

IS THE AGE OF ARBITRATION IN INTERNATIONAL LAW DRAWING TO A CLOSE

by

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Introduction

It is a great honour to be invited to give the Kaplan Lecture this evening. One of my first experiences of sitting as an arbitrator was with Neil Kaplan. As a novice I learned more than I can say from sitting with such an experienced and generous colleague.

I have chosen as my subject for this evening a question: “Is the Age of Arbitration in International Law Drawing to a Close?” I should make clear at the outset that in addressing that question, I am going to speak only about arbitrations which are rooted in, and which apply, public international law. The world of commercial arbitration – though frequently transnational in character and sometimes involving a tribunal in applying public international law – is rather different and I shall touch on it only in passing and by way of comparison.

By public international law arbitration, I mean those arbitrations in which the tribunal derives its authority from public international law, usually in the form of a treaty, and is charged with applying public international law – or some part thereof – to the resolution of the dispute before it. That obviously includes inter-State arbitrations, where the provision for arbitration either takes the form of an agreement between two or more States to refer to arbitration an existing dispute or a treaty containing provision for compulsory arbitration of certain categories of dispute. An example of the former would be the famous *Island of Palmas* dispute between the Netherlands and the United States of America,² or, more recently, the “*Iron Rhine*” case between Belgium and the Netherlands.³ The latter includes the numerous cases brought under the United Nations Convention on the Law of the Sea, such as the *Chagos Marine Protected Area* case between Mauritius and the United Kingdom⁴ and the *South China Seas* case between the Philippines and the People’s Republic of China.⁵

Public international law arbitration also, however, includes arbitrations between a State and an investor from another State which are usually brought under the arbitration provisions of a bilateral investment treaty (“BIT”) or a multilateral agreement such as the Energy Charter

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² (1928) II *Reports of International Arbitration Awards* 829.

³ (2005) 140 *International Law Reports* 130.

⁴ (2015) 162 *International Law Reports* 1.

⁵ (2016) 170 *International Law Reports* 1.

Treaty (“ECT”) the ASEAN Comprehensive Investment Agreement or the Agreement on Promotion, Protection and Guarantee of Investments of the Organization of the Islamic Conference.

Have we then been living in the age of public international law arbitration ? The numbers certainly suggest it. Although arbitration has been a prominent feature of international law since at least the middle of the nineteenth century, the last thirty years have seen a vast and unprecedented increase in arbitrations involving public international law. Inter-State arbitration had languished during the 1970’s with only two major cases, neither of which inspired much faith in arbitration as a remedy. The *Beagle Channel* case between Chile and Argentina led to an award⁶ which, however impeccable it might have been as a piece of legal reasoning, completely failed to resolve the dispute between the two States who went to the brink of war before the Pope stepped in to mediate.⁷ The *Channel Continental Shelf* case between France and the United Kingdom was marred by the failure of the maritime expert charged with implementing the award.⁸ Investor-State arbitration was then almost unknown, in spite of the fact that the Washington Convention establishing the International Centre for the Settlement of Investment Disputes (“ICSID”) was already a decade old.⁹ Since the late 1980’s, there have been more than thirty arbitrations between States and at one recent point in time, there were ten such cases under active consideration. That figure, however, pales beside the dramatic increase in investor-State arbitrations. The number is difficult to assess, since not all these cases are made public but a glance at the annual reports of ICSID and the Permanent Court of Arbitration (“PCA”) gives an indication. At the time of writing, the PCA was administering 106 investor-State arbitrations, while the latest figures for ICSID show 263 cases pending. To that one can add cases being heard by the ICC, the Stockholm Chamber of Commerce, the LCIA and other mechanisms, as well as ad hoc arbitrations.

Since the most frequent complaint about international law is that it lacks means of enforcement, one would have thought that this increase in the availability and use of arbitration to enforce obligations under international law would have been greeted with acclaim by supporters of the international legal order. Surprisingly, however, that has not always been the case. Although specific instances of inter-State arbitration have been the object of political attack, usually by those who had sought a different outcome in particular cases, the institution as such has largely escaped criticism from commentators (though not from politicians). That is not true of investor-State arbitration which has come under fire from the European Commission, a variety of States and a wide range of academic commentators.

My purpose this evening is to examine whether that criticism heralds an end to the ‘golden age’. I shall approach the subject in three parts. First, I want to consider why arbitration has become so important in international law and how international law arbitration differs from its commercial counterpart. Secondly, I shall look at some of the challenges which have recently emerged to international law arbitration, particularly in the context of investor-State disputes. Lastly, I shall offer a few suggestions about how to meet those criticisms.

⁶ 52 *International Law Reports* 93.

⁷ See 82 *International Law Reports* 671.

⁸ 54 *International Law Reports* 6 and 139.

⁹ There were, however, a handful of arbitrations brought under the terms of oil concession agreements; see Greenwood, ‘State Contracts in International Law’, 58 *British Year Book of International Law* (1982), p. 27.

The Nature and Rise of Arbitration in International law

(1) Arbitrations between States

In considering the rise of arbitration in international law, it is important to appreciate that it has its origins in relations between States and not in anything resembling the world of commerce. While commercial arbitration grew up as a method of dispute resolution alternative to a system of courts with compulsory jurisdiction, arbitration in international law evolved as a method of recourse to a third party by agreement in a context in which there existed no courts and no system of compulsory jurisdiction.

