AN INTERNATIONAL LAW OF PRIVILEGES

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Abstract

The statutes and rules governing proceedings before the International Court of Justice, World Trade Organization panels, and International Center for the Settlement of Investment Disputes tribunals are silent on the question of evidentiary privileges. Moreover, there is no established international law of procedure and evidence to which the disputing parties and tribunals can refer. Yet questions regarding privileges have been presented to them, and as the number of cases brought before them increases, such questions are likely to become even more common. How should international tribunals decide claims of privilege presented to them? This article will argue that there are two approaches to answering this question: (i) a choice of law approach, by which the law of a domestic jurisdiction is selected and applied; and (ii) an approach which would lead to the development of international rules of privilege. The latter approach is favoured because privileges reflect the public policy of the state that creates them and international tribunals do not have a mandate to enforce the public policies of any one state. On the contrary, their mandate is to enforce the policies of the international community as reflected in international law. This is not to say that there is nothing to be learned from domestic rules of privilege. Accordingly, the article will explore how domestic rules can help in establishing an international law of privileges. It will examine rules and policy rationales adopted by a few representative jurisdictions for the protection of types of information that are likely to be relevant for the adjudication of disputes brought before international tribunals, such as classified government information, communications involving in-house counsel and government lawyers, and proprietary information.

Keywords

Privileges, choice of law, arbitration, international dispute resolution, public international law

1 Introduction

The law of privilege is comprised of those rules of evidence that allow information—testimonial and documentary evidence—to be withheld from a

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legal proceeding.¹ They bar fact-finders from considering relevant information. The grounds for exclusion are not the reliability of otherwise relevant evidence, but rather considerations of social policy.² Privileges advance social policies such as the protection of national security and the privacy of individuals, and the encouragement of the full, free, and frank communication necessary for the adequate provision of professional services such as legal and medical services. They reflect a judgment that an extrinsic value is more important than an accurate decision, and 'an instrumental assumption that the exclusion of evidence would be effective in preserving that extrinsic value.'³ In short, privileges reflect value judgments of the specific legal system of which they are part and might constitute barriers to the establishment of the truth in a legal proceeding.

The last fifteen years have seen a significant increase in international judicial activity with international tribunals such as the International Court of Justice (ICJ), World Trade Organization (WTO) panels, and International Center for the Settlement of Investment Disputes (ICSID) tribunals being called to decide a myriad of public international law disputes between states, and private investors and states.⁴ As the world becomes more integrated, such activity is bound to increase even further. In this context, international tribunals will be, and have already been,⁵ presented with claims of privilege by litigants trying to prevent the disclosure and use of information in international proceedings.⁶

Unlike their domestic counterparts, however, most international tribunals do not have an established body of international rules of evidence on which they

¹ R M Mosk & T Ginsburg, 'Evidentiary Privileges in International Arbitration' (2001) 50 *ICLQ* 345, 346.

² See G Fisher, *Evidence* (2nd edn, 2008) 842; M Hor, 'Evidential Privilege: Sacrifice in the Search for Truth' (2001) *Sing JLS* 410, 410.

³ M Hor, above n 2, 411.

⁴ See UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS)' (*IIA Issues Note*, April 2014) 2, <http://unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf> [accessed 7 November 2014] (presenting a statistical analysis of cases under BITs); WTO Dispute Settlement Body, 'Overview of the State of Play of WTO Disputes: Annual Report 2013', WTO Doc WT/DSB/61/Add.1 (1 November 2013) (listing the initiation of 467 disputes from 1995 to 2013, of which 148 were resolved by WTO panels).

⁵ See, for example, *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No ARB/05/22 (Procedural Order No 2, 24 May 2006) (*Biwater*); *United Parcel Service of America v Canada*, UNCITRAL/NAFTA (Decision of the Tribunal relating to Canada's Claim of Cabinet Privilege, 8 October 2004).

⁶ Throughout this essay, the expression 'international tribunals' encompasses ICSID and *ad hoc* tribunals adjudicating disputes under investment treaties (investor-state tribunals), the ICJ, and WTO panels.

can rely to decide such claims.⁷ In particular, the statutes and rules governing proceedings before the ICJ, WTO panels, and ICSID tribunals are silent on the question of privileges. This silence encompasses the complete absence of rules establishing and defining the scope of privileges under international law (e.g., attorney-client, settlement, national security) as well as of any reference to whether international tribunals should enforce domestic rules of privilege and, if so, how a tribunal must choose among the rules of all potentially relevant jurisdictions. In this regard, commentators have noted, for instance, that the status and operation of the rules of privilege 'in the conduct of ICJ proceedings is far from clear.'⁸ Yet another commentator has noted that no general rules of privilege have evolved in proceedings governed by international law.⁹

In light of this, how should international tribunals decide claims of privilege presented to them? This article argues that there are two approaches to answering this question: (i) a choice of law approach, by which the law of a domestic jurisdiction is selected and applied; and (ii) an approach which would lead to the development of international rules of privilege. This article favors the latter approach. Among other reasons supporting this choice is the fact that, as noted above, privileges reflect the public policy of the state that creates them. This means that as policy choices vary across jurisdictions, so does the nature and scope of privileges, which translates into a wide variety of rules¹⁰ and the choice of one over others is bound to create inequalities and frustrate expectations. Moreover, except when specifically provided for, international tribunals do not have a mandate to enforce the public policies of any one state; their mandate is to

⁷ The International Criminal Court (ICC) is perhaps one of the few exceptions to this rule. Rule 72 of Rules of Procedure and Evidence of the ICC sets out the national security privilege and Rule 73 establishes several privileges, including the attorney-client, the doctor-patient and a privilege protecting information that has come into the possession of the International Committee of the Red Cross as a consequence of the performance of its functions. The attorney-client privilege is also recognized in Rule 97 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and of the International Criminal Tribunal for Rwanda (ICTR). On the rules of privilege applicable to these tribunals, see K A A Khan & G Azarnia, 'Evidentiary Privileges', in K A A Khan, C Buisman, & C Gosnell (eds), *Principles of Evidence in International Criminal Law* (2010) 551.

⁸ A Riddell & B Plant, *Evidence before the International Court of Justice* (2009) 206.

⁹ R Pietrowski, 'Evidence in International Arbitration' (2006) 22 *Arb Int'l* 373, 404.

¹⁰ See G B Born, *International Commercial Arbitration* (2009) 1911, noting that 'there are significant differences in the nature and scope of privileges under different national laws. In particular, there are substantial differences in the categories of privilege that are recognized, the treatment of waiver of privileges, the persons entitled to invoke privileges (e.g., in-house counsel) and the scope of privileges'.

enforce the policies of the international community.

This article is divided in three parts. The first examines choice of law criteria that have been proposed to help international commercial arbitration tribunals to decide claims of privilege presented to them. The main advantages and disadvantages of each criterion are also discussed. Part Two then discusses the main problems with applying a choice of law approach to decide claims of privilege in public international law disputes. Finally, Part Three explores the question of how international tribunals could go about establishing international rules of privilege. This is followed by some concluding remarks.

2 Choice of Law

A typical dispute submitted to an international tribunal involves litigants from at least two different nationalities. However, the formal litigant may in fact represent the interests of many more parties which might be nationals from different states. For example, in a dispute between a foreign investor and a host state, i.e. the state in which the investment is made), the foreign-investor-litigant may be incorporated in state A, but be a wholly-owned subsidiary of a company based in state B. While the company in state B is not formally a party to the proceedings, it clearly has a direct interest in the dispute and might hold information relevant to the proceedings. Moreover, third parties who do not have a direct interest in the dispute, but who hold relevant information, may yet be based in other states. For instance, the lawyers who represented the foreign-investor-litigant in the organization of its investment in the host state might be based in state C. In short, this indicates that an international tribunal adjudicating a dispute under a treaty may be presented with claims of privilege based on the law of several different states. The question then is whether the tribunal should recognize such privileges. In particular, on the basis of which law should such recognition take place? Should the party invoking the privilege be allowed to choose the law of one state? For example, if the foreign-investor claimed that certain information regarding the organization of its investment was protected by the attorney-client privilege, could the investor choose among the laws of state A, state B, state C, or the host state?

