

National Judiciaries in a Global Economy

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The primary objective of the International Association of Court Administration, set out in its Mission Statement, is 'to promote professional court administration and management in emerging democracies and other countries pursuing the rule of law.' It implies what seems unarguable. Professional court administration and management support the rule of law. The question for this address is 'how do courts in supporting the rule of law interact with national and global economies?'

It is an intuitive observation that the rule of law applied by competent, independent, incorruptible and efficient courts is a factor in sustainable economic development at the national level. The authoritative judicial decisions of such courts are the defining expression of the rule of law in action, in a way that is relevant to the confidence with which economic transactions within a society can be undertaken by members of that society and foreign investors.

It is necessary in approaching this topic not to generalise about the desirable features of courts and the idea of the rule of law from a narrow frame of reference based upon a particular legal system and legal tradition. The International Association of Court Administration has found enough common ground among its members to enable them to define a common purpose in terms of a single Mission Statement embodying the 'rule of law' concept. Within that broad concept there is diversity. The rule of law and the defining characteristics of judicial systems may be understood in different ways, in different societies, having regard to their history, culture, legal traditions and demographic mixtures. Even when formulations of the rule of law are nominally the same, they may be applied differently. There are, however, common elements. A conservative approach begins with what is called the thin concept of the rule of law. Common elements of the thin concept require that official

power be exercised lawfully, rationally, consistently, fairly and in good faith. They require that the law applies to all and that in the resolution of disputes between private parties or between private parties and governments, courts will administer justice according to the law rationally, consistently, fairly and in good faith — that is to say, the courts themselves will exercise their official judicial power in accordance with the rule of law. There are, of course, richer definitions of the rule of law which extend into the fields of human rights protection and the protection and advancement of social, economic and cultural rights — so called thick concepts. Nevertheless, the thin concept, modest as it may appear, is an essential practical element of societal infrastructure.

Supported by an efficient court system the rule of law helps to create and maintain the great social space within which the members of a society can pursue their individual goals and exercise their rights and freedoms — civil and political, social, economic and cultural. That general observation leads to the intuitive view of the importance of the rule of law for economic activity. The intuition is that when courts operate effectively and the rule of law is strong those who enter into economic transactions may have confidence that the promises they make and receive, the obligations they assume and the rights they acquire will ultimately be recognised and enforced. To the extent that economic activity is regulated by public authorities and officials they will have confidence that the authorities and officials will act honestly in their decision making and in the words of the judicial oath which should apply to all official power, 'Without fear or favour, affection or ill-will.'

Although it has been a matter of some contention among economists and others, there is recognition at an international institutional level of the importance of judicial systems to national economies. Last year the President of the Asian Development Bank, Takehiko Nakao, addressed the Annual Meeting of the Conference of Presidents of Law Associations in Asia and described the rule of law as providing the basic underpinnings of all economic activity and thus of economic development. He went on:

It secures property and contract rights — the fundamental building blocks of market economies. The right to own property encourages investments to enhance productivity. Recognition of intellectual property rights encourages activities in research and development. And a well-established framework for enforcing contracts assures entrepreneurs that contracting parties will comply with their obligations. Private parties need to feel secure from abuses of government and private crimes before

investing their time and capital. Under the Rule of Law people can trust that the benefits of their efforts will not be lost or stolen.¹

The belief that there is a causal link between the efficiency of court systems and national economies has an intuitive character. It is not easy to verify empirically. There are debates about how to develop globally valid indices of the rule of law according to a common definition and globally valid measures of the performance standards of national judiciaries and how to link those things to measures of economic performance.

