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**SMOOTHING THE BOUNDARY BETWEEN FOREIGN
AND DOMESTIC LAW: COMMENTS ON
PROFESSORS DODGE, GOLOVE,
AND STEPHAN**

*Richard A. Epstein**

INTRODUCTION

Two of the three papers on which I have been asked to comment address issues involving the importation of foreign into American law. The third paper raises, with a somewhat more general focus, the coordination of activities between foreign and American legal systems. Professor William Dodge discusses the extent to which the procedures under the North American Free Trade Agreement (NAFTA) may, or should, be used to superintend the (perverse) outcomes of the American legal system.¹ Professor David Golove asks the extent to which treaties entered into by the United States can, or should, be effective as domestic legislation.² Professor Paul Stephan then asks the extent to which American courts should pass judgment on the quality of foreign legal systems in the course of resolving legal questions over the coordination of their law with our system.³ Before commenting briefly on each of these three papers, let me give a short account of my approach to the full range of jurisdictional and procedural problems that deal with the incorporation of civil justice concepts from afar into the American system.

The bottom line is this: the structure of these problems countenances modest expectations about our ability to reconcile inconsistent legal commands. The message I take from these three papers is that it is never easy to tidy up the loose ends so as to give full and equal respect to the judgments and traditions of what are, when all is said

* This article is an expanded version of the comments delivered at the Clifford Symposium on Tort Law and Social Policy: Export/Import: American Civil Justice in a Global Context, held at DePaul University College of Law on April 19, 2002.

1. William S. Dodge, *Loewen v. United States: Trials and Errors Under NAFTA Chapter Eleven*, 52 DEPAUL L. REV. 563 (2003).

2. David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579 (2003).

3. Paul B. Stephan, *A Becoming Modesty: U.S. Litigation In the Mirror of International Law*, 52 DEPAUL L. REV. 627 (2003).

and done, inconsistent legal systems. This venerable problem of domestic law transfers without missing a beat into an international context responding to the procedural, choice of law, and jurisdictional issues that frequently arise in more muted forms within our own federal system. Loose ends always remain loose. The difficulty here is distinguishable from the usual problem of substantive law, where the implementation of a program takes two steps. The first issue concerns principle and policy. Regardless of the subject matter, the initial step is to envision the ideal set of relationships between the parties. The next step asks how the pursuit of these ideals must be tempered by the institutional realities in which any substantive law is embedded. We dare not assume a zero transaction cost system of enforcement, nor a zero error rate in setting out legal rules. However attractive it may be to regard all serious promises as enforceable, with real estate contracts and guarantees we nonetheless routinely enforce those promises evidenced in writing. While in principle we may think that any person with ordinary competence and intelligence should be allowed to drive an automobile, we nonetheless impose a minimum age requirement of sixteen years for all drivers. *Ad hoc* determinations are sometimes too expensive to make.

These tradeoffs will differ from legal system to legal system. But no matter how they are resolved, so long as the dispute is confined to individuals governed by a single jurisdiction, we know which unique rule controls. The inconsistent commands of two systems working side-by-side causes no operational imbalance for either system. The situation parallels one where each of two separate communities develop different customary practices for, say, interpreting contracts. So long as they do not collide, each can go on its merry way. But once business cuts across boundaries, then some court must decide *which* set of formalities (or indeed any formalities) should govern and why. The overlap between two systems invites a clash of customs, practices, and legal rules. Each system has already held that its own view of the world is sound, so that any across-border reconciliation necessarily requires that either system, if not both systems, give way on some part of its preferred solution. In principle, the magic balance-wheel should make only those compromises that minimize the dislocation suffered on both sides. So it is these jurisdictional and procedural issues that have an irreducible messiness, which is good reason to review all of these papers with a sympathetic eye.

