CIArb Young Members 2012 Essay Competition

'Arbitration - global, regional or just international?'

An Essay Concerning a Paradox

International arbitration has become increasingly more universal.[1]

A small group of lawyers cornering the field of investment arbitration for themselves and an equally small group of arbitrators finding repeated appointment in the field have between them succeeded in tearing the system apart.[2]

This essay concerns a paradox. Arbitration is international but it is increasingly regional. We can argue that arbitration is international because States have agreed upon 'the value of arbitration as a method of settling disputes that may arise in the context of international commercial relations.'[3] At the same time, we can argue that arbitration is regional in light of the impressive growth in the number of regional arbitration institutions, and regional caseloads.

The Oxford Dictionary defines "international", in its adjectival sense, as something 'agreed on by all or many nations'. Describing arbitration as "*just* international" could imply that there is something more to be achieved. Might we prefer to describe arbitration as "global"? Doing so brings to mind accounts of arbitration as a universally preferred means for resolving commercial disputes, and linking its rise to economic globalisation.[4] The term "global" may also have pejorative connotations, reminding us of those critics who view the 'tale of investment arbitration' as one of unrestrained neoliberal greed.[5]

In this context, the so-called 'backlash' against investment arbitration reveals a further paradox.[6] The same States that are agreed upon the value and utility of arbitration as a means for resolving private commercial disputes—and which have been instrumental in supporting the growth of regional institutions—are increasingly likely to challenge the proposition that arbitration is an appropriate means for resolving disputes to which the State is party. The most strident critics of investment treaty arbitration blame unscrupulous arbitrators and lawyers for this state of affairs, charging that they have arrived at wrong decisions 'because it profited the profession they belonged to' and despite the objections of 'arbitrators with a fidelity to the neutrality that is the basis of arbitration'.[7]

Sam Luttrell describes the situation as a "Catch 22"; 'while the international arbitration system works well because its actors know each other, the perceived validity of their decisions is jeopardized by this very fact.'[8] Insiders acknowledge that the 'relatively small pool' from which international arbitrators are

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1 Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996), 311.

2 M Sornarajah, 'Evolution or revolution in international investment arbitration? The descent into normlessness', in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011), 631-657, 642.

3 United Nations General Assembly, Resolution 65/22 on the UNCITRAL Arbitration Rules as revised in 2010, A/RES/65/22, (57th plenary meeting, 6 December 2010).

4 Eg., Dezalay and Garth, above n 1.

5 Sornarajah, above n 2, 641-642.

6 Michael Waibel et. al. (eds), *The Backlash Against Investment Arbitration* (Kluwer, 2010).

7 Sornarajah, above n 2, 633.

8 Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test*, (Kluwer, 2009), 6.

chosen exacerbates the risk of conflicts of interest.[9] A recent study of cases submitted to the International Centre for the Settlement of Investment Disputes ("ICSID") reveals that from 1995 to 2009 there were 863 nominations appointing 273 individuals.[10] Moreover, 12 arbitrators (just 4.4% of the pool) were involved in 60% of ICSID tribunals.[11] Assuming that increasing the size of the pool can reduce the risk and the perception of bias, might regionalism save arbitration from itself?

Something agreed upon by all or many nations?

There is clearly a high level of consensus among States that arbitration is a useful process for resolving international commercial disputes. For example:

i. 146 States adhere to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention");[12]

ii. in endorsing revisions to the UNCITRAL Arbitration Rules in 2010, the General Assembly of the United Nations '*[r]ecommends* [the use of the Rules] in the settlement of disputes arising in the context of international commercial relations';[13] and

iii. in the preface to the OECD Guidelines for Multinational Enterprises, 'the use of international arbitration is 'encouraged as a means of facilitating the resolution of legal problems arising between enterprises and host country governments.'[14]

158 States have signed, and 147 States have ratified the 1965 the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").[15] However, there are signs of disharmony. Most recently, in January 2012 Venezuela withdrew from the ICSID Convention, following the lead set by Bolivia (in 2007) and Ecuador (in 2009). Disenchantment with investment arbitration is by no means limited to Latin America or the developing world. For example, in April 2011 the Australian government announced that it would no longer agree to the inclusion of investor-State dispute resolution procedures in bilateral or regional trade agreements.[16]

It is interesting to note that the Australian government has denounced investment arbitration while at the same time supporting the development of the Australian Centre for International Commercial Arbitration (ACICA). In an address to the CIArb Asia Pacific Conference in 2011, then Attorney General Robert McClelland stated that the government was 'committed to making Australia the best place to arbitrate' and to ensuring that Australia's legal framework for arbitration 'remains at the cutting edge of international arbitration practice'.[17] The Attorney General also observed that the Asia Pacific region was 'working hard to promote itself on the global stage of international arbitration'.[18]

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[9] Audley Sheppard, 'Arbitrator Independence in ICSID Arbitration', in Christina Binder et. al. (eds), *International Investment Law for the 21st Century* (Oxford University Press, 2009), 131-156, 149.