Although it was not the first arbitration between States, the *Alabama* case between the United States and United Kingdom was probably the most influential in promoting arbitration as a means of resolving even highly sensitive and politicised disputes between States.¹⁰ The case had its origins in the American Civil War. At the outbreak of that conflict in 1861, the United Kingdom had recognized the Confederacy as belligerent and declared itself neutral – a decision which had infuriated the Government in Washington to whom the conflict was one between a lawful government and rebels.

The British decision backfired when, in 1863, it became apparent that the Confederacy had commissioned the construction in a British dockyard of a commerce raider, later known as the *Alabama*.¹¹ The US Government protested that the United Kingdom, having declared itself neutral, was required by international law to prevent the construction of a warship for one of the belligerents and should therefore prevent the *Alabama* from sailing. Due to a series of mishaps, which included a fatal delay occasioned by the Foreign Office seeking legal advice from a Law Officer who had become insane,¹² the British Government failed to prevent the *Alabama* from sailing. She was fitted out with armaments in the Caribbean and then embarked upon a voyage round the world during which she sank or captured a greater tonnage of shipping than any U-Boat during either world war. The *Alabama* was eventually sunk by a US warship nine miles off Cherbourg on 19 June 1864.¹³

After the civil war ended, there was intense pressure in the United States to ensure that the United Kingdom paid substantial compensation for the damage done by the *Alabama*. The United States demanded not merely compensation for the ships lost but for the cost of the last stage of the civil war, on the basis that, had it not been for the *Alabama*, the war would have ended much earlier. The sums of money involved were, therefore, enormous; on one estimate exceeding one trillion US dollars at today's value. In debates in the US Senate it was suggested that the United Kingdom might make *part* payment by transferring to the United States Canada and the West Indian colonies; that proposal was opposed on the ground that the principle of 'manifest destiny' meant that the United States would get Canada and the West Indies anyway, so the United Kingdom should not be enabled to reduce the damages by transferring territories it would lose in any event.

Relations between the United Kingdom and the United States had not been particularly good since American independence and the *Alabama* dispute led to talk of war on both sides. While the United Kingdom was the more powerful State globally, with a larger economy and a bigger navy, the United States was far more powerful in North America since the British had only

¹⁰ For a fascinating account of this case, see Lord Bingham, 'The *Alabama* Arbitration' (2005) 54 *International and Comparative Law Quarterly* p. 1.

¹¹ As Bingham explains, there was a sister ship, the *Florida* and a number of other vessels.

¹² Sir John Harding, QC, was then the Queen's Advocate, a position later abolished. This episode seems to have been one of the factors which led to the creation of the position of Legal Adviser to the Foreign Office.

¹³ Thereby ensuring that she continued to be a subject of legal dispute, since the location of the wreck, though in the High Seas in 1864, is now within French territorial waters.

very limited forces with which to defend the three thousand mile border between Canada and the United States.

In the event, wiser heads prevailed and the dispute was referred to arbitration in Geneva before a tribunal of five members presided over by a former President of the Swiss Confederation. It was a far cry from what we would now regard as an impartial tribunal. The United States appointed Charles Adams (the son and grandson of former US presidents) who, as US Ambassador in London during the civil war had been instrumental in seeking to prevent the *Alabama* and other ships from sailing and would thus certainly be ineligible for appointment today. The United Kingdom appointed the Chief Justice, Sir Alexander Cockburn, whose personal notoriety had made him the only Chief Justice never to be given a peerage, and whose undoubted linguistic ability was coupled with a hatred of foreigners in general and his fellow arbitrators in particular. As Johnny Veeder has explained, Cockburn's behaviour in achieving a compromise resolution of the dispute before the Tribunal would fall foul of all modern standards of behaviour for arbitrators.¹⁴

That resolution took the form of an award in favour of the United States in respect of the direct damage to US shipping but a dismissal, on jurisdictional grounds, of the much larger claim for indirect damage. Not that the amount awarded was small. The United Kingdom was ordered to pay US \$15.5 million, a sum roughly equivalent to some US \$210 million today but amounting to five percent of the United Kingdom's annual budget in 1872.¹⁵ The award was, however, a tremendous success. The United Kingdom paid promptly and in full.¹⁶ Both sides considered that honour was satisfied. More importantly, a dispute which, even if it had not led to war, might well have poisoned Anglo-American relations for decades was settled. Thereafter relations between the two countries steadily improved.

The success of the *Alabama* arbitration did not go unnoticed. There was a steady increase in the use made of inter-State arbitration in the succeeding years.¹⁷ More fundamentally, the award also gave considerable encouragement to those who argued for the establishment of some permanent mechanism for the third party settlement of inter-State disputes. That was a major contributing factor to the Hague Peace Conferences of 1899 and 1907, one consequence of which was the establishment of the Permanent Court of Arbitration, and, later in the twentieth century, to the creation of the Permanent Court of International Justice in 1922 and its successor, the International Court of Justice, following the Second World War.

The modern system of international courts thus grew out of the earlier institution of inter-State arbitration. Moreover, one of the most important features of arbitration was carried over into that system of international courts, namely the notion that jurisdiction is not normally compulsory but depends upon the consent of the parties. Thus, the Statute of the International Court of Justice, like that of its predecessor, provides that the Court has jurisdiction only if the States parties to a dispute have at some stage given their consent to that dispute being resolved by the Court.¹⁸ States may give that consent subject to limitations as to subject-matter and

¹⁴ Veeder, 'The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator – From Miami to Geneva', (2013) 107 *Proceedings of the American Society of International Law* p. 387.