II. DODGE

The task that Dodge sets before himself asks the extent to which NAFTA does, or should, require an arbitral review of litigation outcomes made in ordinary trials in American courts. Intervention under NAFTA has the distinct mission of ensuring that member nation states create an environment that facilitates investment by foreign individuals and firms. One key ingredient of that basic obligation is a stable system of legally enforceable copyright and property rights. Thereafter Section 1011 guards against “expropriation” by local governments against foreign interests.⁴

The formal law on NAFTA is, at this point, in a clear state of flux. To place it in focus, Dodge discusses in depth the well-known dispute involving the Loewen Group.⁵ There, a variety of contractual, anti-trust and interference with contract claims resulted in a Mississippi judgment of one-hundred million dollars in actual damages (including damages for emotional distress) and a judgment of four-hundred million dollars in punitive damages, which led (or at least contributed) to Loewen’s bankruptcy. Shortly thereafter, the Loewen group sued not Mississippi (and remember no state is a signatory to the treaty) but the United States for its failure under NAFTA to provide the appropriate legal safeguards for Loewen.

Unless one examines the factual record in great detail (which I have not), it is hard to make an informed judgment about the soundness of the Mississippi judgment. It seems clear that Loewen mounted a highly flawed defense, which easily explains why it lost but does not necessarily explain why it lost by so much. I agree with Professor Dodge’s general view that it would be better if aggrieved foreign litigants were required to exhaust their domestic remedies before taking refuge in suits against the United States. But given the state of recent affairs, I regard any large judgment coming out of Mississippi as presumptively tainted in light of its overall record in dealing with tort litigation, which can only be regarded as deplorable.⁶ Even if that should prove to be the case, it hardly establishes the wisdom of a procedure that allows quick resort to international arbitral procedures before the local system has a chance to work through its errors. The better procedure for NAFTA would require the exhaustion of national remedies before moving to the arbitral setting where the dis-

4. North American Free Trade Agreement, Dec. 8-17, 1992, ch. 11, 32 I.L.M. 605, 639-49.

5. *The Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3.

6. See, e.g., Roger Parloff, *Asbestos: The \$200 Billion Miscarriage of Justice*, FORTUNE, Mar. 4, 2002, at http://www.fortune.com/indexw.jhtml?channel=artcol.jhtml&doc_id=206477 (last visited Oct. 3, 2002).

pute is no longer with the other party to the litigation but with the United States.

My only quibble on this point has to do with Dodge's argument that the domestic law on key issues is better formed than its arbitral alternative. He gives by way of example the confused decisions under Article 11 of NAFTA, where it is unclear whether its general prohibition against expropriation applies to regulatory takings. Here that question is hardly clear on its face because the word "expropriation" surely smacks of putting government padlocks on the gates of foreign plants. But the word "taking" has a similar ambiguity, for it looks as though the landowner has to be removed from possession in order for the property to be taken. Yet the American courts have shied away from the implication that landowners can only gain relief after the government locks them out of the premises, for otherwise a landowner who has been stripped of all rights to use and dispose of land would be treated as though nothing at all has been taken from him. Dodge is correct to say that NAFTA has not yet developed standards for dealing with expropriation, but unfortunately, it is wrong to say that the host of chaotic Supreme Court decisions on the subject has yielded any clear or defensible standard on the matter either. *Lucas v. South Carolina Coastal Council*⁷ stands for the proposition that a total wipeout of all economic use of the property counts as a taking even if the government does occupy the land. *Penn Central Transportation Co. v. New York City*⁸ stands for the proposition that allowing one to continue with an existing use, but not allowing any new uses, does not count as a taking, even if the foregone uses were highly valuable. Between these two holdings lies the common case where undeveloped land is subject to some restrictions on the permissible set of uses. To this day, the United States Supreme Court has not given any coherent formula to decide which of these diminutions in value is compensable and which not: its most recent effort in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,⁹ shows again the inability of the Court to reach closure on this matter. There is no reason to think that the repeated inability to form a coherent body of law should be treated as a reason for using American law to adopt these provisions. But his argument should not turn on that one point. Even if the Supreme Court were weak in this area and strong in that,

7. 505 U.S. 1003 (1992).

8. 438 U.S. 104 (1978).

