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LEGAL STATUS OF LEGAL ENTITIES IN PRIVATE INTERNATIONAL LAW

The article analyzes the legal status of legal entities and examines the form of their classification. Of course, legal entities occupy an important place in civil law. Because legal entities and their organizations have a significant impact on the economy, whether it is the economy, business, or medicine, this article defines the priority, the role of legal entities in international law. At the same time, following the civil legislation, disputes between the two states regarding legal entities are considered by what rules and norms, and the authors fully disclose the doctrines on the interpretation of legal entities.

Today, various stakeholders show markets about the legal entity and how it should develop to overcome our state's dynamic and global nature. Reforms and other initiatives related to legal entities are being implemented worldwide. It is used to restore trust in the management of a legal entity. About legal entities, the reforms have led to the introduction of various codes of best practices or guiding principles of corporate governance (type) in many countries. In this regard, discussions are underway reflecting the points of opinion on the possibility of equating and applying a unified approach to legal entities in civil law.

Key words: legal entities, corporate organizations, state corporations, public law companies, group of companies, national holding, national company, legal entities of public law, organizations of public interest, finncial-industrial groups, multinational corporations.

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Халықаралық құқықтағы заңды тұлғалардың құқықтық жағдайы

Зерттелініп жатқан мақалада заңды тұлғалардың құқықтық жағдайы талданып отырып, сонымен қатар олардың жіктеулу формасын зерттеп отыр. Әрине заңды тұлғалар азаматтық құқықтағы ерекше маңызды орынға ие болып табылады. Себебі қай саланы қарастырсақта экономика, бизнес, медицина саласы болсын заңды тұлғалар, олардың ұйымдары экономикаға үлкен әсерін тигізуде. Осы мақалада заңды тұлғалардың халықаралық құқықтағы басымдылығы, рөлі, айқындалады. Сонымен қатар азаматтық заңнамаға сәйкес екі мемлекеттің арасындағы заңды тұлғаларға қатысты даулар қандай заңдармен, нормалармен қарастырылады, және де авторлар заңды тұлғаларды түсіндіру бойынша доктриналарды толығымен ашып қарастыруда.

Бүгінгі таңда әр түрлі мүдделі тараптар заңды тұлға туралы және біздің мемлекетіміздің серпінді және жаһандық сипатын жеңу үшін оның қалай дамуы керектігі туралы нарықтарды көрсетіп отыр. Бүкіл әлемде заңды тұлғаларға қатысты реформалар мен басқа да бастамалар жүзеге асырылуда. Заңды тұлғаны басқаруға деген сенімді қалпына келтіру құралы ретінде қолданылады. Заңды тұлғаларға қатысты реформалар көптеген елдерде корпоративтік басқарудың (түрін) озық практикасының түрлі кодекстерін немесе басшылық қағидаттарын енгізуге алып келді. Осыған байланысты азаматтық құқықта бірыңғай тәсілді заңды тұлғаларға теңестіру және қолдану мүмкіндігі туралы пікір сәттерін көрсететін пікірталастар жүргізілуде.

Түйін сөздер: заңды тұлғалар, корпоративтік ұйымдар, мемлекеттік корпорациялар, жариялы-құқықтық компаниялар, компаниялар тобы, ұлттық холдинг, ұлттық компания, жария құқықтың заңды тұлғалары, қоғамдық мүддені білдіретін ұйымдар, қаржылық өнеркәсіптік топтар, трансұлттық корпорациялар.

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Правовое положение юридических лиц в международном частном праве

В статье анализируется правовой статус юридических лиц и рассматривается форма их классификации. Конечно, юридические лица занимают важное место в гражданском праве. Поскольку юридические лица и их организации оказывают значительное влияние на экономику, бизнес или медицина. Эта статья определяет приоритет, роль юридических лиц в международном праве. В то же время, следуя гражданскому законодательству, споры между двумя государствами в отношении юридических лиц рассматриваются по каким правилам и нормам, и авторы полностью раскрывают доктрины о толковании юридических лиц.