¹⁵ See R. Jenkins, *Gladstone* (1995), p. 359.

¹⁶ It is a sign of the wealth of the UK in the 1870's that it paid by transferring part of its holdings of US Government bonds.

¹⁷ See, e.g., the award of the King of Spain in the arbitration between Honduras and Nicaragua given in 1906 (XI *Reports of International Arbitral Awards* p. 101) and the award of the King of the United Kingdom in the arbitration between Argentina and Chile in 1902 (95 *British and Foreign State Papers* p. 764).

¹⁸ Statute of the International Court of Justice, Article 36(1). The Court has repeatedly made clear that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of

other considerations, such as the date at which the dispute arose or the facts on which it is based took place.¹⁹ There is no compulsory jurisdiction even today.²⁰ Article 36(2) of the Court's Statute provides that States may make declarations by which they "recognize as compulsory ... the jurisdiction of the Court" but such declarations are optional, may be subject to extensive reservations, and apply only between States which have both made declarations and only to the extent that those declarations coincide.²¹ Article 36(2) accounts for only a minority of the cases brought before the Court. The others are based either upon a special agreement by which the States party to an existing dispute consent to refer that dispute to the Court, or upon provisions in existing treaties – such as the Optional Protocol to the Vienna Convention on Diplomatic Relations, 1961 – by which disputes regarding the interpretation or application of the treaty may be brought before the Court. A special agreement is very similar in effect to an arbitration agreement, in that it defines the scope and extent of jurisdiction. Less obvious, but nonetheless important, is that the dispute settlement provision of a treaty of the kind mentioned above, and the coinciding declarations of States under Article 36(2) also have similarities with arbitration agreements, in that they too shape and limit the scope of the Court's jurisdiction on the basis of what has – or has not – been agreed between the parties.

In proceedings between States there is thus far more in common between arbitration and adjudication than one would find in commercial disputes within a State. Four other matters are worth noting in this regard. First, the contrast between arbitration, in which the parties can choose the arbitrator (or arbitrators) and judicial proceedings in which they have no such choice, is less stark in inter-State cases than in commercial proceedings. While States going to the International Court of Justice necessarily subject themselves to the fifteen judges who make up the membership of the Court, each party is entitled to appoint an *ad hoc* judge if it does not have a judge of its own nationality upon the Court.²² Moreover, if the States party to a dispute opt to have their case heard by a Chamber of the Court, they will be consulted over the choice of the judges who sit in the Chamber.²³ In the *Gulf of Maine* case between Canada and the United States, the agreement by which the parties consented to refer the dispute to a Chamber of the Court effectively allowed either State to withdraw and refer the case to arbitration if the membership of the Chamber was unacceptable to either of them.²⁴ There seems little difference between this procedure and one in which the parties choose the arbitrators from an existing list with a limited scope for making appointments from outside that list.

Secondly, awards in inter-State arbitration are not generally subject to any system of judicial control, just as judgments of international courts are not generally subject to appeal.²⁵ As an aspect of relations between States they have never been held to fall within the jurisdiction of

those States to its jurisdiction", *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, ICJ Reports 2002, p. 219 at p. 241, para. 57.

¹⁹ There is not general statute of limitations in international law and the restriction on bringing disputes from the distant past before the Court is based very largely upon the limits which States have set to their consent to jurisdiction.

²⁰ Both in 1922 and in 1945 there were proposals for the International Court to be given compulsory jurisdiction but those were not accepted by States.

²¹ Only just over one third of the States parties to the Statute of the Court have made declarations and most of those are subject to reservations.

²² Statute, Article 31.

²³ Rules of Court, Article 17.

²⁴ This feature of the agreement caused some dissent in the Court, see the Order of 20 January 1982, *ICJ Reports, 1982*, p. 3.

²⁵ A noticeable exception is that a judgment of a chamber of the European Court of Human Rights may be appealed to the Grand Chamber. There is no equivalent provision for appealing a judgment of a chamber of the International Court of Justice to the full court.

national courts and there is no mechanism by which the International Court of Justice or any other standing international court or tribunal exercises a supervisory jurisdiction over them, although arbitration awards have occasionally formed the basis for an action in the International Court of Justice in cases where there was a treaty between the two States concerned conferring jurisdiction upon the Court.²⁶ In this respect, they are far closer to judgments of international courts than are domestic arbitration awards to judgments of national courts.

Thirdly, like the judgments of international courts, awards in inter-State cases are almost invariably public. As such they can contribute to the identification and development of international law in much the same way as the judgments of international courts. Huber's renowned award in the *Island of Palmas* case,²⁷ has probably had as much influence on the law on title to territory as any judgment of an international court. While the International Court of Justice tended in the past to cite only its own previous judgments and those of the Permanent Court of International Justice, today its judgments frequently cite – and are clearly influenced by – the awards of arbitration tribunals in relevant fields.²⁸ Moreover, increasingly the pleadings in inter-State arbitrations, like those in cases before the International Court of Justice, are also published. This not only makes for a higher degree of public scrutiny, it also means that the position taken by a State in one case may be quoted against it in another, even after a long lapse of time. Counsel for Iran in one case before the International Court of Justice made extensive use of the United States pleadings in the *Alabama* in support of a claim for consequential damages. Again, this publicity is in marked contrast to commercial arbitration where confidentiality is frequently a major factor in the decision to arbitrate rather than go before a court.

