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Unity and Diversity in International Law

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UNITY AND DIVERSITY IN INTERNATIONAL LAW

WILLIAM W. PARK*

I. LAW AND LAWYERS: THE PROTEAN NATURE OF INTERNATIONAL LAW

The primordial Greek sea-god Proteus could alter his shape at will, notwithstanding that his divine substance remained the same. Reinventing himself by adapting to new circumstances, Proteus still stayed unchanged in essence.

Unlike the sea-god's protean nature, the substance of international law may well undergo alterations when examined through the telescope of legal culture, or with predispositions of divergent educational backgrounds. For the thoughtful reader, scholarly speculation on such variations will be triggered by reading *Is International Law International?*¹ In that book, Professor Anthea Roberts explores a variety of elements in the teaching and practice of international law, viewed through the lenses of scholars and judges from different parts of the world.

At the outset, Professor Roberts explains that her inquiry relates not to law *per se*, in the sense of legal sources such as treaty and custom. Rather, she looks at how various legal communities construct divergent understandings of international law, such as to call into question its universality. The understandings that remain often perpetuate difference and dominance.² Thus, Russian or Chinese students would be fed a different version of international law from the one given to those who have studied and practiced in Boston or Paris. Some arbitrators in cross-border investment disputes might be more likely to understand international law as taught in Western European or North American universities. Students from China and Australia alike might study in Britain or the United States, while Russians would remain more insular.

Professor Roberts focuses on lawyers as much as law, presenting a comparison of the "who" as much as the "what." For example, the 2003 United States invasion of Iraq receives a comparison of how the legality of that war gets treated in textbooks written by French, American, and British academics.³ The author looks not only at academics, but also at judges of different national origins sitting on the International Court of Justice, examining *inter alia* patterns of scholarship and effects of technology.⁴ Language and culture also play roles

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¹ ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* (2017).

² *Id.* at 6-11.

³ *See id.* at 199-205.

⁴ *Id.* at 256-60.

in the study, with observations on the pervasiveness of textbooks and journals in English and French and the location of preeminent universities in Britain, France, and the United States.⁵

For any careful observers, asking “is international law international?” begs prior definitional questions: What is law? And what law gets labelled as international? At least in the tradition of Western legal thinking, notions of “international law” touched relations among nations, addressing subjects such as jurisdiction on the high seas, territorial waters, state succession, treaties, military conflict, duties toward neutrals, and state responsibility. When Professor Brierly’s now-classic *Law of Nations*⁶ first appeared in 1928, these “state-to-state” contours of international law had already been ensconced in diplomatic and scholarly minds for 170 years, since crystalized in *Le droit des gens*,⁷ published in 1758 by the Swiss scholar-diplomat Emer de Vattel. Concepts of international law evolved, however, to encompass human rights and investor protection, with private persons (natural/individual as well as corporate/juridical) included as subjects of international law and given new perspectives by the great German-British lawyer Francis Mann, who in 1972 published his *Studies in International Law*.⁸

In parallel, cross-border economic transactions grew in a fashion that fostered a professional class trained to tackle questions of “trans-national law” such as the resolution of international business disputes and allocation of fiscal jurisdiction. Treaties were negotiated to allocate tax jurisdiction and to enforce foreign arbitration awards.

International arbitration, now a key component of any mature law school curriculum, evolved to include not only such state-to-state disputes but also commercial controversies and claims against sovereign states by foreign investors, from alleged wrongs derived from unjustified expropriation, lack of fair and equitable treatment, or discrimination.⁹ Yet international arbitration never lost its links to an earlier service dedicated more to state-to-state conflicts. These included the Anglo-American disputes addressed by the “Jay Treaty” following the American Revolution,¹⁰ and the 1872 “Alabama Arbitration” that awarded the United States \$15.5 million (equivalent to about \$200 billion in today’s money) for damage to Union shipping during the American Civil War caused by a vessel built in Britain and sold to the Southern Confederacy.¹¹

⁵ *Id.* at 260-72.

⁶ J. L. BRIERLY, *THE LAW OF NATIONS* (1928).

⁷ EMER DE VATTEL, *LE DROIT DES GENS* (1758).

⁸ F. A. MANN, *STUDIES IN INTERNATIONAL LAW* (1972).

⁹ Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 *YALE J. INT’L L.* 365, 366-68 (2003).

¹⁰ Treaty of Amity, Commerce, and Navigation, U.S.-U.K., art. 6, Nov. 19, 1794, 8 Stat. 116 (addressing difficulties from 1783 Treaty of Paris, including damages to British creditors).

¹¹ *E.g.*, Jan Paulsson, *The Alabama Claims Arbitration: Statecraft and Stagecraft*, in *ARBITRATING FOR PEACE – HOW ARBITRATION MADE A DIFFERENCE 7* (Ulf Franke, Annette

Such diversity, nuance, and evolution should surprise no one. The vastness of both “law” as a noun, and “international” as an adjective, suggest that international law, and its cognates in languages other than English, tie together bundles of norms and moral claims whose common denominator includes an authoritative adjudicatory framework for resolving disagreements whose elements will cross national boundaries.

