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International Arbitration, Judicial Education, and Legal Elites

CATHERINE A. ROGERS*

I. INTRODUCTION

One potentially devastating critique of investment arbitration is that it undermines or hampers development of national legal institutions. Investment arbitration was originally conceived of as means of encouraging foreign investment and strengthening rule of law for investment protection. Critics often question whether it actually contributes to either of these goals. If investment arbitration could not deliver on intended goals related to improvements in local legal institutions, it would be disappointing. If, however, investment arbitration not only failed to deliver benefits to, but instead affirmatively undermined, local legal institutions, it would be devastating. While numerous critics have leveled this charge, no empirical evidence has been marshalled to support it.

In response to critics' contentions, commentators have offered various alternative possible accounts of the relationship between investment and international arbitration, and local courts and legal institutions. One theory is that investment arbitration and local courts work in tandem, complementing each other. Under this view, according to Susan Franck:

Arbitration does not occur in a vacuum, and the existence of investment treaty arbitration does not eliminate the need to encourage the development of a court system where rights are adjudicated in an impartial, fair, and predictable manner. Investment treaty arbitration and national courts have a symbiotic relationship. Fostering the development of the rule of law in national courts not only develops local judicial institutions, but it also promotes confidence in the overall process of resolving investment disputes.¹

While this account is more optimistic, it is similarly opaque. Most accounts fail to explain in detail how international and investment arbitration can spur improvements in local courts and legal institutions. In other words, this debate about whether investment arbitration undermines or supports local legal institutions is persistent, but remains largely speculative.² There are specific reasons why these competing hypotheses remain speculative.

First, almost out of necessity, the competing hypotheses rest on numerous assumptions about the features and dynamics of local legal systems. But not all

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1. Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L. J. 337, 368 (2007).

2. *Id.* at 365.

legal systems in developing and emerging economies are the same, and their internal dynamics are difficult to assess accurately from afar.

Second, most of these critiques presume foreign investors and investment arbitration are the primary drivers in the relationship between investment arbitration and local legal institutions. The assumption that external forces provide the primary incentives for local court reform is probably a natural corollary to the debate about investment arbitration's ability to fulfill its own larger goals. But such a focus on external drivers like investment arbitration ignores incentives for legal reforms that may exist in tandem with, but distinct from, investment arbitration.

Finally, hypotheses about the effects of investment arbitration remain speculative because empirically testing these hypotheses would be an exceptionally difficult, complex, and time-consuming task. For example, some commentators have suggested that investment and international arbitration necessarily rely on support from national courts and this symbiotic relationship can generate a "race to the top."³ To date, no accounts have provided a detailed account of how this hypothesized race to the top might occur and what its drivers might be.

This essay sketches an alternative account of how investment arbitration affects development of local legal institutions, in particular domestic courts. When investment arbitration is introduced into a local legal environment, it becomes integrated with international commercial arbitration, and often domestic arbitration. This integration occurs because the local economic elites, private law firms, and local businesses that deal with (or compete with) foreign investors and investment arbitration disputes also deal with international commercial matters, international commercial disputes, and domestic arbitration.

These local economic and legal elites,⁴ meanwhile, have specific and personal interest in ensuring local legal institutions support arbitration and have the political power to press for legal reforms to ensure this support. These local elites also have incentives and opportunities to access well-established legal instruments and models, such as model laws, internationally accepted standards, rules, and structures. These borrowed international sources for reform provide not only concrete, effective guidance but also an internationally established sense of legitimacy and access to an extensive international arbitration network that can be valuable for local elites.

This alternative hypothesis is inspired by anecdotes and observations from my own personal experiences in various capacity-building projects in Palestine and Georgia, and has particular relevance to this Symposium on judicial education. It is often assumed the only form of judicial education needed for international arbitration is training on how to keep judicial "hands off" arbitration proceedings and outcomes. International arbitration reforms, however, integrate judges into various aspects of reforms, which in turn provide potential inspiration for improvements in local judiciaries and legal procedures.

3. *Id.* at 367.