Lastly, inter-State proceedings, whether before courts or arbitral tribunals, can have beneficial effects in a variety of ways. The award in the *Alabama* case ensured that what could easily have been a toxic dispute poisoning UK-US relations for decades was settled enabling the two States to move on. The award in the *Taba* case between Egypt and Israel²⁹ also had that effect but, in addition, the very fact that the arbitration was taking place gave both States an incentive to preserve diplomatic relations during a difficult period. Unlike most commercial litigants, States in dispute expect to have to deal with one another on a wide range of other matters while the proceedings take place and to continue to do so after they have finished.

Inter-State arbitration has not fulfilled some of the unrealistically high expectations which existed at the time of the Hague Peace Conferences but it has undoubtedly played a highly significant role in international relations and continues to do so. Despite some predictions to the contrary, international courts and international arbitration have co-existed perfectly happily. The Law of the Sea Convention, 1982 – one of the few treaties to provide a measure of compulsory settlement of disputes – offers States the choice of submitting certain types of dispute regarding their obligations under the Convention to the International Court of Justice, the International Tribunal on the law of the Sea or arbitration, with the last being the default mechanism if the parties cannot agree on one of the first two. In maritime boundary disputes,

²⁶ See, e.g., *Arbitral Award made by the King of Spain on December 23, 1906 (Honduras v. Nicaragua)*, ICJ Reports, 1960, p. 192 and *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, ICJ Reports, 1991, p. 53.

²⁷ Note 2, above.

²⁸ The judgment of the Court in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, ICJ Reports, 2012, p. 624, which cites extensively to the jurisprudence of arbitration tribunal on the law of the sea.

²⁹ (1988) 80 *International Law Reports* p. 224.

extensive use has been made of all three and they appear to have co-existed in complete harmony.³⁰

(2) *Investor-State Arbitration*

Until the 1980's when an investor from one State which had invested in the territory of another wished to complain of the treatment of its investment by the host State, it was largely dependent upon the willingness of its own State to take up its case by way of diplomatic protection. The concept of diplomatic protection could include recourse to arbitration and there are numerous instances, particularly in the first half of the nineteenth century, in which States created mixed claims commissions to hear claims brought by one State on behalf of an investor against the other State. While the claim was formally brought by the investor's State of nationality, the practical direction of the claim was sometimes in the hands of the investor itself.³¹

The Iran-United States Claims Tribunal, established by the two States in 1981, to hear cases arising out of the Iranian Revolution of 1979, is an interesting development of this model. The Tribunal was given jurisdiction direct claims by one State against the other but also over claims by nationals of one State against the other State. Most of the claims in the latter category were brought by United States nationals and corporations against Iran. The smaller claims were presented by the United States but the larger claims, e.g., those of the oil companies, were presented by the claimants themselves.³²

The requirement that States espouse the claims of their investors had considerable disadvantages both for the investor and for its State. The notion that investors might bring claims directly against the States in which their investments were located started to appear in BITs as early as the 1950's and was a central feature of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States. But although the Convention was concluded in 1965 and entered into force in 1966, it was not until the 1980's that arbitration of this kind became common.

Although, unlike inter-State cases, arbitrations between investors and States are frequently subject to the law of the State in which the tribunal has its seat,³³ they are nevertheless rooted in international law. The treaty under which the claim is brought constitutes the offer of arbitration by the States parties. That offer is accepted by an investor filing a request for arbitration, thus creating the arbitration agreement.³⁴ Whatever the status of that agreement in

³⁰ See Greenwood, 'Unity and Diversity in International Law' in Andenas (ed) *A Farewell to Fragmentation* (2015), p. 37 at pp. 46-47.

³¹ That was sometimes the case even where the claim was brought in an international court. When Iran nationalized the interest of the Anglo-Iranian Oil Company (the modern-day BP) in 1951, the United Kingdom brought a case against Iran in the International Court of Justice (*Anglo-Iranian Oil Company Case, ICJ Reports, 1952*, p. 93), the company hired Professor Hersch Lauterpacht to prepare a draft memorial for use by the United Kingdom; see E. Lauterpacht, *The Life of Hersch Lauterpacht* (2010), p. 351. Lauterpacht's draft is published in E. Lauterpacht (ed), *Hersch Lauterpacht: International Law Collected Papers*, vol. IV (1978), p. 23.

³² See Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996) and Brower and Brueschke, *The Iran-United States Claims Tribunal* (1998).

³³ Thus, the award of the arbitration tribunal in the *Achmea* case was the subject of a preliminary reference to the Court of Justice of the European Union by the courts of Germany (the seat), as a result of which the award has been annulled; see 181 *International Law Reports* 50 and 175 and the subsequent decision of the German Federal Court of Justice, 31 October 2018, (I ZB 2/15) setting aside the award in light of the ruling of the Court of Justice. ICSID tribunals have no national seat and are not subject to the same degree of control by national courts, Washington Convention, Articles 53 and 54.

