"Is arbitration a form of international justice?"

*by **Diane Desierto**, Runner Up of the Laureate of the Arbitration Academy Prize 2011*

Is Arbitration a Form of International Justice?

Humanity has always sought justice through arbitration. From its beginnings in antiquity, and long before the advent of established legal systems and complex government bureaucracies, arbitration has always been premised on the achievement of justice, through parties' voluntary submission of their respective claims to the independent, competent, and impartial arbitrator(s) purposely selected to decide a given dispute. Ancient India, China, Arabic nations and the rest of the Islamic world practiced arbitration long before they established a system for the judicial settlement of disputes. Medieval Europe depended on arbitration to enforce maritime customary usages among its merchant and shipping guilds. The droit naturel of the 1789 French Revolution deemed access to this mode of dispute settlement to be of such importance within the realm of the rights of Man, that formal constitutional status was conferred in 1791 to the right of individuals to resort to arbitration. Dating back to its classical usages, arbitration can thus be seen as one of the original pure forms of international justice.

The telos (purpose) of arbitration is justice. Its nomos (order) has evolved in reach and scope over time, flexibly adapted according to the exigencies, political fabric, and social arrangements necessitated by the human condition. As human transactions and interests transcend borders, so has arbitration evolved to become a unique order of international justice through its use for the peaceable settlement of inter-State, intra-State, and mixed State-individual claims. Arbitration is the most enduring form of international justice precisely because of its universal openness, constrained mainly by the autonomously determined parameters of contract through the arbitral agreement, and residually by minimal State

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regulation and limited procedural review. Arbitration is the only known method of dispute resolution that is available to both State as well as non-State actors; on all possible sedes materiae that could give rise to disputes; encompassing and applying any known corpus juris that parties choose to govern their disputes; and is capable of being conducted in any territorial plane. Unlike international courts operating according to their respective requirements for jurisdictional seisin, as pre-determined under their corresponding treaty or legislative mandates, the principle of autonomy enables parties to arbitration to design and plan for the jurisdictional scope of their disputes long before they materialize. In this effort, however, party autonomy does not mean giving license to a completely disembodied system from the constellation of States; neither does arbitration sever parties from law and regulation in favor of ex cathedra pronouncements devoid of any binding rules. Rather, it is the States' continuing support for the arbitral process; their cooperation in the recognition and enforcement of arbitral awards as a co-equal (and at times, more appropriate) method of dispute resolution to litigation in domestic courts; and their participation in the collective development of substantive international standards and optimal, efficient, and expeditious arbitral rules, which has sustained arbitration as a truly international form of justice.

History bears out various features of arbitration upholding international justice. For one, arbitration inimitably resolves disputes implicating questions of an international character. Arbitration has addressed the broadest range of questions pertaining to the public and the private interest, from the settlement of territorial borders in decolonization processes (such as the Island of Palmas arbitration; the 1872 Alabama Claims arbitration; the 1931 Clipperton Island arbitration; and the more recent 2009 Abyei arbitration); the legality of the

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use of force (such as the 1990 Rainbow Warrior arbitration); the circumstances and conditions for the attribution of private acts to public authorities (the 1927 Roberts Claim), including the corresponding duties of governments to aliens (the 1926 Neer Claim) and the notion of denial of justice (the 1926 Janes Claim); the protection of private property from governmental takings and measures amounting to expropriatory acts or the substantial diminution of commercial values (from the 1930 Lena Goldfields arbitration up to the contemporary international investment awards rendered by ICSID, PCA, ICC, and ad hoc arbitral tribunals); to the multitude of disputes on invariably all aspects of commercial and private transactions submitted to a spectrum of specialized arbitral institutions around the world (the ICC, PCA, LCIA, SCC, SIAC, CIETAC, HKIAC, the Permanent Court of Arbitration for Sport, among others), as well as those organized under private (and often less institutionalized) auspices and ad hoc initiatives (arbitration under UNCITRAL rules, for example, or the Hague Arbitral Tribunal set up for the Bank for International Settlements). The significance of arbitration as a form of international justice is manifest not only from the rich jurisprudence it has generated, but likewise in its direct and progressive influence on the substantive and procedural trajectories of international law.

Secondly, arbitration conforms with the conception of international justice by enabling access to redress for more of the actual subjects of international law, including both State and non-State actors in the international system. Instead of complete dependence on the orthodoxies of diplomatic espousal of claims before the International Court of Justice (and the internal realpolitik of authoritative decisionmakers within States that determine whether espousal would indeed be undertaken for private individual claims), arbitration grants non-

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State private actors meaningful access to international justice. Foreign investors and other alien entities formerly held captive by the uncertain (and often asymmetric) outcomes of host State litigation have been given a more depoliticized recourse through international investment agreements, the ICSID Convention and Additional Facility rules, as well as non-ICSID investment arbitrations governed by UNCITRAL Rules. The same web of international agreements affords host States similar opportunities to pursue their claims against foreign individuals and corporations beyond the traditional terrain of diplomatic protection. International commercial arbitration similarly permits private corporations and individuals based in different territorial jurisdictions to select a neutral third-party forum for the resolution of their disputes, dispensing with the need to apply to governments of their respective places of incorporation or nationality for the diplomatic espousal of their claims against State counterparts.

