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# Trade, Law *and* Development

Vol. 10, No. 1

2018

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## ***Published by***

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

CONFLICT RESOLUTION IN A CHANGING WORLD ORDER

MARIKE R.P. PAULSSON\*

*“Oh! Blessed rage for order, pale Ramon,  
The maker’s rage to order words of the sea,  
Words of the fragrant portals, dimly-starred,  
And of ourselves and of our origins,  
In ghostlier demarcations, keener sounds.”<sup>1</sup>*

*Judge Crawford thus described the rule of law, international law and the world order of our era. In these times of Brexit, ISIS, Nexit, Frexit, and Trump, our world order is in a state of crisis. The world at large has hit the panic button rather than “Keeping Calm and Carrying On”. That panic might lead to a self-fulfilling prophecy with parties moving their conflict resolutions (whether arbitration, conciliation or mediation) elsewhere, but where? Prophecies are already being made about Asia on the rise. Where does Latin America stand in a world that was long dominated by the Old West? A crystal ball could hardly have predicted the Trump and Brexit era that we live in. States attempt to anticipate a future with this newfound reality. Canada is revising the relevance of the WTO when the future of NAFTA is up in the air and Mexico has recently ratified the ICSID Convention: perhaps, on the one hand, to encourage foreign investors to look to Mexico as a thriving place for FDI and, on the other, anticipating collaboration with trading nations without the NAFTA. While the Old West is juggling to grapple with its current reality, Asia continues to be on the rise with its One Belt & One*

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<sup>1</sup> Wallace Stevens, *The Idea of Order at Key West*, in COLLECTED POETRY AND PROSE 105, 105 (1997), cited by James Crawford, Manley O. Hudson Medal Lecture (Mar. 30, 2012).

*Road initiative. In addition, it seems that Brexit has not impacted the attractiveness of London as a primary arbitral seat. The US, however, has many challenges to address. Some of these challenges are related to the Trump administration, like the impact that recent immigration policies will have on the US as a seat. In addition, unrelated to the geopolitical changes, the US courts have increasingly rendered questionable decisions under the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards. The PEMEX decision - enforcing an annulled award - came with harsh criticism leaving appellate judges in Mexico feeling slapped on the fingers. At the same time, the decision jeopardizes the principle of international comity.<sup>2</sup> Perhaps the Trans-Pacific Partnership is dead with the geopolitical developments in the US; perhaps States will look to BITs and regional treaties more than multilateral treaties; and perhaps the future of investor-state dispute settlement will rest on commercial diplomacy, especially with the PR crisis that international arbitration finds itself in.*

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<sup>2</sup> Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PEMEX - Exploraciony Produccion, 38 Y.B. COMM. ARB. 537 (2d Cir. 2016).

## I. INTRODUCTION: THE ORIGINS OF INTERNATIONAL LAW AND THE RISE OF EUROPE AND THE UNITED STATES: THE OLD WESTPHALIA WORLD

“When nation-states around the world signed the New York Convention, 1958, and when after 1958 it was adopted as a UN Convention, old States and newly-formed States acceded to it but one thing that they did not do was to give up State “sovereignty”. This is sometimes known as the Westphalia syndrome. As you all know, the Treaties of Westphalia of the vintage year 1648 ended the 30 years-war in what was then called the Holy Roman Empire and with these treaties began the modern era of nation-states: a new system, the first of its kind – a political order called “Westphalia Sovereignty” based upon the concept of a Sovereign State having a defined territory governed by a sovereign (substituted in modern democracies’ as “the people”) and creating for the first time a prohibition against interference in international affairs in another nation’s domestic business. The Treaty of Westphalia was the first and most important step in the development of international law. It created the basis for national self-determination.”<sup>3</sup>

This is the Westphalia syndrome. When nation-states around the world signed treaties such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1961 European Convention, the Washington Convention and other United Nations conventions, old States and newly-formed States acceded while guarding their ‘sovereignty’. They are like billiard balls; they collide but do not often move in the same direction.<sup>4</sup>

World War-II was followed by a new world order to prevent another war. This new order (that seems to have ceased to exist under the Trump administration)

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<sup>3</sup> Fali S. Nariman, Intervention at the 3<sup>rd</sup> Session at the Conference on “Judicial Dialogue on the New York Convention”: Introduction to the New York Convention – The Convention and Sovereignty (Nov. 23, 2013) (transcript available at [http://www.arbitration-icca.org/media/2/13916005409590/nyc\\_roadshow\\_speech\\_23rd\\_nov\\_nariman.pdf](http://www.arbitration-icca.org/media/2/13916005409590/nyc_roadshow_speech_23rd_nov_nariman.pdf)) hereinafter “*Fali S. Nariman’s Intervention*”].