Сегодня различные заинтересованные стороны рассказывают рынкам о юридическом лице и о том, как оно должно развиваться, чтобы преодолеть динамичный и глобальный характер нашего государства. Реформы и другие инициативы, связанные с юридическими лицами, осуществляются по всему миру. Он используется для восстановления доверия к руководству юридического лица. Что касается юридических лиц, то реформы привели к внедрению различных кодексов наилучшей практики или руководящих принципов корпоративного управления (type) во многих странах. В связи с этим ведутся дискуссии, отражающие моменты мнения о возможности приравнивания и применения в гражданском праве единого подхода к юридическим лицам.

Ключевые слова: юридические лица, корпоративные организации, государственные корпорации, публично-правовые компании, группа компаний, национальный холдинг, национальная компания, юридические лица публичного права, организации, представляющие общественный интерес, финансово-промышленных групп, транснациональных корпорация.

Introduction

Effective conclusion and execution of various kinds of transactions by legal entities of multiple states, as well as the resolution of disputes arising in this case, is impossible without due consideration of the legal status of both Kazakh legal entities and their foreign counterparties, determined primarily by their law (statute) and regulatory conditions for carrying out activities abroad as foreigners.

The creation of integration associations, such as the European Communities and the Commonwealth of Independent States, gives a new sound to the problem. The EU and the CIS are integration associations that provide certain advantages in the economic sphere to the participating countries. This makes it necessary to distinguish the companies of the member States from the companies of third countries.

Moreover, within the framework of integration associations, the mechanisms of convergence of law, such as unification and harmonization, are most fully involved, the generalization and analysis of which is not only of significant theoretical but also practical importance, since the Republic of Kazakhstan, which is currently outside the legal space, for example, the EU, can use the experience of Communities to improve legislation providing legal regulation of the status of legal entities in conditions of economic integration with other countries.

Materials and methods

In the course of the study, comparative jurisprudence was used, which made it possible to analyze and compare the features of the state as a legal entity of public law in the legislation of Kazakhstan and Germany. It was necessary to reach the concept of a legal entity of public law to identify standard features and features. It is possible to find common approaches to the idea of the state as a legal subject of public law in Germany and Kazakhstan.

The goals and objectives of the dissertation research undertaken are to analyze the institute of the nationality of legal entities, its content, and significance in international civil turnover. At the same time, the authors tried to solve the following specific tasks: to identify and analyze legislation, judicial practice, and doctrine regarding the determination of the nationality of legal entities and to establish the principles and rules for determining the race of legal entities in various legal systems; to identify and analyze the mechanisms of convergence of legal systems taking place within the framework of the comprehensive process of internationalization of law, namely: unification and harmonization of the norms of private inter-

national law on the issues of determining the nationality of legal entities.

To this end, it was necessary to consider the provisions of universal and regional international treaties, as well as to generalize the experience of integration associations such as the EU and the CIS; to study the problem of changing the location of a legal entity and its relationship with the traditional criteria for determining the nationality of legal entities, as well as the current methods of changing the establishment of a legal entity; to identify current trends in the legal regulation of the status of foreign legal entities, namely: the tendency to separate the personal law of a legal entity from its state affiliation, as well as non-traditional criteria for determining the nationality of legal entities; to analyze the provisions of Kazakh legislation and treaties of the Republic of Kazakhstan on the status of foreign legal entities.

Methodological and theoretical foundations of the study. The methodological basis of the research is general scientific and private scientific methods: system-structural, historical, method of comparative jurisprudence, logical, formal-legal, and other forms of scientific cognition. The authors were guided by the conceptual provisions of the general theory of state and law.

Results and discussion

The problem of legal entities in Private International Law (PIL) is determining which country's law should regulate a legal entity, which State a particular legal entity belongs to.

A lot depends on it. For example, in England, «partnership» (general partnership) is not legal. In Kazakhstan, it is. Depending on which state the legal entity belongs to, its fate will be decided. If the British choose to organize a partnership under English law in Kazakhstan, they do not register as a legal entity. Still, they will not work in Kazakhstan since they are not entitled to participate in commodity turnover under Kazakh law.

In PIL, ***«nationality of a legal entity»*** and ***«statute of a legal entity»*** are used. These concepts are closely related and overlap with each other. Therefore, in literature and practice, these concepts are often used differently.

