

Goldilocks and International Dispute Settlement

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In his lectures and scholarly writings, David Caron was fond of conjuring images. Last September, he opened a lecture in Geneva by recalling an inscription over an entrance to this law school.¹ In his *American Journal of International Law* article on the 1899 Hague Peace Conference, he described a rather grim statue on the grounds of the Peace Palace in The Hague called “The Spectre of War.”²

These are sober images, befitting the serious topics that David addressed. The title of my presentation also brings to mind an image, but this image is that of little girl, the heroine of a children’s story. I am not sure that David would have approved of this frivolity. In my defense, however, I point to something that David observed when he wrote about the Hague Peace Conference—that there was not a single female at that important meeting.³

I am often shocked and disappointed at how little has changed in this regard since I graduated from this law school in 1981. The World Court that was envisioned at the 1899 Hague Peace Conference has been in existence for about a century. During that time, only four women have been Members of the Court. Looking at the number of women participating in this symposium, however, we can see among David’s colleagues and former students a group of women who have made and will continue to make important contributions to international law. David surely would have been pleased.

So why do I invoke Goldilocks?

In reading legal scholarship, I sometimes think of Goldilocks. On the one hand, some legal writings are by and for practitioners, and these can be very

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1. David D. Caron, *Arbitrators and the Rule of X 2*, King’s College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2017-412-3 (2017).

2. David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT’L L. 4, 7 (2000).

3. *Id.* at 8.

practical, detailed, and technical, but they often cover a topic without locating it in a larger frame. On the other hand, law journals are full of abstract and theoretical articles that often seem disconnected from practical constraints or technical details, perhaps even deliberately indifferent to them. So, like Goldilocks, I often find one bowl of porridge too hot and the other too cold. That is why, whenever I discover that David has written on a particular topic, I feel a sense of relief, like Goldilocks when she proclaims the third bowl of porridge to be “just right.” On topic after topic, David’s porridge was “just right.”

My reflections on David’s writings lead me to three variations on the Goldilocks story that I shall address today:

1. Goldilocks as a shorthand for synthesis and integration in legal writing (illustrated by David’s scholarship);
2. Goldilocks as a representation of the choice of a middle ground in adjudication; and
3. Goldilocks as an impulse that should sometimes be resisted, because in certain situations, the right answer is to choose the hot porridge or the cold porridge, rather than being drawn to something in the middle.

I. DAVID CARON’S “JUST RIGHT” WRITINGS

Over the course of today’s panels, there will be numerous references to David’s scholarship that illustrate David’s capacity to integrate the larger questions and the smaller details. One such example is his article on the 1899 Hague Peace Conference that I mentioned earlier. David began by reminding the reader that, “[t]o go forward, it is often wise, and sometimes necessary, to go back.”⁴ David insisted that modern international lawyers reflect on what really was motivating those conferences, reminding us that, even though we think of those conferences as the birthplace of contemporary institutions of dispute settlement (the Permanent Court of Arbitration and the International Court of Justice), many conferees were focused on very different issues—the arms race in Europe and the laws of war.

After a careful study of the competing views that contributed to the failure to establish a World Court at the 1899 and 1907 Hague conferences, David reminded us of the continued relevance of those views in the present day, observing that “there is no reason to believe that the range of beliefs and personalities involved in the 1899 conference was basically any different from those that can be seen in play today.”⁵ The success of institutions such as dispute settlement mechanisms depends not only on aspiration and inspiration but also on the nuts and bolts of adjudication. David, like the participants in the Hague Peace Conferences, identified precisely those details that have proven to be

4. *Id.* at 5.
5. *Id.* at 23.

important. As he stated, “[t]he quality of the judges as individuals and the process by which they collectively reach a judgment reside at the core of both the respect accorded the Court and the willingness of states to consent to its jurisdiction.”⁶

David held himself to the same high standards in his writings as an adjudicator, both in arbitral decisions and awards and in his capacity as a Judge *ad hoc* at the International Court of Justice (ICJ), weaving together the conceptual framework and the details of the particular case. (I had the great fortune of serving briefly with David both on the ICJ and as a member of an arbitral tribunal.)

I offer two examples of David’s writing as an adjudicator.

As the Judge *ad hoc* appointed by Colombia in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.)*, David was the lone dissenter in a judgment in which the Court rejected Colombia’s jurisdictional objections.⁷ This was a case in which the parties invoked many facts in support of their respective views on jurisdiction, including numerous diplomatic exchanges and reports of encounters at sea.

I hasten to point out that I joined the majority in this case, and thus disagreed with David’s conclusion. However, I have only praise for his approach. His dissenting opinion opens with his perspective on questions at the very foundation of the Court’s legitimacy and jurisdiction, such as the way in which the requirement of a “dispute” limits the Court’s competence in contentious cases.⁸ It then extensively surveys the evidence that led David to conclude that there was no dispute in that case, and thus that the Court lacked jurisdiction.⁹ The reader has no doubt that David has considered both the law and the facts with great care. There is no mystery about the reasons for David’s conclusions.