4. In this essay, I use the term "economic and legal elites" to refer to those members of society who wield significant power based on their economic power and political influence in political institutions. For a related definition of "legal elites" in emerging economies, see David B. Wilkins & Mihaela Papa, *The Rise Of The Corporate Legal Elite In The Brics: Implications For Global Governance*, 54 B.C. L. REV. 1149 (2013) (defining "legal elites" as "lawyers who work in law firms based in [emerging economies] that serve a clientele composed primarily of foreign and domestic corporations, and lawyers who work in the internal legal departments of the growing number of corporations based in [these jurisdictions]").

Ultimately, however, this account is still only a working hypothesis. The remainder of this essay sketches the underpinnings of this hypothesis and identifies factors that could be a basis for empirical evaluation in future work. This essay also lays the groundwork for a more systematic exploration and empirical testing of this hypothesis in a collaborative work with Professor Chris Drahozal for contribution to a larger work, *Empirical Perspectives on the Legitimacy of International Investment Tribunals*, which is being undertaken by the PluriCourts Centre in Oslo.⁵

II. INVESTMENT ARBITRATION AS NEGATIVE INFLUENCE ON LOCAL COURTS

As noted, many commentators suggest one negative consequence of investment arbitration is that it undermines development of local courts and local legal institutions. For example, Tom Ginsburg argues “the decision to bypass domestic courts [by going to investment arbitration] may reduce courts’ incentives to improve performance by depriving key actors from a need to invest in institutional improvement.”⁶ Susan Franck cites critics’ suggestions that “the existence of international dispute resolution for foreign investment inhibits the development of the rule of law in national courts by creating a regime that provides a privilege to foreign investors and removes investment disputes from local courts.”⁷

Under this view, “foreign investors rationally refrain from championing good and generalized law reforms in the developing state, preferring instead to protect their interests by relying on the BIT rule of law enclave.”⁸ Ron Daniels takes this argument even further, reasoning “BITs enfeeble host state governments and, in sharp contrast to the claims made by supporters of BITs, will end up discrediting the normative legitimacy of the BIT as a rule of law demonstration project.”⁹

Each of these explanations presumes that foreign investors and investment arbitration are the primary drivers either inspiring or undermining reform and development in local legal institutions. These explanations, in other words, assume that reforms inspired by foreign investment are transmitted directly from foreign investors (or investment treaties) to national governments.

Governments are ultimately responsible for legal reforms, but they are perhaps more responsive to pressures from internal constituencies than they are to external international forces. Unlike other contexts involving internationally inspired legal reforms, the internal local constituencies implicated by investment arbitration have incentives to press for legal reforms that support international arbitration. This incentive structure develops not because investment arbitration creates pressure from the outside. It develops because when investment arbitra-

5. CTR. FOR THE STUDY OF THE LEGITIMATE ROLES OF THE JUDICIARY IN THE GLOB. ORDER, <http://www.jus.uio.no/pluricourts/english/> (last visited Aug 6, 2015).

6. Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT’L REV. L. & ECON. 107, 119 (2005).

7. Franck, *supra* note 1, at 365.

8. *Id.* at 366.

9. Ronald J. Daniels, *Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World 2*, UNIV. OF SIENA (Mar. 23, 2004), <http://www.unisi.it/lawandeconomics/stile2004/daniels.pdf> (describing BITs as creating a “stand alone enclave” that allows “foreign investors [to be] largely insulated from the legal and political risks of contracting in the home state and relying on its institution”).

tion claims are commenced and defended, they implicate a host of legal elites that are, for both related and independent reasons, eager to engage with the larger international arbitration community.

III. LOCAL LEGAL INSTITUTIONS AND EFFORTS AT REFORM

BITs include arbitration mechanisms because courts and legal institutions in many developing countries and emerging economies are ineffective and unreliable, particularly when foreign nationals are involved.¹⁰ The debate over the relationship between investment arbitration and weak local legal institutions naturally focuses on those two points of reference. Treatment of this issue as a bilateral relationship ignores how international arbitration becomes integrated within leading figures in local legal communities.