A legal entity's law (statute) is the country's legal order applicable to this legal entity. The «statute of a legal entity» category is fixed in Article 1100 of the Civil Code «Law of a Legal Entity». Following the personal statute, the ***legal status of a legal entity*** is determined: the presence of signs of a legal entity, the scope of legal capacity, the order of occurrence and termination, etc. In particular, if the statute of a legal entity recognizes the law of Kazakhstan, then it will determine the legal status per Articles 33-57 of the Civil Code. For example, the signs of a legal entity under Article 33 of the Civil Code will be organizational unity, property isolation, acting in civil turnover on its behalf, independent property liability. The scope of legal capacity is determined by Article 35 of the Civil Code: general for commercial organizations and special for non-profit organizations.

The Civil Code of the Russian Federation lists a range of issues that are determined by the statute of a legal entity. Paragraph 2 of Article 1202 of the Civil Code of the Russian Federation (Part 3) stipulates:

Based on the personal law of a legal entity, it is determined, in particular:

- The status of the organization as a legal entity;
- The organizational and legal form of a legal entity;
- Requirements for the name of a legal entity;
- Issues of creation, reorganization, and liquidation of a legal entity, including issues of succession;
- The content of the legal capacity of a legal entity;
- The procedure for the acquisition of civil rights by a legal entity and the assumption of civil duties;
- Internal relations, including relations of a legal entity with its participants;
- The ability of a legal entity to meet its obligations.

As the authors of the commentary of the Civil Code of the Russian Federation note, this list is not exhaustive. So, for example, by the personal law of a legal entity, the possibility and conditions to have divisions with a specific legal status outside of their location – branches, representative offices, etc. (Makovsky, Sukhanov 2002: 399).

The nationality of a legal entity is the affiliation of a legal entity to a particular state. The concept of *«nationality»* concerning legal entities is somewhat conditional. It is impossible to compare this concept with the idea of *«nationality»* applied to citizens, where it expresses a special stable legal relationship of an individual with the state. Nevertheless, the use of the concept of «nationality of a legal entity» is acceptable since it allows you to immediately distinguish *«your»* (national) legal entities from *«foreign»* (foreign) ones.

It is not difficult to notice that the concepts of «nationality» and «statute» largely coincide and reflect different approaches to the same phenomenon: the belonging of a legal entity to a particular state and its subordination to the rule of law of that state. The nationality of a legal entity determines its status, and the statute's content depends on what nationality the legal entity has. The statute of a legal entity means applying the state's law whose nationality it has.

The term «nationality» is consistently used in the law concerning certain relations, particularly the sea, river, air, and space vessels. Thus, in the Law on Merchant Shipping, paragraph 1 of Article 11 stipulates: «A vessel using the right to sail under the state flag of the Republic of Kazakhstan has the nationality of the Republic of Kazakhstan». National aircraft are referred to in the Decree on the Use of Airspace (Article 54).

To determine the nationality of a legal entity, different countries use different ***criteria*** or, as they are called, ***theories or doctrines.***

Several doctrines stand out:

a. ***The doctrine of incorporation.*** According to the philosophy, the personal law of a legal entity is the law of the state where created the legal entity. Applying the incorporation doctrine is characteristic of the Anglo-Saxon system of law countries. At the same time, several countries of the continental legal system, including Kazakhstan, apply this doctrine.

b. ***The doctrine of settlement*** or, in other words, ***«effective residence»***, according to which the personal law of a legal entity is the location of its administrative center (board of the legal entity). Most European Union countries and other countries of the continental legal system (Poland, Ukraine, etc.) adhere to this doctrine.

However, countries that use the doctrine of incorporation often use the principle of settlement to determine the location of a legal entity. In particular, in the Civil Code, this doctrine is used to determine the site of a legal entity on the republic's territory. Paragraph 1 of Article 39 of the Civil Code stipulates: «The location of a legal entity is recognized as the location of its permanent body».

c. ***According to which the doctrine of the center of exploitation*** (the philosophy of activity), the personal law of a legal entity recognizes the state's right in which its main activity is carried out (profits are extracted, tax deductions are made, etc.). This doctrine is applied mainly in developing countries to exercise control by declaring «their» foreign companies engaged in production activities in these countries. The legislation of Italy also adopted this doctrine.

d. ***The doctrine of control.*** By this doctrine, a legal entity has the nationality, not of the state to which the legal entity formally belongs but of the state where the persons exercising control over the legal entity (the founders of the legal entity) reside or are located. This doctrine has only historical significance, and it was applied during the First World War based on the law «on hostile aliens». The essence of the ideology is to identify the true nationality of a legal entity, despite the observance of formalities.