³⁴ Paulsson, 'Arbitration without Privity', (1995) 10 ICSID Review – Foreign Investment Law Journal, p. 232.

the eyes of national courts – particularly those of the seat³⁵ – the text of the agreement is provided by the treaty which has to be interpreted and applied in accordance with international law. Moreover, in most such cases the treaty is also the source of the substantive legal standards on which the investor relies.³⁶ Though based on customary international law on the treatment of alien property, the standards laid down in most BITs and multilateral investment treaties are more developed than those of customary international law and offer a greater degree of protection to the investor. Those treaties also tend to be less restrictive than customary international law in permitting claims by shareholders.³⁷

In one important respect, however, investor-State arbitration differs from the inter-State variety. While most inter-State cases are public, investor-State cases are generally confidential with awards published only if the parties agree and pleadings seldom made public. Thus, the Washington Convention and the ICSID Arbitration Rules provide for publication of the Award only if the parties agree,³⁸ although ICSID is authorized to publish “excerpts of the legal reasoning of the Tribunal”.³⁹ Similarly, the 1996 UNCITRAL Rules require the agreement of the Parties before the award can be published.⁴⁰ The 2010 edition of the UNCITRAL Rules modifies this provision by recognizing that there may sometimes be a legal duty of disclosure but does not alter the basic rule that confidentiality is the norm in the absence of agreement.⁴¹

Investor-State arbitration thus has features of both inter-State and commercial proceedings. On the one hand, it resembles inter-State arbitration in that the tribunal’s jurisdiction is rooted in public international law, the substantive law to be applied is generally public international law and the awards of tribunals (when made public) often play an important part in the development of the relevant area of public international law. On the other hand, the general rule of confidentiality applicable in investor-State proceedings and the fact that the courts of the seat exercise a supervisory jurisdiction (except in ICSID cases) and enforcement has to be sought through national courts suggest a closer resemblance to commercial arbitration.

Nevertheless, however one views investor-State arbitration, there can be no doubt that in the last thirty years it has become an important feature of the settlement of disputes in international law and the number of cases is now such that any company contemplating investment abroad and any State accepting inward investment needs to take it into account.

The Challenges to Arbitration

Let us then turn to the challenges which have arisen to the institution of arbitration in public international law. While these have tended to focus on investor-State arbitration, it would be

³⁵ See, e.g., the decision of the Court of Appeal in *Republic of Ecuador v. Occidental Exploration and Production Company (No.1)*, [2005] EWCA Civ. 1116, [2006] QB 432; 138 *International Law Reports* 92. The case concerned an award (138 *International Law Reports* 35) rendered by a tribunal established under the Ecuador United States BIT with its seat in London.

³⁶ See, e.g., Washington Convention, Article 42(1).

³⁷ In *Ahmadou Sadio Diallo (Guinea v. Democratic Republic of the Congo)*, (2007-2012), 166 *International Law Reports* 1, the International Court of Justice admitted that customary international law had not developed as far as the normal standard in BITs in respect of indirect claims.

³⁸ Convention, Article 48(5); Arbitration Rule 48(4).

³⁹ Arbitration Rule 48(4).

⁴⁰ UNCITRAL Rules, 1996, Article 32(5). Hearings are in camera unless both parties agree otherwise; Article 25(4).

⁴¹ UNCITRAL Rules, 2010, Article 34(5).

wrong to view them in isolation from inter-State arbitration as many of those criticisms can be applied to both types of proceedings. There are five main grounds of criticism.

First, both types of arbitration are attacked as infringements of the sovereignty of the State and the right of its government and people to determine the future of that State and the policies which it will follow. This criticism is part of a much wider backlash against globalisation and reflects both a reluctance on the part of some States to subject their decisions to any kind of international scrutiny and a sense on the part of many people that decisions affecting them are increasingly taken by authorities which are remote and unaccountable.

Challenges on this ground are most commonly directed against those decisions which address matters that are seen by many as falling within the domestic jurisdiction of the State. Most commentators and governments can see the need for arbitration – or judicial settlement – where two States fail to agree upon a matter like the land or maritime boundary between them. To assert that the limits of a State’s territory are determined by its constitution or can be modified only by its own legislature may be good political rhetoric and may reflect the position in national law but one only has to consider the situation of a boundary disputed between two States which both make assertions of this kind to realize that it is a logical absurdity. As the statesmen who agreed upon arbitration in the *Alabama* case recognized, if such disputes are not settled by arbitration or adjudication, then they will either be settled by the exercise of power or left to fester and poison relations between the two countries. Challenges to arbitration in cases of this kind usually reflect the views of those who consider that their own State is the more powerful party and can get a better deal by flexing – or using – its muscles than by submitting to the decision of an impartial tribunal.

That is one reason why the ire of the opponents of globalisation is more frequently directed towards investor-State arbitration. It is there that recourse to arbitration has challenged national policy decisions – on resolving an economic and currency crisis or requiring plain packaging for cigarettes on health grounds. Moreover, such cases involve a claim that a foreign investor should receive a level of treatment different from – and usually superior to – that accorded to the nationals of the respondent State. The hostility to such claims is not new. Nearly two hundred years ago Latin American States argued for a “Calvo clause” which insisted that a foreign investor was entitled to equal treatment but no more.

Yet, if it is investor-State arbitration which most frequently attracts this kind of criticism, it is important to remember that numerous inter-State awards, and judgments of the International Court of Justice for that matter, also deal with issues which many people consider are purely national. The judgment of the International Court of Justice in the *Avena* case, which required that the United States should not permit US State authorities to proceed with the execution of Mexican nationals convicted of murder without giving the defendants the opportunity to appeal on the ground that their rights of consular access had not been respected at the time of their arrest⁴² was the subject of intense criticism from those in the United States who saw it as unwarranted interference with the process of criminal justice in their courts.