9. 122 S. Ct. 1465 (2002). For more information on the *Lake Tahoe Case*, see Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 1 CATO SUP. CT. REV. 5 (2002).

it seems as though the burdens on the international system of arbitration will be reduced if the domestic system is given first crack to resolve the disputes in question. I agree with Professor Dodge on this point.

III. GOLOVE

Professor Golove raises a very different problem—the integration of the treaty power with the system of domestic legislation. As is well known, the President has “the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”¹⁰ These treaties pack real punch because “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”¹¹ of coordinate stature with domestic legislation that is passed only by both houses, subject to the Presidential veto and its override.

The question that Professor Golove sets for himself involves the tension between the treaty power and other elements of the domestic system. Congress is a branch of government with enumerated powers. The treaty power imposes no specific subject matter limitation on the President or Senate. Now the structural challenge is this: Can the President and Senate (without the cooperation of the House of Representatives, no less) conclude treaties that fall outside Congress’s enumerated powers and thereby circumvent the domestic law making process? Can the President and Senate conspire to adopt treaties that require the individual states to abandon their practices on matters that Congress could not override their local decisions through legislation?

The risk of this end-run has long preoccupied the Senate, and Professor Golove does not give any concrete instance where the President and Senate have so acted to provoke a constitutional confrontation. To the extent that we do not see the President and Senate push to the edges of their powers, so much the better. But that said, what tests could be devised hypothetically to decide whether the President and Senate have abused the treaty power in ways inconsistent with the constitutional structure?

Golove thinks that it is possible to articulate principles that could guide a conscientious senator in deciding whether or not to vote for a particular treaty. But as these tests are heavily tied to the motivations that individual senators or groups of senators have to the legislation, he does not urge that we use these standards for judicial review to

10. U.S. CONST. art. II, § 2.

11. U.S. CONST. art. VI.

determine whether the treaties were properly signed and ratified. In principle, this halfway house is most uneasy; it would be better to find some way to apply judicial review to determine whether the President and Senate did overstep their joint powers. We use that test for judicial review of congressional action,¹² just as judicial review applies for congressional actions that could not be justified under the police power.

Unfortunately, Professor Golove's motivational test does not permit that to happen. Under his test, the key element is whether the treaty is ratified to circumvent constitutional limitations (bad) or to advance some legitimate foreign policy objective, even at the cost of trampling on local interests (good). But how does one police that distinction? To be sure, if the President and Senate had no knowledge of the test, then they might display their true colors. But once the test is articulated, then it should be an easy matter to find some foreign objective that treaty ratification will serve. Thus, the Senate could vote to ratify a treaty that forbids the states to execute juveniles because it wishes to increase the odds of having foreign nations, which abuse this practice, follow suit. At that point the obvious dual motive might not be sufficient to invalidate the treaty. So long, therefore, as the desire to lead by example in international affairs counts as a serious justification for signing treaties, then the treaty power becomes plenary *de facto*, so little can be done to prevent the treaty power from mounting an end-run around federalism limitations contained in the Constitution.

Yet, can we find a better test? Here it is perhaps easier to see the possible solution without starting with the human rights treaties that are Golove's main concern. It also arises with variations in *Missouri v. Holland*,¹³ which upheld the 1918 Migratory Bird Treaty Act against Missouri's claim that it invaded the rights reserved to the states under the Tenth Amendment. The recitals in the treaty indicated how these birds were important as a source of food and pest control to both countries but were at risk for extermination because of insufficient protection, which the treaty sought to supply. When the case was decided, commerce power did not extend (at least unambiguously) to the regulation and preservation of migratory birds. The treaty took the form of a bilateral contract between two nations, in which each agreed to take certain steps to protect a resource that both shared.

12. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995).

13. 252 U.S. 416 (1920).

Justice Oliver Wendell Holmes opined that the treaty was valid notwithstanding the Tenth Amendment objection.