Another example of David’s writing as an adjudicator is an arbitral decision on jurisdiction that I read with great interest soon after it was made published in spring of 2017. David was the President of an International Centre for Settlement of Investment Disputes (ICSID) tribunal in *Kim v. Uzbekistan*.¹⁰ In that case, the Respondent objected to jurisdiction on a variety of grounds, all of which the Tribunal rejected.¹¹ Two of these grounds were of particular interest to me—an objection based on a treaty provision of a sort often described as a “legality” provision¹² and the respondent’s contention that the arbitration was barred by corruption on the part of the claimants.¹³

6. *Id.* at 26.

7. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.)*, Judgment, 2016 I.C.J. Rep. 3, ¶ 74 (Mar. 17) (dissenting opinion by Judge *ad hoc* Caron).

8. *Id.* ¶¶ 5–27.

9. *Id.* ¶¶ 28–53.

10. Vladislav Kim v. Republic of Uzb., ICSID Case No. ARB/13/6, Decision on Jurisdiction (Mar. 8, 2017), <https://www.italaw.com/cases/5403>.

11. *Id.* ¶ 640.

12. *Id.* ¶¶ 358–542.

13. *Id.* ¶¶ 543–617.

I have had reason to consider the legality provisions of investment treaties in several contexts over the years, and I have found much to be lacking in the analysis of tribunals, especially because of the tendency not to differentiate among differently-worded provisions. When I read the decision in *Kim v. Uzbekistan*, however, I was so impressed that I immediately wrote to David to compliment him.

In *Kim v. Uzbekistan*, the Tribunal states that it does not find past analysis to be satisfactory, having been “constructed without reference either to the text of the treaty in question or to underlying principles.”¹⁴ By contrast, we see David’s handiwork in that decision, which both marches carefully through the interpretation of key words and phrases in the treaty and offers an overall substantive framing of the legality test.¹⁵ As in David’s dissent in *Nicaragua v. Colombia*, the reader understands how the Tribunal took into account both the governing policy considerations and the specific provisions.

II. GOLDILOCKS AS A SHORTHAND FOR THE CHOICE OF A MIDDLE GROUND

Many of you are undoubtedly familiar with the idea of a “Goldilocks principle” or “Goldilocks effect.” The phrase is amenable to various definitions. For example, the “Goldilocks principle” can be understood as a shorthand for the calibration of variables that is necessary to achieve the “just right” outcome. The dosage of a drug must be set “just right” to balance benefits against side effects. To achieve the desired economic outcomes, interest rates must be neither too high nor too low.

One permutation of the “Goldilocks effect” is the idea that there can be some inherent attraction to a middle ground. Seasoned bureaucrats know, for example, that when presenting a memorandum setting out options to a minister or a head of state, it can be advantageous to bracket one’s preferred option between two other options, each of which might appear too extreme.

In the context of international dispute settlement, the Goldilocks effect may call to mind the notion of compromise as between the positions of two parties. We sometimes hear observers suggest that compromise is a key driver of outcomes in arbitration. The traditional structure of arbitration, with each party choosing one of three arbitrators, fuels the expectation of compromise as the decision paradigm.

I have come to believe that compromise as an explanation for the behavior of international courts and tribunals is overstated. In any group, solutions that reduce friction and maintain harmony have some appeal. However, when I reflect both on the outcomes and the course of numerous confidential deliberations within the ICJ, I conclude that factors other than compromise drive our decisions.

14. *Id.* ¶ 385.

15. *Id.* ¶ 404.

In interstate adjudication, parties often appear hesitant to advance fallback positions, whether as to law or to facts. Quite often, however, neither party's maximalist position convinces the adjudicators. In addition, substantive law often drives a decision towards an intermediate outcome. When one party says that an indeterminate treaty term means "yellow" and the other says it means "red," the rules of treaty interpretation may point to "orange."

In maritime delimitation, the applicable law calls expressly for an outcome that takes into account both parties' interests. The United Nations Convention on the Law of the Sea creates a presumption in favor of a median line in territorial sea delimitation¹⁶ and calls for an "equitable solution" in delimiting the exclusive economic zone and the continental shelf.¹⁷ When the boundary established by a court or tribunal appears on a map, it may look like a "split the baby" compromise, but the outcome is driven by the law as applied to the parties' coastlines. The treaty, not the spirit of compromise, is often the more convincing explanation for outcomes that appear to accommodate the interests of both parties.

There is, however, a more specific context in which it seems to me that the Goldilocks effect may play an important role in international adjudication. I have in mind the way that it could influence judicial appreciation of complex argumentation presented by parties, especially on scientific and technical issues.

