What's Fair Is Fair: Tribal Assertions of Jurisdiction over Arbitration Decisions

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I. INTRODUCTION

The rules governing the appropriateness and extent of the jurisdiction of the various Indian tribal courts that exist concurrently with the court systems of the states and the federal government are not very well-defined. As such, there exists little guidance for courts faced with mediation awards and these twin assertions of jurisdiction. A largely judicial creation, tribal court jurisdiction has been decimated by certain Supreme Court decisions and upheld as fundamentally important in others.

While the modern trend is to provide tribes with a certain amount of latitude in some areas, the court in First Specialty Insurance Corp. v. Confederated Tribes of the Grand Ronde Community of Oregon was tasked with shoehorning the facts into the applicable precedent because the various doctrines defining the limits of tribal jurisdiction under the Federal Arbitration Act ("FAA") have not often been tested, as they were here. The district court’s opinion followed the modern trend by upholding the Tribe’s assertion of its court system’s jurisdiction, yet the court did not establish a precedent that should trouble the notion of a fair system of arbitration.

II. FACTS AND HOLDING

The Confederated Tribes of the Grand Ronde Community of Oregon ("the Tribe"), a federally recognized Indian tribe, sued its investment advisers, Strategic Wealth Management3 ("SWM") in Multnomah County (Oregon) Circuit Court in 2001 alleging that SWM violated an Oregon securities law4 in its dealings with the Tribe.5 However, pursuant to express language of the parties’ 1992 agreement, whereby SWM would serve as the Tribe’s financial and investment adviser, any dispute between the parties was to be settled by binding arbitration.6 In 2002,
the circuit court ruled that the binding arbitration language was controlling and dismissed the claims without prejudice. In 2003, the Tribe filed a demand for arbitration, seeking damages for misrepresentations and omissions made by SWM and also alleging securities violations, breach of contract, breach of fiduciary duty, fraud, and negligent misrepresentation. SWM counterclaimed against the Tribe, and each party included a request for attorney’s fees in its request for relief. A panel from the American Arbitration Association (“AAA”) conducted the arbitration proceedings in 2004. The panel dismissed the Tribe’s claim, as well as SWM’s counterclaim, and it awarded SWM more than $1.4 million in attorney fees. Later that year, the Tribe petitioned its own tribal court for an order vacating the portion of the panel’s order that awarded the attorney fees. SWM moved to dismiss for lack of subject matter and personal jurisdiction; the tribal court denied the motion and, after a hearing on the merits in 2005, granted the Tribe’s petition to vacate attorney fees and costs. As to the question of jurisdiction, the tribal court concluded that “SWM ... had significant and long term consensual relationships with the Tribe of the qualifying kind to support Tribal Court jurisdiction.” SWM’s insurer, First Specialty Insurance Corporation (“FSIC”), then substituted for SWM in a 2006 appeal to the Tribal Court of Appeals. The Tribal Court of Appeals affirmed the original tribal court’s order.

FSIC then filed the action at hand, this time in the U.S. District Court for the District of Oregon. FSIC’s main point on appeal was that the tribal court lacked the subject matter jurisdiction necessary to review an arbitration award under the FAA. Essentially, FSIC contended that the tribal court’s decision to vacate the arbitration panel’s decision concerned not the actions of SWM in its dealings with the Tribe, but the actions of the arbitration panel, which was located off tribal lands and thus outside the reach of its court system. The Tribe, which moved for summary judgment, responded by arguing that SWM’s consensual dealings on the

