Comparative Analysis of International Dispute Resolution Institutions

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COMPARATIVE ANALYSIS OF INTERNATIONAL DISPUTE RESOLUTION INSTITUTIONS

The panel was convened by its Moderator, Barry E. Carter,* at 10:30 a.m., April 18, 1991.

REMARKS BY DAVID D. CARON*

There are many dimensions in which international dispute resolution mechanisms may be compared: When in the life of the dispute does the mechanism come into play; how formal is the process; is the decision-making process legal or equitable; how is the result of the process to be implemented? I focus on the role in the process accorded, on the one hand, to the parties to the dispute and, on the other hand, to some broader political community which potentially has an interest in the dispute or its resolution. It is hoped that these remarks will help frame the presentations to follow.

In essence, the issue I explore is, When should the international community, or some state, not be willing to have disputes decided privately by the parties and why should such groups not be so willing? If, as I believe intuition suggests, there are some circumstances in which the outcome, or the process, of private resolution is of concern, precisely what interests lead us to that conclusion and how are those interests best addressed? What are the interests of the community in the international resolution of a dispute? What is it about a dispute or its resolution that makes either of general concern? The identity of the parties? The subject matter of the dispute? The norms called into question? How does and how should the community go about protecting such interests, and how do such efforts fare in a marketplace of competing mechanisms?

To explore this range of issues, I comment on three particular questions. First, what are the community’s interests in dispute resolution? Second, how is the community to protect its immediate interests in the case of private mechanisms?

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Third, how are the community’s long-term interests being protected in the case of the private mechanisms?

Before discussing these questions, however, I set the stage by offering two observations. First, international dispute mechanisms vary considerably in how much of a role they give to the parties and to some broader community potentially interested in the dispute. Moreover, as one might expect, greater recognition of community interests is present in those dispute resolution mechanisms that are created by a community rather than by the parties. Why is this so? To provide an explanation, I find it valuable to draw a distinction between dispute resolution mechanisms that have a public origin and those that have a private origin. For example, municipal courts, the International Court of Justice, and the International Centre for the Settlement of Investment Disputes (ICSID) are all examples of institutions that have a public origin. They are created by a community. Arbitration on the other hand—whether it is ad hoc interstate or International Chamber of Commerce (ICC)—is a mechanism that originates in the will of the particular parties. Overlay that distinction with the proposition that groups tend to trust in their own use of discretion, but not in another’s use of discretionary authority over them. In other words, a community in designing a mechanism constructs rules for the mechanism that inherently protect what the community perceives to be its interests. The parties, in contrast, are not so inclined to build in such protections. Thus, the implication of the distinction and the proposition is that there is a fundamental relationship between the composition of the group that creates the mechanism, and the resultant structure of the mechanism.

Stated broadly, public mechanisms tend to build community awareness directly into the mechanism, while mechanisms of a private origin do not. More precisely, even privately originated mechanisms are public in that parties know that their mechanisms must meet some basic community-wide criteria if public mechanisms such as municipal courts are to endorse their process by enforcing an agreement to arbitrate or recognizing a resulting award. Consequently, the private mechanism is not entirely free of community concerns because the designers of the former anticipate the dictates of the latter. Moreover, it is true that a publicly originated mechanism might happen to give a great deal of authority to the parties or that a private mechanism might happen to satisfy community concerns. But, delegation of party autonomy in a public mechanism may allow the parties to circumvent community concerns or abuse the legitimacy held by the institution. Even if a private set of arbitration rules were to embody community concerns, it must be remembered that in almost all cases these rules ultimately are only recommendations to the parties from which they may derogate in their arbitration agreement.

How does one gauge the role accorded some broader community? One valuable diagnostic question asks. To whom does an arbitrator or judge feel he or she has a duty? Does the decision maker feel his or her ethics are defined with reference to the particular parties and dispute before him or her, or to the community that created the mechanism and to the larger set of possible disputes and parties that may come before the institution? Recall the statement of the International Court in the Northern Cameroons case: The “Court itself, and not the parties, must be the guardian of the Court’s judicial integrity.” Does the decision maker view himself or herself as an agent of the community or as filling a role defined by the agreement of the parties? A different way to investigate this issue is to ask whether the judges are given powers of initiation and what such powers reflect? For example, in an institution such as the ICJ, the Court may order interim measures on its own initiative, while in the case of the United Nations Commission on Interna-
tional Trade Law (UNCITRAL) Rules of Arbitral Procedure or the ICC Arbitral, interim measures may be ordered only at the request of a party. This observation regarding initiation repeats with regard to experts and with how nonappearance of a party is addressed. The defining characteristic of public mechanisms appears to be that the community has its own interests in the use of the institution and possibly its own interests in the outcome of the dispute.

