerated in the regulation: (1) when the customer seeks to buy goods from a trader and those goods are delivered to the customer's location or goods are collected at a location on which both sides of the transaction agreed upon on the basis of the general conditions of access; (2) in cases of providing electronically supplied services except for the services which main feature is provision of access to, and use of, copyright protected works. Such scope of the regulation excludes copyright protected content, which makes it hard to understand what kind of electronically supplied services may be actually subjected to the regulation.[18]

Finally, the third case included in the regulation on unjustified geoblocking is the provision of services other than electronically supplied services on the territory of a trader's member state.[19] Thirdly, traders are obliged to ensure equal access to the methods of payment for the customers, without any discrimination depending on their nationality, place of residence of place of establishment. However, the seller may decide upon in which currencies he or she accepts the payments.[20]

When confronted with the results of the mystery shopping study presented above, the provision of the regulation seems to address hardly-existing challenges. Firstly, blocking the access to websites and re-routing practices occurred in less than 2% of situations. Secondly, the differentiation of the general conditions of access to goods and services – concerning mostly the price of goods or services – was identified in 5% (prior to registration) and 13% (after the registration) of cases. However, as the regulation allows offering different general conditions of access, including net sale prices, for the customers from different member states on a non-discriminatory basis,[21] its impact on those practices may be limited. The differentiation would have to be examined on a case-by-case basis in order to determine whether it can be justified by *e.g.* varying legal conditions between the member states.

It is too soon to try to determine the impact of the regulation on unjustified geoblocking on cross-border e-commerce in the EU. However, what can be drawn from the analysis presented above are the areas which are excluded from even the possible impact of adopting this legal act. Focus on goods and services which are not linked to copyright protected works is an effect of a shift which occurred in terms of understanding what geoblocking practices actually are. According to the adopted approach, it is rather about the customer trying to purchase an item, than about the customer trying to watch a Youtube video. The question which I try to answer in the next section is whether such an approach has been complemented by the adoption of other means which could facilitate access to copyright protected content across the EU: which seems to have been the initial goal of combating geoblocking on the European digital single market.

4. Do the Best Intentions in Digital Single Market Go Awry? Traps of Portability

The reasons for presenting the links between geoblocking practices and the regulation on cross-border portability are the following: as presented above, the regulation on unjustified geoblocking does not fully address the challenges resulting from the territoriality of the copyrights regime as an obstacle for creating the European digital single market. However, the regulation on cross-border portability provides, to a certain extent, a solution which may be perceived as a way for the re-interpretation of territoriality. Therefore, it may serve as a tool for coping with geographic discrimination in terms of providing services which offer an access to copyright protected works. Therefore, it deserves to be included in the analysis as an alternative means for combating limited access to content of copyright protected works throughout Europe.

[18] The candidates seem to be *e.g.* hosting services or electronic communication services.
[19] EP and Council Regulation 2018/302, OJ 2018 L 60I/1, Art. 4.
[20] EP and Council Regulation 2018/302, OJ 2018 L 60I/1, Art. 5.
[21] Ibid, Art. 4.

What regulation on cross-border portability does is altering the perspective on the access to copyright protected content in two aspects. Firstly, instead of focusing on 'geoblocking' it focuses on 'portability'. This is a vital shift: subjected to the regulation is not an access to copyright protected works across the EU irrespective of borders, but the access to content to which the customer purchased access in his or her place of residence. As a result – which is the second aspect of the perspective adopted in the regulation on cross-border portability – the provisions lead to change in the understanding of what territoriality is. Instead of being perceived as linked to the territory on which the customer is present at the moment of seeking access to the service, it is linked to the customer's place of residence. An example of the approach adopted in the regulation may be following: if the customer from Slovenia purchases a subscription to video-on-demand platform in Slovenia, he or she should be allowed to access its content irrespective of the place in which he or she currently is. Therefore, according to the regulation on cross-border portability, the offer presented to the customer during his or her holiday in Italy should be the one to which he or she purchased access in Slovenia. As briefly described in the regulation on cross-border portability:

'This Regulation introduces a common approach in the Union to the cross-border portability of online content services, by ensuring that subscribers to portable online content services which are lawfully provided in their Member State of residence can access and use those services when temporarily present in a Member State other than their Member State of residence'.[22]

The regulation on cross-border portability overturns, to a certain extent, the traditional understanding of territoriality in the copyrights protection regime. However, it does not actually address the issue of geoblocking, as it does not change the fact that territoriality of copyrights may lead to limitation of access to digital content for customers in member states. Moreover, it may be perceived as actually strengthening the borders within the digital single market instead of removing them. The fact that the content to which the customer has access when travelling across the EU remains as if he or she never left his or her country, could be interpreted as a limitation for experiencing the variety of copyright protected works offered in various member states. The underlying assumption that one prefers to use the offer to which one has bought access in his or her place of residence, seem to recreate the boundaries in the digital space, while the goal of the digital single market for Europe strategy was to remove them.

As such, one could wonder if actually the provision of the regulation on cross-border portability does not create space for geoblocking practices in their original meaning strictly linked to copyright protected content. It may cause differentiation of the offer presented to customers in a member state, depending on their nationality, place of residence or place of establishment. If the Slovenian customer from the example described above would like to use the Italian offer of the platform during his holidays, the access to it would be – according to the regulation – blocked. The intention to facilitate the customer's usage of digital content within the EU became a source of two-edged provisions. On one hand, it changes the understanding of territoriality in terms of copyright protected digital content: individual becomes a 'carrier' of a territory. On the other hand, it somehow re-creates national boundaries in the digital space in cases when an individual has physically crossed them.