7. Id.
8. Id.
9. Id. The district court does not give any details about SWM’s counterclaim. Id.
10. Id.
11. Id. The court also omits all discussion as to why SWM won the award of attorney fees. Id.
13. FSIC, 2007 WL 3283699, at *2. The opinion briefly summarizes the structure of the tribal court. The tribe’s constitution was approved by the Acting Deputy Assistant Secretary of Indian Affairs and authorizes the establishment of this court. Id. at *1. The Chief Judge and judges for the Court of Appeals must have a J.D. or LL.B degree from an American Bar Association accredited law school, be members of the Oregon Bar, have at least ten years experience in practice and be able to demonstrate a knowledge of Indian law, as well as state and federal. Id.
14. Id. at *2.
15. Id. (internal quotations omitted).
16. Id. at *2.
17. Id.
18. Id.
19. Id. at *3. FSIC also alleged a second error in its appeal, that the arbitration award should be entered under the FAA. Id. at *5. That point was rendered moot by the court’s answer to the jurisdictional question. Id.
20. Id. at *2-*3.
Tribe's reservation created a clear nexus between the arbitration award and the original agreement, thus establishing jurisdiction. Once jurisdiction is established, the Tribe further argued, federal law requires deference to a ruling of the tribal court. The district court concluded that a consensual relationship existed between SWM and the Tribe through the parties' contract, providing the tribal court with a justifiable means by which to assert jurisdiction.

The district court also had to determine whether "comity"—or deference—should be extended to the tribal court's rulings. In concluding that the tribal court's rulings "do not conflict" with the ruling of the Oregon state circuit court, the district court found no reason to withhold comity from the tribal court's vacatur order.

Because SWM's consensual relationship with the Tribe made the investment advisers physically enter the reservation on many occasions, the tribal court's assertion of jurisdiction was valid, and because the tribal court's vacating of the arbitration panel's award did not conflict with any final judgment entered by a U.S. court, the Tribe's motion for summary judgment was granted.

III. LEGAL BACKGROUND

This case, while factually and procedurally complex, can be broken down simply into distinct jurisprudential areas. The first is the issue of jurisdiction, both in terms of venue (regarding the tribal court's ability to overturn the arbitration panel's decision) and subject matter jurisdiction (regarding the tribal court's ability to bind its non-Indian adversaries). The second issue deals with comity, as in whether or not the district court—in applying United States law—must defer to the ruling of the tribal court. The district court followed this general roadmap in discussing the legal issues in this dispute.

A. Selection of the Appropriate Venue in Which to Challenge Arbitration Awards

The FAA exists to make written arbitration agreements "valid, irrevocable, and enforceable." This portion of the FAA—which has been called its "center-
piece" by the Supreme Court—reflected Congress' main goal in passing the legislation, which was "abrogat[ing] the general common law rule against specific enforcement of arbitration agreements" and ensuring that "private arbitration agreements are enforced according to their terms.

To those ends, the FAA provides for a general grant of jurisdiction to the federal court system in cases where a party refuses to arbitrate, allows a district court to vacate an award, and, most on point for the purposes of the case at hand, allows a district court to enter judgment on the award itself. The FAA also specifies the particular actions which would allow for an appeal of the decisions of arbitrators or arbitration panels. Telling, however, is the FAA's permissive language regarding the jurisdictional and procedural grants. Parties disputing an arbitration provision in a contract or quibbling over the arbitrator's award need not hale themselves into federal district court, but, under the general provisions of the FAA, they may choose to do so. The emphasis here is on federal courts' designation as courts of general, not exclusive, jurisdiction. Congress has not, by the language of the FAA, forced parties into a district court for purposes of settling their post-arbitration disputes.

Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co., a 2000 Supreme Court decision, illustrates the consequences of the venue provisions and provides further guidance on the issue. The Court interpreted the FAA's language regarding jurisdiction as permissive regarding the specific venue: parties are permitted to bring challenges to arbitration awards not merely in the district wherein the original award was made but may enter the federal court system in any district where jurisdiction could conceivably be found.