Similar questions have occupied the mind of commercial arbitrators adjudicating international disputes between private parties pursuant to an arbitration agreement and applying the substantive law of a specific domestic jurisdiction

(e.g. the contract law of France) chosen by agreement of the disputing parties.¹¹ As is the case with international tribunals, the rules of the major arbitral institutions such as the International Chamber of Commerce (ICC) and the London Court of Arbitration (LCIA), and the arbitration laws of most, if not all, jurisdictions do not address the question of how international commercial arbitrators should decide claims of privilege.¹² The only major institution which has addressed the question of how claims of privilege are to be decided is the International Center for Dispute Resolution (ICDR). Article 22 of the ICDR International Arbitration Rules contains a choice of law rule that provides that arbitrators 'should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection.' This rule is also known as the most-favored-privilege and will be discussed in more detail below.

There are also no internationally recognized guidelines establishing rules to decide claims of privilege. The International Bar Association's Rules on the Taking of Evidence in International Arbitration (*IBA Rules*)¹³ provide that arbitrators may refuse to order the production of evidence protected by a 'privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.'¹⁴ However, the IBA Rules do not provide detailed guidance on how arbitrators are to determine the applicable rules other than stating that arbitrators 'may take into account' the need to enforce the attorney-client and settlement privileges and that in doing so they may take into account the 'the expectations of the Parties and their advisors' and the 'need to maintain fairness and equality as between the Parties.'¹⁵ Accordingly, the IBA Rules do not set out specific rules

¹¹ The expression 'international commercial arbitrators' is used throughout this article to refer to arbitral tribunals adjudicating private disputes between parties from different jurisdictions and applying the substantive law of a specific domestic jurisdiction.

¹² Born, above n 10, 1911; F von Schlabrendorff & A Sheppard, 'Conflict of Legal Privileges in International Arbitration: an Attempt to Find a Holistic Solution', in G Aksen et al (eds), *Global Reflections in International Law, Commerce and Dispute Resolution: Liber Amicorum in Honor of Robert Briner* (2005) 743, 757–8; M de Boisseson, 'Evidentiary Privileges in International Arbitration', in A J van den Berg (ed), *International Arbitration 2006: Back to Basics?* (2007) 705, 706.

¹³ The IBA Rules are guidelines drafted by the International Bar Association (IBA) for use in international arbitration. The Rules are not binding unless adopted by the parties, the institution administering the arbitration, or the arbitral tribunal. The current version of the Rules was approved by the IBA in May 2010.

¹⁴ IBA Rules, Article 9.2(b).

¹⁵ IBA Rules, Article 9(3). See K P Berger, 'Evidentiary Privileges under the Revised IBA Rules on the Taking of Evidence in International Arbitration' (2010) 13 *Int'l Arb LR* 171, 171. stating that '[Art] 9(2)(b) refrains from providing a specific conflict rule for the application of privileges in international arbitration. At the same time, the rule is not specific enough to provide

of privilege or a choice of law rule, but instead adopt two guiding principles: respect for the equality of the parties and their expectations. Because of their fundamental nature, these principles have framed most of the debate on choice of law even before their adoption by the IBA Rules.¹⁶ For this same reason, this article also refers to them in analyzing and proposing a solution to deal with the issue of privileges in the context of international tribunals.

Possibly due to the larger number of international commercial arbitrations—and the correspondingly higher frequency of privilege claims—as compared to public international law disputes, the question of privileges has been more vigorously debated among commentators in the field of international commercial arbitration than those in the field of public international law. The focus of the international commercial arbitration debate has been on choice of law, that is, on establishing principles to guide international commercial arbitrators in choosing among the possibly applicable domestic rules of privilege. The following options have been considered: (a) the law of the place of arbitration; (b) the substantive law governing the dispute; (c) the law of the domicile of the person or entity claiming the privilege; (d) the law of the place where the communication was generated; (e) the law of the jurisdiction most closely connected to the allegedly privileged communication; (f) the most-favored-privilege; and (g) the least-favored-privilege. These options, including their advantages and disadvantages, are discussed in turn.

2.1 The law of the place of arbitration

When private parties agree to arbitrate a dispute they must designate a place for the arbitration (i.e. the seat of the arbitration), which means that the arbitration law—e.g. in the United States, the Federal Arbitration Act—of that jurisdiction will govern the procedural aspects of the arbitration. As noted above, however, domestic arbitration laws are silent on the question of privileges. In the absence of guidance from the arbitration law, one option could be the application of the rules of privilege applicable in the courts of the selected seat.

The advantage of this approach is that the same privilege rules apply to all parties.¹⁷ There are, however, two problems with applying the rules of privilege

international arbitrators with concrete guidance as to the practical handling of privilege issues’.

¹⁶ See, for example, Berger, above n 15, 508 (stating that ‘it is generally acknowledged that in making choice of law decisions, international arbitral tribunals should do justice to the legitimate expectations of the parties.’).

¹⁷ Schlabrendorff & Sheppard, above n 12, 769.

of the seat of the arbitration. First, it does not take into account the social policy aspects of privileges.¹⁸ This is so because parties often choose a neutral jurisdiction to be the place of arbitration, which means that the seat might have little connection with the parties and the matter at issue in the arbitration. In this context, the place of the arbitration has no interest in enforcing its policies against conduct which takes place outside its boundaries and has no effect within its boundaries. That is to say, the place of the arbitration has no interest in, for instance, encouraging frank communications between a lawyer and a client both of whom are outside its borders, regarding a transaction which has no connection with the jurisdiction. Second, application of the law of the seat is likely to violate the expectations of the parties.¹⁹ When the parties have no connection with the seat and the communications or documents at issue were created in another jurisdiction (perhaps years before the seat was chosen), the parties were likely not expecting that the disclosure of their allegedly privileged communications would be governed by the laws of the seat.

On balance there are more problems than advantages in applying the law of the seat to decide claims of privilege and, accordingly, this approach has had no or little support.

2.2 The substantive law governing the dispute

Another option which would have similar advantages and disadvantages to applying the law of the seat of the arbitration is the application of the substantive law governing the dispute.²⁰ When private parties agree to arbitrate a dispute they choose the substantive law to be applied by the arbitrators in deciding the case. As is the case with the law of the place of arbitration, the law governing the dispute might have no connection with the parties nor with the transaction – e.g., a company from Italy and a company from France contracting for the transfer of technology from the former to the latter may choose the contract law of Switzerland to govern their contract. Moreover, the parties are unlikely to take

¹⁸ Ibid.

¹⁹ K P Berger, 'Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion' (2006) 22 *Arb Int'l* 501, 508. See also Schlabrendorff & Sheppard, above n 12, 769, noting that 'it would come as a surprise to the parties if they were to learn from the arbitrators that, by choosing a place of arbitration for their dispute, they had also chosen the privilege rules applicable in its courts'; J Waincymer, *Procedure and Evidence in International Arbitration* (2012) 803.

²⁰ Schlabrendorff & Sheppard, above n 12, 770; Berger, above n 19, 509–10.

rules of privilege into account in choosing the substantive law to govern their disputes.²¹

As is the case with the law of the place of arbitration, on balance there are more problems than advantages with applying the law governing the dispute to decide claims of privilege and, accordingly, there is no or little support for the application of this approach.

2.3 The law of the domicile of the party claiming the privilege

Claims of privilege could also be decided by reference to the law of the domicile of the person or entity claiming the privilege.²² The main advantage of this approach is that it takes the expectations of the parties into account in the sense that parties are familiar with the laws of their jurisdictions and should expect those laws to apply to their conduct.

Apart from the fact that in certain circumstances it might be difficult to determine the domicile of a certain party,²³ equality of treatment is the main problem with applying the law of the domicile of the party claiming the privilege. Parties might be treated differently in that the rules of privilege of their respective jurisdictions will apply to them and such rules might not be the same or similar. A frequently cited example of this problem involves the extension of the attorney-client privilege to in-house counsel. Jurisdictions such as France, Italy, Switzerland and Sweden do not recognize the privilege with respect to in-house counsel, while others including the US, England, Spain, and Belgium do so.²⁴ Accordingly, if the law of the domicile of the parties applies, in a dispute between a French and a US company, the US company will be able to invoke the privilege, whereas the French company will not.