Currently, a ***set of criteria*** is increasingly being applied in different countries. For example, in the United States, the ***doctrine of incorporation*** is used to determine jurisdiction, and for tax purposes, the ***doctrine of exploitation.***

Various doctrines are also applied in international treaties concluded by Kazakhstan. Thus, Article 15 of the Agreement on Trade Relations between the Republic of Kazakhstan and the United States of May 19, 1992, defines a company as legally established following the laws and regulations of the Party, i.e., the doctrine of incorporation is applied. At the same time, the Agreement between the Republic of Kazakhstan and the Federal Republic of Germany on the Promotion and Mutual Protection of Investments of September 22, 1992, stipulates that the term *«company»* means any legal entity, company, enterprises, and other organizations with a location on the territory of the Republic of Kazakhstan or the Federal Republic of Germany.

In this case, it is not the doctrine of incorporation that applies but ***the criterion of the place of residence of a legal entity.*** Can understand this criterion as applying either the principle of settlement (the seat of the administrative center of the legal entity), the doctrine of the center of exploitation (the location of the central part of the legal entity), or both doctrines in combination.

The term «International legal entities» (ILE) has been actively used in PIL. This is mainly due to the emergence and development of financial and industrial groups (FIG) and multinational corporations (MIC).

FIG is legally regulated in some countries, particularly in the Russian Federation, according to the Law of the Russian Federation of November 30, 1995, «On Financial and Industrial Groups». FIG is a form of organizational association of legal entities for technological and economic integration to implement investment projects to increase competi-

tiveness, expand the market of goods and services, improve production efficiency, and create new jobs (Article 2). ***Article 2 of the Law on FIG establishes two possible types of FIG:***

i. The totality of the legal entities included in the group, acting as the primary and subsidiary companies;

ii. A set of legal entities have combined their tangible and intangible assets in whole or in part based on an agreement on creating a FIG.

The first type is a holding company; the second is a joint activity agreement, i.e., practically a consortium.

There is no legislation on FIG in Kazakhstan, but the groups themselves are created as holding companies or simple partnerships. There are no particular legal specifics in creating the FIG, and it is an economic concept, one of the monetary forms of integration of finance, industry, and trade. The legal norms available in the Civil Code are sufficient for their creation and functioning. Therefore, in our opinion, there is no need to adopt a special law on FIG.

i. The same can be said for multinational companies. These are financial and economic forms of pooling capital, including international. But the legal documents of MIC are very different. The main legal issues are determining the nationality of legal entities that make up MIC or are included in MIC.

ii. There are at least *four organizational and legal forms* that are referred to in Western doctrine as international legal entities and in which MIC act:

iii. National societies, trusts, companies with numerous branches abroad, and subsidiaries. We are talking about monopolies, federal in nature, but international in scope (General Motors in the USA, British Petroleum in Great Britain, Siemens in Germany, Nestlé in Switzerland, etc.).

iv. Trusts and concerns that are international not only in terms of activity but also in terms of capital (Anglo-Dutch concern «Royal Dutch-Shell», Anglo-American-Canadian trust «International Nickle Company of Canada», Anglo-Italian respect of rubber products «Dunlop – Pirelli» etc.).

v. Cartels, syndicates, consortia, industrial and scientific-technical associations are not legal entities (consortium «Kazakhstancaspian shelf», CPC – Caspian pipeline consortium, etc.).

vi. Legal entities that are created either directly by an international treaty (International Bank for Reconstruction and Development – IBRD, Islamic Development Bank – IDP, Eurasian Patent Office – EPO) or based on the internal law of one or two states adopted per an international treaty (European Society for Financing purchases of railway equipment – «Eurofirma», Bank for International Settlements – BIS) (Boguslavsky, 1998: 122-124).

It is not difficult to notice their heterogeneous nature if you look closely at these groups.

