

INVESTMENT ARBITRATION: A WILDERNESS OF SINGLE INSTANCES?¹

*Group Discussion*²

Judge Charles N Brower, Iran-United States Claims Tribunal, asked whether it was implicit in the comments of Professor Orrego-Vicuña that national judicial systems are prisons or zoos, not wildernesses, and that we do not wish to wind up like states with their national judicial systems.

Professor Orrego-Vicuña replied that this was precisely so, from the point of view that domestically the judiciary plays a role as well as arbitration, with arbitration frequently preferred because of its departure from formal judicial procedure. In international law, we have seen a rapid growth of arbitration, but also a tendency towards judicialization, in part caused by the arguments of counsel inspired by domestic litigation, some of which slow down the process and restrict the freedom of arbitrators to decide the case and command justice.

Lord Mustill, Essex Court Chambers, argued that Professor Orrego-Vicuña seemed to have the same view of the world order as the Victorian romantic poet who wrote the words which are the title of the discussion, that wilderness and untutored nature were good. This view was alright if one is on holiday, but the world of mixed investment disputes is about money, and it may be the investor's commercial life blood in suit – not an idea, but a concrete reality. What the investor really wants is to know where he stands. If you are lost and thirsty in a wilderness, you don't want every bush to look the same, you want to know where you are. Coming to ICSID arbitration in the last fifteen years, the problem seems to be that it is impossible to find the way out. There needs to be some unifying factor to provide investors with guidance – people are becoming increasingly despairing of finding a norm to guide them. These are disputes about money, not human rights, and they do not tend to be about rights and wrongs, but simply about who wins.

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² Reported by: Ms Freya Baetens and Dr Alex Mills.

We ought to unite theory and practice to provide a workable system whereby those whose interests are most closely involved can know where they are going and not die of thirst in the desert.

Professor Michael Reisman, Yale Law School, suggested that the discussion was doing a disservice to Sir Hersch Lauterpacht. He argued that Sir Hersch Lauterpacht was always trying to change the international system from a basis of understanding it, and that the discussion was treating his work in a taxidermic fashion, frozen in 1928. If Sir Hersch Lauterpacht were present today, he would ask different and more pertinent questions. Before asking about the role of the judge and whether a diversity of institutions makes sense, it was necessary to ask about the function of international investment law. International investment law is concerned with moving capital and expertise to encourage development, a basic human right. The question then becomes whether this is best achieved by judges who apply agreements strictly or judges who are concerned with distributive justice.

Judge Charles N Brower suggested that Lord Mustill had left out one side of these arbitrations, noting that they are not just about money and investors but about host countries and their national policies (referring to the pending Argentina cases). He also suggested that the notion of the law providing certainty is something of an illusion. The distinctive feature of international law and investment arbitrations is that it does not operate within a tripartite system of separation of powers, with an executive and a legislature; there are simply arbitrators and whatever law has been handed to them, be it by two countries or by two hundred countries. In today's world, compared with the world of the 1920s (for example, the Warsaw Convention, formed by 25 countries), it is very difficult to establish treaties or conventions, given the number of states (almost 200, including very small ones) and given that so many of them are democracies. This is another reason why arbitrators have a peculiar and distinctive creative function, requiring a broad understanding of the context. If there are a hundred bushes in the wilderness, Darwinism will prevail, and the good decisions will drive out the bad ones.

Professor Thomas Wälde, CEPMLP/University of Dundee, did not see a difference between disputes involving rights and money; money was just a way to express issues about rights and absolute security never happens. There is the beginning of a new legal process in investment law, and the system is being vigorously tested in litigation. Out of this testing, he argued that a spontaneous order will emerge, following Hayek. Some rules will prosper, others will not survive. There is settled guidance on a large number of issues, but others are still open.