<sup>4</sup> INT’L COUNCIL COMM. ARB., Rapporteur’s Report: *Judicial Dialogue on the New York Convention* (Nov. 23, 2013), [http://www.arbitration-icca.org/media/2/13915957715800/icca\\_roadshow\\_report\\_india.pdf](http://www.arbitration-icca.org/media/2/13915957715800/icca_roadshow_report_india.pdf). [hereinafter “*Roadshow Report*”].

was called the *Pax Americana*,<sup>5</sup> and was one dominated by the United States. The necessary question often posed in the era of Trump and Brexit is regarding the current relevance of the *Pax Americana*: does it still exist and if not, how has the world order been reshaped?

In the world of international arbitration, the role of the International Chamber of Commerce (the ICC) and its Court of Arbitration was similarly redefined after World War-II. If the international community saw profit in peaceful commerce, it would be less likely to disrupt it by fighting wars. This thought arose post the devastation of World War I.<sup>6</sup> The ICC was created in its immediate aftermath. One of the first organs of the ICC was its Court of Arbitration and one of the first missions of that Court was to enlist the support of national courts so that the international arbitral process could be integrated into a system of compliance effective across borders. The same impulses came to the fore, a generation later, after the ravages of World War-II. Yet, the world emerging from its ruins was remarkably different, notably due to the global phenomenon of decolonization. Relations among national systems were no longer the exclusive preserve of a handful of industrialized countries.<sup>7</sup>

In international arbitration, a phenomenon has been observed - perhaps parallel to the *Pax Americana* - that developed over the last decade, which has been addressed by the ICC and the international community: the Americanization of International Arbitration. We are now seeing a new development: the Latinization of International Arbitration. Is there a parallel between the Old Westphalia and the Americanization of International Arbitration on the one hand, and Brexit, the Trump administration, the rise of multiple seats, the P.R. arbitration crisis and the sovereign attack on investor-state dispute settlement (ISDS) on the other? Are the geopolitical developments influencing or causing the developments in international arbitration? With arbitration facing its own P.R. crisis, are we gearing up for a disposal of party autonomy and an increase in institutional regulation? Do we need institutional regulation for third-party funding for arbitrator appointments and emergency arbitrations and, in a broader sense, for transparency in arbitration? Or are we replacing arbitration with mediation for investor-state disputes and commercial diplomacy?

Treaties ought to continue to shape the international world order: it is how nations co-exist and how nations are willing to sacrifice some of their sovereignty. Judicial

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<sup>5</sup> On the history of treaties and the effect the world order has on treaty interpretation, see generally, RICHARD K. GARDINER, *TREATY INTERPRETATION* 127 (2d ed., 2008).

<sup>6</sup> See GEORGE L. RIDGWAY, *MERCHANTS OF PEACE: 20 YEARS OF BUSINESS DIPLOMACY THROUGH THE INTERNATIONAL CHAMBER OF COMMERCE* (1958).

<sup>7</sup> MARIKE PAULSSON, *THE 1958 NEW YORK CONVENTION IN ACTION* 3-4 (2016).

decisions such as *PEMEX* violate international comity. The international community grapples with the shift in the post World War-II world order and geopolitical developments in the West. Several Latin American States are complicit in the denial of justice and denunciations of bilateral investment treaties (BITs) and the International Centre for Settlement of Investment Disputes (ICSID) Convention. At the same time, Asia is emerging strong with its Belt and Road initiative. Whatever the geopolitical developments, a world order still exists by the rule of law that enables States and investors to address the denial of justice.

During the discussions led by thought leaders in international law and dispute resolution and former and future heads of State at the conferences organized by the Global Legal Institute for Peace and Conflict Resolution (GLIP),<sup>8</sup> a need was addressed for organizations such as the United Nations (U.N.) and its trade branch along with the ICC and the GLIP to play a role in revisiting the legal world order post Trump. It was suggested that like at the United Nations Commission on International Trade Law (UNCITRAL), the United Nations Economic and Social Council (ECOSOC) and U.N. Women, which addresses the challenges of diversity, committees could be considered, along with task forces and working groups to redefine the idea of conflict resolution in international trade, a response to the shift of the *Pax Americana* and the World Compact<sup>9</sup>. Pieter Sanders, Holtzman, Robert and Holleaux in a sense created international arbitration and conciliation as we know it today. We are now at a pivotal crossroads where our community must do this again.

## II. THE DEMISE OF THE WESTPHALIA AND DENIAL OF JUSTICE IN REGIONS SUCH AS LATIN AMERICA: THE ORIGIN, PAST AND PRESENT OF TREATIES SUCH AS THE 1958 NEW YORK CONVENTION

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<sup>8</sup> Erika Yamamoto, *Centro de Resolução de Conflitos realiza conferência sobre paz e arbitragem*, JORNAL DA USP (Oct. 26, 2017), available at <http://jornal.usp.br/institucional/centro-de-resolucao-de-conflitos-da-usp-realiza-conferencia-sobre-paz-e-arbitragem/>.