In the first two groups, despite the international character of the sphere of activity or capital, they act as national legal entities of one state. It should be borne in mind that this is true only if the divisions of the head legal entity in other countries function as branches and representative offices. But if in other countries structural divisions are created as subsidiaries of the parent company, then they work as national legal entities of the countries where they are made. The scheme, in this case, is different: the parent organization as a legal entity of one government and subsidiaries as legal entities in other countries, i.e., the nationality of legal entities is foreign.

At the same time, if we consider the parent and subsidiary organizations as a whole, we are faced with the most ordinary holding, but international, which is not a legal entity. In this case, this association of legal entities falls into the third group of the above.

Associations of the third group are not legal entities; the legal entities included have the nationality of the countries where they are created.

The organizations of the fourth group are international legal entities, but, firstly, these organizations have nothing to do with TNC; secondly, they function as international organizations that are subjects of public international law. It is not for nothing that loan agreements between States and international banks are subject to ratification as international treaties.

However, recently the status of organizations of the fourth group as international legal entities has been questioned. The fact is that these legal entities are subject to the national legal order of the relevant state (as a rule, the form of the location of the organization's main office).

Thus, in the Agreement of the CIS countries «On assistance in the creation and development of industrial, commercial, credit-financial, insurance, mixed transnational associations» dated April 15, 1994, a unified procedure provides that international associations are legal entities under the legislation of the state of their registration. The status of branches (branches) and representative offices of transnational associations is determined in the constituent documents following the legislation of the state of location of branches (branches) and repre-

sentative offices (Article 5). At the same time, it is indicated that can create transnational associations both based on intergovernmental agreements and by concluding contracts directly between economic entities (Article 3).

The Federal Law of the Russian Federation «On Financial and Industrial Groups» also defines the categories «transnational financial and industrial group», «interstate financial and industrial group». A transnational financial and industrial group (with the participation of legal entities of various CIS member states) is registered under the federal law of the Russian Federation and created the Interstate Financial and Industrial Group based on an intergovernmental agreement. For the participants of such a group, the national regime is established by intergovernmental agreements based on reciprocity.

Therefore, there is a well-founded statement in the literature that, in general, the construction of «international legal entities» does not fit as an additional category into the conceptual series existing in the science and practice of private international law, namely: «a national legal entity is a foreign legal entity», and in any case should be included either in one or in another group (Dmitrieva G.K., 2000: 58-59).

As already noted, the incorporation doctrine is in force in Kazakhstan, i.e., the law of a legal entity is considered the law of the country where this legal entity is established (Article 1100 of the Civil Code).

One of the main elements of those circumstances determined by a legal entity's law is the civil legal capacity (paragraph 1 of Article 1101 of the Civil Code).

Specific exceptions to the personal law are fixed in paragraph 2 of Article 1101 of the Civil Code. A foreign legal entity may not refer to the limitation of the powers of its body or representative to make a transaction that is not known to the law of the country in which the body or representative of the foreign legal entity made the transaction. For example, the head of a legal entity with Greek nationality concluded a transaction in Kazakhstan. Still, the transaction was challenged since the head violated the specific limitation of the powers of the bodies of the legal entity provided for by Greek law. However, Kazakhstan has no such restriction to recognize the transaction as valid.

In one arbitration case, a dispute arose about the right to decide on the invalidity of the transaction. Citizen K. was the president of one company registered in Cyprus and a member of the board of directors of another (subsidiary) company registered in Canada. He made a deal in Kazakhstan. The question arose, what right to apply to the definition of the powers of citizen K. as a body of two legal entities.

From the analysis of paragraph 2 of Article 1101 of the Civil Code, it can be concluded that it should apply to Cyprus and Canada's law. Still, the legislation of Kazakhstan should be used as an additional one. Citizen K. must have the authority per the laws of Cyprus and Canada. The legislation of Kazakhstan is applied only when Alberta (or Cyprus) legislation also establishes restrictions that are not known to the law of Kazakhstan.

In practice, the registration of representative offices of foreign organizations that are not legal entities on the territory of Kazakhstan has often arisen. The rules on registering representative offices in Kazakhstan do not allow such a possibility. Meanwhile, in the West, such entities are not uncommon; for example, a full partnership, which is not a legal entity, nevertheless acts in civil circulation as full-fledged subjects of law.

To eliminate such contradictions, specifically included paragraph 3 of Article 1101 of the Civil Code in the Civil Code, which reads:

«The civil legal capacity of foreign organizations that are not a legal entity under foreign law is determined by the country's direction where the organization is established.

