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to have things our own way outside a normative structure, and that, if we are prepared to work within a normative structure, we have to be prepared to lose some and win some.

That's the nature of a normative structure—that you can't win them all. It is extraordinarily difficult, but I think that maybe the American public, and particularly the American foreign policy establishment, is beginning to learn the lesson that we cannot have it all our own way. And if we wish to have some of it our way, it can only be on the basis of a set of reciprocally obeyed normative processes and rules which are international law. And it's all there. I mean, it's operating away. It may not appear in Eric Posner's and Jack Goldsmith's studies, but it's all there, all operating all the time.

It would perhaps surprise you to learn the number of people who have called me since my recent article on proportionality¹ to ask me whether it was safe for them to travel abroad. The very fact that people are calling and asking indicates that there is some concern that there's something out there. That something that is out there is a system of norms, a system of reciprocal obligations that most countries obey. And, yes, indeed, if you were responsible for certain kinds of counter-normative activities, you might not want to take your next vacation in Brussels. That concern is the compliment that exceptionalism pays to international law.

As for the rest of us, we always knew it was out there. It has been just a very small group of people who have been insisting that international law doesn't exist, and I would suggest that we may be emerging from that very dark period of our history, and perhaps the problem will look after itself, and maybe we will never have to have another panel like this.

BUT IS IT LAW?

*By José E. Alvarez**

I am frankly appalled that we are still discussing this 1960's chestnut of a question. Like Tom Franck, I thought we had gotten past it. But I guess years of reading John Bolton¹ and Eric Posner,² and other contemporary international law skeptics, takes its toll . . .

Although some would treat the question as mere semantics,³ I believe that it matters. As we have learned over the course of the past eight years, those who are skeptical that international law is law may write "legal" memoranda that ignore such "non-law" as the Torture or Geneva Conventions or customary rules too numerous to mention.⁴ We are still coming to terms with the *legal* and political consequences of that.

I give different answers to different audiences. Within the legal academy, I point out that the relevant question is actually "*what is law?*". Asking whether international law is "law" presumes national law as the benchmark. If one believes that "law" exists only when a modern state exercises its monopoly on coercion, or that "law" requires both a hierarchy of sources and enforceable judicial remedies, the question becomes an oxymoron. But this blinkered definition limits the term "law" to a historical blink of the eye—to certain Post-Westphalian systems. And not only that. Given contemporary (that is, post-Austinian) forms

¹ Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AJIL 715 (2008).

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¹ See John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROB. 1 (2000).

² Eric Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901 (2003).

³ See Glanville L. Williams, *International Law and the Controversy Concerning the Word 'Law'*, 22 BRIT. Y.B. INT'L L. 146 (1945).

⁴ See, e.g., José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 (2006).

of national law-making and national law-enforcement, this definition would suggest that much of what we discuss today in law schools apart from international law—from administrative law benchmarking to non-judicial remedies to constitutional rules subject to uncertain judicial enforcement—ought be discussed elsewhere, perhaps in our divinity schools.

So I suggest to law students that they look around and see whether there are other kinds of law that look like international law. They usually discover that much law, perhaps most, is not reliably enforced by what Michael Scharf has called the four Cs: cops, courts, criminal penalties, or civil sanctions. Of course I also point out that the *content* of international law is like the *content* of other laws. As many have noted, both international and national laws are different from moral rules because most often legal rules are morally neutral, operate to reduce uncertainty and enhance predictability, tend to favor the status quo, and achieve compliance for non-moral reasons—as when both national and international laws regulate coordination games or enforce specific or defuse reciprocity.⁵ It is also not hard to discredit old canards that contemporary international legal regimes are “merely” consensual, rely on static or inflexible sources, are too vague to be enforced, or have neither law-making institutions nor adjudicators.⁶ In a world with nearly twenty functioning international judicial bodies, even those judicial romantics who fixate on judicialized law have to pay *some* attention.⁷ With the possible exception of Anne Coulter and others who readily believe conspiracy theories, most people do not believe that thousands of government lawyers and private practitioners who engage on a daily basis in the practice of international law are suffering from some kind of collective delusion.

At the same time, when a real client asks, “will I get monetary compensation for this breach of my international law rights?,” I hope that, as good attorneys, we are honest enough to admit that there are no such guarantees when the client seeks dollars from someone with sovereign immunity.

