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Domaine Réservé

Katja S Ziegler

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A. Concept

1 The notion of *domaine réservé* (reserved domain) describes the areas of State activity that are internal or domestic affairs of a → *State* and are therefore within its domestic jurisdiction or competence (see also → *Jurisdiction of States*). Its precise content may vary over time according to the development of → *international law*, but the closely linked principle of → *sovereignty* of States entails that at least some matters remain within the regulatory competence of States. Hence the *domaine réservé* describes areas where States are free from international obligations and regulation. Non-interference in the *domaine réservé* is a fundamental right of States (→ *States, Fundamental Rights and Duties*) derived from sovereignty and protected by the principle of non-intervention in their internal affairs. *Domaine réservé* is habitually used to refer to concretions of the internal dimension of sovereignty and sovereign equality (Art. 2 (1) → *United Nations Charter;* see also → *States, Sovereign Equality*), revealing a traditional conception of spheres of responsibility in defined policy areas (Arangio-Ruiz 391–92). However, violations of a State's external sovereignty, such as the violation of its territorial integrity, which may lead to violations of its internal sovereignty, can also interfere with its *domaine réservé* (see also → *Intervention, Prohibition of*, → *Territorial Integrity and Political Independence*). In that sense there is no distinction between the reach of State sovereignty and the concept of *domaine réservé*.

B. Scope

2 The scope of the *domaine réservé* is not fixed, but is determined both by the treaty obligations of a State and the state of development of → *customary international law* generally, as sovereignty is limited by international law in both the external and internal affairs of States. Therefore, like the concept of (restricted) sovereignty and international law itself, it is both a dynamic and—mostly with regard to → *treaties*—a relative concept. In the abstract it can be defined only by a negative formula as areas or subject-matters or merely issues *not* limited or governed by international law. The → *Permanent Court of International Justice (PCIJ)* expressed this connection and relative nature in its advisory opinion on the French → *nationality* decrees in Tunis and Morocco (*Nationality Decrees Issued in Tunis and Morocco,* [Advisory Opinion]), using the concepts of domestic jurisdiction and reserved domain interchangeably:

> The words 'solely within the domestic jurisdiction' seem rather to contemplate certain matters which, though they may very closely concern the interest of more than one State, are not, in principle, regulated by international law. As regards such matters, each State is sole judge. The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain. (at 23; see also → *Nationality Cases before International Courts and Tribunals*)

An exhaustive delimitation of the scope of *domaine réservé* would therefore require a complete survey of international law in order to define what is outside its ambit, and would amount to writing a history on State sovereignty and international law itself, including that of all treaties concluded. Moreover, since the time of the PCIJ's opinion in *Nationality Decrees Issued in Tunis and Morocco*, the *domaine réservé* has not only been reduced in scope, but its boundaries have also become more blurred.

3 This is because there are hardly any subject-matters or policy areas today that are inherently removed from the international sphere. While it was fairly safe to say in 1923 that nationality or treatment of a State's own population was, as an area of law or policy, completely within the *domaine réservé*, this is not true today because certain aspects of the regulation of nationality have moved from the reserved to the international domain. Because of the evolution and growth of international law and the increasing 'entanglement' of international and domestic situations, it is impossible to say that a certain area per se is removed from the scope of international law (see also → *History of International Law, since World War II*). The boundaries between the domestic and the international domain are evolving constantly and hence are time and context specific. Reference to an area of law as such has become too crude. The fact that there is hardly any scope for exclusive domestic jurisdiction any more is reflected in the shift of the wording of Art. 2 (7) UN Charter in relation to its predecessor, Art. 15 (8) Covenant of the → *League of Nations*, to prevent it from becoming void of any content in the light of a development that leaves no complete areas 'solely' or exclusively within domestic jurisdiction (6 UNCIO [1945] 511–12): today's 'essentially within the domestic jurisdiction of any State' (Art. 2 (7) UN Charter) is the more blurred but adequate description and reflection of the development of international law.

4 The traditional view has been that States are not limited by international law with regard to the essential elements of their statehood: the organization of their government (→ *Governments*), the treatment of their citizens, and the use of their territory (Conforti 136). While this may still serve as a point of departure, the statement must be modified in many respects now.