Two articles by Sir Hersch Lauterpacht on the interpretation of treaties, 50 or 60 years old, provided guidance on the interesting issue of the relationship between international tribunals and domestic courts. One theory is that international tribunals provide better justice and crowd out domestic courts, so that domestic courts cannot unite or compete and thus wither. The other theory, which Professor Wälde leans towards, is one focusing on interaction and legal history. Judicial competition puts pressure on courts to improve their services, for the sake of their resources and particularly their self-esteem. This is reinforced by the exposure of local counsel who appear before international tribunals to different forms of argument and decision-making. Evidence may be found for this in English and German 19th century legal history. International investment arbitration probably increases the quality of the domestic judicial system, although the issue is not fully settled.

Professor Orrego-Vicuña noted that this argument touched on the question of whether the so-called loss of sovereignty in favour of an international organisation was really a loss or a way in which sovereignty was reasserted in new dimensions and in the end strengthened.

Dr Marie-Claire Cordonnier-Segger, Centre for International Sustainable Development Law, sought to bring the perspective of a host government into the debate over sovereignty and the regulation of natural resources. As a regulator for resources in Canada, she saw law as not just what is decided by arbitrators but also what is laid down by the competent authority in accordance with constitutional processes. The missing perspective so far was that of public priorities regarding sustainable development and resource strategies. The work developed in the international investment world has an impact beyond arbitrations; more precisely it has an impact on decisions of government policy and on negotiations between private parties and the public interest. The opposite of a wilderness might be a French formal garden, with not a thing out of place, But we might be looking for is a “Capability” Brown landscape,³ with some areas clear and well-developed, and others not as controlled. In international law now we have the blueprint for the garden, some idea about what works and what does not, but we have not begun planting.

Professor Orrego-Vicuña expressed some doubt as to whether Sir Hersch Lauterpacht would have said something different today, suggesting that the fundamentals of international law have

³ The style of gardening introduced in the 18th century by Lancelot "Capability" Brown replaced the formal character of previous gardens with more 'naturalistic' landscapes, an influence still felt in the grounds of many English stately homes.

not changed so much, and the key disputes in investment law, for example, on the meaning of the fair and equitable treatment standard or customary international law on investment, were similar. Arbitrators could not act contrary to the law, of course, but the law gives them a number of options, decisions and sources within which they can reasonably make a decision. There is scope for different approaches, some more attentive to the terms of a treaty, others more attentive to the needs of justice. It is not necessary – and is even illusory – to seek certainty on all of these questions.

Professor Christoph Schreuer, University of Vienna, questioned whether we wanted to be associated with the condor, because it might evoke the image of a vulture. But some birds move in flocks, in formation, and this was an image that fits or should fit the activity of arbitral tribunals. They are individually free, but they should watch each other's movements, and move in the same direction, and this is largely what they do. On more than 95 percent of issues there is broad consensus, but on some there is not (e.g., the umbrella clause and the application of the most favoured nation clause to jurisdiction). The question is how to think of coordinating mechanisms to make the birds fly better in formation, which should not be thought of as a cage. An appeals facility is one idea; the most radical would be an international investment court but that is so far from reality as to be not worth discussing. One idea worth considering is a preliminary rulings facility.

Another important book by Sir Hersch Lauterpacht should be considered here – *The Development of International Law by the International Court*, written much later. It illustrates the orderly development of substantive international law through judicial action, which is a worthwhile idea and object of study in the context of investment arbitration.

Professor Christian Tomuschat, Humboldt University Berlin, drew attention to the question of the trust placed in judges by, for example, Hersch Lauterpacht. Especially in the UK, international law is often viewed as merely what British judges say it is. He made a comparison between investment law and other areas in which an individual is pitted against a government – human rights law and international criminal law. In these areas there is no trust in judges, because they are often seen as an instrument of the government. The international criminal justice system at Nuremberg was precisely established because domestic German judges were not trusted to prosecute Nazis. Foreign investors equally do not trust national judiciaries. International judges also have to earn that trust by acting fairly and objectively. The question remains whether they

are sufficiently responsive to national needs but in this respect there is no difference between the problems faced by an international arbitral panel and any other international court.

The Rapporteur, Mr Jan Paulsson, Senior Arbitration Partner, Freshfields; President, WBAT, remarked that the issue of independence in an arbitral panel is similar to that of national judges.