The second observation is that there exists a market in international dispute resolution in which mechanisms, whether public or private, compete with one another for adoption. This is so because all of the international mechanisms are similar in that the parties, either before or after the dispute arises, consent to the jurisdiction of the mechanism over their dispute. In this sense, the ability of parties to choose from this amalgam of mechanisms creates a market in which the potential consumers—the parties—decide which mechanism best suits their objectives.

This is not to imply that there exists a perfect market. A limiting factor is that consumer knowledge often is incomplete. Even for the knowledgeable consumer, there are so many variables to weigh that it can be quite difficult to select the “best” mechanism. (Many of us have heard the lecture on how to draft an arbitration clause: the archetype bewilders the audience with a myriad of considerations but provides no formula for their combination.) In reality, the choice is often made more simply. Given the cost of becoming proficient with any particular mechanism, there is an understandable desire by many consumers to employ mechanisms they or their institutions know. Similarly, the reputation of a mechanism can be very influential upon the choice. Nonetheless, it is clear that these mechanisms compete with one another. Thus, if one places a high premium on resolving disputes before they gain much force, then mediation may be attractive. If confidentiality is valued, then private mechanisms such as those available for international commercial arbitration may be preferred. If maximum enforceability is desired, then a mechanism such as ICSID may be best.

I would stress that there are at least two major submarkets to this collection of mechanisms. There are those situations where enforceability by national courts is not agreeable to at least one of the parties—the majority of true interstate disputes; and there are those situations where such enforceability is accepted. In the former case, the market extremes are, on the one hand, the International Court of Justice (a mechanism with high community awareness) and, on the other hand, ad hoc international arbitration (a mechanism highly controlled by the parties). In the latter case, where enforceability is acceptable, the primary competition is among different arbitral institutions (which generally give the parties great control), among the laws of various places of arbitration (which may allow more or less state intervention), and, where applicable, between international commercial arbitration and ICSID.

The important conclusion to draw from these two observations is the competitive disadvantage of mechanisms of a public origin. Why should the parties go to a public mechanism that is somewhat out of their control? I would suggest three reasons: (1) an imperfect market—that is, they don’t realize the choices they possess or the consequences of their choice; (2) greater legitimacy—after all, the community that created the institution should respect its decisions; or (3) reduced costs for the parties—since the costs of a public mechanism are often borne by the community that created it.

We must ask precisely what the community’s interests are in dispute resolution mechanisms, so that overregulation of the public mechanism is avoided, minimum
regulation of the private mechanism is sought, and competitiveness of public mechanisms is maximized.

Community concerns can be of two types: (1) immediate concerns about the particular dispute and how the decision of that dispute may affect nonparties, and (2) long-term concerns about the implications of the decision on future disputes and on the basic community perception of the legitimacy of the institution.

If we focus on immediate concerns and put aside interests of nonparties by assuming they are protected by the refusal to enforce the judgment against nonparties, then what are the community interests in the dispute and its resolution? As Professor Thomas Carbonneau has noted, there are two main approaches: The community may view the resolution as a game in which all that is of concern is the fairness of the process, or the community may perceive some aspect of the dispute of such public importance that the correctness of the result is crucial. This raises the difficult question of what renders a dispute of public importance. Let it suffice to say for the purposes of these remarks that states generally have concluded that they do not have a strong interest in the outcome of specific international commercial disputes. (This may not be true, however, when the commercial dispute is of particular significance to a state either economically or politically. For example, the outcome of a foreign investment dispute may be particularly important to a developing host state.) Rather the concerns of states are more process oriented—that is, they seek to ensure that the parties are treated fairly. The interest in ensuring the fairness of the process results from the willingness of states to lend their coercive powers to the enforcement of the result and from the willingness of the international community to impart added legitimacy to the result. This involvement leads to the need to ensure a fair process because endorsement of an unfair process would in turn erode the legitimacy of the community. The search for fairness focuses, for example, on the existence of an informed agreement to the process, the arbitrability of the subject matter, and notions of due process.