For example, in Cortez Byrd, the Supreme Court held that the parties were not restricted to the U.S. District Court for the Northern District of Alabama—which includes Birmingham, the city in which the two parties arbitrated—but could conceivably file suit in the Southern District of Mississippi, a venue made appropriate under 28 U.S.C. § 1391(a) because that is where the two parties signed the original contract. This decision resolved a significant split within the federal Circuit

35. Id. at § 10.
36. Id. at § 13.
37. Id. at § 16.
38. See, e.g., id. at § 9 ("If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.") (emphasis added). See also id. at § 16 ("An appeal may be taken . . .") (emphasis added).
39. Id. at § 9.
41. Id. at 195.
42. This federal civil procedure statute governs venue generally and states in pertinent part, "A civil action wherein jurisdiction is founded only on diversity of citizenship may . . . be brought only in . . . (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . ." 28 U.S.C. § 1391(a) (2006).
43. Cortez Byrd Chips Inc., 529 U.S. at 198.
Courts of Appeals and now gives parties the choice to litigate an arbitration decision in a potentially more convenient forum.  

B. Jurisdiction of Tribal Courts, Generally

If, as it appears, Cortez Byrd stands for the proposition that a party may bring suit to challenge an arbitration award in any forum whereupon jurisdiction would be proper under federal law, the question for the instant case is: “When may a tribal court exert jurisdiction over non-members of their tribe?” Such a question has perplexed the judiciary for quite some time, as the United States policy toward tribal sovereignty has vacillated over the past 200 years.

Since the 1934 passage of the Indian Reorganization Act, both congressional and presidential policies have supported tribal self-determination. Federal statutes delegated certain powers to tribal governments and appropriations to tribal courts, while executive orders have affirmed that tribes have a government-to-government relationship with the United States, existing as a “third tier”—in addition to the state and national governments—within our scheme of federalism. Conservatives approve of this general policy of limited tribal autonomy because it weakens the federal government’s control and promotes economic development; liberals approve of the policy because it supports the rights of an oppressed minority and because past actions represented social and racial injustice.

However, the Supreme Court has, since 1978, divested tribal members of many of the powers they previously enjoyed over non-members. In the seminal case Oliphant v. Suquamish Indian Tribe, the Supreme Court stated that Indians gave up their power to try non-Indian U.S. citizens because they “submit[ted] to the overriding sovereignty of the United States.” The Court appealed to fundamental principles in stating that subjecting U.S. citizens to tribal authority would contravene the “great solicitude that its citizens be protected... from unwarranted intrusions on their personal liberty.” While the decision was roundly and passionately criticized, it only extended as far as criminal prosecutions by tribal...
courts over non-members.\textsuperscript{53} Still, in the period between 1980 and 1990, the Supreme Court heard a series of cases dealing with the question of what \textit{Oliphant} meant in the civil context; sometimes tribal authority and jurisdiction was affirmed, but sometimes it was not.\textsuperscript{54}

Importantly, however, in \textit{Montana v. United States}, while ruling against a tribe's assertion of jurisdiction, the Court did concede that a tribe can hale non-Indians into its court system in certain circumstances: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."\textsuperscript{55} This statement should not be interpreted as an expansion of tribal court authority though, because the Court, for various reasons,\textsuperscript{56} held that the tribe in question could not regulate hunting and fishing on its land by non-members.\textsuperscript{57}

The Court has continued to narrowly interpret tribal sovereignty seemingly out of concern about the justice dispensed by tribal governments.\textsuperscript{58} Decisions have followed this general pattern,\textsuperscript{59} despite a Congressional rebuke that expressly granted criminal jurisdiction to Indian tribes over all Indians.\textsuperscript{60} This may have been a signal to respect tribal sovereignty, but the Supreme Court has not heeded the signal because it continues to restrict what subject matters and persons tribal courts may reach.\textsuperscript{61} Indeed, a 2001 case decided along these lines\textsuperscript{62} was assailed by at least one scholar as possessing the "potential to destroy tribal sovereignty as we have known it."\textsuperscript{63}

Tribes can still exert significant jurisdiction over non-Indians, despite the restrictions that courts have enacted over the past quarter-century.\textsuperscript{64} Tribal courts retain their jurisdiction in several areas, including suits arising on a reservation

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\textsuperscript{53} \textit{Oliphant}, 435 U.S. at 212.