5 By way of example, the following matters were—and partly still are—considered the domaine réservé of States, but have been significantly internationalized:

a) jurisdiction over and the treatment of foreign nationals on a State's territory, especially with regard to expropriation, has been modified by the law relating to → *aliens* and law on → *human rights* (see also → *Minimum Standards*; → *Property, Right to, International Protection*).

b) absolute discretion regarding the admission of foreign nationals to a State's territory has been modified by human rights and refugee law (see also → *Asylum, Territorial*; → *Refugees*).

c) Absolute discretion regarding jurisdiction over, and the regulation and treatment of, own nationals has been restricted by human rights law.

d) Even the regulation of → *nationality*, as a classic area of State discretion, begins to become influenced by international human rights law.

e) The unfettered use of a State's territory has become increasingly subject to international rules where matters have trans-frontier effects, such as by restrictions on the use of armed force and international environmental law (→ *Environment, International Protection*).

f) The way a State's political system is structured, the way a government came into power, its provenance (military or civilian) is principally still within the domaine réservé, but inroads are evolving through human rights law and the principle of democracy and accountability which begin to be extrapolated to the international level (see also → *Democracy, Right to, International Protection*; → *Elections, Right to Participate in, International Protection*). Also, the right of the State to determine its own organization as a very core of its *domaine réservé* has been qualified: it no longer precludes that a State is responsible for the conduct of entities which are not

qualified as State organs under domestic law, but which may be considered as its organs or whose conduct is attributable to the State under the international law of → *State responsibility* (cf Arts 4–11 Draft Articles on Responsibility of States for Internationally Wrongful Acts of the → *International Law Commission [ILC]*). These inroads reflect the ambivalence of the principle of → *self-determination* of States as to their political, constitutional, economic, and social systems which has a two-fold guarantee, even though the aspects are linked: on the one hand in an external dimension, a right to non-interference against other States that coincides with external sovereignty; on the other hand in an internal dimension a right of the people and population, addressed also to the own State, which has come to bear a democratic connotation.

C. The Reduction of the Domaine Réservé

6 Even the discretion with regard to regulating core elements of statehood is becoming restricted by successive international law. Such a development could occur even without a particular State's → *consent* if a rule of customary international law evolves, or by States concluding treaties. The development of international human rights law, both as customary and standard-setting treaty law, leads to the most notable reduction of *domaine réservé*. More generally, the proliferation of international treaties—both *traité-loi* (normative treaty) and *traité-contrat* (contract treaty), and one may add the category of *traité-intégration* (integrative treaty; see also → *Supranational Law*)—has bound States in areas that classically are within the *domaine réservé*, such as regulation of the economy.

7 In addition, the emergence of new actors and → *subjects of international law*, even if their subjectivity is strictly limited by subject-matter, further reduces the *domaine réservé*: individuals have acquired rights against States under international law; individuals, including companies, may act at the same level as States; and international organizations have gained supranational competences through secondary legislation (→ *International Organizations or Institutions, Secondary Law*).

8 The reduction of *domaine réservé* takes place in three dimensions: the factual increase of interdependence (see paras 9–10 below), the substantive development of international law and its enforcement (see paras 11–22 below), and the increase in international integration (see paras 23–26 below).

1. Reduction by Factual Interdependence

9 Like much of international law, even the advent of international human rights law, the reduction of *domaine réservé* was and is event- (and hence fact-) driven. The reduction of *domaine réservé* by law can be discussed separately, but it cannot be considered independently from its factual side, which often serves as a trigger for the further development of international law, which then reduces the *domaine réservé*. The → *interdependence* of an ever more complex world reduces the *domaine réservé* de facto: increasing interaction, especially through international trade and business activity, increasing mobility, the more far-reaching effects and hazards of modern technologies and modern weapons on humans and the environment, (see also → *Environment, Protection in Armed Conflict*; → *Weapons, Prohibited*), increased awareness and ever-more speedy availability of information and communication—developments that have been termed → *globalization*—mean that more matters have an effect beyond a State's borders and that more actors are involved. In addition, new challenges such as the protection of the environment, climate change, and access to, and utilization of, resources, especially water, require increasingly international co-operation. (see also → *Climate, International Protection*; → *Conservation of Natural Resources*; → *Equitable Utilization of Shared*