Consequently, courts and arbitrators adjudicating cross-border disputes often seek guidance in national as well as international rules, with the line anything but impermeable. Damages for breach of obligations arising from a German-American financial joint venture in Geneva might implicate principles of state responsibility, as well as the Swiss *Code des obligations*, the Massachusetts law of contract, and the German *Bürgerliches Gesetzbuch*. Depending on context, the dispute’s legal dimensions might bring into play notions such as sovereign immunity, Act of State, or treaty-based recognition of arbitral awards as expressed in national statutes such as the U.S. Federal Arbitration Act,¹² or the Swiss doctrine shielding from attachment assets held in Switzerland by foreign sovereigns, absent some sufficient “internal” legal link (*Binnenbeziehung*) between Switzerland and either the parties, the transaction, or the subject matter of the underlying dispute.¹³

In some instances, decision-makers addressing cross-border disputes will consult not only law in its traditional formulation (including treaties and prior decisions), but also the lore of trade usage and professional associations. The latter include associations such as the International Bar Association and the International Chamber of Commerce, whose rules are often decisive in determining how adjudication of an international dispute will unfold in respect of questions such as document production and privilege, which in turn are often decisive as to who wins and who loses. Such “soft law” formulations of normative principles derive legitimacy from their acceptance by the public and private actors who participate in transactions having significant components in more than one country.

Magnusson & Joel Dahlquist eds, 2016); Tom Bingham, *The Alabama Claims Arbitration*, 54 INT’L & COMP. L.Q. 1 (2005); Van Vechten Veeder, *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator*, 107 PROCEEDINGS OF AM. SOC’Y OF INT’L L. 387 (2013); see also Bruno de Loynes de Fumichon & William W. Park, *Retour sur l’Affaire de l’Alabama: de l’Utilité et de la Futilité de l’Histoire du Droit*, REV. ARB. (forthcoming 2019).

¹² 9 U.S.C. § 1 (2012).

¹³ The mere fact that the seat of an arbitration might be in Switzerland will not normally be considered sufficient. Socialist People’s Libyan Arab Jamarhiya v. Libyan American Oil Co. (LIAMCO), Swiss Fed. Supreme Ct., June 19 1980, *reprinted in* 20 I.L.M. 151, 159–60 (1981) (applying Circulaire du Département Fédéral de Justice et Police, Jurisprudence des Autorités Administratives de la Confédération 224 (Nov. 26, 1979)); see also Georges R. Delaume, *Economic Development and Sovereign Immunity*, 79 AM. J. INT’L L. 319, 340 (1985).

Significant cultural differences in approaching such “soft law” norms, procedural and substantive, have led to intriguing debate within the Western legal tradition itself. One example derives from the purported *lex mercatoria*¹⁴ or “international law merchant” whose academic revival a half century ago sparked support from the French,¹⁵ and skepticism on the part of many in Britain,¹⁶ while in passing providing younger scholars with the delightful prospect of taking sides in the exciting intellectual combat.¹⁷

¹⁴ See generally Michael Mustill, *The New Lex Mercatoria*, in LIBER AMICORUM FOR LORD WILBERFORCE 149 (Maarten Bos & Ian Brownlie eds., 1987); William W. Park, *Control Mechanisms in the Development of a Modern Lex Mercatoria*, in LEX MERCATORIA AND ARBITRATION 109 (Thomas E. Carbonneau ed., 1990); Klaus Peter Berger, *The Lex Mercatoria (Old and New) and the TransLex-Principles*, TRANS-LEX: LAW RESEARCH, www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles_ID8 (last visited Mar. 14, 2019) [<https://perma.cc/98AZ-CSWX>].

¹⁵ E.g. Emmanuel Gaillard, *Trente Ans de Lex Mercatoria: Pour une Application Sélective de la Méthode des Principes Généraux du Droit*, 1995 J. DROIT INT'L 5 (1995); Berthold Goldman, *Frontières du droit et lex mercatoria*, 1964 ARCHIVES DE PHILOSOPHIE DU DROIT 177 (1964). The content of *lex mercatoria* related not only to procedural issues in arbitration but also to substantive decisions on breach of obligations. See Cour de Cassation [Cass.][Supreme Court for Judicial Matters], Oct. 9, 1984, 83-11.355 (Fr.) concerning a dispute between the French Norsolor and the Turkish Pabalk, with arbitration in Vienna, in which Norsolor was ordered to pay amounts based on transnational rules (essentially a splitting of the difference), whereas Turkish and French law would have imposed an “all or nothing” result.

¹⁶ As a critic of *lex mercatoria*, Francis Mann once observed, “No merchant of any experience would ever be prepared to submit to the unforeseeable consequences which arise from application of undefined and undefinable standards described as rules of a *lex* of unknown origin.” F. A. Mann, *Introduction*, in LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT xxi (Thomas Carbonneau ed., 1990); see also F.A. Mann, *Lex Facit Arbitrum*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 157 (Pieter Sanders ed., 1967).