\textsuperscript{54} Bethany R. Berger, \textit{supra} note 12, at 1059. The author describes this period as a conflict of two visions of tribes, "the first, as sovereign entities needing jurisdiction to build and develop, and the second as traditional groups for whom exercise of jurisdiction over nonmembers or modern businesses would be both anomalous and unfair." \textit{Id.}

\textsuperscript{55} 450 U.S. 544, 566 (1981).

\textsuperscript{56} The court cited the history of the once-nomadic tribe in question, the lack of tradition within the legal system for allowing Indian tribes in general to regulate this activity, and the fact that it had acquiesced to state regulation for a number of years as controlling. \textit{Id.} at 547, 556, 564, 566-67.

\textsuperscript{57} \textit{Id.} at 566-67.

\textsuperscript{58} Berger, \textit{supra} note 12, at 1063.

\textsuperscript{59} See, e.g., Duro v. Reina, 495 U.S. 676, 677 (1990) (holding that tribal courts had no criminal jurisdiction to prosecute Indians from another tribe); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (holding that the tribe could not zone a parcel of land on the edge of its reservation, close to substantial non-Indian commercial and residential development).


\textsuperscript{61} See, e.g., Strate v. A-1 Contractors, 520 U.S. 438, 439 (1997) (holding that there is no jurisdiction over personal injury claim against non-Indian stemming from accident arising on state highway through reservation); Atkinson Trading Co. v. Shirley, 532 U.S. 645-646 (2001) (holding tribe had no right to tax hotel owned by non-Indian within reservation).

\textsuperscript{62} Nevada v. Hicks, 533 U.S. 353 (2001) (holding that tribal court did not have jurisdiction to hear claim of damages alleging from state official searching Indian's house which was located on tribally owed land).

\textsuperscript{63} Singer, \textit{supra} note 45, at 645.

\textsuperscript{64} \textit{See} Berger, \textit{supra} note 12, at 1050.
where the defendant is an Indian and actions against a tribe as an entity. The principle articulated in Montana regarding the appropriateness of tribal jurisdiction when the conduct of non-Indians on Indian land has some "direct effect on the political integrity, the economic security, or the health or welfare of the tribe" has been cited by several Supreme Court decisions and remains valid law. Still, because only limited types of conduct by non-Indians will bring them under that penumbra of authority, the practical rule appears to be "that tribes do not possess authority over non-Indians who come within their borders."

But as one scholar notes, as Indian tribes become more involved in commercial activity with non-members, Montana may be increasingly relied upon and the numbers of non-member litigants in tribal courts may rise. The increase in business relationships between Indians and non-Indians has an effect upon the field of arbitration, which is almost exclusively commercial in nature. In the absence of an express provision and a waiver of sovereign immunity, courts have held that a tribal court could also have jurisdiction over enforcement of arbitration awards.

It is also important to note that various federal courts have heard the affirmative defense of tribal sovereign immunity, which can arise when a tribe attempts to disclaim a contractual arbitration provision. However, there does not appear to be a reported decision in which a federal court has tried to apply Cortez Bird's permissive forum selection scheme to a tribal court's assertion of jurisdiction.

The Supreme Court, however, has held that entering into an arbitration agreement is a clear waiver of sovereign immunity, and therefore, a tribe would be subject to a state court enforcement action. The Court reasoned that the arbitration clause in question would be rendered "meaningless" if it did not also constitute a waiver of sovereign immunity. That is, a tribe should not be allowed to submit itself to arbitration proceedings only to later claim immunity from the arbitration's enforcement.