At this point, it is worth noting that variations in the rules of privilege result not only from different policy choices among jurisdictions, but also from

²¹ O Meyer, 'Time to Take a Closer Look: Privilege in International Arbitration' (2007) 24 *J Int'l Arb* 365, 368. See also Waincymer, above n 19, 803.

²² Schlabrendorff & Sheppard, above n 12, 770.

²³ For instance, when a Bahamian subsidiary of a German company is formally the party to a dispute, but all decisions regarding the Bahamian subsidiary are made at the German headquarters.

²⁴ M R Vargas, 'Los Privilegios Probatorios (Evidentiary Privileges) en Arbitraje Internacional, en Especial el Secreto Profesional, Privilegios Abogado-cliente y Privilegio de Negociación (Settlement Privilege)' (2012) 15 *Spain Arb R* 79, 83; Schlabrendorff & Sheppard, above n 12, 770; Waincymer, above n 19, 812; Berger, above n 15, 172.

variations in the way proceedings are conceived and structured in common law and the civil law jurisdictions.²⁵ As a general rule, civil law jurisdictions do not have discovery as it is known in common law countries, i.e. non-voluntary disclosure of information. The general rule is that parties do not have a right to demand their opponent to produce information in its possession. While courts in some jurisdictions have the power to request production of information, the exercise of this authority does not lead to a process in any way resembling common law discovery. As a civil law commentator has noted, '[w]e react to the notion of discovery, be it English or, worse, American style, as an invasion of privacy by the court which is only acceptable in criminal cases'.²⁶ Because parties do not have an obligation to produce documents aside from those on which they rely upon, the situations where claims of privilege might arise are limited. In contrast, in common law jurisdictions the general rule is that all information must be disclosed. As the US Supreme Court has noted, there is a 'longstanding principle that the public [...] has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege'.²⁷ The result of these differences is that the law of privileges in civil law jurisdictions is not as developed as in common law countries. In light of this, if the law of the domicile of the parties applies in an international commercial arbitration with some form of non-voluntary disclosure,²⁸ the French company might be placed in the odd position of not being able to invoke the attorney-client privilege to protect communications with in-house counsel from disclosure, while it would likely have no obligation to produce such information in a proceeding before French courts owing to the absence of non-voluntary disclosure.

In sum, because of this inequality of treatment problem, there has been no support to the idea that international commercial arbitrators should rule on questions of privilege based on the law of the domicile of the party claiming the privilege. While the law of the domicile of the party claiming the privilege has been rejected as the sole criterion for choosing the applicable law, it has been accepted as a component of more elaborate approaches to choice of law. These

²⁵ Ibid 772; Meyer, above n 21, 369-370; Waincymer, above n 19, 804, 806.

²⁶ C Reymond, 'Civil Law and Common Law: Which Is the Most Inquisitorial? A Civil Lawyer's Response' (1989) 5 *Arb Int'l* 357, 360.

²⁷ *Branzburg v Hayes*, 408 US 665, 668 (1972).

²⁸ In this regard, Born notes that while there is no uniform standard of disclosure in international commercial arbitration, 'there is an emerging consensus among experienced arbitrators and practitioners that a measure of document disclosure is desirable in most international commercial disputes': Born, above n 10, 1895.

are discussed below.

2.4 The law of the place where the communication was generated

Another option would be to decide claims of privilege by reference to the law of the place where the allegedly privileged communication was generated.²⁹ At first sight, this would seem to be reasonable from the perspective of the parties' expectations in that they might expect to be bound by the rules of the jurisdiction where they create a document or make a communication. However, because the communication might take place at a random location unrelated to the parties or the transaction—e.g. a business trip for an unrelated matter—it cannot be said that the parties expect that by holding the meeting at that place they would attract its rules of privilege. The potential difficulty of identifying where a communication is generated would also lead to speculation and uncertainty.³⁰ This criterion would also be problematic from the perspective of equality of treatment as different laws might apply to the parties depending on where a specific communication was made.

While there is little or no support for the use of this criterion alone, some commentators have suggested that the place where the communication was generated could be a factor to be balanced against other factors with a view to establishing the jurisdiction with the closest connection to the allegedly privileged document or communication.³¹ The closest connection criterion is discussed in turn.

2.5 The law of the jurisdiction most closely connected to the allegedly privileged communication

Several commentators have argued that arbitrators should 'accede to a claim of privilege valid under the municipal law of the jurisdiction with the closest

²⁹ Schlabrendorff & Sheppard, above n 12, 770.

³⁰ In this regard, Schlabrendorff and Sheppard refer to the situation where, in the context of the attorney-client privilege, the lawyer gives advice from his laptop while travelling. They note that in this situation 'the place of production may be difficult to determine and/or be wholly unrelated to any aspect of the transaction or advice': Schlabrendorff & Sheppard, above n 12, 770.

³¹ C Tevendale & U Cartwright-Finch, 'Privilege in International Arbitration: Is it Time to Recognize the Consensus?' (2009) 26 *J Int'l Arb* 823, 831.

relationship with the allegedly privileged evidence'.³² The following factors would be taken into account in determining which jurisdiction has the closest relationship with the evidence: (i) nature of the evidence; (ii) place where the document was created or where the communication occurred; (iii) the likelihood that the parties expected that the evidence would be governed by their local privilege rules.³³

The advantage of this approach is said to be that the parties' expectations are respected if the law with the closest connection with the allegedly privileged evidence is applied.³⁴ This is questionable, however, given the fact that the closest connection test is not a hard and fast rule and that there is no guarantee that in balancing the different factors described above the arbitrators will reach the same conclusion which the parties would have reached at the time the communication was made.³⁵ This is illustrated, for instance, by the lack of consensus as to whether in the context of the attorney-client privilege the closest connection test would lead to the application of the law of the state where the attorney practices, of the state where the attorney-client relationship has its predominant effect, or of the state where most of the attorney-client contact occurred.³⁶

Other disadvantages of this approach include: (i) unequal treatment, since different rules of privilege might apply to the parties; and (ii) the cost of deciding and lack of uniformity which might result in situations in which arbitrators are presented with numerous claims of privilege.³⁷

2.6 The most-favored-privilege

With a view to addressing the inequality of treatment problem which affects some of the approaches described above, some commentators have suggested the

³² Mosk & Ginsburg, above n 1, 346. See also Berger, above n 19, 510–11; C Tevendale & U Cartwright-Finch, 'Privilege in International Arbitration: Is it Time to Recognize the Consensus?' (2009) 26 *J Int'l Arb* 823, 831.

³³ Mosk & Ginsburg, above n 1, 381; Tevendale & Cartwright-Finch, above n 32, 831. The *Restatement (Second) of Conflict of Laws* refers to a similar test—the most significant relationship with the communication—in setting out principles for state courts in the US to determine the applicable rules of privilege in cases where the laws of more than one state are potentially applicable.

³⁴ Mosk & Ginsburg, above n 1, 382; Tevendale & Cartwright-Finch, above n 32, 831.

³⁵ Along these lines, Meyer argues that '[a] certain degree of arbitrariness and subjectivity is unavoidable' in the exercise of determining the law with the closest connection with the allegedly privileged evidence: Meyer, above n 21, 369.

³⁶ See Berger, above n 19, 511 (referring to all of these possibilities).

³⁷ H Alvarez, 'Evidentiary Privileges in International Arbitration', in A J van den Berg (ed), *International Arbitration 2006: Back to Basics?* (2007) 663, 685.

adoption of the most-favored-privilege approach.³⁸ According to this approach, a party may request the application of any rule of privilege that would be applicable to any other party.

The most-favored-privilege approach may be combined with any of the approaches described above which do not guarantee equality of treatment. For instance, Schlabrendorff and Sheppard would combine the most-favored-privilege approach with the closest connection test. They propose that arbitrators first determine the applicable privilege rules based on the closest connection test and then grant any party to the arbitration the 'same legal privileges as are available to any other party'.³⁹ Others have suggested combining the most-favored-privilege approach with the law of domicile of the parties.⁴⁰ For example, in a dispute between a French and an American company, the French company would be able to invoke the attorney-client privilege with respect to communications with its in-house counsel.