Now suppose, however, that the treaty regulated territorial birds (or for that matter land animals) that never ventured out of the territorial limits of Missouri. Could the Senate insist that it was so important to lead by example that the treaty power could be invoked to uphold a treaty in which Canada agreed to take care of its territorial birds in order for us to take care of ours? My deepest instincts say that this pattern of obligations fails regardless of the motivation of the Senate. In contrast, *Missouri v. Holland* contains just the kind of quid pro quo that we expect from treaties. Stated otherwise, the test should ask whether the treaty supplied a quid pro quo for the United States, or whether it just led to the imposition of parallel regimes with foreign nations in cases where we could not have reason to bring suits for damages, injunctions, or other forms of legal relief against other signatory nations. For the most part, human rights treaties look less like migratory bird treaties and more like territorial bird treaties. The object is to bind the states to be humane to their juveniles so that other nations will be humane to theirs. On structural, not motivational grounds, these treaties should not be accepted. A somewhat more difficult case is one where the United States agrees with a foreign nation to impose minimum environmental or labor standards on its work force in order to advance humane objectives and to create some form of "competitive balance" between the labor markets in the two states. On the test proposed here, the second justification should prevail (however distasteful one might find it in principle) and that treaty should be sustained.

No cases to my knowledge have started down this uncertain road. My guess is that the Supreme Court would be unwilling to follow it to the end. If that is the case, then perhaps we should give up on the exercise of outlining in constitutional language the terrain over which the President and Senate can operate. It becomes better, at a guess, to recognize that there are no effective tests to sort out permissible from impermissible treaties. At this point, all the arguments about motivation remain important as ways to influence presidential action and senatorial votes. The motivational arguments still have political force, even if they no longer assume a constitutional dimension.

IV. STEPHAN

Professor Stephan's article presents an inquiry into the proper attitudes that American courts bring in deciding what laws to apply in disputes that contain some substantial foreign component. The source

of this difficulty is easy to see. On the world stage, different nations have different kinds of legal systems. Some of which, in principle, are worthy of emulation and respect, while others most decidedly are not. One simple question is whether the implicit respect that American courts have for various overseas jurisdictions should influence their willingness to hear cases in the United States, even when their center of gravity lies elsewhere, because of their lack of confidence in the ability of foreign tribunals to deliver justice on the disputes before them.

Professor Stephan is of two minds on this question. On the one hand, he notes his evident uneasiness with a decision in the Second Circuit that allowed suits to be brought against international corporations in the United States for alleged misdeeds done to Nigerian citizens in Nigeria. Thus in *Wiwa v. Royal Dutch Petroleum Co.*,¹⁴ the Second Circuit upheld jurisdiction over Royal Dutch Petroleum in the United States because it operated a local office that supervised its publicity activities related to the New York Stock Exchange. The charges in that case seemed far-fetched, and the relevance of New York or United States law seemed dubious; this is hardly the broad range of activities that one would hope to see in connection with general jurisdiction. Since all the relevant events took place overseas, New York was, to say the least, an inconvenient forum.

Recently, I have written on the awkwardness of a theory of personal jurisdiction that allows seizure of the person within the state to give jurisdiction over all matters wholly unrelated to it.¹⁵ That deep concern about the misuse of power applies with equal force in the international context to cases like *Wiwa*. There are many wretches whom we should bring to justice. But our courts are often not the place to do it. The hard question arises in connection with those suits that allege an array of supportive actions in the United States that in turn are alleged to hold it “indirectly” responsible for serious wrongs that have been committed overseas, perhaps on authorization from the top people in this country. Here it is harder to maintain a categorical denunciation of lawsuits—what if the Shell Oil Company had records in its home office ordering the murder of the Ogoni people? But the real question here is whether the case gets into this country on the strength of allegations of that sort when the courts of Great Britain and the Netherlands remain open. Remember, these cases could

14. 226 F.3d 88 (2d Cir. 2000). Professor Stephan notes other cases that raise the same issues. See Stephan, *supra* note 3, at n.8.