C. Applying Comity to Tribal Court Rulings

While the issues of jurisdiction and comity receive separate treatment for the purposes of this note, clearly they are quite inseparable. What good is a tribal court's opportunity to adjudicate if the federal judiciary won't respect that deci-

69. Berger, supra note 12, at 1067.
74. See, Oglala Sioux Tribe, 542 F.3d at 231. ("If a tribe were allowed to operate under [American Arbitration Association] rules, and after an adverse decision assert sovereign immunity and then walk away, it would convert sovereignty from a shield into a sword").
sion? It is, therefore, self-evident that the doctrine of comity is quite significant in
the context of civil litigation. It is not only, perhaps, an unfamiliar term, but a
vaguely defined one, as well. "Where comity is concerned, the treatment by Con-
gress is non-existent, and the treatment by the federal judiciary is limited, leaving
the field open for development."76

Comity, in this instance, "deals with how much respect a federal court should
accord a tribal court in its initial determination of jurisdiction, even where the
federal court may share jurisdiction."77 The general rule is that federal courts
"must recognize and enforce tribal court judgments" under this principle but only
if the tribal court had properly asserted jurisdiction in the first place.78 Once the
tribal court's decision passes this test, the federal court must enforce the judgment
without reconsidering issues decided by the tribal court.79 And that is, in essence,
the key to comity: a federal court may not re-litigate questions of law already
answered by a tribal court, once the jurisdictional test is passed.80

At least one scholar has argued that this principle demonstrates a federal poli-
cy of advancing tribal self-governance by requiring the litigants to exhaust their
tribal court remedies.81 This principle is grounded in efficiency because, in a
corollary to the argument that more non-Indians will assuredly enter tribal court
systems as Indian tribes continue to make myriad economic pacts with non-
Indians, the "respect of comity as a doctrine will allow tribal courts to build their
own jurisprudence."82

Federal courts, including the Ninth Circuit in Wilson v. Marchington, have al-
so addressed comity and relied upon equitable grounds to answer the question of
when to deny comity.83 The court in Wilson enumerated four circumstances in
which a court may do so:

(1) the judgment was obtained by fraud; (2) the judgment conflicts with
another final judgment that is entitled to recognition; (3) the judgment is
inconsistent with the parties' contractual choice of forum; or (4) recogni-
tion of the judgment, or the cause of action upon which it is based, is
against the public policy of the United States or the forum state in which
recognition of the judgment is sought.84

These equitable grounds do not appear to have been widely cited with respect
to the judgments of Indian tribal courts, however, and the Supreme Court has not

75. Raymond L. Niblock & William C. Plouffe, Federal Courts, Tribal Courts, and Comity: Devel-
76. Id.
77. Id. at 221.
78. AT&T Corp. v. Coeur d'Alene Tribe, 295 F.3d 899, 903 (9th Cir. 2002). The other generally
accepted reason for denying comity is a lack of due process. Id.
79. Id. at 903-04.
80. Iowa Mutual Ins. Co. v LaPlante, 480 U.S. 9, 19 ("proper deference to the tribal court system
precludes relitigation of issues raised ... and resolved in the Tribal Courts").
81. Niblock & Plouffe, supra note 75, at 231.
82. Id. at 232. (quoting Frank Pommersheim & Shermann Marshall, Liberation, Dreams, and Hard-
work: An Essay on Tribal Court Jurisprudence, 1992 WIS. L. REV. 411 (1992)).
83. 127 F.3d 805, 810 (9th Cir. 1997).
84. Id. (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §
482(2)(c)-(f) (1987)).
yet addressed the issue. Thus, the district court in *FSIC* was forced to balance the widely permissive venue statutes of the FAA with the generally restrictive grants of tribal court jurisdiction, all while considering the wide latitude the doctrine of comity grants to tribal decisions.

### IV. INSTANT DECISION

In *FSIC*, the U.S. District Court for the District of Oregon alternately discussed both the venue and comity issues before holding that the tribal court did indeed have jurisdiction and that its decision was deserving of comity.86

Addressing venue, the district court cited to *Cortez Byrd* but did not elaborate.87 It noted the generally permissive nature of the FAA’s sections pertaining to venue and summarily stated that there was “no reason to exclude tribal courts from the . . . conclusion of this analysis.”88

Turning next to the jurisdictional issue, the district court mainly relied upon *Montana*89 and *Strate v. A-1 Contractors*90 to find that “[b]ut for the . . . [a]greement [between the tribe and SWM], there would have been no dispute and no arbitration.”91 Hence, because that contract required SWM to deal with the Tribe on its reservation hundreds of times, the court concluded that there was a consensual relationship with the Tribe through this contract that touched squarely upon the Tribe’s economic security, providing the tribal court with a justifiable means by which to assert jurisdiction.92