<sup>9</sup> I use the phrase “World Compact” to refer to the world order the way it was organized post World War –II with the establishment of the United Nations. In a related yet different sense, Prof. Reisman used the phrase “Great Compact” as “the foundational arrangement that underscores the contemporary international investment system, whereby traditionally powerful investor States waived the deployment of their superior powers to protect their investors in return for host States agreeing to submit disputes to international arbitration”. Alison Ross, *The End of the “Great Compact”? Reisman Declares Investment Law at a Crossroads*, GLOBAL ARB. REV. (Feb. 16, 2017), available at <https://globalarbitrationreview.com/article/1081449/the-end-of-the-great-compact%E2%80%9D-reisman-declares-investment-law-at-a-crossroads>.

The most important treaty in the instance of international trade is claimed to be the 1958 New York Convention. The treaty was drafted in 1958 at the United Nations headquarters in New York. Its text is based on what is called The Dutch Proposal by Pieter Sanders.<sup>10</sup> The treaty replaced the 1923 and the 1927 Geneva Conventions and the proposal for that replacement was put forth by the ICC in 1951 and 1953 through its representative Haight.<sup>11</sup> Thus, its push came from the ICC in Paris and the European business community, making it clear that the New York Convention comes from the old Westphalia. While Brexit and the current Trump administration mark the demise of the old Westphalia, Latin America is marked by its own old and new trends. Certain nations in this region defy international law by denouncing BITs, the ICSID Convention, and commit denial of justice by not enforcing binding arbitral awards or not complying with obligations under multilateral treaties. The biggest challenge for international law and conflict resolution systems to flourish in certain Latin American States is corruption and governments and heads of States who have little respect for the international rule of law: it is here where the billiard balls collide often. This comparison was made by Fali Nariman - former president of the International Council of Commercial Arbitration (ICCA) - on the occasion of the Judicial Dialogue on the 1958 New York Convention in New Delhi in 2013.<sup>12</sup>

The real problem with an international court of arbitration was, and still is, that it is a creature of independent sovereign states, and independent sovereign States act too often like billiard balls which collide and do not co-operate. In his foreword to a book published to commemorate the 50th anniversary of the International Court of Justice (ICJ), which is the world's highest but least powerful Court, its then President bemoaned the judicial body's inherent infirmities. "This institution," wrote Judge Bedjaoui, "carries a genetic heritage rendered vulnerable by the chromosomes of state sovereignty and therefore by its very nature seldom spared by the crises, commotions and maladies which affect inter-state relations."<sup>13</sup>

The development of international arbitration and the judicial practice of enforcing foreign arbitral awards have evolved beyond the West and have taken root in other regions like Latin America. The good, the bad and the ugly? The unhappy few? Or a pattern of States willingly engaging in business with investors but less willingly arbitrating when disputes arise and not willingly complying with internationally acceptable and binding awards? States avoid enforcement by setting aside awards rendered against their entities or organs (Mexico), renounce BITs when faced with

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<sup>10</sup> PAULSSON, *supra* note 7, at 6.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Roadshow Report*, *supra* note 4.

<sup>13</sup> Judge Mohammed Bedjaoui, *Foreword* to EYFFINGER ARTHUR, *THE INTERNATIONAL COURT OF JUSTICE, 1946-1996* (1996); *See also Fali S. Nariman's Intervention*, *supra* note 3.



asset freezing or withdrawing from the ICSID Convention (Venezuela) or engage in acts of denial of justice vis-à-vis foreign investors (Uruguay and Ecuador). Finally, the implementation and application of the 1958 New York Convention is still developing in Latin America with only a few cases having been reported in the official sources and most of them from Brazil and Mexico only.<sup>14</sup> States -- having lost an arbitration -- can attempt to invoke immunity of jurisdiction and execution or rely on their sovereign 'right' when the successful party in an arbitration requests another State -- its courts --to grant the enforcement title under the Convention. Even if an immunity defence would not have been invoked, is there no peril in dealing with States? Two salient issues have surfaced under the application of the New York Convention: first, States having lost an arbitration will attempt to defy the rule of law by using other channels to exert pressure when faced with an arbitral procedure or enforcement of an award.<sup>15</sup> Second, which is a major cause for concern as far as a successful application of the Convention is concerned, is that State courts of the country where enforcement is sought have been, at times, are reluctant to grant the request for the enforcement of an award that was rendered against a State. This might be out of notions of international comity; or a hesitance to perform an act that might be one for the executive rather than for the judiciary; or for fear of political or diplomatic backlash.<sup>16</sup>

Courts and tribunals in Latin America and beyond ought to rethink their role and define their mandate in changing times towards a new world order, a re-shifting of powers. Actors and influencers in international law should hold sovereigns accountable and persuade them to be mindful of obligations entered into under international instruments such as bilateral and multilateral treaties. State responsibility means that valid arbitration agreements ought to be recognized and binding awards enforced. Antics such as denouncing BITs and the ICSID Convention, relying on a reversed notion of international comity or possibly pressuring courts into stopping enforcement, might destroy trust in the system of international arbitration, international law and the rule of law. It is then that one does well to remember:

“International law has not achieved much but it is good that it is there.”<sup>17</sup>

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<sup>14</sup> Marike Paulsson, *Arbitrating and Enforcing Against States in Latin America: An Agreement Without Strings Attached: Imposing Parochial Notions of the Sovereign*, ABA SECTION OF INT'L L. 2016 AMERICAS FORUM, available at <https://shop.americanbar.org/PersonifyImages/ProductFiles/224877654/Session2.pdf>.

