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U.S. Supreme Court Applies International Law Without Saying So: *GE Energy v. Outokumpu Stainless*

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On June 1, 2020, the United States Supreme Court issued its [opinion](#) in *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA*. The Court held that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) does not prohibit a Contracting State from applying the domestic law doctrine of equitable estoppel to allow enforcement of an arbitration agreement by a non-signatory.

Commentators have noted that the Court’s decision is “[narrow](#),” and “[make\[s\] no mention](#) of international law,” despite purporting to apply an international treaty.

However, in the author’s view, this decision is noteworthy because it applies (implicitly) a cornerstone doctrine of public international law known as the [Lotus principle](#). Under this principle, a state is free to engage in certain conduct unless it can be shown that international law prohibits that conduct. In other words, international law does not need to affirmatively permit certain conduct for that conduct to be legal; it is enough that international law does not prohibit it.

The *Lotus* principle: States can engage in any conduct that is not prohibited

The *Lotus* principle comes from a 1927 decision by the Permanent Court of International Justice (“PCIJ”) in a [dispute](#) between France and Turkey. That dispute arose after Turkey arrested, imprisoned, and convicted a French captain for causing a fatal collision with a Turkish ship on the high seas. France argued that Turkey’s exercise of criminal jurisdiction over a French national under the circumstances violated international law. (pp. 5, 10-11.) It argued that in order to have jurisdiction, Turkey needed to “point to some title to jurisdiction recognized by international law,” and none existed. By contrast, Turkey argued that it was free to exercise jurisdiction unless France could prove that such exercise was prohibited under international law. (p. 18.)

The PCIJ sided with Turkey. It found that Turkey’s “way of stating the question is . . . dictated by the very nature and existing conditions of international law,” under which states are sovereign. The only limits on their sovereignty are those that they voluntarily assume, by including in their treaties or accepting as custom. “Restrictions upon the independence of States cannot therefore be presumed.” (*Id.*)

Thus, under international law, states are free to engage in conduct unless it can be shown that that

conduct is prohibited.

The PCIJ's successor, the International Court of Justice ("ICJ"), has often reaffirmed this principle. For example, in 1986, it **rejected** the United States' claim that Nicaragua's military build-up was unlawful, because the United States had not identified any applicable rule of international law that limited a state's permissible level of armaments. (p. 135 ¶ 269.) Likewise, in 1996, the ICJ **analyzed** the legality of the threat or use of nuclear weapons. It found that while international law did not specifically "authorize" the use of nuclear weapons, "state practice shows that the illegality of the use of certain weapons as such does not result from the absence of authorization but, on the contrary, is formulated in terms of **prohibition**." (p. 247 ¶ 52 (emphasis added)). It then went on to analyze whether a prohibition on nuclear weapons existed. Finally, in 2008, the United Nations General Assembly asked the ICJ to render an advisory opinion on whether "the unilateral declaration of independence by the [authorities] in Kosovo [was] in accordance with international law." The ICJ **found** that, "[T]he answer to that question turns on whether or not the applicable international law **prohibited** the declaration of independence." (pp. 407, ¶ 1, 425, ¶ 56 (emphasis added)).¹⁾

A critical caveat to this principle is that the prohibition of the relevant conduct need not be explicit. A rule of international law could prohibit certain conduct even if the rule does not address the specific conduct by name. For example, in the aforementioned opinion on nuclear weapons, while the ICJ **found** that no rule of international law "specifically proscrib[ed]" the threat or use of nuclear weapons "per se," it nonetheless analyzed whether the threat or use of such weapons would be inconsistent with principles of international humanitarian law and thus prohibited. (p. 256, ¶ 74.)

Framing the issue in *GE Energy v. Outokumpu* as one of international law

The issue at the heart of *GE Energy v. Outokumpu* was one of international law, to which the *Lotus* principle applied. In the author's view, a proper statement of the issue was the following:

Whether the New York Convention **prohibits a Contracting State** from applying the domestic doctrine of equitable estoppel to permit the enforcement of arbitration agreements by non-signatories.

However, in its **petition** seeking Supreme Court review, GE Energy described the "Question Presented" in the following way:

Whether the [New York Convention] **permits a non-signatory** to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel. (p. i.)

This framing arguably ignores the international law nature of the issue in the dispute in two ways. First, it suggests that the relevant conduct is that of private parties, namely a non-signatory to an arbitration agreement. However, as an international treaty, the New York Convention establishes obligations for Contracting States and their courts; the relevant inquiry is therefore the extent to

which the Convention constrains state conduct. Second, the framing suggests that the New York Convention must affirmatively “permit” certain conduct for that conduct to be allowed. However, under the *Lotus* principle, the relevant inquiry is only whether the New York Convention prohibits certain actions by Contracting States.

Writing for the Supreme Court, Justice Thomas framed the issue as follows:

The question in this case is whether the [New York Convention] conflicts with domestic equitable estoppel doctrine that permit the enforcement of arbitration agreements by non-signatories. (slip op. at p. 1.)

While Justice Thomas abandoned the problematic “permits” language from the petition, his framing does not bring into relief the fact that the relevant conduct here is that of a state party to an international treaty. That framing would have made more obvious the applicability of the *Lotus* principle.

The Supreme Court implicitly followed the *Lotus* principle

In any event, Justice Thomas’s approach was ultimately consistent with the *Lotus* principle (although he cited neither that principle nor any other part of international law). He observed that the New York Convention “does not address” and “is simply silent” on non-signatory enforcement. He then concluded that “this silence is dispositive here because nothing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines.” Furthermore, while Article II(3) requires Contracting States to enforce arbitration agreements in certain circumstances (i.e. when requested by a signatory), “it does not state that arbitration agreements shall be enforced *only* in the identified circumstances.” (pp. 6-7.)

Thus, Justice Thomas correctly recognized that the relevant inquiry was not whether the New York Convention contained “permission” for Contracting States to engage in the relevant conduct (to allow the enforcement of arbitration agreements by non-signatories). Rather, the relevant inquiry was whether the Convention prohibited them from doing so. Since the Convention did not contain such a prohibition, Contracting States remain free to apply domestic law doctrines allowing the enforcement of arbitration agreements by non-signatories.

Conclusion

The *GE Energy Power Conversion v. Outokumpu Stainless USA* case serves as a reminder for litigants and courts to identify the international law issues before them, and apply the correct international law principles to these issues. Here, the *Lotus* principle ensures that, unless a prohibition can be shown in a treaty or customary international law, states are free to adopt and apply policies that are hospitable to international arbitration.

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References

- ?1 *But see* Anne Peters, *Does Kosovo Lie in the Lotus-Land of Freedom*, 24 *Leiden J. Int'l L.* 95, 100-01 (2011), (questioning whether the *Kosovo* advisory opinion should be viewed as a strict application of the *Lotus* principle, in part because that principle applies only to the conduct of states and not non-state entities like the Kosovar authorities).

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