Here I draw on research about attention and perception.¹⁸ Scientists in the Brain and Cognitive Sciences Department at the University of Rochester presented infants with visual stimuli with varying degrees of complexity—some wildly complex, some very bland and some in-between. The scientists observed that the attention of the babies was not held very long by either the bland images or the very complex ones. They concluded that "infants appear to allocate their attention to maintain an intermediate level of complexity."¹⁹

I reflected on this inquiry into the Goldilocks effect as I thought about the way that parties present evidence to adjudicators, the way that adjudicators assimilate evidence, and the way that we present our conclusions in judgments and awards. Take, for example, expert evidence on scientific matters or the quantum of damages. Typically, each party retains an expert who presents a written report. Frequently, these expert reports include concepts, charts, graphs and equations that can be daunting. The expert of each party comments on the views of the other expert. There may be oral testimony and the experts are usually cross-examined by opposing counsel and questioned by the court or tribunal. We

16. United Nations Convention on the Law of the Sea, art. 15, Dec. 10, 1982, 1833 U.N.T.S. 397. Article 15 permits departures from a median line based on historic title or other special circumstances.

17. *Id.* arts. 74(1) & 83(1).

18. Celeste Kidd, Steven T. Piantadosi & Richard N. Aslin, *The Goldilocks Effect: Human Infants Allocate Attention to Visual Sequences That Are Neither Too Simple Nor Too Complex*, PLoS ONE 7(5): e36399 (2012), <https://doi.org/10.1371/journal.pone.0036399>.

19. *Id.* at 6.

lawyers are often accused of writing in “legalese,” but experts can also be faulted for communicating in “expertise,” that is, using terms and concepts that may be easily understood by another expert, but not necessarily by a non-expert, such as a judge or arbitrator.

I certainly invest effort to understanding complex technical reports. Indeed, I may be more open to doing so than some of my colleagues, having endured enough scientific study to have received a bachelor’s degree in biology. However, at the risk of proving that my own facilities for comprehension have not advanced since infancy, I have to admit that overly complex presentations have only a limited effect on me. When I am overwhelmed by the complexity of an expert report, my response is not very different from that of the babies in the study. My instinct is to look away. But at the same time, overly simplistic assertions by counsel sustain my interest no more than the bland images retained the babies’ attention.

I doubt that my experience is unique. Instead, my interactions with colleagues convince me that both excessive complexity and over-simplification can cause adjudicators to lose interest in a party’s proposition. We start looking elsewhere in the case file. In the words of the Rochester scientists, we “allocate our attention” somewhere else.

The baby’s story ends when he or she looks away from the boring image or the overly complicated picture. Adjudicators may also be inclined simply to look away from excessive complexity. However, we cannot do so. Eventually, we have to make a decision and to state our reasons for it. So how do we proceed?

Sometimes we are able to circumnavigate complexity in our decisions. The sequence in which we set out our reasoning often means that we need not address all points of disagreement between the parties. A decision on one point of law can obviate the need to make a decision on a tricky point of evidence, and vice-versa. If a claimant loses a case on jurisdiction or liability, the tribunal does not have to struggle through complicated quantum reports.

When decisions on complex issues of evidence cannot be avoided, we often see adjudicators using a variety of techniques to manage the complexity without directly deciding a scientific or technical issue. They rely heavily on the burden of proof rather than making an explicit choice between the conclusions of dueling experts. They employ a variety of techniques, which I have elsewhere called “second-order indicators”²⁰ to judge the reliability of expert evidence and opinion. These include reliance on agreement between the parties and/or their experts, negative inferences drawn from the unexplained failure to present certain evidence, and gaps and inconsistencies in methodological logic. Through these techniques, adjudicators shift the inquiry to an intermediate level of complexity. The conclusion of a court also often has an intermediate character.

20. Joan E. Donoghue, *Expert Scientific Evidence in a Broader Context*, 9 J.INT’L DISP. SETTLEMENT 379, 383-84 (2018).

Instead of making a direct finding for or against an expert's scientific assertion, a court may, for example, conclude only that the party "failed to provide sufficient evidence" of a fact.

If my intuition about the Goldilocks effect is right, it has implications for parties. When complex facts are in dispute in adjudication and arbitration, the task of a party is to convince adjudicators that the party has better evidence, using concepts and words that we can understand and that we can reflect in our judgment. A conclusory assertion does not suffice, but, on the other hand, we are unlikely to draft judgments or awards containing pages and pages of charts and equations. We are most likely to be persuaded by narratives that have a sufficient level of detail to lend credence and legitimacy to conclusions and that are within the range of judicial comprehension and reasoning.