Professor Tomuschat responded that arbitrators must be independent, but the potential importance of international decisions on national life also must not be overlooked, for example in the Argentina cases. Domestic crises might have a reflection in international law; international arbitrators should show a certain responsiveness without yielding to pressure.

Professor Alan Boyle, University of Edinburgh, found guidance in the rules of cricket: if there is a change of team, a change of umpire and a change of the rules, no one has any idea what the outcome will be. In the law of the sea, the tribunal will decide according to clear rules both on substance and on dispute settlement, so it is possible to give rational advice to clients whereas in investment arbitration one cannot predict what the tribunal will do. Moreover, BITs form a dynamic interaction amongst themselves so no one has any idea what the rules are; they might emerge from multiple tribunals, without binding precedent, be unpredictable, unstable and variable. More coherence is urgently called for: either the rules have to be clarified or a court should have the power to do so.

Professor Orrego-Vicuña asked whether anyone had an alternative institution in mind? In the end, in every game, someone wins or loses. Most arbitrators try to get to a draw, or at least a balanced outcome, but sometimes this is impossible.

Professor Campbell McLachlan, Victoria University of Wellington, wished to expand upon Dr Cordonnier Segger's "Capability Brown" analogy: if one wishes to think of developing a garden for the future, then one should look at the WTO. Initially the international community showed a high degree of commitment, so the international trade system is far from fragmented. By contrast in investment arbitration there is an applicable law issue at stake: does one apply international law or the law of the host state to an issue? And if the answer is international law, what is the content of international law on the point in question? Awards are currently not properly tested, there is no consistency but a considerable unevenness in tackling questions regarding the content of international law.

He discerned a tendency in the opinions presented towards referring to the pre-war period for guidance, when Sir Hersch Lauterpacht wrote *The Function of Law in the International Community*. During this period, public international law, “unshackled” by treaties, grappled with these issues through diplomatic protection. However, since then states have turned away from customary international law (as Professor Duggard has reminded us) in favour of treaties. The critical question is: what are the contemporary reference points of international law in determining the content of the very general standards in investment treaties? Only in that way can we use investment treaty law to start to solve the conundrum of maintaining the balance between private rights and public interest.

Professor Orrego-Vicuña asked whether Professor McLachlan would say that the final assessment he reached in his book *International Investment Arbitration: Substantive Principles* was that the current situation is one of wilderness or a move towards uniformity, and whether this was a positive thing or not?

Professor McLachlan agreed with Professor Schreuer that we tend to focus on areas of disagreement, forgetting the broad areas of agreement. He drew an analogy with the development of domestic law, for example the common law on negligence or Article 1382 of the French Code Civil. Judges or arbitrators have identified a series of factors which give guidance in the application of the rule, which help to determine with greater certainty which factors are important. But unless this process is guided by a principled view of the function which the rules perform, then it will go awry.

Mr Graham Coop, Energy Charter Secretariat, suggested that it would be an error to view the choice as between two extremes of anarchy and order. It is necessary to distinguish between a multiplicity of actors in a system, on the one hand, and a multiplicity of legal systems, on the other, including the number of BITs. Referring to an article by Justin D’Agostino and Oliver Jones (“Energy Charter Treaty: A Step towards Consistency in International Investment Arbitration?” (2007) 25 *Journal of Energy and Natural Resources Law* 225-243), he used the Energy Charter Treaty with its 51 member states as an example of a solution. The system of bilateral tribunals could remain preserved but an advisory role could be played by some organisation, similarly to the role played by the ECT Secretariat. While he was aware that this could be problematic given current institutional arrangements, this could be worth considering as a compromise position in investment law. Of course such a Secretariat could never be entirely

independent, but the advantage of working within an international organisation with numerous member states is that one is less subject to the influence of any one member state.

Professor Wälde spoke about the CAFTA system, in which every party can ask for an authoritative interpretative opinion but the question of who controls this mechanism is essential. The CAFTA Commission seems to be modelled on the NAFTA Commission, which is in the control of governments and thus seems to be skewed against the claimant.