There is an irony here in that different parts of the system of international adjudication are attacked by very different political groups but on broadly similar grounds. Thus, those – more often found on the left of the political spectrum – attack investor-State arbitration as remote and unaccountable tribunals limiting the economic freedom of action of sovereign States, while lauding the work of human rights courts and tribunals which are attacked by others – generally from the right – on the basis that they are remote and unaccountable tribunals limiting the freedom of the State to determine political, social and moral questions. I cannot help but

⁴² *Avena and Other Mexican Nationals (Mexico v. United States of America)*, ICJ Reports 2004, p. 12.

wonder whether those at the forefront of the attack on investor-State arbitration realize the extent to which the arguments which they deploy are handing valuable weapons to those who attack other parts of the international legal system that the critics of investor-State arbitration wish to promote and defend.

Secondly, arbitration is attacked for its perceived lack of transparency with awards said to emanate from “secret” tribunals of whom the electorate of a State had never heard until they were confronted with large awards of damages which the State’s taxpayers are obliged to meet, even though they may have known nothing of the proceedings and may not even be entitled to see the award. Here, as we have seen, the criticism is rightly directed towards investor-State arbitration, since the awards in inter-State cases are generally public and, increasingly, the pleadings are also in the public domain.

Thirdly, the fact that the parties in arbitration proceedings are largely free to choose the arbitrators who will hear the case has been a subject of criticism, again particularly in investor-State cases where there is resentment that a foreign investor can not only challenge government actions before a tribunal from outside the State, it can pick one of the members of that tribunal and have a considerable say in selecting the chairman as well.

Once again, there is a degree of irony. States which criticise party choice in investment cases have sometimes preferred inter-State arbitration over recourse to the International Court of Justice precisely because the former gives them a greater degree of choice over the membership of the tribunal and very few States have declined to exercise their right to choose an *ad hoc* judge when they are involved in proceedings before the International Court, in spite of pleas from successive presidents of the Court to forego that right.

Moreover, to the extent that criticism of party choice is rooted in concerns that a party-appointed arbitrator will lack impartiality and independence, it is worth considering the substantial number of investor-State awards given unanimously. In addition, in modern times the most egregious case of a party-nominated arbitrator breaking the confidence of the tribunal and communicating with a party representative during the deliberations of the tribunal is an inter-State case.⁴³

Fourthly, the limited scope for the intervention of third parties – whether an international body such as the European Commission or a civil society body – in investor-State cases has recently attracted much criticism. Such limits are said to be a product of the essentially contractual nature of arbitration (reflecting its commercial origins) and are contrasted with the greater openness of *some* national courts to this kind of intervention. In fact the limitations on third party intervention reflect the inter-State origins of investor-State proceedings at least as much as the influence of commercial arbitration. The scope for intervention by a third State in proceedings in the International Court of Justice, for example, is extremely limited⁴⁴ and entities other than States cannot intervene at all.

Fifthly, there is the criticism that proceedings take too long and are too expensive. In that context, it is also suggested that there can be an unfairness stemming from the greater resources which are sometimes opine to one party in an arbitration. There is force in this criticism, though – as I shall try to show – not as much as is sometimes thought but it is noticeable that small States have frequently enjoyed significant victories in international litigation against much large and wealthier opponents and a glance at the legal representatives which they employ

⁴³ *Arbitration between Croatia and Slovenia*, 179 *International Law Reports* 1.

⁴⁴ Articles 62 and 63 of the Statute of the Court have generally been restrictively construed.

suggests that they have managed to deploy substantial resources in both inter-State and investor-State proceedings.

Lastly, investor-State arbitration is frequently challenged on the ground that the legal standards applied – particularly the concepts of indirect expropriation and fair and equitable treatment – are too vague and nebulous, with an uncertainty that has a chilling effect on governmental innovation.

A Response to the Challenges

How then should those of us who believe that international law arbitration has a beneficial effect and is worth preserving respond to these challenges. I believe that the first task is to ensure that we have a sense of proportion in looking at the criticisms which have been made. Neither inter-State nor investor-State arbitration is dying on its feet.

The number of inter-State cases is fewer than it was five years ago but it is hardly surprising that the number varies from year to year, given that there are fewer than two hundred States. What is clear from an examination of the last two decades is that States have far more recourse than they used to do to arbitration as a means of resolving their disputes with one another. Competition between standing international courts and *ad hoc* arbitration has generally been beneficial to all concerned and has not led -as some predicted – one form of dispute settlement rendering the others obsolete.

So far as investor-State arbitration is concerned, the growth in the number of new cases initiated each year may have slowed but is still impressive. The ICSID report for 2018, for example, shows that fifty-six new arbitrations were initiated that year – the largest figure for a single year. While three States (Bolivia, Ecuador and Venezuela) have withdrawn from ICSID in recent years, fourteen others have joined and the total membership (153) includes more than three quarters of the members of the United Nations.

If we are to have a proper sense of proportion, it is necessary to refute those criticisms which are not well-founded. Three of the attacks on investor-State arbitration, in particular, seem to me wholly fallacious. First, the attempts to delegitimise investor-State arbitration as based on some kind of improper pact between wealthy corporations and host State governments which overrides the sovereignty of the State ignores the fact that a pre-requisite for arbitration in almost every case is that the State of the investor and the State receiving the investment have chosen to conclude a treaty determining the nature of the dispute settlement process and the legal standards to be applied. In doing so, each State was exercising its sovereignty in offering guarantees to investors from the other State. I find it difficult to see why that exercise of sovereignty is somehow less legitimate or important than the unilateral exercise of sovereignty by one State in its treatment of a particular investment. Nor is it obvious that a court established by one State has a greater claim to legitimacy than a tribunal established by a treaty entered into by that State with another.