<sup>15</sup> *Id.*

<sup>16</sup> Paulsson, *supra* note 14.

<sup>17</sup> *Fali S. Nariman's Intervention*, *supra* note 3.

International law has perhaps not achieved much of its goal of full-fledged implementation of the rule of law. Its flaws are a result of human nature and the propensity of some to revert to corruption, abuse and bias. It is man-made, but we certainly have come a long way. What is pivotal for international law to both flourish globally and be preserved in the United States, is a shift from democracy and distrust<sup>18</sup> to *trias politica* as it was intended to be.

One must continue that journey to aim for the full implementation of international rule of law in the new world order by tackling the challenges that the shifting world order has presented and by bringing up the courage to design conflict resolution methods as was done back in the days of the Man of la Mancha.

### III. GEOPOLITICAL WAVES COINCIDING WITH THE P.R. CRISIS IN INTERNATIONAL ARBITRATION?

The movements that led to Brexit were driven by geopolitical factors, mainly immigration and a populist push against a liberal immigration policy. One may readily presume that the majority of voters were drawn to Trump either because of a faint hope that daily life would improve with respect to matters such as health insurance (*quod non*) or, far worse, xenophobia-driven motivations. Whatever moves the current Trump administration, one only knows by following a Twitter feed. One can't say whether the decisions of the administration are based on idealistic factors leading to pushback on immigration or if they are in the nature of an uneducated stab at trade treaties based on the idea that limiting those trade agreements would lead to more employment domestically. Dealing with the crisis of international arbitration and the sixty-year-old New York Convention comes, perhaps unrelated, at the same time.

As several recent examples demonstrate, scandals and corruption are nothing new in the arena of international arbitration. On July 23, 2015, Global Arbitration Review reported about cyber security and confidentiality breaches experienced by the Permanent Court of Arbitration (PCA).<sup>19</sup> At a confidential hearing about a border dispute between China and the Philippines in a PCA-administered arbitration, the PCA's website was hacked by China's Cyber Espionage Unit.

One judge of the ICJ, Jernej Sekolec, who sat as an arbitrator in a dispute between Slovenia and Croatia (also a PCA-administered arbitration), jeopardized the effective resolution of the arbitration by having an *ex parte* communication with a Slovenian government official (Slovenia had appointed him as arbitrator) wherein

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<sup>18</sup> A phrase coined by University of Miami School of Law's John Hart Ely, *see generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* (2002).

<sup>19</sup> Alison Ross, *Cybersecurity and Confidentiality Shocks for the PCA*, *GLOBAL ARB. REV.* (July 23, 2015), available at <https://globalarbitrationreview.com/article/1034637/cybersecurity-and-confidentiality-shocks-for-the-pca>.

he informed that official of the case's possible outcome. That communication was subsequently exposed through phone-tapping which some politicians and commentators believe was conducted by the Croatian intelligence services.

But scandals and corruption are not just found in international courts. Domestic courts also have to deal with fraud and corruption in international arbitration matters. Bernard Tapie, a French billionaire, actor, and minister under Mitterrand, filed a claim for over a billion euros against the French bank *Crédit Lyonnais* and secured a 403-million-euro arbitration award in 2008. The controversy began with Tapie suing *Crédit Lyonnais* for withholding information on the sale of the German sportswear brand *Adidas* in which Tapie had purchased a majority stake. The award became mired in controversy when the socialist government that followed former French president Sarkozy's administration alleged that the arbitration had been corrupted in Tapie's favour because of his support for Sarkozy's presidential campaign. The Court of Appeal of Paris vacated the award on the grounds that it was tainted by fraud.<sup>20</sup> And so, international arbitration finds itself faced with a P.R. crisis.

#### IV. RESOLVING THE EFFECTS OF GEOPOLITICAL WAVES WHILE SIMULTANEOUSLY ADDRESSING INTERNATIONAL ARBITRATION'S P.R. CRISIS

At the London Court of International Arbitration Centenary Conference in London (in 1995) some old stalwarts – Judge Howard Holtzman and Judge Stephen Schwebel (then a Sitting Judge of the ICJ) envisaged the prospect of a new international Court for resolving disputes in the 21st century. But these worthy gentlemen being experienced Arbitrators and men of the world also recognized that setting up an International Court of Arbitration would be tilting at the windmills of national sovereignty.<sup>21</sup>

Judge Schwebel recalled the theme of a song of a popular film at the time “the Man of La Mancha” where the principal character Don Quixote, who is a dreamer – always dreamed, “the impossible dream”. An International Court of Arbitration,

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<sup>20</sup> *Bernard Tapie Loses Final Appeal in 404m-euro Adidas Case*, BBC NEWS (May 18, 2017), available at <https://www.bbc.com/news/amp/world-europe-39963766#ampshare>.