If we shift our focus to long-term interests, we are confronted with the irony of there being possibly little immediate concern in a particular outcome, but potentially great long-term concern over the precedential effect of a normative decision. How can one allow precedential effect in a system shaped to a large extent by the particular parties and unsupervised by the community? Are all decision makers really of equal capacity? This long-term concern can be eased by denying precedential effect to such decisions. In other words, one need not be worried about the long-term effects of a private process because few will know about the decision and, in any event, it is agreed that as a formal matter arbitral awards will be binding only for the particular dispute. But secret systems pose serious problems. If law serves a broader function than resolution of the particular dispute, such as formation of expectations or deterrence of certain conduct, then a secret system does little to help. Moreover, if the process is to be efficient and sophisticated, how is it to develop amidst secrecy or without publication of the awards rendered? The community desires openness of mechanisms, but fears decentralized and independent origins.

An example of the tension between what are perceived to be community interests (both long-term and immediate) and the desire to keep a community-originated mechanism marketable can be seen in the development of the International Court’s Chamber practice and its treatment of intervention. Both of these areas are addressed in the ICJ’s recent Order and Judgment regarding the “Petition
for Permission to Intervene by Nicaragua in the Land, Maritime and Island Frontier Dispute between El Salvador and Honduras."

The designers of the International Court of Justice originally placed great emphasis on: (1) the Court being a community-appointed, not party-appointed, body of judges representative of the international community, and (2) having the interests of third parties accommodated through the possibility of intervention. These two expressions of community interest, however, can as a result deter parties from coming to the Court at all. Why should parties go before judges they do not select, or involve themselves in a process that may involve states they prefer not to be present? Indeed, the effort to stimulate the use of Chambers over the past decade openly was an effort to make the Court more attractive by allowing parties to have an indirect, but nonetheless important, say as to the composition of the Chamber. Similarly, the narrow effect given to the intervention provisions of the Statute of the Court can be seen as a less overt recognition that broadly construed rights of intervention would deter parties from coming to the Court.

In the instance of Nicaragua's petition to intervene in a Chamber action, Nicaragua submitted its petition to the Court, not the Chamber, arguing that its petition should not be decided by the Chamber inasmuch as the Chamber's composition had been greatly influenced by the parties—El Salvador and Honduras. The Court found that "it is for the Chamber formed to deal with the present case to decide whether the application for permission to intervene . . . should be granted," relying on the notion that "every intervention is incidental to the proceedings in a case." For Judge Shahabuddeen, dissenting, the reliance on intervention as an incidental proceeding was not enough because the Court did not "take account of the principle of equality of States, and there is no possibility of satisfying this principle without appropriate action taken by the full Court within the framework of the very special relationship between itself and the Chamber."

Shahabuddeen was concerned about "which shall prevail—the practical utility of a privately selected chamber claiming to be a legitimate manifestation of the Court, or the grand original design of the Court as a court of justice serving an integrated world and seen by that world to be serving it as such a court?" In seeing how potential litigants were given a voice in the composition of the Chamber in order to encourage recourse to Chambers, Shahabuddeen urged the Court to bring this special position to bear on decisions such as intervention. Clearly, for Shahabuddeen something of value to the community might be lost in the shift to Chambers. On the other hand, in Judge Schwebel's view (writing at an earlier date) the recourse to Chambers at least "has not 'fractionalized' or 'regionalized' international law in any degree [or] thrown into question the universal character of international law."

The Chamber in deciding upon the petition to intervene ultimately reached a crucial point not previously addressed by the Court: "whether the existence of a valid link of jurisdiction with the parties to the case—in the sense of a basis of jurisdiction which could be invoked, by a state seeking to intervene, in order to institute proceedings against either or both of the parties—is an essential condition for the granting of permission to intervene under Article 62 of the Statute." Again, the tension was present. If an intervenor could be a party under Article 62 without any other jurisdictional basis, then potential litigants might avoid the process generally. But if the intervenor had to show an independent basis to be a party, then the community interest in addressing third party rights might be undercut. The Chamber held that it is clear "that a State which is allowed to intervene in a case,
does not, by reason only of being an intervenor, become also a party to the case." Rather, the intervenor simply gains the right to be heard as to certain issues.

The question becomes, Was something lost in these decisions or do the results indicate an original overregulation by the community? Was the Chamber’s decision different from what the Court would have arrived at? If so, should there be explicit recognition that the Chamber’s decisions are less persuasive or authoritative than those of the Court?

It is difficult for the community to protect either immediate or long-term community interests in privately originated mechanisms. The protection of immediate interests in international commercial arbitration is the focus of my second question. Specifically, I point to the difficulty of grafting public concerns on private mechanisms through the example of multiparty arbitration.