Resources). Likewise the phenomenal rise of non-State cross-border actors and actors on the international level, such as → *non-governmental organizations*, but also large economic actors such as transnational corporations contracting with States, are part of and reinforce the trend. (see also → *Contracts between States and Foreign Private Law Persons*). Outside the economic sphere, actions of individuals and the rise of violence both within and across borders resulting from non-State actors contribute de facto to reducing the *domaine réservé* (see also → *Armed Conflict, Non-International*; → *Terrorism*).

10 This de facto opening, which requires international co-operation, triggers and necessitates the legal opening up towards the international level and is responsible for the less clear-cut boundaries between the international and the national and fuels constitutionalization of the international legal order. The many facets of constitutionalization,which lead to a deeper intertwining of the international and national legal orders (Paulus, Peters, Ziegler[2011]), reduce the scope of *domaine réservé* as a legal concept and have repercussions for national constitutions and legal systems as well as for the international legal order (Roberts).

2. Reduction by the Development of International Law

11 Much of the shrinking of the *domaine réservé* since World War II can be described within the following two large categories: *a)* the extension and proliferation of international norms, most notably regarding individual rights, and *b)* an intensification of the enforcement mechanisms for international law, both internationally and under national law, following the evolution of jurisdictional rules.

(a) Examples of the Proliferation of International Norms and Standards, Especially Regarding the Individual

12 The most striking and far-reaching reduction of the *domaine réservé* in the recent history of international law relates to the status and protection of the individual by humanitarian law (→ *Humanitarian Law, International*) and human rights law. It is in these fields that the standard-setting force of human rights codifications (*traité-loi*) and their underlying values become very obvious. It is also an area that is generally extremely illustrative of the way international (customary) law evolves. While rules restricting behaviour in armed conflict date back further, the treatment of a State's own nationals was until rather recently still considered to fall within the *domaine réservé* of each State. The reactions of other States to refugees illustrates this, and in particular the refugees fleeing from Nazi Germany. While neighbouring countries were confronted with the consequences of persecution and human rights violations, they also faced a tightrope walk between protesting against the influx of people and criticizing the internal affairs of their State of origin. The following quote taken from the debate in the International Labour Conference 1933 on the problem of employment of refugees is characteristic:

> A large number of German nationals have taken refuge in neighbouring countries during the last few months.… [T]he presence of so large a number of immigrants is bound very soon, owing to the existing unemployment to cause serious difficulties in several countries.… *Nothing is further from our thoughts than a desire to interfere in internal affairs coming under Germany's sovereignty*. We have *no wish to examine the reasons* why these people have left their country, but we are faced with the undeniable fact that thousands of German subjects have crossed the frontiers of neighbouring countries and are refusing to return to their homes, for reasons which we are not called upon to judge. For us, therefore, it is a *purely technical problem*. (League of Nations, 'Records of the Fourteenth Ordinary Session of the Assembly:

> Plenary Meetings: Text of the Debates: Fourth Meeting' [29 September 1933] LNOJ [1933] 48, emphasis added)

Such compound situations of a cross-border event—affecting a State's sovereignty—which is inextricably linked to an internal affair were the melting pot for human rights and more generally for new international law. It is therefore not surprising that refugee situations have more than once triggered the development of international law (Ziegler [2002] 462–83, 649–58). Today no one would claim that the treatment of a State's own nationals and population with regard to human rights falls within its *domaine réservé*.

13 Even the regulation of nationality, a classic competence in the *domaine réservé*, as discussed in the case of *Nationality Decrees Issued in Tunis and Morocco*, becomes more and more determined by international law. At least for its effect at the international level, it must meet the criteria of an effective 'genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties' (*Nottebohm Case [Liechtenstein v Guatemala] [Second Phase]* 23; → *Nottebohm Case*). Denaturalization may amount to an interference with other States' sovereignty as well as with human rights (→ *Denaturalization and Forced Exile*; → *Western Sahara [Advisory Opinion]*). Emerging rules aimed at reducing statelessness (→ *Stateless Persons*) may restrict the discretion of States further and might even require the conferral of nationality at least on otherwise stateless children (cf Art. 20 (2) → *American Convention on Human Rights [1969]*; Ziegler [2002] 339–40).