Integration vests local legal and business elites, who have an interest in political stability and national legal institutions, in the success of arbitration and the legal institutions that support it. Local legal elites also regard international commercial arbitration as a means of access to the international legal community and its promises of future economic opportunities. To develop these opportunities, local legal elites use their influence to strengthen national legal institutions in order to support international, and often domestic, arbitration. Some of these efforts translate into legislative reforms, judicial training, reforms in legal education, and attorney training that improve rather than detract from national legal institutions.

Another important factor that distinguishes arbitration-related reforms from other types of international reforms is that international arbitration related reforms have concrete goals and are tied to specific economic interests. These reforms can draw from a wealth of internationally established resources and models. By contrast, efforts aimed more generically at improving the rule of law and strengthening legal institutions are typically framed as public law reforms, and headed by human rights and public law lawyers. The goals of these reforms are stated in lofty, but somewhat ethereal terms such as “improving justice” and the “strengthening rule of law.” The means for achieving these overarching goals can be difficult to identify. Meanwhile, the effect of these goals may work against existing interests of those who benefit from or are invested in preservation of the status quo.

By contrast, many reforms to promote domestic and international arbitration are based on well-established international sources and models. Use of these international models also introduces opportunities for local elites to interact with international elites who have developed or act as custodians for international sources and models.

Although only anecdotal and impressionistic, observations in some developing and emerging economies suggest support for this hypothesis. One particularly

10. Some commentators argue that arbitration provisions are not necessary in developed economies that already have robust and effective local court systems that can competently and fairly address foreign investor claims. See William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1, 5-8 (2006). But see Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit-and They Could Bite* (June 2003), <http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-3121>.

robust example is Palestine. Like other jurisdictions, Palestine has recently enacted a series of arbitration-related reforms. These reforms include a new draft arbitration law that is based on the UNCITRAL Model Law, extensive new training programs for arbitrators and judges, and recent accession to the New York Convention.¹¹ These reforms are being implemented formally by the Palestinian Authority (PA), but the PA works closely with the International Chamber of Commerce of Palestine and its Arbitration Commission, which in turn works closely with a network of international arbitration organizations and international arbitration experts, including myself.

This collaboration makes sense when you consider who is involved in the ICC Palestine. The Board of Directors of the ICC Palestine is comprised of the “captains of industry” of the Palestinian economy. Included among them are the owners and principals for the Bank of Palestine, the sole Palestinian Coca-Cola distributorship, the largest Palestinian holding company, and others who have enormous stakes in the Palestinian economy. Consequently, they also hold an interest in legal institutions that can provide adequate protection for their economic interests. The Arbitration Commission of the ICC Palestine, meanwhile, is comprised of leading legal elites—those Palestinian attorneys who typically have at least some international clients and local clients with international commercial transactions and disputes.

Meanwhile, when the ICC Palestine, working in conjunction with the ICC Israel, wanted to establish an arbitration center for resolution of commercial disputes between Palestinians and Israelis, rather than start from scratch, they modeled the rules for the new Jerusalem Arbitration Center (JAC) after the famed International Chamber of Commerce in Paris. By adopting the ICC model, and expressly involving the ICC in the venture, the JAC not only ensured that its rules would have time-tested functionality and efficacy, it also ensured the ICC was actively involved in the process of creating and promoting the JAC.

Although a very different place with a very different legal culture and legal history, recent legal reforms in Georgia are similarly being headed up by local legal and economic elites, working in conjunction with the international arbitration community. In recent years, a new Georgia Arbitration Association (GAA) was founded, as a body that brought together the leading providers of domestic arbitration who are also among those most interested in and integrated with international commercial activities and international commercial disputes.

Efforts to develop and fortify local arbitration, predictably, have Georgia turning to international sources for guidance. For example, Georgia adopted the UNCITRAL Model Law in 2009. In October of 2014, the new Georgian International Arbitration Centre adopted arbitration rules that “reflect best international practices and include many innovations from the recent ICC and LCIA arbitration rules, firmly establish GIAC as the leading dispute resolution institution in the Caucasus – Black Sea – Caspian Region.”¹²

11. Although accession to the New York Convention was part of a political strategy by the Palestinian Authority to join as many treaties and conventions as possible, interest and research into becoming a party to the New York had begun long before and independent of accession to other conventions.

