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LDCs' Unique Challenges of Getting the Composition of Arbitral Tribunals Right

Won Kidane

Introduction

Imagine for a minute that you are the Attorney General of a small African Country. Towards the end of one fateful day in your office, your administrative assistant brings a DHL package containing a Request for Arbitration (RFA) by one of the largest European investors in your country. You had heard rumors that business has not been very good for them lately.

The RFA says that your country violated some fundamental principles of international investment law contained in your country's bilateral investment treaty (BIT) with the home state of the investor, and seeks \$300 million dollars in damages. The RFA also contains the name of the arbitrator that the claimant has nominated. He is a partner at a large New York law firm. The RFA invites you to provide a preliminary response to the substantive allegations and also nominate your own arbitrator. It warns you that if you fail to nominate your arbitrator within 30 days, the appointing authority, to which you have agreed in the treaty, will appoint one for you, and that the two will eventually select a suitable chair. It further advises that if you fail to participate in the proceedings, the tribunal will hear the case in your absence and render an award. The award could be enforced against your country's assets around the world. Consider further that this is the first time ever that you had faced this problem since you assumed the position of the Attorney General in your country. Assume further that you know the claim is entirely false and that the company is trying to shift the risk of business loss to your government. You also know that it is not going to be easy to prove the falsity of the claim. What should you do?

The Challenges

The investor-state dispute settlement (ISDS) system has in recent years attracted acrimonious criticism not only because of allegations of pervasive conflict of interests and incoherent jurisprudence¹ but also because of evident representational deficit.²

¹ See e.g., EUROPEAN UNION COMMISSION CONCEPT PAPER, INVESTMENT IN TTIP AND BEYOND – THE PATH FOR REFORM, ENHANCING THE RIGHT TO REGULATE AND MOVING FROM CURRENT AD HOC ARBITRATION TOWARDS AN INVESTMENT COURT (2015) at 6-7 (“Currently, arbitrators on ISDS tribunals are chosen by the disputing parties (i.e. the investor and the defending state) on a case-by-case basis. The current system does not preclude the same individuals from acting as lawyers (e.g. preparing the investor's claims) in other ISDS cases. This situation can give rise to conflicts of interest – real or perceived - and thus concerns that these individuals are not acting with full impartiality when acting as arbitrators. The ad hoc nature of their appointment is perceived by the public as interfering in their ability to act independently and to properly balance investment protection against the right to regulate. It has also led to perceptions that this provides financial incentives to arbitrators to multiply ISDS cases.”)

Available at: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF

² See e.g., ICSID Caseload Statistics (Issue 2017-1), at Chart 6: Geographic Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules, by State Party Involved (Western Europe (7%), Middle East and North Africa (10%), Sub-Saharan Africa (15%)). Compare, Chart 12: Arbitrators, Conciliators and *ad hoc* Committee Members Appointed in Cases Registered under the ICSID Convention and Additional Facility Rules –

Developing countries dread the arbitral process principally because they are called upon to answer charges of violations of indeterminate external legal standards³ before a group of total strangers – not a jury of their peers.⁴ They are frequently concerned that the arbitrators are not only biased against them (and in favor of private claimants) but more importantly, they fear that the arbitrators are often incapable of understanding them because of their cultural background.⁵ They know that in the arbitral process, the three people who make the decision are not necessarily the most informed three people in the room. In most cases, the parties and their counsel know exactly what transpired between the parties but they present evidence selectively not necessarily to aid the arbitrators to arrive at the correct result but to distort their vision and steer them to a result that would favor their client’s position. In the words of Judge Jerome Franck, in the adversarial trial, what the lawyer does is “the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation.”⁶ Arbitration specialists have adopted the same culture.

It might be that, by agreeing to arbitrate, as U.S. Supreme Court Justice Stevens said in his Mitsubishi dissent, what parties have signed up for is “*a best approximation of the correct result*,”⁷ but the party who suffered injustice or the one who is falsely accused of perpetrating it, wants that approximation to be as close to the truth as possible. The most important agents of this approximation are the arbitrators. The way they are mixed makes a profound difference. For example, social science studies conducted in the United States have shown that mixed race jurors are more likely to get the facts right – that is because they educate each other and challenge each other’s biases and predispositions.⁸