<sup>21</sup> Howard Holtzman, *A Task for the 21<sup>st</sup> Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*, in MARTIN HUNTER ET AL., *THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE* (1995); Stephen Schwebel, *The Creation and Operation of an International Court of Arbitral Awards*, in MARTIN HUNTER ET AL., *THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE* (1995).

Schwebel said, was like an impossible dream.<sup>22</sup> Is it still? The proposed permanent investment arbitration court in the EU-Canada Comprehensive and Economic Trade Agreement (CETA) seems to be that impossible dream of the Man of La Mancha, or even worse, a deception. Article 8.29 of the CETA provides that the Contracting States to the treaty shall establish a multilateral investment tribunal. On the basis of Article 8.27 the CETA Joint Committee shall appoint fifteen members to the tribunal.<sup>23</sup> Yet, they remain sovereign appointments.

By now, the 1958 New York Convention is one of the most successful treaties in the history of international trade. It is a multilateral treaty ratified by 157 States. Its application by national courts is still deemed better than having one international permanent court review all enforcement requests. And with that such a court is indeed an impossible dream. At the same time, with globalization, the worldwide application of the New York Convention - and its inherent local legal culture clashes injected in its treaty by its public policy provisions - has become a hazard. And these hazards are trumped by the hazards in international arbitration that were part of the intrinsic idea of arbitration: a self-regulated idea of dispute resolution based on party autonomy: with that the system of arbitrator appointments is driven by parties with a near complete lack of institutional or sovereign regulation. How to resolve them, then?

#### *A. Specialized Courts and the Role of the National Courts in Curing Arbitration*

I propose to steer away from the inward-looking approach that is too often seen in the world of international arbitration. The role of the courts is crucial: who should cure or protect the system: the institutions, the judiciary or both? Judges in most jurisdictions are mindful of the autonomy of will when faced with the mandate to protect the system of arbitration and serve as a safety net.

These courts are to protect the rule of law, the international rule of law; they are to protect and promote international arbitration and with that international trade. Specialized courts in Panama, Switzerland, Miami and Brazil are the answer to Schwebel's impossible dream: they might be the future of the New York Convention.

The role of the courts in the United States has been circumscribed by the legislator and the Supreme Court and with that judges in the United States will favour

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<sup>22</sup> *Fali S. Nariman's Intervention*, *supra* note 3.

<sup>23</sup> *CETA Chapter by Chapter*, EUR. COMM'N, <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> (last visited Mar. 15, 2018).

arbitration: there is not only a bias; there is a presumption that judges should let arbitration be.<sup>24</sup>

Judges will not presume to ‘know better’; they will not serve as an appeal court. Only if there is a fundamental notion of procedural public policy at stake should the judiciary intervene. “Unless we are asked, we will not intervene.”<sup>25</sup> There has to be a specific request from the parties and intervention is only warranted in case of flagrant violations of due process. As for the federal perspective, the Honorable Judge Jordan (11<sup>th</sup> Judicial Circuit, Florida) agreed: “Let arbitrators do what they are supposed to do”.<sup>26</sup> The rule of thumb is that judges are “not there to grade papers: if there is any bias, there is a judicial bias in that judges expect arbitrators to do what they must do”.<sup>27</sup> International arbitration perhaps thrives under the protection of national courts and national laws. As Pieter Sanders remarked:

“Falling back on national arbitration laws apparently cannot be avoided. I compare international arbitration with a young bird. It rises up in the air, but from time to time it falls back on its nest.”<sup>28</sup> In my opinion this still applies today.

Popular jurisdictions such as Switzerland and Miami have recently established specialized arbitration courts. The Miami courts act as the guardians of ethics in international arbitration. International arbitration between investors and certain Latin American countries often involves far more scandals than we see in Europe. In anticipation of these coming challenges, Miami has reorganized its judicial infrastructure. The Miami-Dade County’s International Commercial Arbitration (ICA) subsection will begin as a subsection of the Complex Business Litigation Division of the 11th Judicial Circuit. The ICA Subsection will handle all arbitration cases that are filed under the Florida Statute on International Commercial Arbitration as well as those that fall under the Federal Arbitration Act.

It is clear that national courts will have a pivotal role to play in the enforcement of international arbitration. And if the Tapie and Sekolec events teach us anything it is that a strong judiciary is critical to keeping fraudulent, unethical, and scandalous arbitral incidents at bay.

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<sup>24</sup> See, e.g., *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639-40 (1985).