5. Conclusions

In the article I argue that the recently adopted legal acts: the regulation on unjustified geoblocking and regulation on cross-border portability might be perceived as tools to combat hardly-existing obstacles in a hardly-existing European digital single market. By this statement I do not try to sug-

[22] EP and Council Regulation 2017/1128, OJ 2017 L 168/1, Art. 1.

gest that the borders between the EU member states in digital space do not exist: on the contrary. I claim that their presence remains not having been tackled or maybe having even been strengthened by the adopted regulations, the aim of which was – technically – to remove them. The legal means adopted by the EU and the issues which they address are focused on obstacles which are hardly present in the web, such as, for example, blocking access to certain websites on the basis of customer's nationality, place of residence or place of establishment. Simultaneously, the areas in which the geoblocking practices seem to be the most present, such as services which are focused on providing the access to copyright protected works, are left outside of the scope of regulation.

The fact that the most commonly experienced geographical discrimination has been left outside the regulation is an argument for the second part of my hypothesis: the European single digital market remains a hardly-existing phenomenon. The sources of such a state are not only linked to the uniqueness of the digital sphere, its rapid development and the need to catch up when trying to regulate such a fast-changing environment. They are also linked to the shift which takes place concerning the character of the obstacles which impede intra-EU trade: the digital economy grows in services, whereas the freedom of the services provision in the EU remains chaotic and fragmentary.

The current situation concerning the digital single market reveals a kind of paradox: even though technically new opportunities offered by the development of e-commerce sales channel and new business models should allow the cross-border trade to boost, it seems not to have a major influence on the growth of the European digital market. Even though digital platform businesses are easily scaled-up and their potential lies in the huge number of users, those opportunities are rarely used by the European companies. The question which remains open is whether initiatives such as those described above, concerning unjustified geoblocking and cross-border portability of digital content, anyhow support change in this matter. As I attempted to present in this article: there may be severe doubts as to whether they do.

The Role of Customs in Budget Revenues and Economic Development in Kosovo

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In this paper we address some of the most important issues related to custom: its functioning, its impact on budget revenues in Kosovo, the method of revenue collection, revenue classification, participation of customs revenues in total revenues and other aspects of fiscal character. Also, other customs functions as instruments of accomplishing other political and economic policies are mentioned in this paper. Special attention is given to regulation and its harmonization with EU directives and other customs standards in the region and beyond. CEFTA agreement is especially mentioned, its impact and role in elimination of non-tariff barriers and market liberalization of signatory countries of this agreement as a step forward for connection in regional and EU integration processes.

Keywords: Public revenues, excise, customs tax, VAT

1. Introduction

Public revenues are all those financial funds with which the state/government meets the needs of the public and performs its functions. As such they represent all income or funds that are channelled into a state budget. Economic performance and country development depends largely on public revenues. They are a collection of various taxes, fees, contributions and any other financial income. Public revenues and public expenditures together constitute a state budget. In cases when public revenues are higher than public spending, then we are dealing with a budget surplus, while in cases when public revenues are less than public spending, then we are dealing with a budget deficit. For accomplishing state requirements in the implementation of constitution and performing its functions, to cover the expenses that arise during carrying out of these tasks in its competence. Certain revenues are needed that are implemented by the state and are called public revenues. In short we can say that state revenues are revenues (monetary funds) in cash money, annual and serve for financing (completion) of public expenditure (public requirements) and are part of newly created value. Most important forms of revenue/income are: taxes, contributions, customs, fees, state loans, grants, money emission etc. Customs revenues are notable by the importance, role and participation in public revenue in our country as a dominant form of public revenues along with other revenues collected at the border crossings, which currently participate with 65% in Kosovo's

Budget.

This trend of customs revenue has decreased over the years because customs revenue participation since 2000 was higher and that was over 70% of the total budget revenue.[1]

2. Revenues from Customs as a Form of Public Revenues

It is still not very clear exactly where and when the concept of customs has begun for the first time. Adam Smith in his famous work "The Wealth of Nations" says that Customs as common payment obligations existed since ancient times. It is believed that customs existed in the kingdom of the ancient Egypt, around 2700-2200 BC. Evidence is found that tell that " caravan management" a title for one of official administration posts of that time, that was responsible for registration of goods entering and exiting Egypt, would also collect customs duties along with statistics, thus having similar functions to those of a general directorate of customs today. Many books refer to trade and customs of ancient Egypt. Customs are state cash revenue that is paid on the occasion of certain goods crossing through customs border. The nature and role of customs duties has not been the same in all periods of historical development. Starting from the XV century when their role began to take importance to follow until present day and until XVIII century the role of customs duties focused on the regulation of the country's trade balance, in order to ensure the introduction of gold in the country at that time regarded as the only real/wealth. This was due to the prevalence at the time of mercantilist theories and policies on the economy. Customs revenues are a special type of indirect taxes which are paid to the case and at the time of the passage of goods through the customs border. Although customs duties are actually paid by people who bring or take out the goods from the customs territory (importers or exporters) given that the latter are included in paying customs duties as a cost in commodity prices, in the final analysis it is the Customers who bought imported goods that are paying the customs duties paid on those goods. This is precisely the reason why customs duties are classified in the category of indirect taxes[2].

The nature and role of customs duties has not been the same in all periods of historical development. Customs revenues are the oldest taxes/fees that are collected historically. They began, as historical facts show, since the time of slave order, but they took the proper development and weight in the second phase of development of feudalism and especially the in first phase of capitalist relations development. Throughout whole this time have dominated customs duties aimed at protecting domestic production and therefore it may be called the period of protectionism in customs. In the nineteenth century, Adam Smith's ideas regarding free trade began to settle down more and more, changing the purpose for which customs duties continued to be collected. They began to be considered not as a barrier to the introduction of foreign goods in the domestic market but as a means to raise revenue for public finances, thus profiling fiscal role of customs duties.