¹⁷ The two titans, Professor Berthold Goldman and Dr. F.A. Mann, wrote dueling introductions to a collection of essays on *lex mercatoria*: Goldman “for” and Mann “against”. See LEX MERCATORIA AND ARBITRATION xv-xxi (Thomas Carbonneau ed., rev. ed. 1998) (Goldman and Mann introductions). A few years earlier, the author of this present essay, then a beginner, had been privileged to sit with these men at a conference dinner, one on the left and the other on the right. Presumptuously, that neophyte had written on *lex mercatoria* and “delocalization” of arbitration, favoring the views of Dr. Mann and expressing concern about the prospect that “transnational” notions might serve as fig leaves to hide unauthorized substitution of arbitrators’ private preferences for properly applicable law. As wine was poured, Goldman looked to Mann with a smile and said, “Francis, between us sits the only living disciple of your non-theory.”

II. THE DEVIL IN DETAIL: WHEN AND HOW DO DIFFERENCES MATTER?

A. *What is at Stake?*

When (and why) should it matter whether international law is truly international? In law, as in the rest of life, the devil often remains in the details. Efforts to understand the cross-cultural dimensions of international law get a boost by looking at concrete examples of the impact of language and civilization on specific legal norms.

Perhaps the most accessible illustrations derive from variations in articulation and implementation of legal doctrines as between relatively homogeneous legal cultures, for example those of France, Britain, and the United States.¹⁸ Even in this connection, however, perceived “technicalities” (to use a loaded term) impede understanding of what really happens in applying legal principles.

Few antidotes to lazy lawyering exist short of tackling specific illustrations of how precise language and culture impact the norms we understand to implicate international law. Decorticating these principles often requires patience and a perseverance rarely shared except by those in the thick of the controversy.

B. *Three Dilemmas: Treaties, Expropriation, and Jurisdiction*

To help elaborate what remains at stake in understanding variations among different notions of international law, let us take three legal dilemmas: (i) the fate of annulled arbitration awards, (ii) title to expropriated property, and (iii) jurisdiction to tax cross-border transactions. All bear on the “internationality” of international law in different ways.

1. *Interpreting Multilateral Treaties: Annulled Arbitral Awards*

To assess whether and how differences matter in international law, one starting point might be treaty interpretation. An illustrative scenario might take a simple cross-border sales agreement subject to an arbitration clause, with an award made in one country presented for enforcement in another.

Going back to first principles, few would disagree that freely-accepted obligations generally deserve respect. If a buyer in New York agrees to pay \$10 million for goods imported from France, the purchaser should not escape payment absent some good reason. Who is to determine whether a “good reason” does in fact exist? The American buyer might say the merchandise was defective, with the French seller maintaining the opposite. Who decides? Does the matter go to courts of the importer in the United States or to courts of the exporter in France? Or to some supra-national body, such as an arbitral tribunal in London?

In the search for a fair and certain forum, the most common solution would be arbitration, at least for international transactions like the one above. To pursue

¹⁸ ROBERTS, *supra* note 1, at 254-64 (noting dominance of French and English legal cultures, with English ascendant as lingua franca of international law).

matters further, let us assume the controversy goes to arbitration in London, as agreed by both sides. The arbitral tribunal decides in favor of the French seller/exporter: the goods were indeed up to the contractually stipulated quality, and the American buyer owes money for failing to pay. Let us posit further that, rightly or wrongly, an English court, with jurisdiction based on the seat of the arbitral tribunal, vacates the award due to violation of some provision of the English arbitration act.¹⁹

When the French winner under the award, now annulled, seeks to have the award enforced by attaching the American company's assets both in New York and in Paris, those enforcement courts will need to decide whether to give effect to the arbitration award itself, which says that damages must be paid, or to the English court judgment setting aside the arbitral award, thus relieving the American buyer of its payment obligations pursuant to the arbitration.

What is to be done? Award enforcement (which in turn engages respect for cross-border commitments) implicates one of the most successful instruments of international law: the 1958 UN (New York) Convention (the "Convention"),²⁰ now signed by over 150 states ranging from Afghanistan to Zimbabwe.²¹ The Convention provides for recognition of foreign arbitral awards, but with some significant caveats, in particular concerning awards annulled in their country of origin. These caveats have been applied differently by courts in France, Britain, and the United States. Indeed, the Convention language has been applied differently even within the United States, with divergence derived not from any perversity of judges but from good faith variants in perspectives on how to construe the treaty.

The battle plays itself out, in part, through Article V(1)(e) of the Convention, whose application triggers different results depending on whether the word "may" gets read as conveying (i) permission or (ii) expectation, a matter that sometimes depends on the context of the case or on which of the five official language versions gets consulted.²²

The English version of Article V(1)(e) reads:

¹⁹ The Arbitration Act might permit annulment, for example, due to a perceived procedural irregularity. Arbitration Act 1996, ch. 23 § 68 (UK). Or an award in some instances may be set aside following an appeal under Section 69 on a point of law, in this context defined by Section 82 to include the law of England and Wales. *Id.* at §§ 69, 82.

²⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

²¹ Indeed, except for the letters W and X, signatories include countries beginning with every character in the Roman alphabet. The letter Y remains somewhat problematic, since Slavic Macedonia often identifies itself by reference to the former Yugoslavia.

²² Under Convention Article XVI(1), the treaty's Chinese, English, French, Russian, and Spanish texts are "equally authentic." New York Convention, *supra* note 20, at art. XVI(1). On the comparison of treaty texts with different meanings, see Vienna Convention on the Law of Treaties, art. 33(4), May 23 1969, 1155 U.N.T.S. 331, which provides for adoption of the "meaning which best reconciles the texts having regard to the object and purposes of the treaty."

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes proof that . . . [the award] has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.²³

In contrast, the French text lends itself to a more forceful interpretation that could mandate deference to the annulment court decision, providing that recognition and enforcement “will not be refused . . . *unless* [que si] . . . the award was annulled or suspended” by a competent authority where that award was made:

*La reconnaissance et l'exécution de la sentence ne seront refusées, sur requête de la partie contre laquelle elle est invoquée que si cette partie fournit à l'autorité compétente du pays où la reconnaissance et l'exécution sont demandées la preuve . . . a été annulée ou suspendue par une autorité compétente du pays dans lequel, ou d'après la loi duquel, la sentence a été rendu.*²⁴

The French text lacks notions of discretion conveyed by “may” in English. Rather, the “*unless*” [“*que si*” in the original] combined with a future indicative (recognition will not be refused) seems to compel expectation of non-recognition of the annulled award.²⁵

Thus, an arbitral award annulled in its country of origin could be presented for enforcement against assets in other countries, with dramatically different results. Courts purporting to apply the very same treaty to the very same facts may come to diametrically opposed conclusions.²⁶

²³ New York Convention, *supra* note 20, at art. V(1)(e).

²⁴ Convention pour la Reconnaissance et l'Exécution des Sentences Arbitrales Étrangères, June 10, 1958, 330 U.N.T.S. 38.

²⁵ The mandatory (or expectation) tone in such a future indicative construction might be illustrated in a sentence such as, “The scholarships will not be revoked unless (“la bourse ne sera révoquée que si . . .”) the student is found guilty of cheating.” On the “may” vs. “must” debate in relation to New York Convention Article V, see generally Richard W. Hulbert, *Further Observations on Chromalloy: A Contract Misconstrued, a Law Misapplied, and an Opportunity Foregone*, 13 ICSID REV. 124, 144 (1998); Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 ARB. INT'L 227 (1998); Georgios Petrochilos, *On the Mechanics and Rationale of Enforcing Awards Annulled in their State of Origin under the New York Convention*, 48 INT'L & COMP. L. Q. 858 (1999).

²⁶ For an interesting twist on competing views about the effect of arbitral awards rendered abroad, see *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46. The U.K. Supreme Court refused to enforce an ICC award made in Paris, in favor of a Saudi company, reasoning that under French law the Pakistani government was not bound by an arbitration agreement signed by a trust the government established. A year later, however, a French court came to the opposite conclusion in rejecting an application to vacate the award in favor of the Saudi creditor, reasoning that the intervention in contract negotiations by officials of the Pakistani government meant that the state (not the trust) was in fact the true contracting party (la

Scholars and judges in England or the United States often (though not always²⁷) see annulment as triggering a universal effect, making an award unenforceable wherever presented for enforcement, in essence permitting a court at the place of arbitration to uproot an award once and for all. According to that view, the Convention contains an implicit understanding that the arbitral situs will monitor an arbitration's procedural integrity, in exchange for which other countries will recognize awards that pass muster where rendered.²⁸

In contrast, French scholars see the Convention as providing considerably more leeway and discretion, with recognition of the award (rather than the annulment decision) proving the rule rather than the exception due to invocation of a part of the Convention other than Article V(1)(e) as mentioned above.

French courts look to its Article VII which provides that the treaty shall not deprive any interested party of a right to avail itself of an arbitral award in the manner allowed by the law where the award has been relied upon. The French judiciary thus gives effect to vacated awards under the national law of France, as enforcement forum. Such shift of emphasis implicates the influence of theories of "a-national" arbitration and "lex mercatoria" espoused by Gallic scholars such as Emmanuel Gaillard, along with the late Philippe Fouchard and the late Berthold Goldman.²⁹

véritable partie pakistanaise lors de l'opération économique). *See* Cour d'appel [CA] [regional court of appeal] Paris, 1^e ch., Feb. 17, 2011, [09/28533] (Fr.).