It is common knowledge that diversity on any decision making body improves the quality of justice, but in investor-state arbitration, it is difficult to appoint a group of diverse arbitrators because of the limited pool. The most important question that needs to be asked is thus: why is the pool of arbitrators so small? Why do you have three European arbitrators resolve a dispute between a Chinese company and an African State? The simple and obvious response is that it is

Distribution of Appointments by Geographic Region: Western Europe (47%), Sub-Saharan Africa (2%), Middle East and North Africa (4%). The most recent statistics (2017) is available on the official website of ICSID at: [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf)

³ For example, according to Stephan Schill “Fair and equitable treatment is the clearest example of how vague the standard clauses in international investment treaties are formulated. It is characterized by a lack of clarity concerning not only of its scope, but its underlying normative concept.” STEPHAN W. SCHILL, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT LAW IN INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS* 157-58 (Tarcisio Gazzini and Eric De Brabandere eds. Martinus Nijhoff, 2012) 133-181.

⁴ See e.g., WON L. KIDANE, *THE CULTURE OF INTERNATIONAL ARBITRATION* 239-254 (OUP, 2017).

⁵ *Id.* at 254-261.

⁶ JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 85 (First Princeton Paperback ed. 1973). (“In short, the lawyer aims at victory, at winning in the fight, not at aiding the court to discover the facts. He does not want the trial court to reach a sound educated guess, if it is likely to be contrary to his client’s interest. Our present trial method is thus the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation.”)

⁷ *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614, 656-7 (1985), Steven, J. dissenting. (“Arbitration awards are only reviewable for manifest disregard of the law and the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator’s decision is virtually unreviewable. Despotism decision making of this kind is fine for parties who are willing to agree in advance to settle for a *best approximation of the correct result* in order to resolve quickly and inexpensively any contractual dispute that may arise in an ongoing commercial relationship. Such informality, however, is simply unacceptable when every error may have devastating consequences for important businesses in our national economy.”)

⁸ See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90(4) *J. PERSONALITY & SOCIAL PSYCHOLOGY* 597–612, 598 (2006) (“Whites demonstrated a more complex thinking when assigned to a diverse group than when assigned to an all-white group.”)

the parties' choice; no body imposed it on them. That simple response, however, underappreciates the complexities of the appointment process.

Both the New York Convention and the ICSID Convention were actively promoted to developing countries with the promise that they would help modernize their laws and even attract investment and commerce. The New York Convention was promoted by the United Nations,⁹ and the ICSID Convention was actively promoted to developing countries by the World Bank.¹⁰ The United Nations had committed to assisting developing countries to acquire and develop expertise in this area. And indeed the records show that it was anticipated that such expertise would be developed within a relatively short period of time.¹¹ The United Nations relegated this task to the chambers of commerce in Europe resulting in the effective outsourcing of the administration of international economic justice to European capitals.

At the most basic level, the ICSID Convention permitted developing countries to designate arbitrators who are not their citizens. They naturally relied on experts from the developed world. In most cases, they appointed arbitrators they neither knew nor understood. Fifty years later, they continue to do the same because their citizens are still said to lack the required expertise. For more than half century, they appeared before ICSID tribunals in large numbers and answered charges of expropriation and denial of justice, among other things, before a limited number of mostly Western arbitrators. Regrettably, in investment arbitration, the composition of arbitrators today looks a lot like it looked fifty years ago. It is interesting to see that in a dispute between a Korean investor and the Chinese Government, all the arbitrators are Western.¹² If you look at the composition of the tribunals for all 22 investor claims against India, almost all are from the developed world of the West.¹³ The most recent publically available ICSID statistics show that, while cases against Sub-Saharan African states constitute approximately 15 percent, only 2 percent of arbitrators have been from Africa.¹⁴

Evidently, developing countries still face the exact same dilemma that they had faced fifty years ago. As I write in my book, *The Culture of International Arbitration*, fifty years is not an

⁹ See e.g., U.N. Secretary-General, Note on Consideration of Other Measures for Increasing the Effectiveness of Arbitration in the Settlement of Private Law Disputes (Item 5 on the Agenda) United Nations Conference on International Commercial Arbitration, U.N. Doc. E/CONF.26/6, at 6 (May 1, 1957), available at http://www.arbitration-icca.org/media/0/12734521657370/4281_001.pdf. (“The existence of such laws [laws implementing the New York Convention] and facilities may remove the obstacles to economic development created by misgivings which – rightly or wrongly – arise when foreign traders or investors are faced with the need to submit to jurisdictions of other countries.”)