Customs revenues and quantitative restrictions on the import or export constitute what is often called trade policy instruments. Customs represent one of the fundamental instruments for the protection of national economies from foreign competition.[3]

The role of customs in tax systems and the overall economic system of a country is of great importance. In Kosovo, customs play a role of great importance in an economic aspect, but also for defence and health reasons. Like we said above, the greatest part of the budget consists of customs revenues, and based on the available data similar to previous years this year also Kosovo Customs continued with positive trend of growth in revenues, a trend following customs throughout years.

[1] Kosovo Customs, Annual Reports 2013.
[2] Adam Smith, *The Wealth of Nations*, London, 1998.
[3] Jelçiç B., *Shkenca mbi financat dhe e drejta financiare*, Prishtina 1985, p. 278.

Despite numerous difficulties in the north of Kosovo, as well as losses in taxes during the first quarter resulting from the non-functioning of two customs points in Jarinja and Bernjak, the plan of forecasted revenues according to projections provided by the Ministry of Finances has been achieved.

3. Kosovo Customs Accomplishment: Performance of Customs Revenues (2014)

Customs is an institution that consistently provides the Kosovo budget with revenues that are increasing from year to year. This fact results after a comparison of the respective data corresponding to 11 months of each year. Thus, referring to the data released by the Customs, during January-August period of the year 2015 budget of the country a total a sum of € 542,151.444, 00 were brought by customs revenues, i.e. 59.2% of the plan provided, this includes customs duty, Value Added Tax (VAT) and excise duties. This was a good performance not only as regards Kosovo's Customs but also regarding the Kosovo economy in general, also fiscal policies that the government follows in reducing the fiscal burden. An important step that was taken during 2016 was the continuation of the removal and reduction of minimum tax for agricultural and manufacturing equipment which will have a major impact in stimulating production and agriculture. Overcoming revenues received this year compared to last year's and continuing change of structure of imports and orientation on imported raw materials and semi-finished products, is key indicator that shows a work in progress and a performance which is continuously increasing.[4] This success is primarily the result of increasing the efficiency of the entire administration of Customs control located at the border in the north of the country, applying simplified procedures and cooperation and awareness among businesses, preventing and combatting smuggling and corruption and other negative occurrences. Work on implementing the new electronic customs system for processing customs declarations called ASYCUDA system has also begun which has replaced the last TIMS system.[5] The newly applied ASYCUDA system has provided much greater opportunities for the work of customs officials but also for the business community, since it enables access to system from anywhere where there is an Internet connection, it is a centralized electronic system that will enable the standard application procedures and customs control, also it enables easier supervision of transit goods etc. All these elements will undoubtedly affect continuous increase of customs revenue in the future, from which a greater fiscal consistency will be created from where a financing of public expenditure of the state administration in general will be done without any problem (Asycuda World Program Kosovo-UNCTAD).

In achieving better performance of customs -in particular in terms of filling the budget- various factors have contributed and it is important to reckon:

- Good management and increased control and surveillance of the customs authorities at the border and inside the country
- Changing policies and fiscal rates during 2010 and onwards by the Act 03/L-220 for excise on fuel and cigarettes
- Increasing imports in the main categories of goods such as fuel, cigarettes, vehicles, etc.
- Risk management - application of selective controls and focus on high-risk shipments/ hazardous shipments.
- Return of control at border crossings in northern Kosovo.

[4] Asllani G. & Imeri V., *E drejta fiskale dhe ndertimi I sistemit tatimor*, Prishtina 2016 p. 64.
[5] https://dogana.rks-gov.net (20 October 2019).

- Allowing import of vehicles older than 8 years and raising the excise rate.
- The application of excise tax on gambling and other games of chance.
- Exchange of information with countries in the region, also awareness of importing companies about their obligations, etc.

4. Customs Revenues in the Overall Structure of Public Revenues

Revenues collected by customs as the main source of total budget revenues participate in total revenues on average with 65 %. In 2013 total revenues from border crossings are planned to be 906 million euro as main source of Kosovo's total budget revenues. Based on planning by the end of 2015, revenues from the border are planned to reach 991 million euros, a figure which represents an increase of 13.3 % compared to the planned revenues from the border for this year. This projected growth of border revenues for this period mainly comes as a result of the assumption of import level growth, while import growth is estimated to come from the increase in consumption and growth of overall investments. Increased border revenues followed the same trend of import growth, which means that over the years, in general, import growth was accompanied by increased customs revenues. Positive contribution to the growth of revenues is expected to give the continuous increase of the Kosovo Customs performance through increasing cooperation with customs in the region and beyond, customs evaluation basis, enhancing risk analysis, upgrading information systems and combating informality, and also an important role in the growth of revenues is expected to give the control introduction of border points 1 and 31 in the north. In total revenues from border crossings, the main contributor to the revenues from the tax are revenues from VAT with a share of approximately 49 %, followed by excise tax (36 % on average) whereas the share of customs duties/fees in total revenues from the border crossings is 14%. In this regard that customs revenues respectively customs duties/fees occupy a smaller part is influenced a lot by regional agreements on free trade CEFTA (part of which is Kosovo) an agreement that provides the elimination of customs duties/fees on Member States and where the vast majority of products only pay VAT.