²⁷ *Compare* Thai-Lao Lignite (Thail.) Co. v. Gov't of Lao People's Democratic Republic, 864 F.3d 172 (2d Cir. 2017) (deferring to Malaysian court judgment annulling arbitral award made in Malaysia); *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 939 (D.C. Cir. 2007) (deferring to annulment in Colombia of award made in Bogotá); *Baker Marine, Ltd. v. Chevron, Ltd.*, 191 F.3d 194, 197 (2d Cir. 1999) (deferring to Nigerian court vacatur of arbitral award made in Lagos); *with In re Int'l Betchel Co.*, 300 F.Supp. 2d 112, 118 (D.D.C. 2004) (refusing to enforce award annulled for failure to administer oath invoking God Almighty as required by UAE law, at time when UAE had not signed New York Convention). *But see* *Chromalloy v. Egypt*, 939 F.Supp. 907, 914 (D.D.C. 1996) (vacating Cairo tribunal's award of damages for tribunal's alleged failure to apply correct law). In an opinion with no American precedent at that time, the court reasoned that error of law did not constitute a ground for vacatur in the United States, thus permitting award enforcement. *See also* *Corporación Mexicana de Mantenimiento Integral v. Pemex-Exploración y Producción*, 832 F.3d 92, 111-12 (2d Cir. 2016) (recognizing annulled award rather than annulment).

²⁸ Albert Jan van den Berg, *Annulment of Awards in International Arbitration*, in *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY* 133, 137 (R. Lillich & C. Brower eds., 1994); ALBERT JAN VAN DEN BERG, *THE NEW YORK CONVENTION OF 1958*, at 355-58 (1981); W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 *TEX. INT'L LAW J.* 1, 58 (1995); *see also* W. Michael Reisman, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR* 113-20 (1992).

²⁹ *See* PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, *TRAITE DE L'ARBITRAGE COMMERCIAL INTERNATIONAL* §§ 270, 1595, 1687-89 (1996); Philippe Fouchard, *La Portée Internationale de l'Annulation de la Sentence Arbitrale dans son Pays d'Origine*, 1997 *REV. ARB.* 329 (1997). For later and earlier debate on the matter, see authorities cited in

The French view received its most classic expression in the *Hilmarton* case,³⁰ a many faceted saga where an arbitrator in Geneva denied a claim for consulting fees, erroneously believing that the contract violated Switzerland's public policy.³¹ After a cantonal court vacated the award on the basis of this mistake, a second arbitral tribunal gave damages to the claimant.³² In France, both awards were recognized, each in a separate proceeding: first the annulled award in favor of the defendant;³³ then the award in the second arbitration in favor of the claimant.³⁴ Ultimately the *Cour de Cassation* held that the first judgment,

Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16 (1999); William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L LAW 805 (1999); William W. Park, *Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21 (1983); Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L COMP. L.Q. 358 (1981); Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53 (1983).

³⁰ Cour de cassation [Cass.] [Supreme Court for Judicial Matters], Civ., *Hilmarton v. OTV*, June 10, 1997, note Ph. Fouchard (Fr.) [hereinafter *Hilmarton* 1997]. See generally Georges Delaume, *Enforcement Against a Foreign State of an Arbitral Award Annulled in the Foreign State*, 1997 REV. DROIT DES AFFAIRES INT. 253 (1997); Philippe Fouchard, *La Portée Internationale de l'Annulation de la Sentence Arbitrale dans son Pays d'Origine*, 1997 REV. ARB. 329 (1997); Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment*, 6 ASIAN PAC. L. REV. 1 (1998); Jean-François Poudret, *Quelle Solution Pour en Finir avec L'Affaire Hilmarton?*, 1998 REV. ARB. 7 (1998); Eric Schwartz, *French Supreme Court Renders Final Judgment in the Hilmarton Case*, 1997 INT'L ARB. L.R. 45 (1997). For an earlier decision along these lines, see Cour de Cassation [Cass.] [Supreme Court for Judicial Matters], Oct. 9 1984, 83-11.355 (Fr.) (award vacated in Austria enforceable in France).

³¹ The consultant successfully helped obtain a contract for drainage in Algiers. While there was no allegation of bribery, the consultant's activity allegedly ran afoul of an Algerian statute on commercial intermediaries.

³² The award was rendered in August 1988 and thus subject to challenge for "arbitrariness" under Article 36 of the Intercantonal Arbitration Concordat. Since January 1989, awards in international arbitration would normally be subject to the Loi fédérale sur le droit internationale privé ("LDIP"). Upheld by the Swiss Tribunal fédéral, the Geneva court found that the conflict with Algerian legislation did not constitute a violation of Swiss public policy. See Tribunal fédéral [TF] Federal Supreme Court] Apr. 17, 1990 (Switz.); Court de Justice [Court of Justice] Geneva, Nov. 17, 1989, 322 (Switz.).

³³ Cour d'Appel [CA] [regional court of appeal] Paris, Dec. 19, 1991, 90-16778 (relying on NCPC arts. 1498 & 1502, which limit appeal against award recognition to grounds that do not include annulment of award where rendered). The appellate court's judgment was upheld by the Cour de cassation [Cass.] [Supreme Court for Judicial Matters] Mar. 23, 1994, 92-15.137, note Jarrosson (Fr.) [hereinafter *Hilmarton* 1994]. See generally Vincent Heuzé, *La Morale, L'Arbitre et Le Juge*, 1993 REV. ARB. 179 (1993).