Secondly, the criticism of the standards applied by investor-State arbitration tribunals seems to me to overlook the fact that those standards have been chosen by States over a long period of time. They are not an invention of arbitrators. If the fair and equitable treatment standard is too vague – and I do not accept that it is – then one can only wonder that States continue to make use of it. Moreover, if some of the claims which are made by investors are extreme, it is the treatment of those claims by tribunals which really matters and they are very rarely

accepted. It is rather like the “hot coffee” personal injury claims which attract so much opprobrium in the British press – such claims are hardly ever successful.

Lastly, the criticism that investor-State arbitration accords a foreign investor greater protection in a State than is enjoyed by that State’s own nationals, while superficially attractive, ignores the temptation which any government faces, especially in times of hardship, to shift the burden on to the foreigner in order to boost its position with its own electorate. The foreign investor may need greater protection. But this criticism also overlooks the fact that nothing prevents the State from extending the same treatment to its own investors. Indeed, the enforcement of standards such as fair and equitable treatment are capable of having – in my opinion have had – a beneficial effect in improving standards of governance in many States to the benefit not only of the foreign investor but of all.

A sense of proportion also involves an awareness of the benefits which arbitration has brought. That is why I began by looking at the *Alabama* case, because that is a particularly striking example of an award which had an enormously beneficial effect. Many of the more recent awards – for example in the sphere of maritime boundary delimitation – may turn out to have been similarly beneficial in resolving disputes which could have festered for decades.

In that context, it is always worth recalling that recourse to arbitration (or to an international court) has the valuable effect of isolating a particular dispute from the broader context of relations between the parties. That reduces the leverage which a more powerful party could bring to bear if, for instance, the dispute were left to negotiation between the parties, where the more powerful protagonist can always use its political, economic or even military strength, rather than recourse to third party settlement.

In the field of investor-State disputes, the ability of an investor to have direct recourse to arbitration also has the advantage that the investor’s dispute with the host State can be resolved without dragging in the investor’s own State of nationality, as was required in the customary law of diplomatic protection. The modern world involves vast investments across frontiers. If investors were deprived of direct access to reliable third party settlement, it seems inevitable that more of them would seek the support of their own States, with consequent adverse effects for inter-State relations.

Nevertheless, some of the criticisms which are made of the international arbitral process are well-founded and cannot be ignored. A lecture like this does not afford the scope to offer any comprehensive analysis but it does allow me to make a few modest suggestions. In closing, therefore, let me offer three ideas for reforms of investor-State arbitration which I believe may help to meet those criticisms.

First, while I believe that party choice of arbitrators can be valuable in enhancing confidence in the system of arbitration, it has to be recognized that it also has serious disadvantages. Not surprisingly, each party tries to ensure that it selects someone likely to be favourable to as many of its arguments as possible and then to exercise what influence it can on the selection of a chairman to the same end. In itself that may not be too much of a problem, given that each party gets to pick one arbitrator, provided that the method of choosing the chairman ensures someone of robust independence. Moreover, as I have mentioned, the number of unanimous awards suggests that party choice may have less effect than is often imagined.⁴⁵

However, there is little doubt that the perception of some arbitrators as “claimant oriented” while others are favoured by respondents has harmed public confidence in the system of

⁴⁵ Ironically, party choice seems to have more effect in inter-State proceedings in which it has never been seriously questioned.

investor-State arbitration. Even more damaging may have been the conflict challenges against individual arbitrators. It is obviously important that any system of arbitration has a proper system for ensuring the independence and impartiality of tribunal members and an international system in which arbitrators and parties come from a wide range of different legal traditions has to be particularly robust. Yet it is apparent that challenges are all too frequently used as tactical ploys by parties and that the threat of a challenge is sometimes employed to try to overawe individual arbitrators.

What can be done ? Some have suggested that the answer lies in the creation of a standing court for investment disputes. Such a court would, it is said, not only remove the problem of parties picking and choosing their tribunal, by creating an institution it would also ensure a greater degree of consistency in the interpretation and application of legal standards. Such an idea has its attractions but there are considerable drawbacks. How would the members of the court be appointed and what mechanism would be used for deciding which would sit in any particular case. A politicised system of appointment would undermine confidence and run the risk that the cure turned out to be worse than the disease. Funding such an institution would create problems – especially at a time when States have exhibited a noticeable reluctance to provide sufficient funds for existing international institutions. Moreover, a standing court could replace arbitration only through the amendment of thousands of bilateral investment treaties, a task likely to take decades, even if all States were committed to making such a change which seems unlikely.

My preference, therefore, is for a number of smaller, incremental changes. The first would be a more robust code of ethics which makes clear what activities are compatible with the profession of arbitrator and which addresses the particularly difficult matter of “issue conflicts” in which an arbitrator is challenged in one case over a decision he or she had taken in another proceeding. Another change would be to tighten up the way in which challenges to arbitrators are handled. Is it desirable, for example, that a challenge to one member of a tribunal should be handled by the other members, rather than by an appointing authority or other outside body ? Frivolous, tactical challenges could be penalised by requiring the party which brings them to pay the costs of the challenge. Greater use of the system whereby arbitrators – or at least chairmen – are picked from a list could help to meet the criticism about “claimants” arbitrators” and “respondent’s choices”.