<sup>25</sup> *ICC YAF: Close Friends or Forbidden Friends?*, ICC YAF YOUNG ARBITRATORS FORUM (Mar. 4, 2016), <https://iccyafnorthamerica.wordpress.com/2016/03/04/icc-yaf-close-friends-or-forbidden-friends/> [hereinafter “*Close Friends or Forbidden Friends*”].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Piet Sanders, *The Making of the Convention*, in U.N., ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION, EXPERIENCE AND PROSPECTS 4 (1999).

*B. Accountability of Arbitrators and Increasing Transparency in International Arbitration: Education, Mentoring, Training and Diversification of the Arbitrator Pool and Arbitral Institutions*

Over the past twenty years, conflicts of interest have grown exponentially as have complaints about them. But is this problem one that can be solved by regulation or self-regulation?

Addressing the International Federation of Commercial Arbitration Institutions (IFCAI) conference in Manama in 2015, the CEO of Bahrain's international arbitration institution, the Bahrain Chamber for Dispute Resolution (BCDR-AAA), Nassib Ziadé argued forcefully that to maintain their legitimacy in the eyes of users, arbitral institutions need to 'step up' and take on the responsibility of regulating potential conflicts of interest among arbitrators and counsel.<sup>29</sup> Ziadé has for long been a proponent of broadening the pool of arbitrators, increasing diversity, abolishing the system of so-called 'double-hatting' all in order to prevent that crisis in international arbitration. The proposals of Ziadé are built on increased regulation by institutions, which would reduce the primacy of party autonomy, one of the pillars of international arbitration. He also proposes to increase arbitrator disclosures of any possible conflict and he proposes for investment arbitrators to take off their counsel hat. In addition, it is claimed that a broadening of the arbitrator pool would reduce the number of conflicts. The arguments against these proposals are driven by some of the key elements of arbitration: party autonomy, confidentiality and the liberty of parties to appoint 'their' arbitrator. Overregulating the system of arbitration would lead to the inevitable question: who polices the police? How is one to place trust in arbitral institutions that are being assigned the daunting task of overseeing arbitrator selection and conduct? For arbitrators and institutions to be more transparent, one must immediately address how that would affect the fact that many arbitrations are confidential. The latter is one of the important advantages of commercial arbitration. It is true that many arbitrators who are part of the elite pool of arbitrators get repeat appointments which would lead to an inherent bias in favour of the party that had appointed that arbitrator. A small elite pool of arbitrators naturally leads to more conflicts. However, the truth behind arbitrators being appointed is that users want to win cases and want to appoint known and experienced arbitrators with a track record. They would not appoint a younger female arbitrator because it would be the right thing to do. Institutions can increase diversity in their lists and they can make suggestions, but the parties choose the arbitrator. It is the premise of party autonomy, an almost

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<sup>29</sup> Douglas Thomson, *Conflict over Conflicts in Bahrain*, GLOBAL ARB. REV. (Mar. 25, 2017), available at <https://globalarbitrationreview.com/article/1034326/conflict-over-conflicts-in-bahrain>.

fundamental right that parties will not be willing to give up. To replace the party appointed arbitrator with an institutionally appointed arbitrator would be better perhaps from a policy perspective but it still begs the question: who is going to police the police? The legitimacy of arbitral institutions is perhaps enhanced by increased transparency. It would surely shine a light on costs. However, taking away the right of parties to appoint an arbitrator will be received with resistance. Many institutions are reluctant to embark upon Ziadé's path for fear of antagonizing users.

However, by not taking this risk, in the long run they take the far greater risk of losing some of their users and their legitimacy and becoming irrelevant in the process of change.<sup>30</sup>

The answers to most of these challenges in arbitration would, over the long term, be education, mentoring and training. Courses on ethics ought to be mandatory, and yet, at the same time, a new generation of arbitrators ought to internalize an idea of ethics organically.

The Honourable Joseph Farina, the former Chief Judge (11th Judicial Circuit, Florida) raised a valid point of criticism as to why there is a fear of disclosing conflicts when in doubt. If the pool of arbitrators is to be broadened and to become more diverse, training should first and foremost focus on an inherent 'judicial hunch' to apply judgment when being presented with the request to disclose any conflicts, to which I would add the mantra: "You can only lose your reputation once: when in doubt, disclose".<sup>31</sup>

In sum, the international community and its key players ought to collaborate in working towards a cure for the latent defects of arbitration. Whether it is an increased level of transparency, education or a broadening of the arbitrator pool, the legitimacy of arbitration and the continued use of international arbitration as a preferred method of dispute resolution will largely depend on the proper conduct of counsel, due process, and the fair judgment of tribunals.

## V. RELEVANCE OF AND RELEVANCE TO THE WTO

Whether it be arbitration tribunals or the WTO, all institutions of dispute resolution will have to re-calibrate themselves with modern challenges. The current and future generation of practitioners must understand the latent and patent differences amongst the several institutions and yet, learn how lessons from one can be moulded to make the other better.

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<sup>30</sup> *Id.*

<sup>31</sup> *Close Friends or Forbidden Friends*, *supra* note 25.