On the other hand, the total costs over the projected period of 2013 were expected to show a continuous increase by an annual average of about 2 %, reaching a value of € 1.548 million in 2013. Forecasts suggested that in 2013 total spending budget will mark a slight increase compared with their growth during 2012. This slight increase comes as a result of a more prudent fiscal planning in order to maintain fiscal sustainability in the mid-term. The reduction of public spending, respectively slower increase of spending for this year it has come as a result of the signing of the letter of good Intent (short LOI), between the Ministry of Finance and the IMF in December 2012. The main purpose of these recommendations was that through fiscal rules put certain limitations on one of the specific fiscal indicators as a policy for controlled oversight of macro fiscal stability; as such the restriction can be placed at the level of the budget deficit, debt level, general expenses and similar indicators. As Kosovo moves towards the integration process and one day hopes to be part of the European family and once the SAA-agreement (Stabilization and Association Agreement) is signed then the revenues from customs duties for goods and products coming from the European Union will gradually be eliminated, which will significantly contribute to the collection of customs duty which is currently applied to these countries. Filling the budget from custom tax revenues is not an ideal option for a sustainable budget within a country. Usually, a distinction should be made, as it is known that not only customs tax is collected at customs points, but also is collected VAT on imports and excise; regarding VAT on imports and excise they are more stable revenues for a stable economy, but regarding relying on customs duties, then this is not sustainable in financial terms. Gross domestic product in Kosovo depends on the import of products, goods and services,

then basically, revenues will come from customs and long-term budget stability will not be safe and the best way to succeed in increasing revenues is to increase interior revenues through the Tax Administration where domestic VAT, income from wages, from rents, income from profit, etc. are included. However, the increase of budget revenues within state borders is made possible only through economic growth and economic development, while another option that is very important is combatting the informal economy in Kosovo which is in unfortunately a significant issue.

5. Customs Revenues and their Impact on Economic Development

Customs, in addition to the fiscal aspect which is directly related to the collection of revenues and filling the budget, furthermore have their own economic character and an significant role in preserving and developing the economy. Revenues from customs considering their characteristics represent a special kind of indirect taxes.

5.1. The Impact of Customs Revenues in the Economic and Social Trends

Kosovo emerged as a new state from a long process of wars (and later a political and economic transition) is faced with economic and social problems, and is currently trying to mitigate these problems through customs policies and the application of custom tariffs.[6]

Customs duty as an instrument of fiscal policy in general and in particular of the customs policy has great importance not only in providing state revenues, but also in economic and social trends in the country. It may be noted that customs duty has significant impact on the volume of imports of goods, increasing productivity of production capacities, in the formation of prices of the imported goods, in reports of offer/supply and demand in the market, employing people etc…how much these effects will achieve depends on customs policy settings respectively defining of customs duty rates. Currently in our country customs duty rate is fixed in value tax of 10% for all goods which are imported from abroad, except for countries of CEFTA (Central European Free Trade Agreement) where customs duties do not apply for products originating from these countries. This rate of taxation was for the first time applied by UNMIK Regulation 1999/3 and is still currently effective and represents a fundamental flaw in terms of design and application of a genuine customs policy. According to reports from the WTO (World Trade Organization) approximately 9 % of all EU tariffs exceed the rate of 15 %, and a number of them exceed the rate of 100 %. It seems Albania currently has the most liberal tariff regime in the Western Balkans. Its fees consist of six rates: 0 %, 2 %, 5 %, 6 %, 10 % and 15 %. Kosovo has only two, the rate of 10 % and 0%. In order to promote domestic production, the New Kosovo Custom Code implements the reduced tariff rate of 0% of customs duties for the following goods: majority of the raw material, most of the equipment used for production and all raw agriculture materials (such as seeds, fertilizers, etc.) and equipment. For this reason there should be a designation of linear norms of customs duties and trends of further development depend on the setting of these rates, so the adoption of national customs tariff law is most necessary in which case throughout professional analysis that would be provided by law, the appointment of customs duty rates fairly and right, obviously that would ensure the achievement of the clearly defined objectives of customs policy.

5.2. The Impact of Customs Revenue in Supporting the Country Budget

As regards fiscal issues, in developed countries' economies customs revenues participate with a

[6] Kadriu S., *Financimi i shpenzimeve të përgjithshme e të përbashkëta me vështrim të posaçëm në Republikën e Kosovës*, Prishtina 2003, p. 135.

small percentage in supporting or increasing the country budget, but this doesn't apply to the developing economies, including Kosovo's economy where revenues from customs have the biggest influence on raising the state budget. In countries which are in a transition phase, revenue from customs has even greater impact/influence in raising and stabilizing the country budget. In these countries customs revenue are very high and intend to provide funds for financing domestic activities, services and properties, since the state budget can be sustained only if raised by a fiscal system with a comprehensive basis of the non-producing payers –taxpayers and customs payers, respectively financing public spending. For proper functioning of the government organs means must be provided, which after collection on the occasion of the approval of the budget are allocated for financing social activities. In Kosovo, due to the low level of economic development revenues from customs have and important fiscal character, except that at the time of collection of revenues apart from applying regular taxes special taxes are also collected such as various types of excise, since the revenues collected have a dominant role in the establishment of the state budget; the same thing happens in most countries of the Balkans where in war-torn economies like in Croatia, Bosnia-Herzegovina as well as those arising from political transition, such as Albania and Macedonia revenues from customs have got a fiscal character and play a dominant role in raising and stabilizing the respective national budgets in these states.

5.3. The Impact of Customs Revenue on Domestic Productivity and Employment

Custom revenues have an impact and influence also on domestic productivity and economic development, therefore customs application should be regulated by the national law for customs fees and taxes.. A greater caution should be exercised in this context regarding eliminating taxes for reproductive materials, raw materials, production equipment and spare parts, since through such measuress the cost of domestic production would be reduced; while in an opposite case (i.e. with increased financial duties being applied to these products) there would be some perceivable negative impacts in the process of domestic production. However for widespread consumer goods customs tax should be higher since it reduces their import and stimulates the placing on the market of domestic/local products increasing market competition which is a prerequisite for stable economic development. The application of customs tax rates should be regulated by the law on tariffs, and should be set to a level that would not prevent the import of goods that impact the technological process and should be higher for the goods that are in the market (commercial goods) because this way the aggregate market situation can be adjusted.