14 In addition to the expansion of international law, normative hierarchies have evolved. This is demonstrated by the → *ius cogens* status of the prohibition of → *slavery*, torture (→ *Torture, Prohibition of*, racial discrimination and colonial domination (→ *Apartheid*; → *Colonialism*; → *Racial and Religious Discrimination*), → *war crimes*, → *genocide*, and → *crimes against humanity*. The emergence of normative hierarchies amounts to a further step in the reduction of the *domaine réservé* in that individual States cannot retract from the binding nature of such rules.

(b) Mechanisms of Enforcement of International Law

15 The mechanisms for enforcing international law, and individual rights in particular, have reduced the scope of *domaine réservé*. This is due both to the fact that the substance of international law is enforced and to the procedural means for that type of interference in the *domaine réservé*. The level of enforcement became more intense, first through the availability and States' ad hoc or even general acceptance of jurisdiction of international forums of enforcement; and, secondly, through changes in the international rules on jurisdiction of States which have allowed for more extensive exercise of national jurisdiction to enforce international law.

16 The most advanced judicial enforcement mechanism on the international level is the individual complaint procedure under the → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* ('ECHR'; see also → *Human Rights, Individual Communications/Complaints*). In addition, other human rights enforcement mechanisms in quasi-judicial or more diplomatic and report-based channels (→ *Human Rights, State Complaints*; → *Human Rights, State Reports*) reduced the domaine réservé of States. The → *European Court of Human Rights (ECtHR)* summed this up:

> Speaking generally, the various conventions and covenants on human rights, but more particularly the European Convention, have broken entirely new ground internationally, making heavy inroads on some of the most cherished preserves of governments in the sphere of their domestic jurisdiction or *domaine réservé*. Most especially, and most strikingly, is this the case as regards what is often known as the

> ‘right of individual petition’, whereby private persons or entities are enabled to (in effect) sue their own governments before an international commission or tribunal,—something that, even as recently as thirty years ago, would have been regarded as internationally inconceivable. (*Golder v UK* para. 38)

Enforcement mechanisms available to individuals are not limited to human rights, but are increasingly relevant in the economic context, eg in → *investment disputes*.

17 Another channel for enforcing international norms on the international level is via → *international criminal law* and the establishment of → *international courts and tribunals*. Removing the State as a mediator for the application of international norms to individuals is a huge reduction of *domaine réservé*.

18 An aspect of the *domaine réservé* of States in norm enforcement at the international level is the requirement to exhaust local remedies (→ *Local Remedies, Exhaustion of*; cf Art. 35 (1) ECHR, Art. 41 (1) → *International Covenant on Civil and Political Rights [1966]*, and Art. 26 Convention on the Settlement of Investment Disputes between States and Nationals of Other States). International responsibility under customary international law does generally not arise without giving the State the opportunity to remedy the alleged injury (→ *Interhandel Case*). Traditionally, the local remedies rule did not conflict with the customary law principle of → *res iudicata* because the subject-matter of and parties to a claim that is made by a State in the framework of → *diplomatic protection* are not identical with a claim brought at domestic level by an individual. Where an individual can initiate proceedings at international level, investment dispute settlement tribunals such as the → *International Centre for Settlement of Investment Disputes (ICSID)* have sometimes held that they should not act as a court of appeal against domestic courts, but only exercise a restricted, deferential standard of review over the domestic court (*Mondev International Ltd v United States of America* para. 126). While this might be described as a conditional deference to domestic (judicial) decisions and hence as delimiting the *domaine réservé*, it contradicts the purpose of the local remedies rule and would shield from the jurisdiction of international tribunals (cf Dodge [2000] 379–83; [2004] 161–62).