³⁴ The order of the Nanterre Tribunal de Grande Instance, which recognized the second award (as well as the Swiss court's annulment of the first award), was confirmed by the Versailles Cour d'Appel on June 29, 1995. Cour d'Appel [CA][regional court of appeal] Versailles, June 29, 1995.

recognizing the annulled award, prevented recognition of the second arbitral award.³⁵ Although the position of the French *Cour de Cassation* on *res judicata* is understandable, its reasoning may be less so in concluding that international arbitrations were not integrated into the legal order of the arbitral situs.³⁶

Of course, even the English text of the Convention with its permissive “may” (“recognition ... may be refused”) leaves open a mandatory meaning. The verb “may” in that context does not easily read as an acceptance of equally viable options, as in, “You may have vanilla ice cream for dessert or you may have apple pie.” Rather, the “may” carries a sense of expectation, as in “You may worship according to the dictates of your own conscience.” The context of Article V(1) makes clear such an “expectation” – at least if one considers the other listed items for which recognition “may” be refused: for an agreement that is not valid; for absence of proper notice; for a denial of one side’s right to present its case; for an award beyond the submission to arbitration; and for an arbitral tribunal composed contrary to the parties’ agreement.³⁷

Some looking at the dispute from outside the practical context (seller vs. buyer) may roll their eyes in respect of nuances in wording from one text to another. However, for those in the thick of the action, it will be justice and equity (not “technicalities”) that get furthered or denied, depending on whether effect is given to the arbitral award supporting the seller/exporter or the French court decision in favor of the buyer/importer. The seller will say, “Where is the justice in denying the arbitrators’ clear decision?” The buyer will retort, “Where is the equity in disregarding a ruling of the English court?”

In short, general discussions of international law, as juxtaposing human rights against state sovereignty and equality,³⁸ take meaning only in concrete cases, some of which prove quite mundane, except to those whose welfare and fortunes remain in jeopardy. In the narrative set forth above, human rights include an entitlement to be paid (for the seller), just as state sovereignty (for the seller) implicates respect for the judicial decisions at the place of arbitration.

2. Expropriated Property: The Act of State Doctrine

Outside the realm of treaty interpretation, differences in international law may arise when one country purports to expropriate property initially held by a resident of another nation, with the seized assets ultimately finding their way to another nation with less revolutionary notions of property law. The so-called

³⁵ Hilmarton 1997, *supra* note 30.

³⁶ See Hilmarton 1994, *supra* note 33 (affirming lower court’s recognition of annulled award and stating that Geneva award “n’était pas intégrée à l’ordre juridique de [la Suisse]”). In *Hilmarton*, the ultimate result of recognizing the annulled award was that the claimant who prevailed at the bargained-for situs was hindered in obtaining unpaid fees.

³⁷ See New York Convention, *supra* note 20, at art. V(1) (a)-(d).

³⁸ In this connection, see ROBERTS, *supra* note 1, at 286-91 (discussing how China and Russia may resist certain aspects of Western legal order, in particular through 2016 joint declarations reflecting their views on United Nations Charter and 1970 Declaration on Principles of International Law).

“Act of State Doctrine” presents an illustration of national differences even among closely-related legal systems, Britain and the United States, relating more to reasoning than to result. In the British matter, an enterprise operating a sawmill in Russia before the 1917 Revolution found its wood seized by the Bolsheviks and sold to a competitor in England.³⁹ In an analogous case arising in the United States, an American firm with plantations in Cuba saw its sugar confiscated after Fidel Castro’s Communist government took power in 1959, with title to the dispossessed cargo ending up in New York through the form of a “bill of lading” held in that state.⁴⁰

Who ultimately owns the lumber or the sugar? In Britain, the matter was addressed essentially as a choice-of-law problem, with title to property depending on its situs, determined according to rules fixed by the recognized government of that territory. His Majesty’s Government had recognized the Soviet Union as the government of Russia,⁴¹ leading an English court to find that the Soviets had rights to the Russian-situated lumber, such rights being granted to a buyer that purchased the wood after it had been taken from its original owner.

While similar in result, the American and British approaches to analogous expropriations contrast sharply in reasoning. In the United States, pursuant to the so-called *Sabbatino* principle,⁴² a simple choice-of-law principle transformed itself into a doctrine of Constitutional dimension, providing opportunities for tenure-hungry academics to pen sophisticated and nuanced law review commentaries. The United States Supreme Court addressed expropriation of a cargo of sugar taken by the newly instituted Castro government, which had dispossessed the owners of an American-owned corporation. When the bill of lading (representing title to the sugar) ended up in New York, the United States Supreme Court sustained the expropriation decree of the Cuban government on the basis of an “Act of State Doctrine” that precludes courts from inquiring into the validity of the public acts of recognized foreign sovereigns committed within their own territory.⁴³ An opinion by Justice Harlan saw “constitutional underpinnings” for the doctrine, in the form of separation of powers principles precluding the judiciary from passing on the

³⁹ See generally *Luther v. Sagor*, [1921] 1. K.B. 456 (UK).