Secondly, there is the question of transparency. I have great sympathy for those who object to proceedings in which a State’s policies are challenged and which may entail payment of vast sums in damages taking place without the public scrutiny to which court proceedings are subject. It is in this presumption of confidentiality, even for awards, that investor-State arbitration most closely resembles commercial arbitration and departs from its origins in inter-State litigation. Yet the issues raised in many, if not most, investor-State cases are far closer to those in inter-State proceedings in that they concern matters of national policy and good governance which should surely be exposed to the gaze and criticism of a State’s electorate.

As we have seen, both the ICSID and UNCITRAL Arbitration Rules have moved in that direction. In the case of ICSID, the current Arbitration Rules permit ICSID to publish excerpts of the legal reasoning of an award even if a party has not consented to full publication.⁴⁶ The current proposals for revision of the Rules go even further,⁴⁷ although amendment of the Washington Convention itself would be required to make publication of awards mandatory if a party did not consent. The 2010 UNCITRAL Rules make more allowance for transparency but they apply only to arbitration agreements concluded after the Rules entered into force. In

⁴⁶ ICSID Arbitration Rule 48(4).

⁴⁷ See ICSID Secretariat, *Proposals for Amendment of the Arbitration Rules*, Working Paper 2.

the context of a case brought under a BIT, this means that if the offer of arbitration is contained in a treaty concluded before 2010, the new rules will not apply unless the parties otherwise agree.⁴⁸

These changes are welcome but in my view do not go far enough. While I accept that some redaction may be necessary for reasons of commercial confidentiality or to protect national security, I believe that awards should be published. I would go farther and suggest that the practice employed by the International Court of Justice whereby pleadings are published on the Court's website – a practice already followed in many inter-State arbitrations – should be emulated in investor-State cases, again subject to provision for redaction where that is truly necessary.

Another aspect of transparency is the ability of non-parties to intervene in some form or other. Limited scope for such intervention already exists in the ICSID Arbitration Rules⁴⁹ but not in many other arbitration rules. In principle, there is much to be said for allowing some interventions. In particular, NAFTA has a valuable provision which permits the States parties to NAFTA which are not party to the proceedings to make submissions regarding the interpretation of NAFTA, a provision which could usefully be extended to other arbitration provisions since in some cases it would assist a tribunal to determine the intentions of the parties to the treaties and to gain a more balanced view of the travaux préparatoires and subsequent practice of the parties, something which is frequently difficult to do unless both States party to the treaty are involved. A proposal to this effect is part of the proposals for revision of the ICSID Rules.⁵⁰

I am more cautious about NGO interventions. In some cases these can be invaluable and they can certainly enhance confidence in the arbitral process by ensuring that the views of interested groups are properly placed before the tribunal. However, the quality of such submissions varies greatly and it is important that they not be allowed to disturb fairness between the parties or lead to greatly increased costs.

That leads me to my last point, the vexed question of the time and expense of proceedings. There is no doubt that both have increased in recent years and that it has become a matter of urgency to tackle the increased delay and expense of arbitral proceedings. The two problems are closely bound up with one another and both are down primarily to the behaviour of parties. In far too many instances, cases are made more complex than they need to be because parties insist upon putting forward argument which are either weak or add nothing to the main line of argument advanced. Rare is the claimant with a claim for unfair and inequitable treatment who does not feel the need to add a claim for indirect expropriation. No matter that the latter rarely succeeds and that it multiplies the number of documents and authorities submitted, increasing the costs of both parties and the length of the award (as well as the length of time taken to produce that award). Nor are respondents free from blame as jurisdictional objections and different lines of defence multiply.

Parties are entitled to demand that cases be conducted economically and efficiently but much of the remedy lies in their own hands. Redfern schedules which run to several hundred pages, the submission of thousands of documents many of which are scarcely mentioned in submissions, multiple authorities supporting the same point, often peripheral to the main issues in the case all lead to longer and more expensive proceedings.

⁴⁸ UNCITRAL Rules, 20109, Article 1(2).

⁴⁹ ICSID Arbitration Rule 37(2). Draft Rule 65 proposes an extension of the scope for non-disputing party intervention.

⁵⁰ Draft Rule 66.

That is not to say that arbitrators are free from all responsibility. We have a duty to conduct proceedings as expeditiously and economically as possible. That may mean banging heads together in case management. It also requires, in my opinion, a far greater use of the power to award costs to penalise a party – even if that party emerges as the victor in the proceedings as a whole – that has engaged in “guerrilla tactics” or unnecessary applications. I am also in favour of using the power to award costs to deter parties from running unnecessary additional arguments. Even if a party is successful on its main case, the fact that it also advanced other lines of argument which were rejected is a factor that should be taken into account. Unfortunately that happens all too seldom, partly because tribunals generally have to deal with costs as their last item of business in the award and do not have the equivalent of a “taxing master” who can review in detail the different elements of each party’s bill of costs.

Conclusion

My answer to the question I posed at the outset – is the age of arbitration in international law drawing to a close – is “no”. But it is not an unqualified “no”. I have tried to show that international arbitration has many achievements to its credit, that it has played an invaluable role in giving teeth to international law standards of fairness, non-discrimination and good governance and that many of the criticisms directed at it are unfair and in some cases wholly unfounded. I have also endeavoured to show that, despite those criticisms, the institution continues to thrive in that there is no diminution in the number of cases. The age of arbitration thus deserves to continue and is capable of continuing. But we would be foolish not to recognize that the institution is increasingly under attack. It can survive but to make sure that it will do so, we need to tackle those criticisms which are well founded and speak out against those which are not. Above all, we need to remind ourselves and others of what the world could look like if effective means of dispute resolution were weakened or removed. The arbitrators in the *Alabama* understood that very well.