As to the issue of comity, FSIC argued primarily on equitable grounds; it leaned upon the second clause of the test articulated by *Wilson*,93 asserting that the “judgment [of the tribal court] conflicts with another final judgment that is entitled to recognition.”94 FSIC claimed that the original Oregon district court ruling that sent “all claims” to arbitration created the conflict.95 Based on this “all claims” language, FSIC asserted that the Oregon state court took away the Tribe’s sovereign immunity—i.e., its basis for possessing a court system in the first place, without which there obviously could be no jurisdiction—and any further judicial hearing over the matter lay in conflict with the order to arbitrate.96

The federal district court, however, refused to “read an implied holding into the [state] court’s ruling.”97 In concluding that the tribal court’s rulings “do not conflict” with the ruling of the Oregon state court, the district court found no rea-

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87. Id. at *3.
88. Id.
92. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at *5.
son to withhold comity from the tribal court’s ruling to vacate the decision of the arbitration panel.\textsuperscript{98} The issues thus decided, the court granted the Tribe’s motion for summary judgment and dismissed the action with prejudice.\textsuperscript{99}

V. COMMENT

It may seem contradictory that the judiciary, on one hand, is engaged in a pattern of limiting tribal court jurisdiction, while on the other hand, is taking steps to preserve the integrity of that jurisdiction.\textsuperscript{100} This tension is, however, unavoidable. The patchwork of rights and powers granted to and taken away from tribal courts generally are judicial creations, and because of that—because these rights and powers are not exclusively reliant upon powers positively granted by Congress—they are not even readily identifiable.\textsuperscript{101} Existing in this sliver of adjudicative space as they do, decisions regarding tribal sovereignty and jurisdiction are few; yet it is these relatively few cases driving the body of law forward.\textsuperscript{102}

This lack of guideposts conflicts directly with the legislative and executive policy, shown above, of advancing the tribal judiciary. The federal judiciary, while ostensibly ensuring, though its limitations on tribal jurisdiction, that U.S. citizens are adequately protected from overreaching tribal judiciaries, has generally recognized that permitting tribes a certain degree of autonomy over their own affairs is for the tribes’ own benefit.\textsuperscript{103} In that context, the argument that “a critical part of promoting tribal self-government is advancing a tribal judiciary”\textsuperscript{104} makes the utmost sense. If the United States is going to allow the various tribal courts a certain degree of autonomy, such a policy needs teeth, or it risks becoming ineffectual. Limiting tribal courts’ reach further risks jeopardizing the incentive for tribal judges to do an adequate job because a lack of any and all jurisdiction denies these courts any sense of self-importance, which could discourage judges from taking their roles seriously—the effect being perhaps an erosion of any sense of fairness.\textsuperscript{105}

With that general background, it is a bit easier to find FSIC’s place within the historical and policy-driven framework of tribal adjudication. While the language of the opinion and the holding itself are not particularly revolutionary, or even plainly noteworthy, it would understate the case’s relevance to the body of law governing tribal courts by stating that FSIC merely stands for the proposition that the FAA allows for tribal court review of arbitration decisions.

For instance, the district court’s comment that it “[s]aw no reason to exclude tribal courts from the permissive conclusion” of the \textit{Cortez Byrd} venue selection