⁴⁰ See generally *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

⁴¹ *Luther*, *supra* note 39, at 456. James Sagor & Company had purchased wood from the Soviet regime that had expropriated the lumber from its original owner, the A.M. Luther Company. Title to wood, shipped to England, had been claimed by both the Soviet government and the owners whose factory had been nationalized.

⁴² *Sabbatino*, *supra* note 40, at 427-37.

⁴³ *Id.* at 438. The name of the case derived from one Peter Sabbatino, who had been appointed receiver for the New York assets of the expropriated sugar company, which the Banco Nacional de Cuba had received by assignment from the agent for the Cuban Government, and which were later delivered to the French bank Société Générale for presentment to the purchaser. *Id.* at 406.

validity of foreign acts in a fashion that hinders conduct of international relations by the executive branch of government.⁴⁴

As with the matter of annulled awards, this stark difference in approach occurs not because of any divide between Eastern and Western legal cultures. Rather, two nations with long and close cultural ties, plus similar legal traditions, diverged in articulating analogous international law principles, in part by reason of how one judiciary interpreted its own constitution.

3. Allocating Fiscal Jurisdiction

A third example presents itself from the tax field, which surprisingly often finds itself unexplored by jurists focused on public international law. One says “surprisingly” because tax implicates the most universal of topics, generating regular international disputes and governed by thousands of treaties, including “model” conventions issued by supra-national organizations such as the United Nations and the Organization for Economic Cooperation and Development (“OECD”).

Most of these treaties include “MAP” mechanisms providing “mutual agreement procedures” directing negotiation of differences on taxation of profits that touch more than one nation. For example, a royalty payment might be made by a French subsidiary to its American parent. As between the French and American tax authorities, different views might exist on the correct amount of royalty. The French government, concerned with the royalty as a deduction from income, might say the “arm’s length” rate would be 3% only. The United States government, looking to increase revenue to the parent corporation, might impose tax on a deemed royalty received of 7% of the income generated in France.

The multinational enterprise remains a stake-holder, generally most concerned that the income in the United States be matched by a corresponding deduction in France, hoping that the two national tax authorities would agree, whether on 3%, 7%, or something in between. And indeed, from a perspective of logic, such must be the case. The lack of agreement between the two governments means that the total taxed income in France and the United States will be more than the real income in these two countries.⁴⁵

⁴⁴ *Id.* at 423. Of note in this connection is a provision of the Federal Arbitration Act explicitly making the Act of State doctrine inapplicable in respect of enforcing arbitration agreements or confirming arbitration awards. 9 U.S.C. § 15 (2012). Presumably, the “separation of powers” argument would not apply given that arbitrators serve as private rather than public judges. This provision has sometimes been referred to as part of the “LIAMCO Amendments” to both the Federal Arbitration Act and the Foreign Sovereign Immunities Act, following the disappointing reasoning in *LIAMCO v. Libya*, 482 F. Supp. 1175 (D.D.C. 1980), vacated D.C. Cir., 6 May 1981 (Order No. 80-1207).

⁴⁵ Assume that the amount of income in France from the licensed patent equals \$100 before the royalty. If the French take a deduction of 5%, then the income would be \$95. If the United States recognizes the 5% royalty received by the American parent, then the total income comes to \$100: \$95 in France, and \$5 in the United States. However, if the French reduce to 3% the royalty recognized for tax purposes, and the Americans increase to 7% the royalty

Although not double taxation in a *juridical* sense (given the separate corporate personalities of parent and subsidiary), such situations present *economic* double taxation. The same income might be taxed twice, to the extent that an inclusion in the American company's taxable profits has not been offset by a corresponding deduction in France. The multinational enterprise acts as stakeholder, ready to pay tax either to the United States or to France but not to both countries.

Tax treaty arbitration provides one hope for fiscal symmetry, thereby reducing the fiscal barriers to cross-border trade and investment. To meet the challenge of such double taxation of cross-border transactions, the OECD model bilateral tax treaty⁴⁶ initially attempted to address this issue by providing a mutual agreement procedure under Article 25 to resolve disputes between tax authorities, investors, and states about double taxation and tax loopholes. However, binding arbitration proves only an option: a permissible "may" to arbitrate – but not a mandatory "must" to resolve the differences. Some treaties have been amended in 2008 to require mandatory arbitration if negotiations fail.⁴⁷ Finally, the OECD initiated a project addressing "Base Erosion and Profit Shifting" ("BEPS"), resulting in a multilateral instrument with refinements to mutual agreement procedures. While an "Action 14" of the BEPS initiative recommended commitment to provide for mandatory binding arbitration in the bilateral tax treaties as a mechanism to guarantee that treaty-related disputes will be resolved within a specified timeframe, the multilateral instrument itself left arbitration as an option, not a requirement.