For instance, an impetuous decision to transplant the WTO DSU regime to international commercial or investment arbitration will definitely have dire consequences, just as doing the reverse will. Party autonomy and arbitrator challenges is the norm in one, while standing bodies with members nominated by States is the rule in the other. BITs are open to all who satisfy certain conditions. On the other hand, only States can bring disputes in the WTO. This is just the tip of the iceberg of the numerous differences between the two regimes.

Recent past has seen several attempts nudging for a full-scale transplant of a WTO-like regime to ISDS. A regime where States control the composition, remuneration and tenure of tribunals. Whether this is a reaction underscoring attaining the noble objective of public welfare or one premised on a narrow approach to sovereignty, what it is effectively doing is making investors nervous (in an already snow-balling disquietude in transnational diplomatic relations).

One might argue that these investors already have cause to be nervous: awards are being subject to set-aside proceedings, in a manner that was unforeseen by the drafters of the New York Convention<sup>32</sup>; States are rampantly withdrawing from bilateral treaties and multilateral institutions<sup>33</sup>; and enforcement is being thwarted by clever tactics<sup>34</sup>.

The antithesis, the WTO, comes with its own can of worms. The C4 initiative, shepherded by developing countries, has been pending for over a decade<sup>35</sup>; there have been claims of undue interference with sovereign policy<sup>36</sup>; Havana Club has

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<sup>32</sup> For example, see M. Paulsson, *The 1958 New York Convention in Action* 194 (2016) *et seq* on Article V(1)(e).

<sup>33</sup> As explored in detail above in Part II.

<sup>34</sup> A classic example being the inauguration of the Russian cathedral in the shadow of Yukos enforcement. For more, see Douglas Thomson, *Yukos Shareholders Give Up on Enforcement in France*, GLOBAL ARB. REV. (Oct. 10, 2017), available at <https://globalarbitrationreview.com/article/1148728/yukos-shareholders-give-up-on-enforcement-in-france>; Tom Jones, *Yukos Shareholder Abandons Cathedral Crusade*, GLOBAL ARB. REV. (Oct. 6, 2016), available at <https://globalarbitrationreview.com/article/1069023/yukos-shareholder-abandons-cathedral-crusade>.

<sup>35</sup> Press Release, C4, Trade Negotiations on Cotton (Dec. 26, 2015), available at [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/cpressnegotcottonngomc10171215\\_e.pdf](https://www.wto.org/english/thewto_e/minist_e/mc10_e/cpressnegotcottonngomc10171215_e.pdf).

<sup>36</sup> For an illustration exploring this assertion, see Allison Areias, *The GATT: Tuna, Dolphins, Diapers and You*, 16(2) ENVIRONS (1992), <https://environs.law.ucdavis.edu/volumes/16/2/articles/areias.pdf>.



shown us enforcement remains a power-oriented geopolitical spar<sup>37</sup>; and finally, the appointment of Appellate Body members has become the playground for politicians<sup>38</sup>.

An umpire's appointment (regardless of the nature of the metaphorical stadium) always seems to have sprinkles of political flavour. Nevertheless, going with the premise that a dispute settlement body (whether it be a private arbitral tribunal or the Panel and Appellate Body at the WTO) is truly neutral and has truly tendered justice to the parties, when it comes to finality and compliance, in both mechanisms (WTO and private arbitration), there are excuses to execution. Whether these excuses stem from a tactical rule-oriented approach of the losing party or a strategical power-oriented one, the legitimacy of both institutions is under siege. A mindless transplant is surely a surgical disaster. Recalibration rooted in the needs of all stakeholders – and egalitarian and justice-centric means and ends -- will be crucial if these frameworks seek to maintain the sovereign compromises our forefathers originally intended.

Discussing the future of these parallel dispute resolution systems will be incomplete without mentioning the possibility of an abuse of process that overlapping jurisdictions could cause. With an eye on the horizon, it will be key that adjudicating authorities -- arbitrators, panel and appellate body members, judges -- respect comity in case of parallel proceedings. These authorities -- whether national or transnational -- should keep their eyes open for claims that are disguised or could potentially ripen into an abuse of process.

In light of the geopolitical waves, the changing dynamics and the vigorous crashing of sovereignty, it is only international fora that remain the thread that holds together the rule of law. By whatever name the forum goes, that should be understood by the decision makers, the institutions and the corresponding practitioners.

## **VI. CONCLUSION: THE FUTURE OF TRADE AGREEMENTS, INTERNATIONAL ARBITRATION, THE NEW YORK CONVENTION POST TRUMP: THE POST WESTPHALIAN WORLD ON THE RISE: THE PAST, PRESENT & FUTURE**

### *A. The Future of International Arbitration and a New World Order*

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<sup>37</sup> See Matthew Kennedy, *Enforcing the WTO Rulings on Trade Marks and Trade Names in Havana Club*, 5(4) *QUEEN MARY J. INTELL. PROP.* 430 (2015).