Moreover, the inclusive and participatory nature of arbitration makes it less susceptible to "democratic deficit" or countermajoritarian criticisms voiced against inter-State litigation at the International Court of Justice and other international tribunals. Admittedly in recent years, there has been greater agitation to widen the access of third-parties (amicus curiae submissions or third-party intervention) in arbitrations deemed to be more keenly imbued with public interest. Sharply contrasting with the static nature of the ICJ's Rules of Court and Practice Directions, arbitration can adapt to allow third-party access within its framework, as was done in some investment arbitrations with the consent of the parties, such as in Suez v. Argentina. The consent of parties to an arbitration to third-party intervention can more easily facilitate such access than the requirements for intervention

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under Article 62 of the ICJ Statute, which has, in practice, empowered the ICJ to separately assess the propriety of third party intervention according to its effect on the Court's judicial function, regardless of the parties' expressed opinions on the subject.

A third feature of arbitration that hearkens most to international justice is its acceptance of the procedural flexibility inevitable in an international system driven by interlocking competences, numerous objects and subjects of law, bases of jurisdiction, civil and common law traditions. International law, paraphrasing ICJ President Rosalyn Higgins, is not a set of rules, but a process of international authoritative decision-making. The international legal order is not a vertical order driven by a world government with Montesquieu-esque separation of powers, rather it is a horizontal system of equal competences and bases of authority among sovereign States. Arbitration is the form of dispute resolution most consistent with this vision of the international legal process, as it generally recognizes the fundamental equality and jus standi of all actors in the international system, State or non-State. Arbitrators, acting within their mandate from the parties, enjoy greater freedom than international and domestic courts to devise and adopt procedures for evidence-taking, the conduct of the arbitration, standards and burdens of proof, and other procedural rules which come closest to the reasonable and legitimate expectations of parties, who are themselves aware of the proliferation of diffuse processes, multiple standards, and alternative procedures in the international system.

For example, time limits for submissions, hearing procedures, and the rendering of awards in institutional arbitral rules applicable to international commercial disputes, such as

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the ICC, for example, are fully cognizant of the need for expeditious and efficacious dispute resolution for transnational business entities who likely undertake repeat transactions with the very same respondents (suppliers, distributors, transport agents, strategic business partners, among others) to the arbitration. In inter- State arbitrations, time may also be more crucially of the essence where political negotiations are tenuously and sensitively anchored on thin internal support from constituencies for the government representatives, and cannot await the less predictable deliberations periods and processes of the International Court of Justice or other inter-State courts.

Furthermore, the parties' selection of their arbitrators presupposes that these individuals have the qualifications best suited to appreciate the factual, technical, and specialized contours of the dispute, and necessarily determine the most appropriate procedural orders for eliciting, illuminating, or weighing these specific technical aspects during the arbitration. For instance, interim and conservatory measures need not be limited to traditional judicial forms such as injunctions or attachments, but can (within certain limits, and to some degree dependent on the applicable law or in default thereof, the lex arbitrii) admit innovative asset protection (such as 'hybrid' interim measures among others) tailored for certain situations. Hearings and submissions can be expedited and structured to reduce the time and costs incurred by the parties, without sacrificing the deliberative processes of the arbitrators. In this sense, arbitration reflects the actual nature of international decision-making that takes into account party preferences and extant circumstances.

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Finally, the feature of arbitration that best exemplifies its nature as a form of international justice is its accountability to stakeholders. Arbitration has been derided for its alleged cloak of secrecy; its seeming perpetuation of a self-interested mentality among a class of international lawyers scrupulously bent on gaining repeat appointments; alleged arbitrator indifference to public interest concerns. There is little (and often) indeterminate empirical evidence supporting any of these claims of bias and self-interest to date, but an overlooked counter-argument based on the actual nature of arbitration should be considered. Arbitration creates direct accountability for its stakeholders (State and non-State) precisely because the latter are its ultimate architects. Arbitration is not an artifice catering to special interests, but has been resorted to since antiquity across sectors, industries, groups, and States for the very virtue of its responsiveness to the needs of parties to a dispute. Within the arbitral process, parties have greater freedom to advance their claims, present (mostly) any form of evidence, and ascertain the truth alongside the just resolution of the dispute, in a neutral environment conducive to objective, transparent, and reasoned judgment. However, even while parties enjoy this relative 'isolation' for the duration of the arbitration, they are not removed altogether from any form of public regulation or State oversight. States may decline to recognize or enforce arbitral awards that offend public policy (among other reasons); they may also enter into treaties that directly confer greater participation rights to third parties or more bases for judicial review of arbitral awards. The fact that the New York Convention, the ICSID Convention, or most of the relevant treaties have not been amended to enlarge State intervention and judicial interference during the arbitration is indicative of States' belief in the continuing salience of this form of dispute settlement.

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Arbitration has not been a uniformly successful project according to historical annals. It has not always prevented, abated, or contained wars, bankruptcies, or losses. It endures quietly as a lasting form of international justice, however, because its genius lies with the close approximation of the binding quality of international decisions upon the very same stakeholders voluntarily submitting themselves to this process. Silently and without any self-congratulatory fanfare characteristic of international politics, arbitration has augured a convergence towards a genuine opinio juris sive necessitatis, consensually and equally writ large by State and non-State subjects of the international system.

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