\begin{itemize}
\item \textsuperscript{98} Id.
\item \textsuperscript{99} Id.
\item \textsuperscript{100} See \textit{Nat’l Farmers Union Ins. Co. v. Crow Tribe of Indians}, 471 U.S. 845 (1985). The opinion here placed great emphasis on the policy of promoting self-government, citing to a Congressional policy in favor of Indian self-governance and several practical, procedural reasons in support. \textit{Id.} at 856-57.
\item \textsuperscript{101} Niblock & Plouffe, \textit{supra} note 75, at 225.
\item \textsuperscript{102} Id. at 226.
\item \textsuperscript{103} Id. at 226-27.
\item \textsuperscript{104} Id. at 227.
\item \textsuperscript{105} Berger, \textit{supra} note 12, at 1052.
\end{itemize}
analysis contrasts sharply with the language used in Supreme Court cases like Oliphant, in which the Court took a patronizing view of the ability of tribal courts to fairly exercise any jurisdiction over outsiders. Whereas the Court once doubted that tribal courts could ever be fair, the district court in FSIC assumed just the opposite: that there was no reason to deny a tribal court the opportunity to hear a challenge to an arbitration proceeding entered into under United States, not tribal, law. This is not to suggest that FSIC is a revolutionary decision, that the court here has crafted a novel interpretation of tribal sovereignty; it does, however, reflect the trend in modern jurisprudence of elevating the issue of tribal jurisdiction to a "principle of law." 

Of course, this decision lends itself to a certain level of skepticism as to the possibility that a tribal court can simply take an arbitration decision it does not like and use a permissive doctrine to challenge the decision in its own court system. Having shown that, arguably, Cortez Byrd does allow a tribe to use the FAA to bring a decision it dislikes into the tribal courts, the underlying question is, should a tribe be allowed to? Is it fair to allow a tribe to forum shop to the extent that the Tribe did in FSIC, theoretically gaining a sizable advantage over cultural outsiders?

In answering that question, it is important to look back to the locus of the dispute in this instance. The district court found that SWM, FSIC’s litigative successor-in-interest, met with the Tribe hundreds of times on the Tribe’s reservation throughout the parties’ contractual history. It is not unreasonable to demand that SWM be cognizant of the possibility it may be haled into tribal court by nature of its relationship. Given the broad latitude over venue selection granted by both the FAA and Cortez Byrd, the decision to allow the Tribe to assert its jurisdiction over the matter is not, on its face, an unreasonable one. In this sense, "fairness" has the same meaning one might ascribe to it in a more general debate over black-letter rules governing personal jurisdiction.

In fact, one scholar argues that the tribal court’s FSIC ruling is a “perfect example” of fairness. That author asserts that SWM presented itself as being able to “bridge the gap” between the Tribe’s on-reservation capital and off-reservation opportunities to invest that capital; SWM should have expected to be haled into tribal court in the event of a dispute.

But to be sure, when speaking of “fairness,” the fairness in question has the cultural undertones espoused by the Supreme Court in Oliphant. To be “fair,” in this context, means to be blind to the acrimony that pervades this nation’s historically sordid relationship with the various indigenous peoples that pre-existed colonization. So, is this decision the clarion call giving rise to the idea that no arbitration decision disagreeable to an Indian tribe will ever be honored because it is

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107. Berger, supra note 12, at 1055-56. The language of the Oliphant Court, which stated that tribal jurisdiction must be denied in criminal cases because of the importance of “[U.S.] citizens being protected . . . from unwarranted intrusions on their personal liberty,” implies that the Court did not believe tribal courts would adequately handle such matters. Id. at 1050.
108. Niblock & Plouffe, supra note 75, at 236.
111. Id.
sure to be thrown out by a more favorable court system? In this context, the question is better framed as: "Can fairness even exist here?"

Simply put, yes, for several reasons. One scholar has shown through exhaustive evidence that, historically, tribal courts have been fair to non-members. In decisions regarding tribes and outsiders, not only does it appear that there is "numerical" balance—i.e., regarding the number of times outsiders win versus how often they lose—but it also appears that there is "qualitative" balance—i.e., balance in areas more prone to bias, such as contract disputes. The balance is what one would normally expect from litigated decisions. Clearly, this "tends to undermine the assumption that the [tribal] courts are unfair to ... outsiders." More specifically, "non-Indian businesses are not overly disadvantaged" in the Indian courts that formed the basis of the study. They have even been found to be more pro-business than surrounding U.S. District and Circuit Courts.