Applying taxes on imports also has an impact on employment, this occurs when applying import taxes for certain types of goods demand increases in the country for such types of goods, which in turn increases the need for national production and requires engaging an increased workforce in the respective technological process. But this measure of reducing unemployment should be short-term since this problem should be solved essentially not via customs policy instruments but by applying economic policy measures throughout capital investments and with absorption of foreign investments in domestic economy.[7]

5.4. The Impact of Customs Revenues in Setting the Market Price of Goods

Customs revenues have got also a direct impact on setting market prices in the country. It is known that the amount of customs duties calculated for the imported goods is paid by the importer and this factors into the calculation of the price that is applied at retail stores and is ultimately paid by the last buyer. Apart from direct impact, an indirect impact of customs duties on setting market price

[7] Rraci Y., *Bazat e sistemit doganor*, Prishtina 2010,p. 107.

also exists; this happens in case of imports when the rate that determines a high customs tax payment is applied; this will raise the price of imported goods and creates space for raising the price of local goods as well. We can conclude that the impact of the customs taxes may have has a positive character in some circumstances because it increases competition in the market and creates motivation for local economic entities (businesses) to place higher quality products on the market with much lower cost and competitive prices in the local market as well as regarding exports.

6. Conclusions

While Kosovo is moving towards the European integration process, and in the near future will be part of the European family and has already signed the Stabilization and Association Agreement in 2015[8], the revenues from customs duties for goods and products coming from the European Union will gradually begin to decrease and later will be almost completely eliminated. Collection of over 65 per cent of revenues to state crate (state budget) by Kosovo Customs has put the country's budget in an unfavorable situation, the fact is that this way is not stable for a country especially when taking into account the increased level of integration into European mechanisms. International agreements reached between Kosovo and several other states, as in the case of CEFTA in some cases restrict the capacity of budget revenues because certain categories of goods are removed from the obligation to pay customs. Kosovo Government concluded agreements with some countries to reduce customs duties, which are expected to be achieved at the beginning of this year, and will result in Kosovo having even lower customs revenues compared to previous years. The agreement with Turkey alone, which had already been concluded will have an impact of 17 million euro less in revenues, since it will provide an agreement where the customs tax/fee will fall from 10 % to 0%. Also, the reduction of customs tariffs for capital and reproductive material from 10 % to 2 %. It would be preferable also to reduce VAT rates on imports of capital equipment and especially for investors meaning to apply incentive fees for investors as with the increased level of integration the importance of borders will be reduced and consequently puts to risk the main source of revenue such as customs. In the meantime, revenues will be needed in the budget to fund the spending / costs and I think real opportunity to compensate this reduction in customs revenues is only by setting excise as a special tax/fee since excise is rarely or almost never included in any agreement. Different excise and fees can be assigned to some categories of goods that will compensate what is lost from agreements.

A positive aspect would probably be for Kosovo to entirely remove customs taxes either for product processing, production or final products from EU countries and other countries. And, while not losing sight of the contours of revenues to the budget, VAT should be increased, increasing also the efficiency of VAT collection, increase income/wage revenue and combating informality as well.

The first thing to do is to minimize the informal economy, coupled with combating tax evasion. Furthermore the budget revenues should primarily be based on sources established within Kosovo's borders because the current method of collecting revenues for the state budget from customs results in financial and fiscal instability. As in most other states that have passed this stage, there are always other elements or additional sources from which Kosovo's budget can be covered, such as VAT, income/wage revenue, rents, profit revenue, etc. But the increase of budget revenues within state borders is made possible only through economic growth, economic development – or increasing VAT which is not very practical as it increases the inflation rate. On the other hand, it would be important that Kosovo government make efforts through domestic economic policies to aid the business community in order to increase production capacity, improve quality of production and be influenced in promoting export thus reducing the huge deficit in the trade balance that currently

[8] https://www.consilium.europa.eu/en/press/press-releases/2015/10/27/kosovo-eu-stabilisation-association-agreement/ (20 October 2019).

exists.

Thoughts on the Importance of a Migrant Health Database in Connection with the Asylum Crisis of 2015 on the Occasion of the Consensus Conference

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The article examines public health issues related to the asylum crisis of 2015 in the European Union. It does so by first reviewing the Consensus Conference held in Pécs on the 8-9th October 2019. It examines legal aspects of creating a migrant health database on a European level consisting of health data of migrants and asylum-seekers in order to tackle public health risks brought by the mass influx of refugees. As a final point, the article suggests two possible ways to incorporate the migrant health database to the reform of the Common European Asylum System.

Keywords: European Union, asylum system, CEAS, public health, infectious diseases, Dublin System, reception conditions, European Parliament, European Commission

1. Introduction

There are many aspects of the asylum crisis of 2015 in the European Union. Most of the legal literature is engaged with the upcoming reform of the Common European Asylum System (CEAS) since the crisis showed that it has systemic flaws which must be corrected. However, another important aspect of the crisis is the public health system of member states in the context of migration and asylum. This article will specifically deal with the public health problems originating from the asylum crisis.

The so-called Consensus Conference organized by the Department of Operational Medicine WHO Collaborating Centre at the University of Pécs Medical School on the 8-9th of October 2019 aimed to discuss the importance of migrant health with specific regard to asylum-seekers. The purpose of the conference was to achieve consensus on conditions for establishing a European level migration health database, hoping that the common points determined could even guide lawmakers in creating such a database. On the first day presenters emphasized the importance of creating such a database which was followed by thematic workshops dealing with a diversity of questions which may arise in connection with the creation of a migrant and refugee health database. They discussed the potential data sources of which this database could feed, examined the legal aspects of creating a database which would clearly incorporate special categories of personal data,[2] exchanged best practices stemming from country experiences, studied the possibility of the integration of the data on refugee and migrant health in health information systems in the WHO European Region and last but not least discussed one of the most challenging aspects of creating such a database, namely how

[1] The study was supported by the ÚNKP-19-2 New National Excellence Program of the Ministry for Innovation and Technology.