The inspiration for this approach might have come from the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (*Hague Convention*).⁴¹ The Hague Convention establishes a framework for mutual assistance between countries for the taking of evidence in one signatory for use in a proceeding before the courts of another signatory. According to Article 11 of the Convention, a person may refuse to give evidence when the evidence is protected by a privilege under the law of the assisting court, or under the law of the court requesting assistance whenever such court has specified or otherwise confirmed the existence under its law of a privilege protecting the evidence from disclosure.

Apart from ensuring the equal treatment of the parties, the other positive aspect of the most-favored-privilege approach is that by allowing the parties to claim the privileges that would apply to them as well as the privileges that would apply to the other parties, the expectations of all the parties are respected.⁴²

³⁸ See Mosk & Ginsburg, above n 1, 384; Berger, above n 19, 520; J H Rubinstein & B B Guerrina, 'The Attorney-Client Privilege and International Arbitration' (2001) 18 *J Int'l Arb* 587, 601; Boisseson, above n 12, 716; M F Gusy & M H Illmer, 'The ICDR Guidelines for Arbitrators Concerning Exchanges of Information: a German/American Introduction in Light of International Practice' (2008) 6 *Int'l Arb LR* 195, 201–2; Berger, above n 15, 176.

³⁹ Schlabrendorff & Sheppard, above n 12, 773.

⁴⁰ Rubinstein & Guerrina, above n 38, 599; Berger, above n 19, 518.

⁴¹ Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 18 March 1970, 847 UNTS 231.

⁴² Rubinstein & Guerrina, above n 32, 598, 601; P Heitzmann, 'Confidentiality and Privileges in Cross-Border Legal Practice: the Need for a Global Standard?' (2008) 26 *ASA Bulletin* 205, 223; Berger, above n 19, 518; Boisseson, above n 12, 714; M F Gusy & M H Illmer, 'The ICDR Guidelines

The extent to which expectations are protected, however, depends on which approach—e.g. domicile of the party, closest connection—is combined with the most-favored-privilege rule.

The main disadvantage of this approach is that it is over-inclusive. It even protects expectations which the parties do not have. Consequently, the approach might lead to the exclusion of too much evidence, constituting a barrier to accurate fact-finding.⁴³ For example, because of the absence of non-voluntary disclosure in civil law jurisdictions, there is no attorney-client privilege as it is understood in common law jurisdictions. Instead, civil law jurisdictions protect communications between attorneys and their clients through the much broader notion of professional secrecy.⁴⁴ Such notion requires lawyers not to disclose any information that has come to their knowledge in the course of conducting their profession, no matter whether the client has not otherwise kept that information confidential.⁴⁵ In certain jurisdictions such as France, lawyers are exposed to criminal penalties if they violate their obligation to maintain professional secrecy.⁴⁶ Moreover, in many jurisdictions the notion of professional secrecy encompasses not only lawyers but all professional services providers.⁴⁷ Another broad notion of privilege is found in Argentine law, according to which ‘witnesses may refuse to answer questions when an answer will reveal “professional, military, scientific, artistic or industrial secrets”’.⁴⁸ Accordingly, in an arbitration involving Argentine, French, and American parties, a lot of information might be excluded from production if all the parties are allowed to invoke the broad notion of professional secrecy and the Argentine rules of privilege. This might have a negative impact on the establishment of the facts.

Notwithstanding the over-inclusiveness problem, there is increasing support for the most-favored-privilege approach.⁴⁹ The ICDR International Arbitration

for Arbitrators Concerning Exchanges of Information: a German/American Introduction in Light of International Practice’ (2008) 6 *Int’l Arb LR* 195, 201.

⁴³ Meyer, above n 21, 371.

⁴⁴ Alvarez, above n 37, 669; Berger, above n 15, 172; Vargas, above n 24, 80.

⁴⁵ Vargas, above n 24, 81-82; Schlabrendorff & Sheppard, above n 12, 752, 754 (referring to the cases of Germany and France). This notion may be analogized with the general duty of confidentiality imposed by Rule 1.6(a) of the 2004 ABA Model Rules of Professional Conduct. However, under the ABA Model Rules, information which must be kept confidential is not necessarily protected from disclosure in judicial proceedings.

⁴⁶ Schlabrendorff & Sheppard, above n 12, 754.

⁴⁷ Alvarez, above n 37, 669.

⁴⁸ Mosk & Ginsburg, above n 1, 350.

⁴⁹ Supporting the most-favored-privilege approach: Mosk & Ginsburg, above n 1, 84; Berger, above

Rules have adopted the most-favored-privilege rule in its Article 22.

2.7 The least-favored-privilege

The least-favored-privilege is an alternative which would ensure equal treatment of the parties and address the over-inclusiveness problem posed by the most-favored-privilege approach. The least-favored-privilege approach would work similarly to the most-favored-privilege rule except for the fact that under the former the parties would be limited to invoking the less protective of all potentially applicable rules. In other words, this approach would favor disclosure over exclusion of evidence on grounds of privilege. This is the approach adopted by the *Restatement (Second) of Conflict of Laws* for resolving conflicts between the rules of privilege of the different states in the US.⁵⁰

The obvious weakness of this approach is that it frustrates the expectations of the parties which would be subject to higher protection from disclosure under the privilege rules otherwise applicable to them.⁵¹ For this reason, the least-favored-privilege approach has not had much support in the international commercial arbitration community.⁵²

3 Problems with Choice of Law for Public International Law Disputes

As discussed above, international arbitration commentators have overwhelmingly focused on the choice of law approach, that is, they have sought to establish criteria to assist arbitrators in choosing among the potentially applicable domestic rules of privilege. Notably, some of those commentators have considered under the rubric of 'international arbitration' not only international commercial ar-

n 19, 520; Rubenstein & Guerrina, above n 32, 601; Boisseson, above n 12, 716; Gusy & Illmer, above n 42, 201–2.

⁵⁰ §139 of the *Restatement Second* provides: '(1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum. (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.'

⁵¹ Berger, above n 19, 519.

⁵² See Tevendale & Cartwright-Finch, above n 32, 834.

bitration but also public international law adjudication.⁵³ This section contends that the choice of law methodology, which ultimately results in the application of domestic rules, is not well suited for public international law disputes. Instead, it argues that claims of privilege before international tribunals should be adjudicated by reference to international rules of privilege that take into account the particularities of public international law disputes.

There are many problems with the choice of law methodology; some are of a general character and others specific to each of the criteria discussed above. Apart from the problems with some of the criteria that were noted in the previous section, the following are some of the more specific problems that would militate against the adoption of the choice of law approach in public international law disputes.

First, applying the law of the place of the arbitration is not an option in public international law disputes because as a general rule such disputes do not have a seat.⁵⁴ They are not adjudicated under the framework of a domestic arbitration law, but instead under a separate framework which has its foundations in public international law.

Second, the application of the law of the jurisdiction most closely connected to the allegedly privileged communication or of the law of the place where the communication was generated involves a certain degree of subjectivity. The ensuing uncertainty is one of the main drawbacks of these criteria because they lose what is purported to be their main advantage; that is, the promotion of certainty and predictability, and the protection of the expectations of the parties.

Third, the application of the law of the domicile, the law of the place where the communication occurred, and the closest connection do not guarantee the equal treatment of the parties because different rules of privilege will apply to them depending on their domicile and other considerations. This inequality of treatment would be particularly unfair when the privilege at issue concerns government classified information. This is so because this is a frequently invoked privilege in public international law disputes and all three criteria are likely to lead

⁵³ See e.g. Mosk & Ginsburg, above n 1.

⁵⁴ The main exception to this rule are *ad hoc* tribunals constituted pursuant to dispute resolution clauses of investment treaties providing for arbitration under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (*ICSID Additional Facility Rules*), the UNCITRAL Arbitration Rules, or the rules of other arbitral institutions. See, for example, Article 24(3)(b)–(d) of the 2012 US Model Bilateral Investment Treaty, <<http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>> [accessed 22 August 2014].

to the application of the law of the state invoking the privilege. This means that if such criteria were applied, a party to a dispute would in effect be allowed to determine the rules that apply to it.