¹⁰ See e.g., *Settlement of Investment Disputes, Consultative Meeting of Legal Experts*, in ICSID, 2-1 HISTORY OF THE CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND FORMULATION OF THE CONVENTION 236-255 (1968).

¹¹ U.N. Secretary-General, Note, at 7. Interestingly though, the Secretary-General believed that the technical assistance would resolve the problem within a short time. In his own words: “The technical assistance that may be required for the improvement of arbitration facilities in some countries could take the form of furnishing to or through the Government concerned experts competent to advise on the drafting of appropriate arbitration legislation and familiar with the problems relating to the setting up of arbitration institutions capable of providing adequate facilities for the requirements of international commerce. It would probably not be necessary to make available the services of such experts on a long term basis; *their presence in the country concerned for a few weeks or months might be sufficient in most cases.*” (emphasis added) U.N. Secretary-General, Note on Consideration of Other Measures for Increasing the Effectiveness of Arbitration in the Settlement of Private Law Disputes (Item 5 on the Agenda) United Nations Conference on International Commercial Arbitration, U.N. Doc. E/CONF.26/6, at 7 (May 1, 1957), available at http://www.arbitration-icca.org/media/0/12734521657370/4281_001.pdf.

¹² See *Ansung Housing Co. Ltd v. People's Republic of China*, ICSID Case No. ARB/14/25 (Award of March 9, 2017). Available at: <http://investmentpolicyhub.unctad.org/ISDS/Details/602> .

¹³ Basic information about all the cases against India is available at: <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2> .

¹⁴ See note 2 *supra*.

insufficient amount of time to study five provisions of the New York Convention or the principle of fair and equitable treatment.¹⁵ The problem is broader than the alleged lack of expertise in the developing world. It is a microcosm and function of the world's old economic decision-making hierarchy.

The pool of arbitrators is structurally kept small. This is not pure theory. Those of us who represent developing countries know it very well from experience and appreciate the challenges. Here is the structural problem and it lies in the default appointment authority.

In investment arbitration, under the ICISD Convention, if one party fails to appoint or the party appointed arbitrators fail to agree on a chair, the power of appointment goes to the Chair of the Administrative Council;¹⁶ needless to point out that the Chairman of the Administrative Council is the President of the World Bank. If it is UNCITRAL arbitration, the default appointing power goes to the Secretary General of the Permanent Court of Arbitration (PCA), a position always held by a Dutch national. These individuals make appointments out of a familiar circle not because they want to reward their friends but because they want to avoid the risk that comes along with unknown names. The safest choice is often the biggest name.

Similarly, in commercial arbitration, parties often incorporate institutional rules into their contracts. Their choice might at first appear innocuous but carries significant consequences. If, for example, they choose ICC Rules, by so doing, they empower the ICC Court of Arbitration in Paris to make the default appointment.¹⁷ Traditionally, they also choose familiar seats in Europe, which in turn influences not only the selection of the arbitrators but also frequently grants European courts a monopoly over annulment power,¹⁸ allowing them the opportunity to singularly shape the jurisprudence in the area.

It is within these structural constraints that developing countries choose their arbitrators. The perennial question is thus: How can they get the composition right? They know the statistics; they know who will make the default appointment; and they know who will be appointed as chair. Who must they choose as their party appointed arbitrator? If they choose someone who is likely to understand them, culturally and otherwise, someone they know very well, they fear that the best they could hope for is a great dissenting opinion. This is not because arbitrators from the developed world consciously conspire to exclude the outsider, but because of a broader cultural incommensurability problem. One has to be in that hearing room to understand the awkwardness and the power dynamics. It translates into issues of trust, respect, misunderstanding and even hierarchy. In that environment, the position of a minority arbitrator is not enviable. Developing countries have over the decades endured the anxieties of stranger justice.

To avoid that kind of awkwardness, most developing countries appoint arbitrators from within the small circle. To be sure, they do have allies within the circle. But they are again faced with another problem. This time, it is not cultural but ideological. The economics of privatized justice

¹⁵ KIDANE, THE CULTURE OF INTERNATIONAL ARBITRATION, *supra* note 4 at 288.

¹⁶ See ICSID Convention Art. 38. Information on the process is also available at: <https://icsid.worldbank.org/en/Pages/process/Arbitration.aspx>.

¹⁷ See ICC Arbitration Rules, art. 12(5). Available at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_13.