15. See, e.g., Richard A. Epstein, *Consent, Not Power, as the Basis of Jurisdiction*, 2001 U. CHI. LEGAL F. 1.

have been brought in respectable fora, with much more extensive connections to the defendant. Whatever this grant of jurisdiction does to solve one problem, it creates another. The obvious practical danger is that large corporations will be hung out to dry on improbable charges in a forum that could easily harbor deep-seated hostility toward them. If courts are willing to give a broad account to general personal jurisdiction, then it seems as though the *forum non conveniens* doctrine should be given broad play to send this case packing. I agree with Professor Stephan, the recent developments that contract the use of that doctrine are unwelcome.

Professor Stephan, however, seems to switch gears in his evaluation of *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*,¹⁶ where the question was which of two Russian entities owned a particular copyright to certain Russian stories. Here the court decided that the place of infringement was the United States, but the place of authorship was Russia. Accordingly, the court decided to make its best guess of the Russian law of copyright ownership. In my view, this seems like the correct decision in that copyrights run around the world (albeit under separate giants), and it would be most unfortunate if their ownership in Canada, say, should be found to differ from that of their ownership in the United States, which could happen under Stephan's fragmentation of the ownership approach. This preference for a single determination of copyright ownership is wholly consistent with our own constitutional design, which from the outset created a fount of *federal* law for both copyright and patent, precisely to avoid inconsistencies in copyrights and patents across state boundaries.¹⁷ All other things being equal, larger jurisdictions do better for intellectual property, which instantly expands to fill the applicable legal space.

There are, moreover, no risks to any distinctive American interests no matter which way this question is decided, so that we should abide by the Russian decision unless and until some clear evidence is produced to suggest that Russian institutions have skewed this decision in order to gain some undeserved tactical advantage in the United States. But even if that should crop up, then the right response is to allow the Russians to first dispense their justice and then to allow the losing party to overturn the result only on clear proof that the proceedings in Russia were wholly corrupt. In general, however, the best approach in these areas is not to make judgments to take or turn down cases based on our perceived quality of the decisions overseas. It is to

16. 153 F.3d 82 (2d Cir. 1998).

17. See U.S. CONST. art. I, § 8.

apply standard principles of jurisdiction and choice of law, and to let the chips fall where they may. We should not circumvent the Russian system any more than we should avoid Nigeria (or the United Kingdom or the Netherlands in *Wiwa*).

This conclusion ties in with the principle of loose parity between the United States and other nations that I defended at the outset. We should be prepared (as we often are not) to abandon the role of a nine hundred-pound gorilla in international affairs. We have to recognize that all nations have interests that run beyond their territories, and we must be prepared to stay our hand influencing matters overseas if we are to ask other nations to do the same. The system of national boundaries forces us to recognize that there are activities that we care about outside our borders on which we must nonetheless not have the final word. A deep concern about the affairs of the world is not the same as a direct financial stake in the outcome of certain events overseas. It is one thing to be worried about the instability in Russia for its own stake. It is another thing to be worried about a Russian cartel that seeks to do business in the United States. We should worry about the real stakes in the second case and be chary about seeking to vindicate our broad sense of concern in the former.

V. DISTRIBUTIVE AND EXPRESSIVE FUNCTIONS

This general attitude to litigation means that, whatever my disagreements with Professor Stephan on *Iter-Tass*, I strongly endorse his suspicion to the “expressive” as opposed to “distributive” function of courts. The distributive function in this terminology refers to the necessity that courts adjudicate claims to ownership and legal rights. This is the indispensable function of any system of dispute resolution, and the first order of judicial business is to resolve the disputes before it, not to pontificate about the general state of the world. The expressive function invites courts to undertake that second job, and I agree with Stephan that taking on a second role compromises the ability of a court to discharge its primary function.