To the activities of such organizations, if the law of the Republic of Kazakhstan is applicable, the rules of the Civil Code that regulate the activities of legal entities that are commercial organizations are applied, unless otherwise follows from the legislation of the Republic of Kazakhstan or the substance of the obligation».

However, no one of these forms does not consider the property interests of a non-profit organization of the founders. At that time, the economic value of the shares (through its ownership of crucial competence) is that the subject will buy the account the dividends on the entity's shares. Therefore, non-profit organizations in the form of joint-stock companies are theoretically unjustified and, secondly, for the economic system of any significant economic or social benefits (Mukaldyeva, Makhambetsaliyev, 2019: 77-84).

The residents of competitive commitments, as well as any other obligations, are the parties. As parties, the law names the initiator of the contest and the winner of the competition. However, as mentioned above, the competitive obligations in its formation go through several successive stages. Each of these

stages has its composition of the participants of legal relations. Only the contest's initiator's figure, participating in all competitive obligation development phases, remains unchanged (Mukaldyeva, Urysbayeva, Alkebaeva, 2020: 24-37).

The issues are closely related to the introduction of public law in civil law, both in German law and in some Anglo-Saxon states. The presence of globalization processes in direction is evident since the problem of the inclusion of a legal entity of public law in Kazakh legislation is the most discussed in science and lawmaking. However, there are two unresolved problems on the way to such a unification.

The processes of globalization have a significant impact not only on the content and development of international and national law but also on the trends and nature of the interrelationships and interconnection of legal systems existing in the world. It is also necessary to consider the existence of general civilizational foundations of legal systems. Western civilization gave rise to similar Romano-Germanic and Anglo-Saxon legal systems. The commonality of "Romano-Germanic and Anglo-Saxon law itself, by the very logic of their historical process, inevitably presupposes their peculiarity. Otherwise, it would be challenging to explain their relatively independent, isolated existence, and even more so.

The activity of the state in relations regulated by civil law is dictated by the realization of socially valuable functions and the achievement of political goals, which at the same time determines the existence of its authority. As a result of this duality, the following problem arises. In civil law, the legislator must constantly find a balance between respect for the principle of equality and the oppressive nature of the state, which takes place in the general direction (Yakovlev, Talapina, 2016).

According to paragraph 89 of section three of the German Civil Code, the list of legal entities of public law includes the Treasury, corporations of public law, legal entities in the form of institutions, and civil authorities. The rules of paragraph 31 of the Regulations governing the union's responsibility as a legal entity for the actions of its bodies apply to legal entities of public law. Legal entities of public law are liable for damage caused to a third party by an authorized person under the charter of the representative, which was carried out in the performance of official duties assigned to them. The rules on insolvency and reorganization of legal entities do not apply to the state as a legal entity of public law; the activities of legal entities of public law are regulated by civil legislation with some exceptions. The state is also classified as a legal entity under public law (Sandevoire, 1994).

To participate in relations regulated by civil law, the state in its status should be as equal as possible to other participants in these relations. In this regard, researchers write that equality of participants in public relations, discretionary nature, initiative, and legal decentralization are criteria for distinguishing the right to public and private (Hajiyev, 1996).

An appeal to the approach of personification of the state in the historical process. He contributed to a qualitatively new restructuring of the relations of power-subordination, called subordination, into links based on equality and mutual responsibility, provided for by the system of necessary legal guarantees of the corresponding legal statuses.

Conclusion

The form of a legal entity is necessary for civil law to formulate and express the legal personality of all non-physical persons. In this regard, it seems correct to conclude that state and municipal legal entities are usually identified with legal entities, suggesting a common generic concept – organizations (Andreev, Kirpichev, 2014). In general, it is the crucial goal in forming a legal entity. Can obtain the idea of a legal entity by determining the primary economic purpose of the specified institution (Kulagin, 1997). In particular, such public organizations may or may not exist in different legal systems. Recognized as legal entities, it depends on historical and civilizational features, theoretical approaches that have developed in the science and practice of individual countries. However, despite some peculiarities of public legal entities in the developed legal systems of the world, the state is a legal entity. According to general law in all legal systems, the division of legal entities into private and public is recognized.

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