[2] The special categories of personal data include personal data concerning the health of the data subject. See; *Handbook on European data protection law*. Publications Office of the European Union, Luxembourg 2018. p. 96.

states can provide enough human resource capacity to maintain this system.

In this article I will concentrate on the legal aspects of creating a migrant and refugee health database. I will briefly introduce the reasons for creating such a database which will be followed by the review of the workshop which examined data protection and legal aspects in connection with a database consisting of migrant health data. As a final point I will evaluate the CEAS from the point of view of how such a system can be translated into future reforms.

2. The Importance of Creating a Migrant and Refugee Health Database[3]

The conference started with a plenary session during which presenters mainly emphasized the need for a consolidated migrant and refugee health database (from here on: database) and the challenges lawmakers may encounter during the creation of this database.

Teymur Noori, colleague of the European Center of Disease Prevention and Control (ECDC) examined which infectious diseases are the most wide-spread among asylum-seekers coming to Europe. According to the data acquired by the ECDC these diseases include HIV, tuberculosis, hepatitis B and C partly because vaccination rates are much lower among refugees then the overall population of Europe. Multidrug resistant bacteria brought by asylum-seekers also pose a great threat. This situation gets worse with undocumented migration, since it results in migrants staying in Europe without the possibility to seek medical attention. However even asylum seekers are generally only provided with free screening which is not combined with access to treatment.

Iveta Nagyova, President of the Section of Chronic Diseases at the European Public Health (EUPHA) Association and member of the EUPHA Executive Board explained that the treatment of the above-mentioned infectious diseases burdens the economy of each state receiving asylum-seekers greatly. It incurs high costs to even identify them, not to mention treating them.

Jozef Bartovic, Technical Officer with the Migration and Health program at the WHO Regional Office for Europe, and Dominik Zenner, associate at the International Office of Migration both explained that many challenges must be overcome to create a migrant-sensitive healthcare starting with tackling linguistic barriers and finding a way to sufficiently gather and manage the specific data needed to prevent a public health crisis stemming from infectious diseases brought by asylum-seekers. Currently there is a great need to gather data on the overall health status of migrants and asylum-seekers then disaggregate this by sex, migration status, age and existing sub groups.[4]

2.1 Legal Aspects of Creating an EU-wide Database for Health Data of Asylum-seekers[5]

Several data protection and human rights specialists participated in the Workshop including Alexander Beck from the Office of the United Nations High Commissioner for Refugees, Tamás Molnár, legal expert at the European Union Agency for Fundamental Rights, Gergely László Szőke, senior lecturer at the University of Pécs Faculty of Law, Zsolt Pádár forensics expert from the University of Pécs Medical School and Ramóna Tömösi from the Hungarian National Authority for Data Protection and Freedom of Information. The workshop was chaired and moderated by Ágoston Mohay, associate professor at the University of Pécs, Faculty of Law.

[3] This part of the article was mostly created using facts, figures and statements provided by the presenters at the Consensus Conference.
[4] Teymur Noori suggested in his presentation that the gathered data should be disaggregated according to the country of origin which would help identify risks since asylum-seekers from the same country of origin tend to have the same infectious diseases.
[5] The review of the workshop is mainly based on the statement concluding the findings of the conference which is available on the website of the conference. See; https://www.mighealth-unipecs.hu/education-downloads/category/91-workshop-reports (17 November 2019)

First and foremost it must be laid down that there are two possible ways to establish a migrant health database. Either it may be established on a European level or based on data-sharing between national databases. A truly European database could be operated by the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (hereinafter: EU-Lisa).[6] However there are many examples for the other type of database as well which is based on the data-sharing between national databases such as the Europol Information System (EIS). According to the Europol Regulation which defines the sources of this information system, Europol may gather relevant data from Union, international and national information systems to maintain its own database.[7]

There are two other key issues which must be addressed in connection with creating a database for this purpose. Most importantly currently there is no legal basis provided either in the founding treaties of the EU or in any secondary legal act. As a result, a database of this kind can only exist in a fragmented manner on national level until the creation of an appropriate legal basis. With this solution Member states would have the possibility to share the data among each other, however a European system of any kind cannot be established in this manner. Nonetheless it must be noted that an EU-level database could be established by a legal act – providing legal basis for the establishment of such database – based on several articles of the Treaty on the Functioning of the European Union (TFEU), e.g. Arts. 77-78 TFEU on the common migration and asylum policy of the EU or Art. 74 TFEU which aims to enhance administrative cooperation of Member States. Furthermore Art. 168 TFEU provides legal basis for the adoption of legal acts regarding the public health system of Member States.

In addition it is also important to note that a database consisting of the health data of migrants and asylum-seekers must meet strict requirements regarding the processing of this data, since the General Data Protection Regulation (GDPR) of the EU generally prohibits the processing of special categories of data unless an exception determined in the regulation can be established in connection with the sensitive data. The processing of health data of migrants and asylum seekers could be based on purposes of preventive or occupational medicine or it could be processed for reasons of public interest in the area of public health.[8]

To sum up the findings of the workshop, a legal framework providing suitable and specific measures to safeguard the rights and freedoms of the data subject should be established in order to create a database. These safeguards shall cover both the collection and transfer of as well as the access to personal health data in the European Union. The Schengen Information System, also covering sensitive data, may provide good practice for regulating a European level database which could be managed by EU-Lisa. In addition it also needs to be clearly defined by law who the data subjects of such a database would be. Last but not least, if cooperation with international organizations is envisaged, it must be mentioned that these institutions also have their own data protection regimes which may differ from GDPR. As a result, first the different regimes must be harmonized before the cooperation can start.