Furthermore, this jurisdictional tug-of-war does not exist in a vacuum. It is counterintuitive that an Indian tribe would usurp its authority by acting in a patently absurd and unfair way. Tribes have "extremely strong incentives to act fairly to non-Indians in their dealings." They must know that the only thing standing in the way of losing their sovereign powers is Congressional action. To think they would engage in a systematic pattern of unfairness toward non-members is baseless. Were tribes to continually challenge arbitration awards in their own court systems, with the express intent that these systems would inevitably render a judgment more favorable to the tribes, certainly Congress' interest would be piqued, and an elimination of tribal jurisdiction in this arena could be a mere rubber-stamped act of Congress away. That tribal jurisdiction and sovereignty are entirely dependent upon U.S. acquiescence is motivation enough for tribes to ensure that their systems of justice are inherently fair to outsiders.

It also seems just as appropriate to attack this fundamental question from the opposite angle: is it not also possible that state and federal courts may be inherently unfair to tribal members, especially because the Supreme Court and Congress have, through various acts and decisions, asserted plenary power over tribes? In other words, because Congress and U.S. courts have as much power over tribes and tribe members as they care to give themselves, what framework exists to protect Indian interests when they are only insulated from the outside by a benevolent federal policy that has provided tribes the limited jurisdiction and sovereignty that they now enjoy? Perhaps to be "fair" is simply to be respectful of the tribal au-

113. Id. Berger found that 47.4 percent of non-members won when they appeared before the Najaoo Nation court system between January 1969 and December 2004, a number that is hardly indicative of a widespread bias, even when taking account of the fact that Navaoo customary or common law is the law of preference within their courts. Id. at 1075. While the long statistical analysis Berger cites as evidence will not be dissected in detail here, it is worth mentioning that analyses of other tribal court systems suggest a similar parity. Id. at 1094-97.
114. Id. at 1076.
115. Id. at 1077.
116. Id. at 1086.
117. Id. at 1087.
118. Singer, supra note 45, at 667.
119. Id.
120. Id. at 667-68.
121. Id. at 665.
authority that exists contemporaneously with current federal laws because only then is the United States government acting consistently with the inherent first principles of civil rights, property rights, and democracy that guide the nation as a whole. In that sense, it seems only fair to encourage self-governance in as many ways as possible.

If there is no reason to believe that tribal courts cannot be fair to outsiders—and that does appear to be the case—there is little justification for clinging to the outdated belief that tribal courts lack the inherent ability to adjudicate fairly. Because there is no reason to believe that tribal courts cannot look at conflicts between tribal members and non-members dispassionately, there is no reason to believe that the Tribe’s actions in FSIC signal any unfortunate trend in arbitration between tribes and outsiders. A more objective reading begs for an interpretation that FSIC stands for no more than an acknowledgement of the appropriateness of tribal adjudication in certain circumstances and a necessary commitment to the principle of tribal self-government.

VI. CONCLUSION

It is easy to see why such a short decision emanating from the U.S. District Court for the District of Oregon might elicit the following knee-jerk reaction: “You mean to tell me that a tribe can simply take an arbitration award it doesn’t like and appeal the decision to its own court?” In *First Specialty Insurance Corp. v. Confederated Tribes of the Grand Ronde Community of Oregon*, the district court, in essence, held just that, subject to the caveat that there be sufficient personal jurisdiction over the non-member party in the first place.

However, this decision should not deter future non-member parties from including arbitration provisions when agreeing to contract, nor should it lead to a fear that such arbitration decisions will be rendered moot by what some might term a “more favorable” tribal court. As history has shown, tribal courts have been able to rule with the required impartiality. As notions of justice demand, it is only appropriate for the judiciary to let tribal courts assert the jurisdictional and sovereign principles afforded them by Congress. This decision is nothing more than an affirmation of the importance of treating the tribal court systems, as well as the members and non-members whose disputes they settle, with the respect they deserve. After all, it’s only fair.

MATTHEW E. TERRY

122. *Id.*