<sup>38</sup> For more on Prof. Chang's appointment and how the legitimacy of the WTO is affected, see Arman Sarvarian & Filippo Fontanelli, *The USA and Reappointment at the WTO: A Legitimacy Crisis*, *EJIL:TALK!* (May 27, 2016), available at <https://www.ejiltalk.org/the-usa-and-re-appointment-at-the-wto-a-legitimacy-crisis/>.

I mentioned the upcoming new world order. I mentioned a movement from the old Westphalia to the *Pax Americana* and Americanization of international law to a possible future of *Latinization* and a shift to other regions: Asia and beyond. Until recently, treaties shaped the international world order: it is how nations co-exist and how nations are willing to sacrifice some of their sovereignty. Sovereigns do not protect the free world by unscripted phone calls or tweets with a 'hashtag #'. The leader of the free world has caused fear to ripple through the strongest nation of the U.N., a fear that we have not experienced in the Westphalia world since World War II. We need a strong response to that fear and the pending denial of justice, defiance of international rule of law and improper use of sovereign power, and we can no longer rely on the strong European nations of 1958 to do so.

*B. Resolutions for the Flourishing of International Law in a New World Order*

Courts and tribunals ought to rethink their role and define their mandate in changing times towards a new world order, a re-shifting of powers. Actors and influencers in international law should hold sovereigns accountable and persuade them to be mindful of obligations entered into under international instruments such as bilateral and multilateral treaties. State responsibility means that valid arbitration agreements ought to be recognized and binding awards enforced. Antics such as denouncing BITs and the ICSID Convention, relying on a reversed notion of international comity or possibly pressuring courts into stopping enforcement must be met with resistance. The aforementioned actions might destroy trust in the system of international arbitration, international law and the rule of law. Stakeholders would do well to revisit the idea of investor-state dispute resolution as it is under fire in both the US and Europe. The old Westphalia's governments and its citizens have voiced their criticism. International arbitration as it exists will soon be subjected to a total make-over. The idea of arbitrator appointments and institutional regulation is being revisited which will result in revisiting the original idea of party autonomy, once the main pillar of international arbitration.

Lack of transparency, corruption, bias, costs and inefficiency have pushed users and the international arbitration community to attack the core of international arbitration. Although there is resistance to institutional regulation of the arbitral process and the idea of institutional appointment of arbitrators, not only the objections raised by users but also policy driven factors such as a push for diversity have exposed the P.R. crisis of international arbitration. Pieter Sanders, in an interview in 2010, predicted that the rise of new countries participating in international trade and arbitration and the rise of new seats and institutions would

create problems.<sup>39</sup> Yet, diversification has been embraced at the same time. Pieter Sanders also predicted in 2010 that mediation would be the future.<sup>40</sup> I dare to go a step further: commercial diplomacy. States being involved in international trade preferred international arbitration as a method for dispute resolution for many reasons but one of them was the discreetness of the process. It is a pillar that is being torn apart with the push for transparency. Commercial diplomacy is still a method marked by discreet settlement negotiations that enable States and investors to resolve disputes without destroying an existing relationship. International law perhaps has not achieved much, but as Fali S. Nariman said, “it is good that it is there”.<sup>41</sup> It is in this spirit that perhaps the below listed resolutions would provide guidance or at least encouragement for nations and key stakeholders to reshape the pending and changing world order:

1. Drafting, replacing and revisiting of treaties such as the New York Convention, the CETA and the NAFTA by the proper stakeholders and experts.
2. Preparations by the key stake holders in international law and arbitration to hold a dialogue with the judiciary and policymakers for proper application of the 1958 New York Convention and other treaties such as the NAFTA, the Panama Convention and the CETA. Increasing the judicial dialogues and developing dialogues with policymakers in order to address the cross-over from the old Westphalia to a new world order.
3. Supplementary Commentary for the most important treaty in international trade: the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
4. Addressing a new arbitral global system with institutions on the rise in Asia and Latin America and moving towards harmonization of global regulation of institutional arbitration.
5. Promoting mediation and commercial diplomacy as alternative means of resolving disputes in international trade and using commercial diplomacy as a soft tool in settling disputes and renegotiation of treaties by sovereigns.
6. Developing model clauses for amicable settlement in private contracts and BITs.
7. Collaboration of institutions to help States implement and apply treaties properly.
8. Creating specialized courts, efficient dockets, and having trained judges with pro-enforcement and pro-arbitration attitude.

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<sup>39</sup> *Pieter Sanders Collection*, INT’L COUNCIL COMM. ARB., available at <http://www.arbitration-icca.org/historic-treasures/profsanders.html> (last visited Mar. 16, 2018).

<sup>40</sup> *Id.*

<sup>41</sup> *Fali S. Nariman’s Intervention*, *supra* note 3.

9. Enforcing arbitration and other dispute resolution agreements in a manner consistent with the needs and practice of international trade.
10. Overcoming geopolitically driven developments and the resurrection of sovereignty and nationalism by persuading States of there being a renewed self-interest in complying with international law.