Four, the application of the closest connection, the law of the place where the communication was generated, and the most-favored-privilege criteria are time and resource consuming because for every piece of evidence for which a privilege is invoked it is first necessary to undertake a multistep analysis to determine which law among several possibilities applies, to only then finally apply such law.

Five, as noted above, privileges reflect the public policy of the state which creates them; because international tribunals do not have a mandate to enforce the public policies of any one state, except when specifically provided for, there is no justification for a tribunal to apply domestic law in deciding claims of privilege.⁵⁵

Six, and relatedly, the application of domestic rules of privilege which have been designed to reflect domestic policy concerns may result in the exclusion of evidence that is crucial to the adjudication of international disputes. This affects all of the choice of law criteria discussed above. The following example may help to illustrate the problem. Assume that a government document concerning a decision which negatively affected the investment of a foreign investor protected under an investment treaty is privileged under the domestic law of the host state and of the home state of the investor. In this situation, an international tribunal adopting a choice of law methodology is likely to exclude the document from production. The exclusion of a document going directly to a question lying at the core of the mandate of the international tribunal, however, would put in question the very purpose of the tribunal. A similar concern guided the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in denying Croatia's claim of national security privilege. In the words of the Appeals Chamber: 'to allow national security considerations to prevent the International Tribunal from obtaining documents that might prove of decisive importance to the conduct of trials would be tantamount to undermining the very essence of the International Tribunal's functions'.⁵⁶

⁵⁵ In this vein, the *Biwater* tribunal affirmed that '[i]t is hardly conceivable that, in this setting, a State might invoke domestic notions of public interest and policy relating to the operations of its own Government as a basis to object to the production of documents which are relevant to determine whether the State has violated its international obligations and whether, therefore, its international responsibility is engaged': *Biwater*, Procedural Order No 2, above n 5, 8.

⁵⁶ *Prosecutor v Tihomir Blaskic*, ICTY, IT-95-14 (Appeals Chamber, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29

Accordingly, because a communication may have a more significant role to play in a public international law dispute than in a domestic dispute, it is inappropriate to enforce domestic rules of privilege in public international law proceedings. In short, the factors involved in the balancing process that leads to the creation of a privilege are not necessarily the same at the domestic and international level and, therefore, there is no reason to believe that the end result should be the same.

Seven, while some might argue that the community of nations has manifested a preference for the most-favored-privilege approach through the adoption of the Hague Convention, the reality is that the Hague Convention is an instrument of private international law to promote cooperation in the taking of evidence between domestic courts in proceedings applying domestic law. In other words, there is no reason to believe that the principle established in the Hague Convention would be adopted for public international law disputes in light of the differences in nature and scope between public international law and domestic proceedings. International commercial arbitration, in contrast, is an alternative to litigation before domestic courts, which justifies the reference to the Hague Convention in that context.

Moreover, the support of the international commercial arbitration community to the most-favored-privilege approach is to a great extent influenced by the fact that the most-favored-privilege is the only choice of law criterion that ensures the parties equality of treatment and respect for their expectations.

International commercial arbitrators give special emphasis to these two factors because of the concern that unequal treatment and failure to respect the expectations of the parties—particularly when the expectation relates to the application of privileges recognized at the seat of the arbitration or where enforcement of the award might be sought—may provide grounds for domestic courts to set aside or refuse to enforce their awards.⁵⁷ This concern is fueled by the fact that the 1958 New York Convention on the Recognition and Enforcement

October 1997) 64. This is also analogous to the situation in which lawyers are accused of acting wrongfully during the representation of their clients. In such cases, there are exceptions to the attorney-client privilege that allow the disclosure of attorney-client communications necessary to decide the questions at issue. In this regard, see, for instance, Article 13(B) of the ICTY's Code of Professional Conduct for Counsel Appearing before the International Tribunal; *Restatement (Third) of the Law Governing Lawyers*, §83.

⁵⁷ Schlabbendorff & Sheppard, above n 12, 767-68 (referring to enforcement proceedings); Alvarez, above n 37, 687-8 (referring to enforcement proceedings); Meyer, above n 21, 366 (referring to enforcement proceedings).

of Foreign Arbitral Awards (*New York Convention*),⁵⁸ and domestic arbitration laws such as those based on the UNCITRAL Model Law on International Commercial Arbitration (*UNCITRAL Model Law*)⁵⁹ provide, respectively, that an award may be refused enforcement⁶⁰ or be set aside⁶¹ if it conflicts with the public policy of the state. The concern is that an award which does not apply the same rules of privilege to both parties and which does not recognize a privilege of the jurisdiction where the award is made or where enforcement is sought might be found to violate the public policy of the seat or of the enforcing state. This system of enforcement and set aside of awards, however, does not apply to public international law disputes as general rule. The most significant exception regards awards issued by *ad hoc* tribunals constituted under investment treaties.⁶² This, however, does not apply to investor-state tribunals operating under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (*ICSID Convention*).⁶³ While ICSID awards may be enforced through domestic courts if not voluntarily honored, according to the ICSID Convention an award rendered pursuant to the convention cannot be denied enforcement or be set aside by the domestic courts of a signatory.⁶⁴

Importantly, if international rules of privilege are adopted as suggested here, equality of treatment would not be a concern since the same rules would apply to both parties. As for the expectations of the parties, it is arguable that the parties cannot expect to rely on their domestic law of privileges in a public international law dispute. This is in line with the principle of international law that a state cannot invoke its domestic law to justify non-compliance with international obligations.⁶⁵ While this principle might not directly apply to a foreign investor in investor-state arbitrations because an investor is not a state, it is fair to argue that when the foreign investor opts to pursue its case under a regime of public

⁵⁸ 10 June 1958, 330 UNTS 3. The Convention is the principal international instrument governing the recognition and enforcement of international commercial arbitration awards.

⁵⁹ UNCITRAL Model Law on International Commercial Arbitration (2006) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> [accessed 22 August 2014].

⁶⁰ New York Convention, Art V:2(b).

⁶¹ UNCITRAL Model Law, Art 18.

⁶² See, for example, Arts 24(3)(b)–(d) of the 2012 US Model BIT.

⁶³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159.

⁶⁴ ICSID Convention, Arts 53 & 54.

⁶⁵ I Brownlie, *Principles of Public International Law* (6th edn, 2003) 34. See also Art 27 of the Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331, which states that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'; *Biwater*, Procedural Order No 2, above n 5, 8.

international law, taking advantage of what that regime has to offer, it must be prepared to assume the ensuing obligations.

Admittedly, the proposed approach creates the risk that the international system will interfere with the achievement of domestic policies, for instance, when a privilege whose objective is to foster frank communications is recognized at the domestic but not at the international level. However, this situation is not unique to privileges; any rule of public international law has the potential to interfere with domestic policy-making. Nor is the situation unique to public international law dispute resolution. The same problem is present in federal states such as the US. In the US, Rule 501 of the Federal Rules of Evidence provides that when the rule of decision with respect to a claim or defense is federal, questions of privilege are 'governed by the principles of the common law as they may be interpreted by the courts of the United States'. In other words, in federal courts, state privilege law applies only with respect to claims or defenses grounded upon state substantive law, not those based on federal law.

Eight, enforcing domestic rules of privilege may also be problematic in that those rules reflect different approaches to disclosure in common law and civil law jurisdictions—i.e. civil law countries generally do not have non-voluntary disclosure. As a general rule, public international law adjudication provides for some non-voluntary disclosure but of a more limited scope than common law (particularly American) discovery. In public international law proceedings, disclosure is generally closely controlled by international tribunals. Requests for production of information must be specific⁶⁶ and the information must be shown to be relevant to the claims and defenses of the parties. Moreover, because the parties are required to submit written memorials explaining their case in detail, including how the evidence supports their case, international tribunals are better positioned than a typical common law court is at the stage discovery is conducted to determine which information is in fact relevant and necessary to decide the case. Accordingly, a unique international approach to claims of privilege is warranted—the next section discusses in more detail how the rules of privilege can be designed to reflect the particular structure of public international law proceedings.

