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'Is International Law Fair? Le droit international est-il juste?': A Few Remarks from the 2023 ESIL Conference in Aix-en-Provence

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In recent years, my calendar has had a recurrent appointment at the end of August or the beginning of September: the ESIL Annual Conference. This year, the 18th Annual Conference of the European Society of International Law (ESIL)[1] brought together international scholars and practitioners in beautiful Aix-en-Provence, in the homonymous French region. Aix-en-Provence is an 'open-air history book', a history that began 2,000 years ago. It has always been a city of culture and art; it has hosted its university since 1409, and is also the hometown of one of the most famous post-impressionist painters, Paul Cézanne.

In these beautiful surroundings, the ESIL Annual Conference ran for four days, hosting Interest Groups (IGs) pre-workshops, panels, fora, agora and discussions that continued over lunches and dinners – including a reception with exceptional entertainment offered by the University's Jazz Big Band – around the umbrella topic of the conference: 'Is international law fair? Le droit international est-il juste?'.

When I saw the topic and the question posed by the conference, I could not help myself from trying to find an immediate answer to it – without much success (!). And as remarked in the Closing Discussion session of the conference, the question seems to linger in our minds. What is more, it has raised additional questions.

As co-convenor of the International Economic Law (IEL) interest group,[2] I was confronted with the first questions relating to the topic of the conference when preparing

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1 The 18th Annual Conference of the European Society of International Law took place in Aix-en-Provence, France, 30 August to 2 September 2023.

2 I was co-convenor of the ESIL IG IEL between 2021 and 2023.

the call for papers with my colleagues for our IG pre-workshop.[3] The pre-workshop gave us the opportunity to engage immediately with the question of fairness in the specific field of international economic law. When putting together the call, we held several discussions on how we understood the concept of fairness in our field and, in the end, we decided to keep all the doors open in order to receive as many views as possible on this topic.

In the call, we mentioned the (un)fairness in international economic law across several topics, for instance the status of developing countries in the World Trade Organization (WTO), the level playing field amongst WTO members, the use of sanctions, the fairness of unilateral policies such as the European Union's (EU) Green Industrial plan and Foreign Subsidies Regulation, as well as the potentially (un)fair use of security exceptions in connection with violations of WTO law. In the field of international investment law, we focused on the concept of fairness as part of the substantial obligations of host states towards foreign investors (as the 'fair and equitable' standard of treatment), and as part of the procedural requirements of investment arbitration – including the evaluation of the fairness and independence of investment arbitration and arbitrators. At the same time, and more broadly, we underlined how fairness can be used to evaluate the relationship between developed and developing countries. For example, we can question what requirements make an international investment agreement 'fair' for all relevant stakeholders, including, among others, indigenous communities. The concept of fairness can also be used to evaluate how to implement international investment treaty obligations in times of crisis. Lastly, we wanted to shed some light on the possible meaning(s) of fairness in international financial law, inviting submissions on the future of the 'Global Financial Architecture' (which was shaped as a reaction to the 2007–2009 global financial crisis) and on how it could be re-imagined aligning it with the fulfilment of social and economic rights embodied in other international law regimes.

The large number of submissions received (over 50) testified to the topical relevance of the question of fairness in international economic law. Most papers reflected the suggested topics in the call, with some interesting additions. Equally interesting were the more neglected topics: while we expected to receive more papers on the question of fairness in security issues, in the end we received very few. We also expected several papers on the divide between developed and developing countries and fairness in the relevant economic relationships, but again few papers submitted tackled this question. On the other hand, we had the opportunity to accommodate papers reflecting on the language of investment treaties, showing that the way treaties are linguistically drafted not only reflects the background ideology of the contracting parties but also influences how the treaties are implemented, thus demonstrating the power and value of words and concepts. We also included papers on the concept of fairness in

[3] Workshop of the ESIL International Economic Law Interest Group on the topic 'Pursuing Fairness in Times of Crisis: Reflections on the Future of International Economic Law' (30–31 August 2023), https://www.esilaix2023.fr/pre-conference-workshops.

global tax law, the digital economy and international administrative law – going beyond what we envisaged in our call for papers.

More than 30 speakers engaged in very stimulating discussions during the two days of the IEL IG workshop. One of the most recurrent discussions about fairness concerned its definition and understanding as 'equity', and the question of how to concretely 'measure' and evaluate fairness in international economic law issues – for instance, how to assess whether an evaluation of damages carried out by an investment arbitral tribunal is 'fair'. At the end of our workshop, these questions remained unanswered.

Questions about the meaning of the concept of fairness and its practical evaluation in international law continued during the following days of the conference.

More generally, the principle of fairness is one of the most difficult to define and conceptualize. As outlined by several speakers, a first obstacle when talking about 'fairness' is to understand what we are talking about; additionally, we need to understand in which language we are resonating. Indeed, the concept of fairness is difficult to translate into languages other than English – for instance, in French, it can be translated as 'juste' and 'équitable'; so too in Italian, it can be translated either as 'giustizia' or 'equità'. In these examples, fairness is translated in the concepts of *justice* and *equity*, which are a bit different from the English concept of *fairness*, which, according to the Oxford Dictionary, refers to 'the quality of treating people equally or in a way that is reasonable'.[4]

Even setting aside the language question (which can also lead to additional questions regarding the language itself of international law and international scholarship), another obstacle is how to translate 'fairness' in the international legal system. Indeed, while the concept of fairness seems more linked to the sense of justice and to the values of international law, it becomes difficult to translate it in legal terms. The different presentations and discussions mapped several facets of the concept of fairness – most notably, 'justice', 'equity', 'proportionality' and 'democracy'. Moreover, fairness was discussed also with respect to international procedural questions – such as questioning what makes procedures 'fair', or what makes a compensation award 'fair'.

The general feeling is that almost all speakers agreed that 'fairness' should be generally linked to an expectation of unbiased treatment. With reference to international law, this would be linked to what we expect from an international legal order. And perhaps we can reiterate the question that was posed during the closing session: 'Is it for lawyers to address the question of fairness?' Without claiming to provide an answer, while it is true that international law is not made by lawyers themselves, it is still important for us to question which international legal order we aim towards – in order to identify gaps and unfairness in the legal system and offer possible alternatives.

This reminds me of the post-impressionist movement, which strongly reacted to the artificiality of the picture and favoured instead the symbolic content, formal order and structure of paintings. As Paul Cézanne wrote to the younger artist Émile Bernard,

[4] *Oxford Dictionary*, available at https://www.oxfordlearnersdictionaries.com/definition.

'[t]he painter gives concrete expression to his sensations, his perceptions, by means of line and color',[5] in order to 'make of Impressionism something solid and durable, like the art of the museum'.[6] In the same way, international scholars have the possibility to 'give concrete expression' to fundamental values by means of legal instruments, in order to make as far as possible the international legal system a 'solid and durable' one.

[5] Cézanne, 'Letter to Émile Bernard, 26 May 1904', in A. Danchev (ed. and transl.), *The Letters of Paul Cézanne* (2013), at 235.

[6] As quoted by Denis, 'Cézanne I', 16 *The Burlington Magazine for Connoisseurs* (1910) 213.