Consider what is probably the most enforceable set of international law rights that exist in the world today: foreign investors’ property rights and legitimate expectations under bilateral investment treaty (BITs). These rights, unlike those adjudicated in human rights courts, generally do not require the exhaustion of local remedies. Unlike traders’ rights in the WTO, they require no intercession by a state, since the private investor can bring a direct claim for breach of a BIT directly to ICSID arbitration and ICSID awards are to be enforced like any judgment by a national court. Moreover, unlike the WTO or most human rights regimes, the point of BITs is precisely to secure compensation for past injury. This is not a namby-pamby regime seeking to prevent trade or human rights disputes from escalating. BIT parties can’t just say, as WTO members can, “oh sorry, I will just remove my unlawful measure” and expect not to owe hard cash for damage caused.

Moreover, investors’ rights are secured by the most credible enforcement device there is—one that much national law relies on as well—namely the market, as well as thousands of private attorney generals known as MNEs. Countries that don’t respect the rights of investors get pounded by the IMF, can’t get a dime out of the World Bank or other regional banks,

⁵ See H.L.A. HART, *THE CONCEPT OF LAW*, 221-226 (1961); Anthony A D’Amato, *The Neo-Positivist Concept of International Law*, 59 *AJIL* 321 (1965).

⁶ For contemporary doubts concerning the viability of customary international law along some of these lines, see, e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 *VA. J. INT’L L.* 449 (2000).

⁷ But international law’s fate should not turn on the extent to which international courts exist and operate. See generally, José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 *TEX. INT’L L. J.* 1 (2003).

and have their political risk and business rankings downgraded by risk insurers everywhere—with predictable consequences on incoming FDI flows thereafter.

As Andrew Guzman has argued,⁸ countries adhere to BITs precisely to be able to make *credible* commitments to investors who worry that neither political risk insurance nor their investment contracts will be enough to protect them. Let's pause on the irony of that: countries turn to international law and international arbitration in this case because their national law and national courts are not credible enough.

And yet, tell that to successful ICSID claimants who won multi-million dollar awards against Argentina years ago and have yet to collect a penny because Argentina, who is out from under IMF scrutiny, is simply refusing to pay. Indeed, at this moment, other ICSID tribunals are trying to figure out what to do about this blow to their supposedly foolproof enforcement system and are trying to increase the pressure on Argentina by, for example, forcing it to pay a security deposit into escrow accounts as their cases proceed. Stay tuned to see if that leads to a better result.⁹

In the end, forcing a sovereign to pay is no easy thing. Even a BIT claim may prove (monetarily speaking) to be worthless. For many people (they are called "clients") this is where the rubber hits the road—and where our responses to the law skeptics may flounder a bit.

Now one can say, as I do, that this enforcement problem does not prevent international regimes (whether those involving trade, investment, or human rights) from casting their *shadow* over the behavior of states and deterring unlawful behavior or nudging some states into settling, even if for ten cents on the dollar. We can also point out that international litigation—as under the Alien Tort Claims Act in U.S. courts or even the trials of war criminals—is often not about collecting actual damages but about letting victims "tell their stories" or achieving other expressive goals.

All of this is true, but we would be committing malpractice if we suggested to a client who does not *only* want to tell her story but also *wants prompt, adequate, and effective compensation for her full damage* that international law assures such an outcome. Of course, neither the BIT investor—nor the U.S. taxpayer who wants his money back from government-owned AIG—is ever assured of that. This does not mean, of course, that "law" is not in either picture.

THE CONCEPT OF INTERNATIONAL LAW

*By Sean D. Murphy**

It is hardly possible in just a few minutes to answer the question posed for this panel. Yet as we approach the fiftieth anniversary of the publication of H.L.A. Hart's classic book, *The Concept of Law*,¹ I thought it might be useful to revisit briefly some of Hart's views about law and about international law as "law," and to reflect on how contemporary developments in international law might figure in Hart's theory.

⁸ Andrew T. Guzman, *Explaining the Popularity of Bilateral Investment Treaties*, in *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT* 73 (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

⁹ See *Sempra Energy International v. Argentina* (ICSID Case No. ARB/02/16), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, Mar. 5, 2009.

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¹ H.L.A. HART, *THE CONCEPT OF LAW* (1961).