Finally, even commentators who have supported the application of the most-favored-privilege criterion in international commercial arbitration have recog-

⁶⁶ Requests such as 'all correspondence from 1999 to 2001 between management of the subsidiary and the parent company relating to the establishment of the effluent treatment plant of the subsidiary' are not considered specific. A specific request must refer to a narrow and precisely described piece of information.

nized that 'having an autonomous set of privilege rules in international arbitration [...] would be the best means of achieving predictability and equality of arms for parties in the arbitral process'.⁶⁷ Those commentators, however, have supported the adoption of the most-favored-privilege criterion because of the alleged difficulty of designing transnational rules.⁶⁸ This difficulty, however, is overestimated. There are a number of governmental and non-governmental international organizations, including the IBA, the International Law Association (ILA), and UNCITRAL, to name a few, which could assist in this task. Moreover, public international law adjudication has an advantage over international commercial arbitration in this regard, namely, the awards of international tribunals are usually publicly available. The public availability of awards encourages dialogue between different international tribunals as well as between tribunals and commentators, which is likely to facilitate the development of an international law of privileges.

Compared to domestic litigation, public international law adjudication is still in its infancy. This explains the lack of well established rules of privilege, and also suggests that with time such rules might well develop if international tribunals do not shy away from the task. In fact, some international tribunals have adopted the view that claims of privilege should not be decided by reference to the domestic law of the parties.⁶⁹ The decisions that provide guidance on how international rules can be developed are still very few, but hopefully more tribunals will follow

⁶⁷ Schlabrendorff & Sheppard, above n 12, 774. See also Meyer, above n 21, 377–8, arguing that '[u]ntil the debate surrounding privilege is uncoupled from national law, there will always be systematic infringements within the discovery procedure and arbitrary ad hoc decisions which are difficult to predict'.

⁶⁸ Schlabrendorff & Sheppard, above n 12, 774.

⁶⁹ See *Biwater*, Procedural Order No 2, above n 5, 8–9, rejecting Tanzania's objection to a request for production of documents on the grounds that the documents were protected by the doctrine of public interest immunity under Tanzanian law. The tribunal noted that it was mandated to apply international law, and that such doctrine has no equivalent in international law); *Pope & Talbot v Canada*, NAFTA (Award on the Merits of Phase 2, 10 April 2001) para 193, rejecting the application of Canadian law to a claim of privilege brought before it). But cf the following decisions which essentially apply the domestic law of one of the parties: *Glamis Gold Ltd v USA*, NAFTA (Decision on Parties' Request for Production of Documents Withheld on Grounds of Privilege, 17 November 2005); *S D Myers Inc v Canada*, NAFTA (Procedural Order No 10 (Concerning Crown Privilege), 16 November 1999); *Merrill & Ring Forestry LP v Canada*, NAFTA (Decision of the Tribunal on Production of Documents in Respect of Which Cabinet Privilege Has Been Invoked, 3 September 2008); *Apotex Holdings Inc and Apotex Inc v US*, NAFTA (Procedural Order on Document Production regarding the Parties' Respective Claims to Privilege and Privilege Logs, 5 July 2013).

suit.⁷⁰

The following section explores how international tribunals could go about establishing international rules of privilege.

4 The Path to an International Law of Privileges

4.1 General contours of the approach

The essence of the suggested approach is that in light of the special nature of public international law adjudication, international tribunals must decide claims of privilege by applying international rather than domestic rules. Where such rules do not exist or are not well developed, international tribunals must establish such rules using their inherent powers.⁷¹

In undertaking this task, international tribunals must consider the policy objectives that the privilege would promote as well as its impact on the accurate determination of the facts. As part of this analysis, tribunals should consider relevant international instruments setting out policy objectives of the international community. They may also wish to review representative domestic laws or transnational law principles with a view to determining whether there is a general principle regarding the proposed privilege. The existence of such principle would constitute evidence that the policy which the privilege is meant to promote is particularly important. The protection of communications between lawyers and their clients is likely to fall under this category.⁷²

⁷⁰ See, for example, *Vito G Gallo v Canada*, NAFTA (Procedural Order No 3, 8 April 2009) paras 41, 46–7, 49; *Vito G Gallo v Canada*, NAFTA (Procedural Order No 4, 21 December 2009) paras 42–5; *St Marys VCNA v Canada*, NAFTA (Report on Inadvertent Disclosure of Privileged Documents by James Spigelman, 27 December 2012) 4.

⁷¹ The power to manage the proceedings to the extent necessary to fulfil their adjudicative function has been recognized as inherent to international tribunals. This is particularly so because international tribunals do not benefit from comprehensive codes of procedure or guidelines. See A D Mitchell, ‘The Legal Basis for Using Principles in WTO Disputes’ (2007) 10 *JIEL* 795, 828–32 (discussing the inherent powers of international courts and tribunals and those of WTO panels); D V Sandifer, *Evidence Before International Tribunals* (revised edn, 1975) 40 (arguing that international tribunals have inherent powers); C Brown, *A Common Law of International Adjudication* (2007) 55–80 (arguing that international courts and tribunals have inherent powers); S Rosenne, *The Law and Practice of the International Court 1920–2005* (2006) 584 (on the inherent powers of the ICJ).

⁷² See Mosk and Ginsburg, above n 1, 378. However, the specific contours of a privilege to protect communications between clients and their lawyers would still be an open question because, as noted above, such communications are protected differently in different countries, in particular

This approach is similar to that followed by the US Supreme Court in *Jaffee v Redmond*. In deciding whether there is a federal psychotherapist privilege under Rule 501 of the Federal Rules of Evidence, the Court started from the assumption that 'there is a general duty to give what testimony one is capable of giving'.⁷³ It then undertook an analysis of the social policy which the privilege would advance. In this regard, the Court concluded that '[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem'.⁷⁴ The Court also noted that '[t]he mental health of our citizenry [...] is a public good of transcendent importance'.⁷⁵ The Court then focused on determining what would be the evidentiary benefit that would result from the denial of the privilege. It concluded that rejection of the privilege would likely have a chilling effect on communications between psychotherapists and their patients, which ultimately would mean that much of the desirable evidence to which litigants would seek access would never come into being.⁷⁶ In other words, denial of the privilege would not necessarily promote more accurate fact-finding. Finally, the Court noted that its understanding was confirmed by the fact that 'all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege'.⁷⁷

A similar approach has also been adopted by international criminal tribunals when faced with novel questions of privilege. For instance,⁷⁸ in the *Brđjanin* case, the Appeals Chamber of the ICTY in deciding whether war correspondents were protected from testifying at trial took into consideration: (i) the interest in protecting the integrity of the newsgathering process in war zones so that the international community receives information about 'the horrors and reality of

in common law and civil law jurisdictions. Therefore, the work of the tribunal would not end with the identification of the privilege.

⁷³ *Jaffee v Redmond*, 518 US 1 (1996) 9.

⁷⁴ *Ibid.*, 11.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, 11–12.

⁷⁷ *Ibid.*, 12.

⁷⁸ For other examples, see *Prosecutor v Charles Ghankay Taylor*, SCSL, Trial Chamber II, SCSL-03-1-T (Decision on the Defense Motion for the Disclosure of the Identity of a Confidential 'Source' Raised during the Cross-Examination of TF1-355, 6 March 2009) paras 25, 33, 35 (considering policy objectives of the privilege); *Prosecutor v Blagoje Simic et al*, ICTY, Trial Chamber, IT-95-9-PT (Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999) paras 46–75 (considering policy objectives of the international community relating to the activities of the International Committee of the Red Cross).

conflict’;⁷⁹ (ii) the policy objectives of the international community expressed in the Universal Declaration of Human Rights—Article 19 of which protects the right to freely communicate and receive information—and decisions of the European Court of Human Rights;⁸⁰ and (iii) the recognition of the privilege by certain domestic jurisdictions.⁸¹ The Appeals Chamber also considered the impact of the privilege on accurate fact-finding, and, similarly to the US Supreme Court in *Jaffee v Redmond*, concluded that the recognition of the privilege did not necessarily result in less information being available to the court because ‘if war correspondents were to be perceived as potential witnesses for the prosecution, they could have difficulties in gathering significant information because the interviewed persons, particularly those committing human rights violations, may talk less freely with them and may deny access to conflict zones.’⁸²

Though still the minority, some investor-state tribunals have started to adopt an approach similar to that proposed above, taking into account, at least to some extent, the policy rationale for the proposed privilege and a sample of domestic laws with a view to determining whether the privilege is recognized by the international community. This was the case in *Vito G Gallo v Canada* and *St Marys VCNA v Canada*. In *Vito G Gallo*, the tribunal examined the policy objectives behind the attorney-client privilege, including the situations in which waiver of such privilege would be justified, and considered the recognition of the privilege by most jurisdictions as a relevant factor—though as the tribunal admitted, in answering specific questions it focused more on Canadian law.⁸³ Similarly, in *St Marys VCNA*, the special arbitrator for questions of privilege made reference to the policy objectives behind the attorney-client privilege and the fact that those policy objectives have been recognized ‘in the domestic law of many jurisdictions’.⁸⁴ Although this type of decisions are still not the norm in investor-state dispute resolution, they indicate that at least some tribunals are aware of the importance of creating an international law of privileges based on objective considerations.