[6] Currently the agency is responsible for the operational management of various European level databases, for example the Schengen Information System, the Visa Information System and the Eurodac. Its function is connected to the Area of Freedom, Security and Justice (AFSJ) so it would be the perfect choice for a migrant health database since the agency already has practice in managing databases established in the framework of AFSJ. See; OJ 2018 L 295/99 Art. 1. it. 3.

[7] OJ 2016 L 135/53 Art. 17. it. 3.The effectiveness of such databases can be illustrated by the cooperation of member states in the field of criminal justice. The competent authorities of member states discover in many cases that the same perpetrators are involved in crimes committed in different European countries with the help of EIS. Thus, it can be effectively used to counter transnational crime in the EU.

[8] OJ 2016 L 135/53 Art. 9. it. 2. points (h)-(i).

3. Evaluation of the CEAS Reform in the Abovementioned Context

As I have already mentioned in the introduction, the crisis showed that the CEAS has systemic flaws. These flaws result in the system not being able to process the amount of asylum applications which have been experienced in the last years. The problems arise in various areas of the European asylum system with the greatest issue being the faulty regulation of the Dublin System.[9] The system is not able to handle the mass influx of asylum seekers as it does not take into account the economic situation and geographical location of Member States.[10] Thus most asylum applications were received by border Member States. As a consequence, the asylum systems of these Member States were overburdened with asylum procedures.[11] Another issue is that Member States' asylum systems are not equipped to accommodate the mass influx of people while waiting for their application to be considered.[12]

These two factors can very well result in a situation – which was even experienced already – that bordering Member States do not register asylum-seekers in the EURODAC system since this act could make them responsible for having to process their asylum applications. Instead it happened that bordering Member States let through asylum-seekers allowing them to revive the practice of asylum-shopping, to move freely towards inner Member States and among many other problems bring with themselves whatever infectious diseases they may have unnoticed. The serious consequences of this phenomenon have already been discussed above however it must be stressed that these are diseases that are extinct in Europe, thus the European population is not accustomed to them. As a result there is a dire need to effectively fight them yet we seem to lose this fight.

One step towards the reform of the CEAS must be the correction of the Dublin System. The European Commission proposed a corrective allocation mechanism which would ease the burden on bordering Member States. To set up such a mechanism, the EU first needs an information system to keep track of all incoming applications. This would keep track of how many applications a Member State is responsible for. The allocation mechanism would determine how many applications a Member State is obliged to consider in a crisis-like situation in proportion (*inter alia*) to the population of the Member States and its Gross Domestic Product (GDP) ("reference rate"). The reference rate should be reviewed annually. This statutory method would determine the capacity of Member States. If the information system set up to monitor incoming applications shows that a Member State has currently received more than 150% of its quota, then Member States whose asylum systems are not overburdened should take over from that point on. If a Member State refuses to take over the asylum seekers in this system – which means it practically does not participate in the operation of the allocation mechanism – it would have to pay EUR 250.000 per asylum seeker to the Member State which accepts the transfer.[13]

On the other hand, the European Parliament intends to significantly change the allocation mechanism of the Commission's original proposal while retaining the reference key on which it is based. The proposal would lower the limit from 150% to 100%, so that the Member States' liability would already be suspended when the asylum system is full according to the reference key. In addition, it

[9] The Dublin System was put in place *inter alia* in order to prevent so called „asylum-shopping" which means that an asylum seeker applies for asylum in the state where he or she sees his or her future situation more favorable. This, on the one hand, multiplies the burden on MS and, on the other hand, raises the problem that the right to asylum does not include the right for the applicant to decide in which State of the common asylum system his or her application would be considered. See; Mohay Ágoston: *Nemzetközi jogi standardok az uniós menekültügyben*. Scriptura. Vol. 3, No. 1, June 2016 p. 106.; Nadine El-Enany: *The Safe Country Concept in European Union Asylum Law: In Safe Hands.* Cambridge Student Law Review. Vol. 2, No. 1, January 2006 p. 2.

[10] Lana Maani: *Refugees in the European Union: The Harsh Reality of Dublin Regulation*. Notre Dame Journal of International and Comparative Law. Vol. 8, No. 2, February 2018 pp. 98-99.

[11] The Dublin System does have its own mechanism in the event of a Member State's asylum system being overburdened. It is the Early Warning, Preparedness and Crisis Management Mechanism. However this mechanism does not, in fact, identify a tool to mitigate the migratory pressure on a Member State. See; Viola von Braun: *Europe's policy crisis: An analysis of the Dublin System*. SAOS Law Journal. Vol. 4, No. 2, December 2017 pp. 18-19.

[12] Hanne Beirens: *Cracked Foundation, Uncertain Future. Structural weaknesses in the Common European Asylum System*. Migration Policy Institute Europe, Brussels 2018. p. 8.

[13] COM(2016) 270 final pp. 18-19.

would create a permanent system for distributing asylum seekers. The Member State of first entry shall examine whether the asylum seeker has a genuine link with any Member State. If there is one, the Member State to which the asylum seeker is linked is responsible for examining the application for asylum. A close relationship is first and foremost a family relationship or other previous relationship, such as having previously studied in the Member State or having previously been lawfully a resident of the Member State. However, if such a link cannot be found, the automatic distribution of asylum seekers between Member States will take effect, and an electronic system would randomly determine which of the four least burdened Member States should be placed in the asylum seeker.[14]

The basic problem with the Dublin System is that whatever regulations are made on the reception of asylum applications, most asylum seekers will arrive first in the Schengen border Member States, almost without exception. The positions of the Member States in this regard are wide-ranging today. It is in the interest of border Member States that internal Member States take charge of asylum seekers, but many inward Member States reject it. This is why there is currently no solidarity between Member States. The details of the mechanism have not been agreed upon by Member States and even by EU legislature. The Commission envisaged a crisis management mechanism, while the European Parliament would set up a system for the distribution of asylum applications and severe sanctions in the event of a breach of the solidarity expected from Member States.