In making this statement, I do not wish to be understood as insisting that courts decide only one case at a time or defer to juries on matters of fact or legislatures on matters of constitutionality. In some cases, aggressive intervention is justified both in resolving disputes and in setting out precedent for future cases. But it would be very odd on this view for courts to be against settlement—if the parties can resolve the dispute themselves, they can increase certainty and save money. Owen Fiss argued that these settlements deprive us of a public good in

the form of more law.¹⁸ But it could easily be said that we have too much law already, and that settlements under law only strengthen our confidence in the current legal rules while reducing the costs that lawyers and laymen must bear in finding out what the law means. It would be odd to reach out to conclude cases that would otherwise disappear. It is equally odd in the cases that remain to reach out beyond the deliberation of the factual or legal matters in the case to send some message to a segment of the community about, for example, the soundness of foreign legal systems. It is too easy for courts to conclude that the message is more important than the case, and thus by degrees to give the facts contained on the record less attention than they deserve.

In stressing the dominance of the distributive function, my point is *not* that no one should stress the expressive function—quite the opposite. That function properly falls within the province of journalists and broadcasters, academics and lawyers, and ordinary citizens. But here when they express their views on these matters, there is no conflation of the two functions. Rather, since all these actors are powerless, it is appropriate for them to exercise as much or as little influence that they can command in the world of ideas. But things go awry when we try to fold the expressive function into ordinary judgments. Professor Stephan quotes a well-intentioned but misguided statement of the role of civil judgments from a well-known civil procedure casebook:

A court's favorable judgment is a solemn pronouncement that the victor has acted properly on the basis of a factually accurate understanding of reality. A favorable judgment is an affirmation of the prevailing party's rationality and good citizenship All these benefits have a considerable psychological as well as material value.¹⁹

Not so. Too many grubby realities stand in the path of this utopian vision. In some cases, the court system is itself sufficiently biased as to be worthy of contempt. That may well be the case with Mississippi tort law today. It surely has been the case in many other situations as well. But even if we assume any individual court is unerring in its judgment, then inference from favorable judgment to “rationality and good citizenship” is strained at best. In one case a court may hold that the good Samaritan owed no duty to rescue a stranger even when it could have been done with little or no cost or inconvenience. That same court could easily conclude that a moral obligation did lie, even if it should not be enforced as a matter of law. That is hardly an affir-

18. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

19. JAMES FLEMING, JR., ET AL., CIVIL PROCEDURE § 6.5 (4th ed. 1992).

mation of the defendant's virtue. In other cases, plaintiffs recover even though they are criminal trespassers on the defendant's land. Once again, no virtue here. In some cases, the defendant is accorded an absolute immunity for larger systematic ends, even if it means that the plaintiff goes home empty-handed against a scurrilous and dishonest defendant. There is a lot of slippage between the judgment and the underlying moral reality. It is not a court's job to spell out those gaps in painful detail. If the case really matters, then other people can engage in full time and unalloyed expressive activities.

These dangers spill over into the international arena where a fascination with the expressive function could, as in *Wiwa*, lead to an inversion of priorities and a radical expansion in the scope of United States jurisdiction in order to provide a bully pulpit from which to speak. It is not needed, for judges do not have a monopoly on moral indignation. In fact, owing to the confusion of roles, judges should be careful about their own *ex cathedra* pronouncements, which could easily color the perceptions others have of them in the ordinary course of their official business. The use of rhetoric is unavoidable in judicial settings, but it should be in the service of resolving the cases that come before the courts.

It therefore follows that Stephan is correct in noting how, in the international context, a broader conception of the expressive function can easily undermine the constitutional division of authority of foreign affairs, between the judiciary on the one hand and the Executive and Congress on the other. These two bodies between them should take the initiative in international affairs and speak out on whatever matters they think fit. Their portfolio of business is not shaped by the institutional limitations of a court. Indeed, they do not have to wait until legal cases and controversies appear before they speak, nor must their pronouncements resolve these disputes. They need only address the political and social ends of the nation. Clean lines of authority are, in this case, a neat corollary of the principle of separation of powers.

VI. CONCLUSION

Professors Dodge, Golove, and Stephan have written about somewhat diverse topics. But one common theme does shine throughout their work. All three authors think that it is dangerous to develop unique principles to deal with the interaction of foreign and domestic law. All start with the assumption that the conventional tools of law and administration carry over from domestic to international contexts, and they all start from a sound premise.