⁷⁹ *Prosecutor v Radoslav Brdjanin*, ICTY, Appeals Chamber, IT-99-36-AR73.9 (Decision on Interlocutory Appeal, 11 December 2002) para 36.

⁸⁰ *Ibid*, paras 35 & 37.

⁸¹ *Ibid*, paras 35 & 41.

⁸² *Ibid*, para 43.

⁸³ *Vito G Gallo v Canada*, NAFTA (Procedural Order No 3, 8 April 2009) paras 41, 46-7, 49; *Vito G Gallo v Canada*, NAFTA (Procedural Order No 4, 21 December 2009) paras 42-5.

⁸⁴ *St Marys VCNA v Government of Canada*, Report on Inadvertent Disclosure of Privileged Documents by James Spigelman, above n 70, 4.

4.2 Whose social policy?

In seeking to determine the policies which a proposed rule of privilege would promote, international tribunals should not focus on the interests of a particular country but rather on the interests of the international community. For this purpose, the interests of the international community may be classified into two different categories: (i) those which are specific to the international community as an entity separate from the individual states which compose it; and (ii) those which by virtue of being widely pursued by the members of the international community are elevated to the level of community interests.

For illustrative purposes, it is worth noting that the WTO agreements contain two examples of privileges pursuing policies specific to the international community. First, the Trade Policy Review Mechanism (TPRM)⁸⁵ explicitly precludes WTO members from introducing into evidence in dispute settlement proceedings information produced specifically for the TPRM, which includes reports submitted by the reviewed member and the WTO Secretariat, and the minutes of the meetings of the Trade Policy Review Body.⁸⁶ The reason for not permitting WTO members to introduce such information into evidence is to encourage a dialogue among members on their policies and practices which allows them to become acquainted with each other's policies and practices, and to promote voluntary compliance with the WTO agreements.⁸⁷

Second, Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),⁸⁸ which establishes a process of consultations to be undertaken by the disputing parties before submission of the dispute to a WTO panel, provides that consultations 'shall be confidential, and without prejudice to the rights of any Member in any further proceedings.'⁸⁹ Accordingly,

⁸⁵ WTO Trade Policy Review Mechanism, <http://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm> [accessed 22 August 2014].

⁸⁶ According to paragraph A(i) of the TPRM, the review mechanism is not 'intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures.' In this regard, see Panel, *Canada – Measures Affecting the Export of Civilian Aircraft*, WTO Doc WT/DS70/R (14 April 1999) para 9.274.

⁸⁷ The stated objective of the TPRM 'is to contribute to improved adherence by all Members to rules, disciplines and commitments' made under the WTO agreements while allowing 'collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system'. The TPRM essentially allows for peer review of a member's trade policies and practices based on reports prepared by the reviewed member and the WTO Secretariat.

⁸⁸ WTO Dispute Settlement Understanding, 15 April 1994, 1869 UNTS 401.

⁸⁹ DSU Article 4.6.

information exchanged during consultations, including settlement proposals and related documents are not admissible in WTO panel proceedings.⁹⁰ The policy objective behind this privilege is to encourage WTO Members to talk to each other in a meaningful way with a view to reaching an amicable solution to their dispute before they initiate the formal panel process. The importance of this objective is made clear in the first paragraph of Article 4, which provides that 'Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.' If settlement proposals and related materials could be submitted into evidence, WTO Members might be discouraged from fully engaging in a dialogue with a view to resolving their disputes amicably. Moreover, admitting such proposals into evidence may not necessarily promote the accurate establishment of the facts in that parties may be willing during consultations to compromise on certain issues to reach an agreement.

Examples of possible international rules of privilege reflecting social policies which are widely pursued by the members of the international community would include some form of attorney-client privilege, settlement (or consultations) privilege,⁹¹ and national security privilege.

The widespread acceptance of the policies pursued by the national security privilege is made clear in the WTO agreements. Article XXI of the General Agreement on Tariffs and Trade (GATT)⁹² and Article XIVbis of the General Agreement on Trade in Services (GATS)⁹³ provide that nothing in those agreements shall be construed to require any WTO member 'to furnish any information the disclosure of which it considers contrary to its essential security interests'. Along these lines, Reisman notes that requiring states to disclose documents which would endanger themselves would likely drive states away from international adjudication.⁹⁴ According to him, concerns regarding the disclosure of documents which might weaken intelligence systems and jeopardize individuals 'must be accepted as valid exclusive interests, recognized by the public order of the most compre-

⁹⁰ In this regard, see Panel, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WTO Doc WT/DS24/R (11 August 1996) para 7.27.

⁹¹ See Berger, above n 15, 173, stating that 'there is a transnational privilege principle with respect to written or oral statements made in good faith by the parties to an arbitration during previous settlement negotiations between them'.

⁹² General Agreement on Tariffs and Trade, 1 January 1948, 55 UNTS 194.

⁹³ General Agreement on Trade in Services, 15 April 1994, 1896 UNTS 183.

⁹⁴ W M Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (1971) 601–2.

hensive international community'.⁹⁵

4.3 Accurate fact-finding

Accuracy is considered a—if not the—major objective of adjudication.⁹⁶ In the absence of an accurate determination of the facts, the law cannot be applied properly; such improper application of the law will in turn prevent the attainment of the goals pursued by the substantive law. Moreover, as law and economics scholars have explained, the accurate determination of the facts is important to the efficacy of the law in imparting efficient incentives for its observance, that is, accuracy is important for the legal system's optimization of deterrence.⁹⁷ This is explained by the fact that false negatives make committing the harmful act more attractive, while false positives reduce the incentives to comply with the law by subjecting wrongdoers and those who comply with the law to the same penalties.

In addition to its role in securing the social benefits noted above, accuracy is also crucial to the fairness of a decision, and fairness on its turn is important to encourage compliance by the losing party. This aspect is particularly important in public international law adjudication given that the system relies heavily on voluntary compliance.

Accurate outcomes are also essential to inspire confidence in international adjudication on the part of the international community and the public at large. International tribunals are constantly in the spotlight and inaccurate decisions may destroy public support for their mandate. In this regard, the ICJ was heavily criticized for its decision in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,⁹⁸ in which the court refused to compel the production of certain evidence which was crucial to the accurate determination of the facts at issue.⁹⁹

⁹⁵ Ibid.

⁹⁶ See, for example, J Zekoll, 'Comparative Civil Procedure', in M Reimann & R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006) 1327, 1355; R S Summers, 'Formal Legal Truth and Substantive Truth in Judicial Fact-Finding: Their Justified Divergence in Some Particular Cases' (1999) 18 *L & Phil* 497, 497–8; L B Solum, 'Procedural Justice' (2004) 78 *S Ca LR* 181, 184–5, 192, 252, 306.

⁹⁷ See, for example, L Kaplow, 'The Value of Accuracy in Adjudication: an Economic Analysis' (1994) 23(1) *JLS* 307, 348; R A Posner, 'An Economic Approach to the Law of Evidence' (1999) 51 *Stan LR* 1477, 1483–4; A Stein, *Foundations of Evidence Law* (2005) 144, 148.

⁹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ Reports 2007 p 43 (hereinafter the *Genocide Case*).