[10] José Augusto Fontoura Costa, Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields, 1(4) *Oñati Socio-Legal Series*, 1-24.

[11] Ibid.

[12] See, < http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> (accessed 18 April 2012).

[13] United Nations, above n 3.

[14] OECD, *OECD Guidelines for Multinational Enterprises*, (OECD Publishing, 2011). The Guidelines form part of the Declaration On International Investment And Multinational Enterprises first adopted in 1976 and updated on 25 May 2011. States adhering to the Declaration and Guidelines include member States of the OECD as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania.

[15] See, <http://icsid.worldbank.org/> (accessed 18 April 2012).

[16] Australian Government, Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading ou r way to more jobs and prosperity* (2011), <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-pro sperity.html> (accessed 18 April 2012).

[17] Address to the Chartered Institute of Arbitrators (CIArb) Asia Pacific Conference 2011 Investment and Innovation in Intern ational Dispute Resolution, Sofitel Wentworth, Sydney, 27 May 2011, < https://www.ciarb.org/> (accessed 18 April 2012), 20.

[18] Ibid, 5.

The growth of regionalism

A 2010 survey conducted by the Queen Mary School of International Arbitration ("2010 QM Survey") confirmed the existence of a trend towards regionalism.[19] In particular, it was observed that since a similar survey conducted in 2008, there had been a significant increase in Singapore's popularity as an arbitral seat. This finding will be gratifying to arbitration professionals and the Singapore government, who have made great efforts to develop excellent legal and physical infrastructure in that country. The Singapore International Arbitration Centre (SIAC) stands out amongst regional institutions in terms of the dramatic increase in its caseload in recent years.[20] Although many other regional institutions also have increasing caseloads a lack of reported statistics makes it difficult to determine whether their overall share of cases is increasing (i.e. whether they are taking cases which might otherwise be referred to more established institutions such as the AAA/ICDR, ICC or LCIA).

The 2010 QM Survey found that formal legal infrastructure of the place of arbitration is an important factor in decisions on whether to arbitrate there, and also links the success of regional institutions to 'convenience' factors, including location, established contacts with lawyers in the jurisdiction, language and culture.[21] It was emphasised that users of international commercial arbitration rate 'neutrality' as one of the most important factors influencing the choice of institution.[22] In reflecting further on these findings, we might also hypothesise that (at least in some cases) parties place a higher degree of trust in local institutions and local arbitrators.[23]

The town elders and the global village

In a 2008 paper, David Rivkin argued that 'growth in caseloads has strained international arbitration institutions, parties, counsel, and the core of international arbitrators themselves' leading to serious delays and unnecessary costs:[24]

> *The complexity of cases today and the size of the claims have led to more extenuated proceedings, mountainous written submissions and longer hearings. … The broad public policy issues raised in cases involving governments cause arbitrators to allow longer proceedings. Arbitrators who are too busy cannot schedule timely hearings and take a long time to draft the award. All of these factors today combine to create a crisis that we must find ways to resolve if international arbitration is going to continue to be the favoured means of resolving international disputes.*

In order to restore confidence in international arbitration, Rivkin argues for the adoption of a 'Town Elder model' based upon '[t]he original conception of arbitration', which Rivkin describes as 'two business people taking their dispute to a wise business person in whom they both trusted, describing their respective claims, and then asking the arbitrator to provide them with the best solution to their dispute.'[25]

In the Town Elder model, various procedural strategies are suggested to reduce the effort and time involved in resolving cases. Of course, to the extent that part of the problem is that arbitrators are too busy, part of the solution might be to increase the number of arbitrators. The model, however, appears to assume that the pool of arbitrators will remain relatively small. Rivkin describes the potential rewards of the town elder approach by relating the story of Deioces, who 'did such a good

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[19] See, Queen Mary (University of London) School of International Arbitration and White & Case LLP, *2010 International Arbitration Survey: Choices in International Arbitration* < http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf>, 17.

[20] SIAC, *Statistics-2011*, < http://siac.org.sg/> (accessed 18 April 2012). SIAC also reports statistics for other institutions

[21] QM 2010 Survey, 2.

[22] Ibid. Another factor is 'internationalism' but this term is not further defined.

[23] See, eg., Simon Roberts and Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision Making* (Cambridge University Press, 2005.

[24] David Rivkin, *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited*, 24(3) *Arbitration International*, 375-386, 376.

[25] Ibid, 377.

job of professing and practising justice that people from all over Media came to see him. And eventually, they made him King.'[26] An already too-busy arbitrator might well interpret the model as allowing him or her, like Deioces, to take on more and more cases by the simple expedient of reducing the amount of time spent on each.