12. See Timothy Lindsay et al., *Georgian International Arbitration Centre Adopts New Arbitration Rules*, DECHERT LLP (Oct. 2014), <http://sites.edechert.com/10/3834/october-2014/georgian-international-arbitration-centre-adopts-new-arbitration-rules.asp>.

In addition to these reforms, the Georgia Arbitration Association (GAA) has adopted a new code of ethics for arbitrators, which borrows quite heavily from the American Arbitration Association's Code of Ethics. This new Code introduced new ideas about what constitutes a conflict of interest for arbitrators in concrete, measurable terms. The GAA introduced the new Code at a conference that also examined various potential enforcement mechanisms that create incentives for arbitrators to comply with in order to ensure future appointments.

These reforms were specifically aimed at arbitrators and arbitrator conduct. One of the most striking moments at the conference, however, was when a Georgian appellate court judge stood up and said something to the effect (I was listening to a simultaneous translation) that if the GAA was going to raise the standards for conduct for arbitrators, it would put pressure on judges to also raise their standards of conduct. This one quote offers a possible explanation of how the race to the top, imagined by some commentators, is being facilitated. National judges are not simply regarding investment arbitration's outcomes and impact as a competition, they are instead participating in local reform efforts headed by local elites that aim to improve domestic and international arbitration. They are responding to specific provisions in those reforms, rather than abstract notions about self-improvement and the rule of law. While this is just an anecdote, it seems to provide a potentially compelling narrative about how international and investment arbitration affect local judges and may also inspire judicial improvements.

IV. CONCLUDING THOUGHTS AND FUTURE EMPIRICAL TESTING

The thesis of this essay gives rise to testable implications that could fill gaps in the existing speculative debate and that differ from those hypotheses tested in previous empirical studies on the impact of investment arbitration on national legal institutions. As noted in the introduction, this empirical work will be taken up with Professor Drahozal under the auspices of a PluriCourts research project. This conclusion, therefore, previews some of the ways in which that research will differ from earlier research and hypotheses about the relationship between investment arbitration and local legal reforms.

First, prior studies testing the effect of BITs on national legal institutions have used the number of BITs or the dates on which BITs entered into force as explanatory variables rather than the existence or number of investment arbitration proceedings.¹³ The thesis of this essay suggests, instead, that the relevant variable that triggers local reforms is not the adoption of BITs, but instead the filing of investment arbitration cases under the BITs. The filing and defense of investment arbitration cases actively involves legal elites in the international arbitration process, and ties investment arbitration into integrated initiatives to promote international and domestic arbitration. In other words, it is not the adoption of BITs or the prospect of arbitral decisionmaking under the BIT that matters, but instead local self-interested reforms that relate to, but are also distinct from, investment arbitration.

13. JAN PETER SASSE, AN ECONOMIC ANALYSIS OF BILATERAL INVESTMENT TREATIES 163 (2011) ("The BIT variable is simply the number of BITs of a country in a given year."); Ginsburg, *supra* note 6, at 120-22 (examining the number and timing of BITs).

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Second, prior studies attempting to evaluate the impact of investment arbitration have examined aggregate rule of law measures for a country's legal institutions as a whole, and considered almost exclusively the incentives and behavior of public actors.¹⁴ The thesis of this essay suggests instead that an assessment of the impact of investment arbitration on domestic legal systems should focus more narrowly on domestic courts and on local legal communities, as well as on arbitration-specific legal reforms, rather than on abstract conceptions of or measures for the rule of law more generally. Local courts and law firms are the national legal institutions most directly involved with international commercial arbitration.

14. SASSE, *supra* note 13, at 165 (examining “government effectiveness,” “regulatory quality,” “rule of law,” and “corruption control”); Ginsburg, *supra* note 6, at 120-22.