¹⁸ Whether courts outside of the seat of the arbitration may have annulment power is a subject of dispute but the predominant view is that only the courts of the seat have principal jurisdiction for purposes of annulment. See *e.g.*, *Karaha Bodas Co. v. Perus*, 364 F. 3rd 274 (5th Cir. 2004). (Acknowledging the theoretical possibility that under Article V(1)(e) of the New York Convention courts of two countries (“the country in which, or under the laws of which”) could have principal jurisdiction.)

appears to put a downward pressure on the number of elite arbitrators on the host-state side of the ideological spectrum. They are outnumbered by many-folds by those on the other side of the ideological spectrum. So, appointing one of them carries a similar risk as appointing outsiders.

Developing countries also face a third set of problems in this regard: choosing counsel. Because they anticipate what the tribunal is going to look like based on the claimant's initial appointment, they often select someone who is likely to be acceptable to the tribunal. Counsel in turn influences the choice of the host state's appointment. It is fair to assume that Counsel, in principle, wants to win and advises the state to appoint someone that he/she deems appropriate. Depending on the Counsel's level of cultural competency, the attorney-client communication may or may not be sufficient to apprise the host state of the risks and benefits. In any event, counsel for the Respondent state shares the exact same dilemmas of the host state.

Is Getting the Composition Right Possible?

Recall the question presented to the hypothetical African Attorney General at the beginning of my remarks. I've had the privilege of advising Attorneys General who find themselves under these circumstances but I have not been able to resolve their dilemmas. Over the years, I have, however, offered some helpful thoughts that I considered could minimize bias and the possibility of a decently veiled corrupt outcome. There are two extremely important considerations:

First is the cultural familiarity and cultural competence of the arbitrators no matter what their background. Someone who has never been to Africa and had no interactions with Africans whatsoever would have considerable difficulty understanding witnesses who come from remote villages of Africa to provide testimony. The most culturally able arbitrators are often those who have in their practice days had the opportunity to work with culturally different groups. The communality of interest that representation necessarily imposes allows them to appreciate the client's perspectives. That perspective presumably remains to be an enduring life experience.

The second is a demand for gender and racial diversity on each tribunal. What justifies an all Western Male tribunal is the mythology of expertise. The pursuit of justice is not an incomprehensible scientific algorithm. As Professor John Crook usefully articulates, the arbitral process is essentially the identification and ascertainment of the applicable rules of law, the determination of fact, and the application of the law to the facts.¹⁹ If a Chinese claimant against an African state appoints a Chinese arbitrator because all of its documents and witnesses are going to be Chinese, it does not appear that the African state would have difficulty appoint an African arbitrator. If, on the other hand, the Chinese claimant appoints a preeminent European arbitrator, prudence counsels the African state to appoint someone who is likely to be match the stature of the European arbitrator. It is not the work that demands such appointment but the power politics. That frequently leads to the small circle. The task of diversifying then rests on either the co-arbitrators or the appointing authority. If the co-arbitrators fail to agree, the developing state party to the dispute must always vigorously demand diversity on the tribunal. In crude terms it means gender, nationality, racial or other forms of cultural diversity. A diverse panel of arbitrators does not only garner better political legitimacy and a sense of inclusiveness, which

¹⁹ John Crook, *Fact-Finding in the Fog: Determining the Facts of Upheavals and Wars in Inter-State Disputes*, in CATHERINE A. ROGERS & ROGER P. ALFORD, *THE FUTURE OF INVESTMENT ARBITRATION* 313, 314 (2009). ("Should they pause to reflect, most international lawyers would likely accept the thought that the science and art of deciding legal disputes involves at least three inter-related components. The first two involve determining the relevant law and the relevant facts. There comes stage three—applying the law to the facts.")

increases the likelihood of enforceability of the award, but it is also more likely to be free of bias and prejudice and hence lead to the correct result.

Conclusion

Respondent states must reject the mythology of specialized knowledge that keeps the pool of eligible arbitrators artificially small and demand diversity on each tribunal. The key is to request appointing authorities to exercise their discretion in a genuine and respectful manner. Appointing authorities have not made a meaningful effort to diversify the pool of arbitrators in the last fifty years. Least Developed Countries may not be able ask for a jury of their peers but while they consider contemporary proposals for the establishment of investment court systems as possible replacements for ISDS, they must forcefully demand diversity on arbitral tribunals in each case through the arbitral, political, and diplomatic processes.