19 International obligations on States to enforce international law domestically, rather than the direct enforcement on the international level, reflect the differentiation between norms that protect human beings and their enforcement and the staggered development of international law (see also → *International Law and Domestic [Municipal] Law*). The duty on States to implement international norms and to punish acts of individuals under domestic law, as found in the → *Geneva Conventions I–IV (1949)*, as well as in the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Elimination of All Forms of Racial Discrimination (1965), and the Convention on the Elimination of All Forms of Discrimination Against Women (1979) can be considered the link between the national and the international enforcement mechanisms (see also → *Human Rights, Domestic Implementation*).

20 In addition, the exercise of jurisdiction of States over foreign nationals and situations, especially criminal acts committed outside their territory, has been expanded for certain grave human rights violations, allowing for increased enforcement at national level. According to the principle of universal jurisdiction, severe human rights violations, such as genocide, war crimes and crimes against humanity, may be—and in some cases must be—prosecuted under national law, irrespective of the nationality of the perpetrator or victim or place of committal, providing a limited exception from the exercise of exterritorial jurisdiction in favour of internationally recognized values (see also → *Aut dedere aut iudicare*; → *Criminal Jurisdiction of States under International Law*; → *Extraterritoriality*;

→ *Gross and Systematic Human Rights Violations*). States increasingly provide for the exercise of such jurisdiction in their criminal and tort law (cf the German Code of Crimes against International Law [2002], or the United States of America ('US') Torture Victim Protection Act [1992]).

21 The principle of → *State immunity* reflects the *domaine réservé* in the context of norm enforcement at national level. Even the principle that States are to a large extent insulated from norm enforcement for actions of their representatives and agents is becoming diluted for criminal offences (→ *Arrest Warrant Case [Democratic Republic of the Congo v Belgium]*; contrast, for civil proceedings → *Al-Adsani Case*; *Jurisdictional Immunities of the State [Germany v Italy, Greece intervening]*).

22 The hierarchy of norms has an enforcement aspect with regard to State and individual responsibility because *ius cogens* norms (see para. 14 above) are applicable and enforceable *erga omnes* (see also → *Barcelona Traction Case*; → *Obligations erga omnes*): State jurisdiction, for example over genocide wherever committed, is not restricted; it can be prosecuted by any court in the world. However, it is doubtful whether the decline of the *domaine réservé* has gone so far as to allow for → *humanitarian intervention* as an enforcement mechanism of basic international norms without an authorization by the UN Security Council ('UNSC'; → *United Nation, Security Council*; see also → *Responsibility to Protect*), and hence as a further exception from the prohibition of the use of force of Art. 2 (4) UN Charter. (→ *Use of Force, Prohibition of*).

3. Reduction of the Domaine Réservé through International Integration

23 Integration into international organizations is one example of introducing new actors on the international level and of giving individuals new rights under international law, a fact which at least de facto decreases the *domaine réservé* and often creates new and independent dynamics. Then the substantive provisions in the framework of integration, providing for the functions and competences exercised by the international organization, reduce the *domaine réservé* and, through judicialization and doctrines such as implied powers, also develop their own momentum (see also → *International Organizations or Institutions, Implied Powers*).

(a) International Organizations Generally

24 The scope of the *domaine réservé* can be distinguished as freedom from interference from other States and from international organizations. Although the scope of the *domaine réservé* vis-à-vis international organizations, and especially those which pursue regional (economic) integration, will mainly be treaty-based, and hence subject to the special rules of such a treaty, (see also → *Economic Integration, Comparative Analysis*), the general fall-back position is always the protection awarded by international law as applicable between States (see para. 1 above), as expressed on numerous occasions and prominently in the → *Friendly Relations Declaration (1970)*. In the system of the → *United Nations*, Art. (7) UN Charter prohibits the UN 'to intervene in matters essentially within the domestic jurisdiction of any State'. This provision as such only restates and clarifies that its authors did not want to deviate from this principle which generally governs inter-State relationships. However, the significance of the UN Charter regime lies in the second sentence, which states that this does not apply to enforcement measures taken under Chapter VII which can be said to be *lex specialis*. The UN Charter's Chapter VII is today potentially the most far-reaching reduction of *domaine réservé*. In contrast to the predominantly customary-law induced reduction of the *domaine réservé*, this is a more far-reaching treaty obligation under the UN Charter. The fact that subsequent interpretation, especially of Art. 39 UN Charter, went beyond what had been imagined by the drafters and