A fifteenth item in the BEPS Action Plan bears the somewhat cumbersome title, "Developing a Multilateral Instrument to Modify Bilateral Tax Treaties." Such a multinational instrument was signed in 2017,⁴⁸ including two options. A

deemed received in the United States, the thoughtful observer finds a total of \$104 in income taxed (\$97 in France and \$7 in the United States), when the initial income pie came to only \$100 in total.

⁴⁶ OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL (2017), <http://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm> [https://perma.cc/99E8-MTLD].

⁴⁷ The earliest income tax treaty containing an arbitration provision appears to be the 1926 United Kingdom-Irish Free State Convention, which in Article 7 provides that questions on interpretation of the treaty "shall be determined by such tribunal as may be agreed between them [the Parties], and the determination of such tribunal shall, as between them, be final." Finance Act, 1926 (No. 35/1926) (Ir.), <http://www.irishstatutebook.ie/eli/1926/act/35/schedule/1/enacted/en/html> [https://perma.cc/QF46-KPT4].

⁴⁸ The Multilateral Instrument itself was promulgated on November 24, 2016, followed by a signing ceremony in Paris on June 7, 2017. OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Jul. 1, 2018), <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf> [https://perma.cc/C3U8-72F7]. To date, approximately seventy countries have signed the instrument, although none has yet concluded ratification.

traditional process tells competent governmental authorities to “endeavor” to resolve taxation considered not in accordance with the treaty, with the chips falling where they may in the event of no agreement. A more forceful Part VI of that multilateral instrument (from Articles 18 through 26) provides a process for mandatory binding arbitration of controversies as to which the competent authorities were unable to reach agreement.

For better or for worse, the arbitration provision of that multilateral instrument fixes a form of “baseball arbitration” with an unreasoned decision, with Article 23(1)(c) providing as follows:

The arbitration panel shall select as its decision one of the proposed resolutions for the case submitted by the competent authorities with respect to each issue and any threshold questions, and shall not include a rationale or any other explanation of the decision. The arbitration decision will be adopted by a simple majority of the panel members. The arbitration panel shall deliver its decision in writing to the competent authorities of the Contracting Jurisdictions. The arbitration decision shall have no precedential value.⁴⁹

This OECD BEPS initiative, although far from universally accepted, provides an example of where international law does in fact reach toward an international character. The aspiration realizes itself through a combination of multilateral negotiation and bilateral treaties.

III. LOOKING FORWARD: STORIES FOR ANOTHER DAY

Asking whether international law is international will to some extent prove a matter of vocabulary. Whether chess is a “game” depends on whether that notion includes only vigorous physical activity with a roundish object, such as baseball, basketball, tennis, football, and squash. If so, chess would be out of consideration. By contrast, however, a wider notion of “game” might include the type of diversion and competition that comprises a sixty-four square board designed for moving figurines designated as king, queen, rook, knight, bishop, and pawn. Those who wish to limit the notion of “game” may of course choose not to include chess.

Different parts of the world include divergent notions of cross-border norms in their lexicon of international law. Some limit the field to the type of custom

Notably, the United States did not sign the instrument, although American delegates participated actively in the BEPS process.

⁴⁹ *Id.* at art. 23(1)(c). In setting compensation of major league American ballplayers in the United States, the late winter finds baseball players often asking for more than the teams wish to pay. The “baseball” approach to arbitration requires each side to submit to arbitration its “last best offer” – from which arbitrators must choose one position or the other. Faced with the prospect of an arbitrator who will see things with a relative amount of realism, the player becomes more modest and the team more generous. As the player moves from a request for \$10 to a request for \$6, and the team budes from its offer of \$3 to a proposal of \$5.5, the two sides find a common ground that permits last-minute settlement.

or treaty recognized as binding one nation in its relations with another among so-called “civilized nations” as initially recognized by Western Europe. Others go further, and include notions of fairness (*ex aequo et bono* or *amiable composition*) by which a court or arbitrator decides in a way that seems to it fair and good, full stop. Such “public” international law distinguishes itself in many academic traditions from the somewhat distinct (yet overlapping) field of “private” international law (often called “conflict of laws”) looking to principles on choice-of-law, enforcement of foreign judgments, and jurisdiction, both legislative and adjudicatory. Also considered a separate field of study, the realm of “international business transactions” touches public and private notions of law, as well as national legal rules which touch transactions that cross-national borders, such as investments, finance, and taxation.

International lawyers have been blessed to live in exhilarating times. The book by Professor Roberts leaves us with many questions. Will we see convergence of scholarship and legal theory from different nations? Will Europe and North America become more like China and Russia? Or the reverse? What time of convergence would enhance net global welfare? Answers, of course, depend on context: sometimes yes, sometimes no, and sometimes maybe. As Rudyard Kipling might have written, these remain stories for another day.