There are numerous international transactions where more than two parties are interested in the resolution of a particular dispute. For example, let us assume the owner of a vessel enters in a charterparty with “A,” who subsequently subcharterers the vessel to “B.” Both charterparties call for private international arbitration. The vessel is damaged by “B” during docking. The owner initiates an arbitration against “A,” and “A” initiates an arbitration against “B.”

As mentioned above, most states express no particular interest in the outcome of either of these two arbitrations, rather they simply seek a fair process in each. Examining the situation afresh, however, the multiparty context raises three possible community interests. First, there is an interest in efficiency, namely, there will be two arbitrations on virtually identical questions of fact and law. Such efficiency is protected in public mechanisms such as U.S. federal court by rules for consolidation of actions. However, as a general matter, this efficiency interest appears to be held as less important than maintenance of party autonomy—the fact that the parties apparently choose not to authorize consolidation in their agreement to arbitration.

Second, there is an interest in avoiding inconsistent outcomes. For example, in The Vismerrra, the charterparty situation described above was involved. In the arbitration between the owners and “A,” the three arbitrators held for the owners, finding negligence on the part of “A.” The same panel in the later arbitration between the charterer and subcharterer, faced with fresh evidence, held the subcharterer not to be negligent. (In the second arbitration, the award was in the form of a unanimous award by two arbitrators. Consequently, the third member, who served as umpire in that arbitration, had no reason to speak.) If the community’s interest in an individual arbitration is limited to providing a fair process rather than a “correct” outcome, why does the community’s interest increase if such fair processes occasionally result in inconsistent outcomes? The explanation I would offer is that inconsistent outcomes are damaging in the sense that they demonstrate too tangibly the inability of a fair process to always yield the correct outcome and, consequently, undermine what is otherwise viewed as a legitimate mechanism.

The third community interest arguing for consolidation would be the assertion that a fair process can be present only if consolidation is possible. In particular, the conduct of multiple proceedings tends to alter the negotiating positions of the parties. Is the charterer in the above situation more inclined to settle, being the most exposed to the possibility of inconsistent awards?

If we assume that one of these community interests is regarded as essential, how does the community go about grafting it on the private mechanisms? One can, of course, encourage the private parties to authorize consolidation in their contracts. Indeed, the ICC has done this. But such provisions often can be viewed
by the negotiating parties as creating commitments to arbitrate of an uncertain scope, and thus this party discretion leaves uncertain satisfaction of the community's concern.

The other alternative is for the community to authorize its courts to consolidate arbitrations. The difficulty with this is that the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards places a high premium on the arbitration being conducted in accordance with the agreement of the parties. Thus, if a state simply ignores such autonomy there is a risk that enforcement of award may be threatened. For several states, this premium on party autonomy is viewed as correct and is not tampered with by legislative action. In other jurisdictions, consent to consolidation may be implied if consolidation was not expressly ruled out. In the few jurisdictions that have statutes authorizing consolidation—Hong Kong, Massachusetts, and California—it also can be argued that there was consent to consolidation in that the parties chose to go to that jurisdiction as the place of arbitration. How does such community interference fare in the market? Thus far I perceive little effect on the parties' choice of the place of arbitration. Moreover, little effect should be expected, given that the risks are not yet clear and consumer awareness in any event is low. But as I perceive the historical development of this market, the test will come when a consolidation effort goes seriously awry, thereby gaining notoriety.

The third and concluding question I wish to briefly comment upon is how the private origins of international commercial arbitration perhaps are being brought into conflict with the long-term interests of the international community. Earlier, I pointed out that community concern over the long-term impact of precedent can be mitigated by isolating individual decisions, by keeping the system secret. However, a major trend in international commercial arbitration is an effort by the arbitration bar, arbitral institutions, and academia to make this decentralized system more open. Awards are published; sometimes sanitized, sometimes not. Previous arbitral awards are being cited in present arbitral cases, apparently as persuasive authority though national courts would not cite such awards. All of this is serving to strengthen the place of international commercial arbitration as the articulator of norms for international commerce. There are advantages to organizing this informal system. Moreover, the long-term negative costs of doing so are not at all clear. In this sense, I do not believe this trend could be or even should be opposed. It does suggest to me, however, that the academic community needs to ask precisely which community interests are affected, which are essential, and how might they be protected.

There is an inescapable tension between community and party interests in international dispute resolution because ultimately the parties choose which mechanisms they will use. This does not mean, however, that community interests must yield entirely, but rather that the community must decide carefully and precisely what are its essential interests in international dispute resolution. Then, that community must protect those interests by grafting them onto private mechanisms, and preserving them in public mechanisms even if these public mechanisms become less competitive.