signatories at that time, exemplifies the dynamics integrative treaty regimes may develop. Treaty and subsequent new customary law developments intertwine here. The coupling of a wide interpretation of what amounts to a threat to or breach of the peace (→ *Interpretation in International Law*; → *Peace, Breach of*; → *Peace, Threat to*) together with the almost unlimited potential of measures that can be taken under Chapter VII today allows not only the enforcement of human rights with the instruments of Chapter VII, but also removes from the *domaine réservé* measures of internal democratic restructuring (Kosovo, East Timor, West Africa [see also → *Sierra Leone*; → *Liberia*], Iraq), (attempted) State- and nation-building (see also → *Nations*), and international criminal prosecutions (see also → *International Criminal Tribunal for Rwanda [ICTR]*; → *International Criminal Tribunal for the Former Yugoslavia [ICTY]*).

(b) International Economic Law and Integration

25 Economic integration can be considered the main motivation for creating new public international law which reduces the *domaine réservé* and which constitutionalizes the international order (Trachtman 36). 'In addition, there may be a spillover effect from the economic to the political; this was the conscious strategy of Jean Monnet and Robert Schuman in designing the European Economic Community … [which may be termed] "the international economic law revolution"' (ibid). This has a quantitative dimension in that circa 90% of international trade comes under the purview of law of the → *World Trade Organization (WTO)*. It also has several qualitative dimensions. The increase in international economic relationships reduces the *domaine réservé* in that—in specific circumstances—it may elevate individuals, either by making them the subject of rights or by putting them on the same level vis-à-vis a State, allowing non-State actors to enter into international agreements, as is the case in internationalized agreements or → *concession* contracts by means of protective or stabilization clauses (see also → *Investments, International Protection*).

(c) Regional Integration: The European Union

26 The restriction of *domaine réservé* by regional economic integration, such as the European Union (see also → *European (Economic) Community*), the → *North American Free Trade Agreement (1992)*, → *MERCOSUR* (Mercado Común del Sur; Southern Common Market), and the → *Association of Southeast Asian Nations (ASEAN)* is far-reaching because of the conferral of wide-ranging competences (*traité-intégration*). The direct effect not only of provisions of the *Treaty on the Functioning of the European Union* ('TFEU') but also of directly binding secondary legislation—regulations and some directives—conferring rights on individuals means a far-reaching delegation of State sovereignty and a matching reduction of *domaine réservé*, removing the State as a mediator between the international level and the individual. Moreover, this effect is reinforced by the → *European integration* process having acquired momentum of its own, most notably through the jurisprudence of the Court of Justice of the EU, (→ *European Union, Court of Justice and General Court*) which has firmly established—from an EU perspective—crucial pegs in the integration process with the doctrines of supremacy of EU law over national law, direct effect, and Member State liability for breaches of EU law (see also → *European Community and Union Law and Domestic [Municipal] Law*; → *Treaties, Direct Applicability*). The result is to limit the *domaine réservé* of the Member States as expressed in fears over 'competence creep'. The tendency to spill over into other fields of law-making is especially visible in an EU context where areas of economic regulation and non-economic interests overlap. Also, the history of amendments of the European Treaties and supplementation of the then EC Treaty

(now TFEU) by the EU Treaty show the dynamics of integration in the sense of a broadening and deepening.

D. 'Who Decides?' and the Plea of 'Domaine Réservé' in International Litigation

27 Who decides whether a matter is under domestic or international jurisdiction is a question inextricably linked to the notion of *domaine réservé*. Two issues have to be separated: the question of whether it is one of national or international law, and whether there is a binding instance.

28 On the first issue, similarly to the question in the context of so-called automatic or self-judging reservations to submission to the compulsory jurisdiction of the → *International Court of Justice (ICJ)* under Art. 36 of its Statute (→ *Connally Reservation*), which was rejected by the ICJ in → *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America*), the answer can only be that whether a matter is governed by international law is a question of international law itself. Otherwise international law would be stripped of any meaning. On the second issue, the decentralized nature of international law also reflects on this issue in that—irrespective of their strong persuasive force—there is no formally binding central decision beyond the inter partes binding effect of judgments of the ICJ.