⁹⁹ For these criticisms see R J Goldstone & R J Hamilton, '*Bosnia v Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for

In *Bosnian Genocide*, the ICJ was presented with the questions of whether the atrocities committed in Bosnia and Herzegovina (hereinafter 'Bosnia') after the dissolution of the former Yugoslavia constituted genocide and whether Serbia could be held responsible for it.¹⁰⁰ The critical issue with respect to the latter question was whether the acts of the Army of *Republika Srpska* (VRS) at Srebrenica could be attributed to Serbia. The answer to this question depended on the extent of the control exercised by Yugoslavia over the VRS. In order to prove this issue, Bosnia requested unredacted versions of documents from meetings of Yugoslavia's Supreme Defence Council, which Bosnia argued would show that Yugoslavia's armed forces had financed the operations of the VRS. Serbia refused to provide the documents on the grounds of its national security interests and the ICJ declined to order the production of the documents even though the same documents had been produced in a different proceeding before the ICTY. The Court then went on to rule that not enough evidence had been presented to it to allow the Court to conclude that Serbia had effective control over the VRS. Critics of the Court have argued that the requested documents went directly to that question and that by refusing to order their production the Court undermined the legitimacy of its decision.¹⁰¹

Finally, another reason for pursuing accurate fact-finding in public international law adjudication is that '[t]he vital interests of states, directly concerning the welfare of thousands of people, may be adversely affected by a decision based upon a misconception of the facts.'¹⁰²

Accordingly, in considering the creation and the scope of a privilege, international tribunals must carefully assess the impact which the privilege would have on the accurate determination of material facts which fall under their mandate to adjudicate. In this regard, international tribunals should take into account—as the US Supreme Court in *Jaffee v Redmond* and the ICTY in *Brdjanin*

the Former Yugoslavia' (2008) 21 *LJIL* 95, 109–10; Riddell & Plant, above n 8, 216; J E Alvarez, 'Burdens of Proof' (2007) 23(2) *ASIL Newsletter*.

¹⁰⁰Serbia is the successor state to Yugoslavia.

¹⁰¹See Goldstone & Hamilton, above n 99, 109–10; Riddell & Plant, above n 8, 216; Alvarez, above n 37. Goldstone and Hamilton specifically noted (at 110): '[T]he perception of unfairness generated by the Court's refusal even to ask for the documents is a sad legacy to leave following 14 years of litigation [...] At its best, an international judicial process [...] has the potential to lay contested issues to rest, thereby allowing those affected to move into a phase of healing and more stable form of coexistence, if not complete reconciliation. By refusing, without any plausible justification, to request unredacted versions of the documents, the Court undermined its potential to play this much needed role in the region.'

¹⁰²Sandifer, above n 71, 5.

case did—the likelihood that in the absence of the privilege the evidence at issue would have never come into being.¹⁰³ They may also seek to reconcile the interest in accurate fact-finding with the interest in protecting certain information by creating qualified privileges. This issue is discussed in turn.

4.4 Absolute versus qualified privileges

In crafting rules of privilege, international tribunals may consider whether the interest in accurate fact-finding and in pursuing the policy motivating the creation of the privilege could both be served at the same time through the creation of a qualified privilege. While ‘an absolute privilege allows the holder to refuse to testify or to submit evidence under any circumstances, [...] a qualified privilege can be overcome under certain conditions, such as when a showing is made that the evidence is necessary for a fair determination.’¹⁰⁴ In other words, qualified privileges involve a balancing of interests—i.e. the public interest in disclosure versus the public interest in protecting the information—on a case-by-case basis. This also means that an assessment is made in each case about: (i) how important for the resolution of the dispute is the issue which the evidence is intended to prove; and (ii) how probative of that issue is the evidence.

Qualified privileges are particularly well suited for situations where the protection of information from disclosure is unrelated to the objective of encouraging the full, free, and frank communication necessary for the achievement of an objective which society considers worthy of protection—e.g. the provision of a professional service. For this category of privileges, the possibility that discretion might be exercised against the privilege may eviscerate its effectiveness because people might choose not to communicate if the protection of the communication is uncertain.¹⁰⁵

It is a fact, however, that protection of even this type of communications is not always absolute.¹⁰⁶ Privileges intended to pursue other objectives such as

¹⁰³ See *Jaffee v Redmond*, above n 73, 11–12; *Prosecutor v Radoslav Brdjanin*, Decision on Interlocutory Appeal, above n 79, para 43.

¹⁰⁴ Mosk & Ginsburg, above n 1, 346.

¹⁰⁵ See *Jaffee v Redmond*, above n 73, 17–8 (where the U.S. Supreme Court noted in the context of the psychotherapist privilege that ‘[m]aking the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.’)

¹⁰⁶ See, for instance, *In Re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 1001 (DC Cir, 2005) (where the Court of Appeals for the DC Circuit noted in the context of the journalist’s privilege that ‘the clash of fundamental interests at stake when the government seeks discovery of a

protection of privacy and sensitive information whose public disclosure may be damaging can more easily be qualified, because limited disclosure in adjudicatory proceedings does not necessarily undermine the purpose of the privilege. In fact, this has been recognized by some investor-state tribunals which have found that information falling within deliberative and policy making processes at high levels of government may be protected from production, but only in cases in which the interest in having the information disclosed is not stronger.¹⁰⁷

Importantly, in deciding in a particular case whether information protected by a qualified privilege should be produced, adjudicators may consider the sensitiveness of the information, the damage which public disclosure would cause, and the likelihood that protective measures restricting access to the information would be effective. If the national security privilege is qualified, for instance, adjudicators may conclude that when the information sought relates to a current national security issue, the risk that the information might be leaked even with a protective order and the damage that the leak would cause would be so significant that the information could not be disclosed. However, when the information sought relates to an issue which is no longer current—as was the case in *Bosnian Genocide*—the incentives to leak the information and the likelihood that a protective order would be effective would weigh in favor of production. Notably, as pointed out above, the information requested by Bosnia in *Bosnian Genocide* was produced in a proceeding before the ICTY—where the tribunal issued a protective order—and there are no reports that the information has been leaked.¹⁰⁸

In short, the creation of a distinction between absolute and qualified privileges may be a useful tool for international tribunals in reconciling the interest in pursuing social policies through the protection of certain information from disclosure with the interest in accurate fact-finding. Other mechanisms may be available as well. Ultimately, what is important is that international tribunals be active in searching for and implementing rules which take into account their specific mandates and the environment in which they operate.

reporter's sources precludes a categorical approach.') According to Mosk & Ginsburg, most privileges in English law are qualified, including the medical privilege and the journalists' privilege. Mosk & Ginsburg, above n 1, 347.

¹⁰⁷ See *United Parcel Service of America Inc v Canada*, NAFTA (Decision of the Tribunal relating to Canada's Claim of Cabinet Privilege, 8 October 2004) paras 11–12; *William Ralph Clayton et al v Canada*, NAFTA (Procedural Order No 13, 11 July 2012) para 22.

¹⁰⁸ Goldstone & Hamilton, above n 99, 108, 110.

5 Concluding Remarks

This article set out to answer the question of how international tribunals should decide claims of privilege presented to them. It noted that international tribunals could follow either one of two approaches: (i) a choice of law approach, by which the law of a domestic jurisdiction is selected and applied; and (ii) an approach which would lead to the development of international rules of privilege. The former has been the preferred approach in international commercial arbitration. After reviewing several potential choice of law rules, this article concluded that none of those rules are well suited to public international law adjudication. The main criticism to the choice of law approach in general is that it disregards the fact that domestic rules of privilege might not be the most appropriate for public international law adjudication.

In light of this, it was argued that international tribunals should decide claims of privilege on the basis of international rules. While such rules are not well established yet, the task of developing them is not impossible or outside the competence of international tribunals. In fact, it is important that international tribunals do not shy away from that task because by leaving questions unanswered they expose themselves to criticism and risk compromising their legitimacy.

The path suggested in this article would require international tribunals to openly consider the policy implications of a proposed privilege, including balancing the social policies which the privilege would promote against the interest in accurate fact-finding. This would result in rules that reflect the specific mandate and circumstances under which international tribunals operate and would thus contribute to the effectiveness and legitimacy of public international law adjudication. International professional and governmental organizations such as the IBA, ILA, and UNCITRAL, to name a few, could also help out by conducting much the same analysis and presenting the results in the form of privilege guidelines, which may then be adopted or used as a reference by international tribunals.