It is true that the story of Deioces begins as the story of a clever man with a reputation for resolving disputes justly. It ends as a cautionary tale:[27]

> *…this Deioces loved power and set about getting it like this. Already being well regarded in his own place, one of the many country towns in which the Medes had settled, he began to offer more ambitiously his services in resolving disputes … The number who came with their disputes grew and grew … But Deioces exploited his power, built the mighty palace of Ekbatana, encircled it with seven walls, and would let none of his old acquaintances near him. … When he had sorted all these things out, and protected himself with tyrannical power, he became severe in his dispensation of justice. Everyone had to write down their pleas and send them in to him. Then he would take them all in, make his decisions and send them out again. This is how he made his judgments.*

Other accounts suggest that Deioces was merely a tribal chieftain,[28] although we might imagine that, as mere chieftain, he was afflicted by an aspiration to be King (or similar delusions of grandeur).

The suggestion that international arbitrators should aspire to be like Deioces is problematic. The account of Deioces' tyrannical ambition for power certainly does no favours to the reputation of the international arbitrator wishing to emulate him. Moreover, the full story suggests that as more and more people submitted their disputes to Deioces the quality and fairness of his decisions was affected; without the time to hear the parties, he was forced to dispense his dictats "on the papers".

In relation to the theme of this paper, thinking about the Town Elder model in the investment arbitration context might prompt us to conclude that a particular problem with the system is that too many of the elders come from the same towns. In this regard, there can hardly be any doubt that negative perceptions of investment arbitration are linked to the fact that the pool of arbitrators regularly sitting in such cases is a small and elite one. Even in the age of the "global village" there is a need for sensitivity to local and regional issues—be they legal, political or cultural—and this points to a need to increase the size and diversity of the pool of arbitrators.

Stopping the rot: can regionalism save international arbitration from itself?

José Augusto Fontoura Costa has recently argued that the WTO dispute settlement process enjoys greater legitimacy than investment arbitration by virtue of the fact that the pool of decision-makers is larger.[29] Fontoura Costa also observes amongst the elite group of international arbitrators strategies for achieving repeat nomination to tribunals focused 'on the projection of an image of high standards of knowledge and morality associated with professional networking'.[30] Fontoura Costa's observations echo those of Yves Dezalay and Bryant Garth who, in the mid 1990s, said:[31]

> *We could quickly see a senior generation—the "grand old men" of arbitration (which included no women)—and a younger generation of lawyers in their forties (which is characterized by slightly more diversity). And it was clear that this international arbitration community was relatively small and linked together pretty closely. Members of the inner circle and outsiders often referred to this group as a "mafia" or a "club".*

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[26] Rivkin, above n 24, 386.

[27] Lisbeth Fried, *The Priest and the Great King: Temple-Palace Relations in the Persian Empire*, (Eisenbrauns, 2004), 128-129, citing a translation from Derek Roebuck, *Ancient Greek Arbitration,* (Holo Books, 2001).

[28] *Webster's New Biographical Dictionary* (Merriam-Webster, 1988), 270.

[29] Fontoura Costa, above n 29.

[30] Fontoura Costa, above n 29, 22.

[31] Dezalay and Garth, above n 1, 10.

Some commentators, such as Professor Sornarajah, use more colourful language to make the point:[32]

> *Some of the successful challenges [to arbitrators] demonstrate the incestuous nature of investment arbitration where a small clique of persons act as counsel on the sides of both claimants as well as respondent States and also sit as arbitrators. They also become the 'highly qualified publicists' in the area, writing up their opinions as articles to be published in glossy journals run by their clique. The fact that these arbitrators are increasingly challenged on account of bias also exhibits the rot that is setting in at the very core of arbitration.*

Improving the numbers and diversity of international arbitrators can make an important contribution to improving the image of international arbitration, particularly in the investment arbitration context. In this regard, the trend towards regionalism may help to save arbitration from itself, by increasing both the absolute number of qualified and experienced arbitrators "in the pool" and also their diversity, including in terms of legal qualifications, cultural background and political outlook. Of course, there are other challenges to be tackled, including gender diversity[33] and the vexed issue of ethics.[34]

Let us return briefly to the original question in case there is anything which has been missed. Arbitration – global, regional or just international? From the outset, the term "global" was dismissed as a descriptor for our topic on the basis that it has pejorative connotations. It has been argued that arbitration is "international" in the sense that States are (largely) in agreement regarding the utility of arbitration as a means for resolving disputes. At the same time, a trend towards regionalism has been observed. These observations lead to the discussion of a paradox, whereby States actively promote the use of arbitration for international commercial disputes while becoming increasingly disenchanted with investment arbitration. In this discussion, we have heard the story of Deioces who became hungry for power and ended up a tyrant. Against this background it has been argued that there is a need for the pool of international arbitrators to become larger and more diverse. Of course, size is not everything. We must not forget (as the word "*just*" reminds us), that the role of the arbitrator is always to resolve disputes fairly.

2840 words (including footnotes)

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[32] Sornarajah, above n 2, 647-648.

[33] See, eg., Sophie Nappert and Sarita Patil Woolhouse, 'Diversity Amongst Arbitrators and the Usefulness of Lists - An OGEMID Discussion', 1 *Transnational Dispute Management* (2010).

[34] See, eg., Catherine Rogers, *Ethics In International Arbitration*, (Oxford University Press, forthcoming 2012).