29 In international litigation the plea of *domaine réservé* has double relevance, procedural and substantive. The 'resort to the notion of the reserved domain' is a challenge to jurisdiction of the Court in the admissibility phase, a 'preliminary objection of incompetence' which 'equally concerns the merits' (*Case relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium [Preliminary Objections]; ['Belgian Linguistics']* 19). Although an argument could be made to treat the plea as a → *preliminary objection* because jurisdiction is dependent on the consent of States (*Case of the Mavrommatis Palestine Concessions [Greece v United Kingdom]* 16; → *Mavrommatis Concessions Cases*), it is regularly and better considered in the merit phase because the jurisdiction 'extends to all cases concerning the interpretation and application' of treaties (*Belgian Linguistics* 19; *Nationality Decrees in Tunis and Morocco* 26). As a concession to expediency, in ICJ proceedings on → *interim (provisional) measures of protection*, the plea of domestic jurisdiction is not heard.

E. The End of Domaine Réservé?

30 The concept of *domaine réservé* is outdated if used as a complete shield for entire policy areas. This would be reminiscent of times when sovereignty was thought to be absolute. However, in spite of the difficulties of drawing the ever-changing boundaries around *domaine réservé*, this is in the nature of international law generally and does not mean that *domaine réservé* as a concept is increasingly irrelevant. It is—however defined in any given context and point in time—a standard against which actions of States and of the UN and other international organizations have to be justified; see, for example, the *Barcelona Traction Case* where the ICJ stated that the rules as to the establishment, status, and personality of a company were in a 'domain essentially within their domestic jurisdiction' (at para. 38). Hence, *domaine réservé* is regularly pleaded in international litigation (see para. 29 above). Statements in regard of *domaine réservé* are also a recurrent theme in UNSC resolutions which generally reiterate the reference to Art. 2 (7) UN Charter.

31 *Domaine réservé* may, for example, also serve as a bar to asserting extraterritorial jurisdiction of national laws and standards more generally, ie beyond the implementation of international norms and values such as in the context of human rights (see para. 20 above). Such a tendency can be observed in several jurisdictions in the context of economic regulation, especially with regard to the regulation of cartels and mergers (see also → *Antitrust or Competition Law, International*), such as under the effects doctrine in the US and its allegedly moderated counterpart in EU competition law, the doctrine of implementation (Joined Cases 89/85, 104/85 and others *A Ahlström Osakeyhtiö and others v Commission of the European Communities [Woodpulp II]*). Outside competition law, the US Cuban Liberty and Democratic Solidarity (Libertad) Act and the Iran and Libya Sanctions Act of 1996 (Helms-Burton and D'Amato Act, respectively) may be considered as assertions of exterritorial jurisdiction. If such practices by States were to become generally accepted as international law, this would lead to significant inroads into States' *domaine réservé* in the area of jurisdiction (see also → *Extraterritoriality*).

32 The concept and notion of *domaine réservé* can also be seen as part of a wider picture. In both areas which have allegedly contributed most to reducing the *domaine réservé*, more flexible softer functional equivalents have been developed as tools to draw the line between international and national competence: the principle of → *subsidiarity* in the context of economic integration and the → *margin of appreciation* doctrine in international human rights law. In the context of the intersection of international economic law with domestic regulatory decisions a certain deference to State regulatory measures may be observed, but at the same time limited by the application of the principle of → *proportionality* to States' measures (Trujillo; *Técnicas Medioambentales Tecmed SA v United Mexican States*). These principles result from the blurred boundaries of the notion of *domaine réservé*. Both show that some matters remain to be reserved to (sovereign) States because they fulfil a function in international law in an increasingly 'smaller' and more diverse world—as long as the State does not dissolve downwards (see also → *Failing States*). The decline of the State as the exclusive functional unit and actor in international law reduces the role of the concept, but as long as States play a role in international law, there is scope for *domaine réservé*, even if the impact becomes more symbolic than legal.

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