It is a striking difference between the two proposals that the Commission would trigger a crisis management mechanism 50% above the reference rate, while the Parliament proposal would immediately put in place a crisis management mechanism when the reference rate is reached to transfer asylum applications to one of the least burdened Member States. Moreover, the European Parliament's draft would create a permanent system that would reform the current system of criteria for the Dublin system. Above all, it would remove the current responsibility of Member States where the asylum seeker first entered the Union. In addition, it would apply criteria that effectively reflect the relationship between the asylum seeker and the Member State responsible for examining the application. In the absence of such a link, asylum seekers should be immediately distributed among the Member States. Indeed, such a system would be able to enforce the principle of solidarity between Member States and prevent the overloading of Member States' asylum systems by a permanent distribution. This could prove the right way to fix the Dublin System. However, it is not guaranteed that this can be realized in practice, as the cost of transporting asylum seekers would be extremely high.[15]

In addition, the reform of the Dublin System must find a solution for unregistered asylum seekers. This is a complex problem deriving from both state and individual practice. In recent years there had been many examples where Member States did not register asylum seekers in order to avoid taking responsibility to consider their applications. However, there is a tendency among asylum seekers as well to resist being registered since then they would be "stuck" in the first country of entry.[16] This could be corrected with creating a legal obligation for asylum seekers to be registered to the information system keeping track of the number of applications Member States receive.

In conclusion, the aim of the reform is to enforce solidarity between Member States and achieve the registration of every asylum-seeker in the EURODAC system. Once solidarity and the registration of every asylum-seeker is achieved there is a far better chance of fighting infectious diseases as well, since there would be a chance to register health data of asylum-seekers when their biometric data is collected.

[14] Wikström Report: http://www.europarl.europa.eu/doceo/document/LIBE-PR-599751_EN.pdf?redirect (8 September 2019) pp. 112-113.
[15] Steve Peers: *Unfinished Business: The European Parliament in the negotiations for reform of the Common European Asylum System.* (A too Ambitious Reform for a still Weak Legislator) EU Law Analysis: http://eulawanalysis.blogspot.com/2019/06/unfinished-business-european-parliament.html (8 September 2019)
[16] Maani: ibid. 99.

4. Suggestions for the Future

Returning to the problem of infectious diseases, the information system which is meant to be established with the reform of the Dublin System could store health data of asylum seekers if the regulation would provide a legal basis for it. However, it must be noted that the reform aims to establish this database in order to store biometric data of asylum-seekers and the fact that they applied for international protection. So its aims differ from the database containing health data of migrants and asylum-seekers. As a result, there is a more adequate alternative for this purpose than the integration of these databases, namely a database for storing health data of only asylum-seekers could be translated into the asylum system by the reform of the reception conditions directive.[17]

The EU framework of reception of asylum-seekers could effectively integrate such a database given the legal basis for it which could be established in the reform.[18] The reason for this is that the directive already has a few provisions related to public health issues and the mental and physical health of asylum-seekers accommodated for the time of their application being considered. First and foremost the directive provides the possibility for Member States to require medical screening of asylum-seekers on public health grounds.[19] Moreover the directive provides asylum-seekers admitted into the system with at least emergency health care and the essential treatment of illnesses and mental disorders.[20] This provision stands on the ground of material reception conditions providing asylum-seekers with an adequate standard of living, which guarantees their subsistence and protects their physical and mental health.[21]

Provisions relating to the mental and physical health of asylum-seekers are further elaborated in the reform of reception conditions. As a result, the adoption of the amended directive would provide greater protection for asylum-seekers in terms of their health. The proposal of the European Parliament highlights public health concerns. The new directive would provide preventive healthcare besides emergency care and essential treatment.[22] This provision would have great impact since most asylum-seekers are accommodated in so called accommodation centers which are places where the collective housing of applicants takes place.[23] Thus asylum-seekers are placed in accommodation centers where applicants of various third countries are housed. As I have already mentioned above according to their country of origin applicants may carry different diseases. In these centers they become vulnerable against diseases they have not yet encountered and they may bring infections others are vulnerable to. This is why preventive medicine, including vaccination is of great importance.

In conclusion the present reception conditions directive and the reform of reception conditions could ultimately achieve better healthcare of asylum-seekers. However, a database consisting of health data of asylum-seekers could further enhance the level of public health among them since it would make deciding on preventive measures easier and competent authorities may share these data with each other in order to provide a uniform standard of healthcare in every Member State for asylum-seekers. It could also allow for better follow-up treatments and the avoidance of unnecessarily repeated treatments. To this end the Consensus Conference achieved consensus regarding measures which could be applied in order to facilitate the establishment of a migrant and refugee health database. According to the final statement of the organizers measures to facilitate harmonization of definitions, variables, indicators and categories to ensure cross-border comparability of data and addressing the gaps in data collection are recommended in order to ensure compatibility

[17] The directive regulates a wide variety of needs related to the accommodation of asylum seekers for the time their application is considered by competent authorities.
[18] This could be based on Art. 78 TFEU as already stated in part 2.1.
[19] OJ 2013 L 180/96 Art. 13.
[20] OJ 2013 L 180/96 Art. 19.
[21] OJ 2013 L 180/96 Art. 17. para. (2).
[22] COM(2016) 465 final para. (31).
[23] OJ 2013 L 180/96 Art. 2. it. (i).

and completeness of data. Improving international cooperation and governance of data management is also advised in order to share and transfer data if there is a justifiable need for that. Last but not least inclusion of migration-related variables in routine data collection and data linkage is encouraged. Adopting these measures could greatly help create the health database which could effectively counter public health risks.[24]

[24] https://www.mighealth-unipecs.hu/education-downloads/send/89-final-document/206-outcome-document (17 November 2019).

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