Professor Armand De Mestral, McGill University, emphasised that it was equally important to look at what the dynamic development of investment arbitration is doing to public international law. The interaction and opposition between public and private actors is a very significant element in determining the applicable law, and requires those doing the work to perform a certain mental gymnastics to adapt old rules to a new context – it is one of the most revolutionary elements of international law today. Possibly there is an issue of new subjects of international law, but certainly there is an issue of the application of rules of public international law developed for states to the public and private context. The best work is done by those who appreciate the need to balance these public and private interests. There may not always be an obvious answer as to what principles we should adopt, but, as Sir Hersch Lauterpacht would have thought, the law is there.

Professor Maurice Mendelson QC, Blackstone Chambers, claimed we are in a situation where the rules are guaranteed to produce conflicts, for example regarding the interpretation of fair and equitable treatment. Hersch Lauterpacht may have trusted judges to know the system but they remain appointed by states. Since 1960, there have been at least six ludicrous ICJ decisions, and similar situations have occurred with arbitral awards. One solution is that treaties should be better drafted.

Dr Markus Gehring, University of Cambridge, suggested that those studying international political economy have found interesting indicators as to how to design a good regime. With increasing legalisation, one needs to look carefully at design choices. One of the parameters is the clarity of the rules, and another is the strength of the institutions. If we design these wrongly, most of the stakeholders will walk away.

Professor Boyle pointed out that there is one very important investment case before the ICJ at this moment: the *Pulp Mills* case (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*). He

suggested that the *Gabčíkovo* case (*Gabčíkovo-Nagyymaros Project (Hungary/Slovakia)*) could be regarded as an investment case as well.

Professor Schreuer returned to the question of interpretations by advisory bodies. Governmentally composed bodies are not ideal, because they pursue state interests, and one-sided interpretation should be discouraged. A different idea is the system of preliminary interpretation rulings submitted by domestic courts to the ECJ. A preliminary rulings facility could be established at ICSID, there is no reason why this should not be possible, and it would definitely be easier to reach a consensus upon such a system rather than upon the establishment of an appeals facility which would require an amendment of the Convention. This preliminary rulings facility would be an independent permanent body which would rule on core issues of investment law submitted by tribunals. This would retain the decentralised character of investment arbitration, but there would also be a degree of coordination. Certain questions remain, such as the obligatory nature of these opinions. The major question, however, is who would be sitting on this preliminary interpretation panel, as these people would probably have to be excluded from doing other work in investment arbitration.

Ms Mahmoud Arsanjani, United Nations, Office of Legal Affairs, commented that the question of whether it is good to have a decentralised or central system also requires consideration of the international structure in general, where centralised regulation has been only partially successful. This is reflected in the way that states sometimes still take unilateral action. The problem in a centralised system for arbitration, is that once you think of a court or an appellate body, the question is who selects the judges? This would probably be governments and they have a different conception of what is a qualified judge to represent them in that tribunal. More precise treaty-making might be a better way, but there is a limit to how many scenarios can be imagined and anticipated while drafting. The question of whether to have a centralised or decentralised system comes down to a cost-benefit analysis, and it is not clear that a centralised system is necessarily ideal.

Professor Orrego-Vicuña suggested that there was a difference between having independent judges appointed in some way, and judges who are politically elected. But the question of how you avoid political manoeuvring remains.

Professor Tomuschat said that the European Court of Human Rights also has a number of investment disputes pending.

The Rapporteur, Mr Jan Paulsson, summed up the discussion by dividing the opinions regarding freedom or discipline into two large groups. On the one hand, there was the idea supported by Lord Mustill and others embodied by the words of the Victorian poet Alfred, Lord Tennyson, who was deeply depressed at the wild and uncoordinated state of English law. On the other hand, there was the group formed by Professor Reisman and others who considered that freedom and discipline could be balanced, if arbitrators applied the law and were respectful of the normative universe of the parties before the tribunal.