III. GOLDILOCKS MAY NOT ALWAYS BE RIGHT

My third invocation of Goldilocks is a reminder that the middle option is not always the right one. Perhaps a wily bureaucrat has managed to position his or her preferred option as a center point between two extremes, but that does not mean that the middle option should be chosen. Indeed, if there is a tendency to be drawn towards middle options, we should be especially cautious when we find ourselves being pulled towards the center and we should ask whether, in a particular situation, the best choice is actually the scalding porridge or the cold porridge.

Cold porridge certainly does not sound very inviting. Although David certainly never referred to breakfast foods in his writings, his scholarship on dispute settlement offers examples of situations in which we should resist the temptation to improve cold porridge by combining it with hot cereal.

David understood the importance of preserving and respecting the limits of various mechanisms of international dispute settlement. In his 2012 article on ICSID annulment committees,²¹ he observed that annulment committees sometimes go beyond the confines of annulment to offer broader observations or to comment on the substance of a tribunal's decisions. He asked what would impel them to do so and suggested that committees may feel a sense of responsibility for the correctness of the award, "possibly in hopes of instructing and improving subsequent awards."²² They may, he said, have a concern for the integrity of the system of ICSID arbitration as a whole.²³ For David, this was an impulse to be suppressed.

21. David D. Caron, *Framing the Work of ICSID Annulment Committees*, 6 WORLD ARB. & MEDIATION REV. 173 (2012).

22. *Id.* at 192.

23. *Id.*

David's observations about the behavior of ICSID annulment committees call to mind comments that Judge Thomas Buergenthal made about the ICJ²⁴ in the case brought by the Democratic Republic of the Congo against Rwanda. The context was one of enormous tragedy and loss of life. Despite the ongoing violence, the Court found that it lacked *prima facie* jurisdiction and thus declined to impose provisional measures. Judge Buergenthal voted in favor of the Court's order. But, in a declaration, he criticized the Court for making a series of statements about the rights and obligations of the Parties, observing that "the Court's function is to pronounce itself on matters within its jurisdiction," not to make what he called "feel good" pronouncements.²⁵

David and Tom, each of them not only a distinguished scholar but also an experienced jurist, understood the impetus on the part of adjudicators to do more than is prescribed by their specific mandate. They recognized why adjudicators feel responsibility for the entire system, why, in my terms, they might want to add just a bit of hot porridge to make a cold, lumpy gruel a little more palatable. However, David and Tom admonished adjudicators not to give in to these frustrations, and instead to adhere to their respective institutional limits.

As David observed in his Brower Lecture at the 2017 ASIL Annual Meeting, in the absence of robust machinery for international governance, international courts "are the only tool available; they are screwdrivers that have been asked not only to place screws but also to hammer nails." He cautioned, however, that, if courts are used excessively as hammers, they will cease to function well as screwdrivers.²⁶

When I have reflected on this admonition by David, I have thought about how it might tie to his observations on what he described as the "elegance of international law."²⁷ For David, an elegant solution in law was one that takes responsibility for its consequences. At first blush, this might suggest that adjudicators take responsibility by doing more by pressing the boundaries of their mandate to tackle the underlying problem, whether that is the loss of life in the Great Lakes region of Africa or errors in an arbitral award. However, it seems to me that the idea of elegance may instead call for humility and self-restraint on the part of adjudicators. International courts and tribunals have been created by states and can be undermined or eliminated by them. To maintain them as means for the peaceful settlement of disputes, adjudicators must be faithful to their

24. *Armed Activities on the Territory of the Congo (New Application: 2002)* (Dem. Rep. Congo v. Rwanda), Order, 2002 I.C.J. Rep. 219, 257 (July 10) (declaration by Buergenthal, T.).

25. *Id.* at 258.

26. David D. Caron, *Fifth Annual Charles N. Brower Lecture on International Dispute Resolution: The Multiple Functions of International Courts and The Singular Task of The Adjudicator*, 111 AM. SOC'Y INT'L L. PROC. 231, at 236, 239 (2017).

27. David D. Caron, *Confronting Complexity, Valuing Elegance*, 106 AM. SOC'Y INT'L L. PROC. 21 (2012).

mandates. We must take responsibility for the consequences of doing the task assigned to us, while leaving it to others to fight broader battles.

For those of us working in the field of international dispute settlement, this is a busy and challenging time. As David said in Geneva about a year ago, “international dispute settlement mechanisms are paradoxically being employed in an unprecedented fashion and to an unprecedented extent while simultaneously also being subject to intense criticism and thus seeking sounder footing.”²⁸ To establish and maintain the legitimacy and credibility of dispute settlement mechanisms, adjudicators must honor the vision that inspired the Hague Peace Conference through the best work that we can do, mindful of the mandate assigned to us. We must always be self-reflective and must take into account both the big picture and the nitty gritty details. In short, we must approach our work as David approached his.

28. Caron, *supra* note 1, at 3.

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