The website of the World Bank contains an appropriate caution in its section dedicated to law and justice institutions. It refers to 'the belief in the power of legal and judicial reform to spur economic development', which it says is supported by 'a growing body of research showing that economic development is strongly affected by the quality of institutions — including the quality of a nation's legal institutions.' However, it acknowledges that:

It is very hard to measure the quality of legal institutions, harder still to sort out the strength of the causal relationships between their quality and economic development, and virtually impossible at this stage to sort out the complex and contingent relationship between the different components of real-world institutions.²

Mere correlation between institutional strength and economic development does not of itself demonstrate that institutional strength facilitates such development. It might be the other way around. As the World Bank points out:

It is also plausible that high levels of economic growth spur the development of better institutions.³

Court administrators would be among the first to acknowledge the difficulty of measuring the quality of legal institutions and in particular of devising useful measures of performance and efficiency. Nevertheless, the endeavour is worthwhile. Such measures are

¹ Takehiko Nakeo, 'Economic Development in Asia and Rule of Law' (Keynote address delivered at the Annual Meeting of the Conference of Presidents of Law Associations in Asia, Tokyo, Japan, 10 June 2013).

² The World Bank, *Economic Development and the Quality of Legal Institutions*, Law and Justice Institutions
<<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:23103355~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062~isCURL:Y,00.html>>.

³ Ibid.

important aspects of the judicial function. They have a direct relationship to access to justice. They can play an important role in dialogue with government which is responsible for the funding of the judiciary.

From an international perspective the development of quantitative performance measures has an obvious bearing on the planning of capacity building programs. Capacity building internationally tends to be directed to:

- Enhancing judicial independence — including promoting measures which reform judicial selection and tenure, giving courts greater autonomy in the administration of funds and furnishing them with greater powers of judicial review.
- Addressing court delay — by case management training, the revision of court filing procedures, procuring resources such as computers or personnel and creating specialised courts.
- Increasing access to justice — by measures including the development of alternative dispute resolution mechanisms, increasing the role of court registrars for non-contentious matters, providing court translators and creating legal aid agencies.
- Training the legal and judicial profession — including specialised training for judges in new areas of jurisdiction.⁴

Institutional capacity building, however, is not a story of progress down a yellow brick road. In a study published in 2008, Trebilcock and Daniels surveyed a number of judicial reform programs across Latin America, Africa and Asia.⁵ The examples which they selected demonstrated mixed success in international judicial reform programs. They included studies of programs delivered in Argentina, The Dominican Republic, Mozambique and Mali. Their examples suggest that international programs face significant challenges in capacity building for effective performance within national legal systems and are a long way from building the capacity of courts to deal with dispute resolution in complex commercial matters much less in international trade and commerce.

⁴ Richard E Messick, 'Judicial Reform and Economic Development: A Survey of the Issues' (1999) 14(1) *The World Bank Research Observer* 117, 118-119.

⁵ Michael J Trebilcock and Ronald J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar, 2008).

There are some interesting examples of the need to engage within the global economy driving national judicial reform. In Mexico, a number of constitutional reform measures were implemented in the 1990s in order to better address investment and expropriation disputes. Those reforms are said to have been brought about by Mexico's desire to 'open up' to the global economy, as well as its recognition that the shortcomings in its judiciary might hamper that involvement.⁶ Professor Patrick Del Duca co-chair of the Mexico Committee of the American Bar Association International Law Section put it thus:

The phenomenon of economic globalisation originated outside Mexico. Mexico's leaders catalysed Mexico's opening to it through their policy initiatives. Exposure to economic globalisation reinforced attention to the rule of law's importance because of its perceived significance to where investors direct their capital.⁷

Despite the challenges posed by such changes to the Mexican judiciary, Del Duca has argued that 'Mexico's judicial reforms and international opening are significant strides by Mexico in establishing the legal infrastructure to support its encounter with global competition for investment capital.'⁸

Brazil offers another example of a model of judicial reform locally generated in response to global market forces and an awareness of barriers posed by its domestic courts to engagement in international trade and investment. Professor Megan Ballard writing at the commencement of the reform process in 1999 said that:

calls for a more efficient judiciary [were] bolstered by fear that Brazil's lethargic courts dissuade potential investors. Lawyers [had] circulated stories that foreign business clients opt out of privatization auctions and other investment opportunities because the judiciary functions too slowly.⁹

⁶ Jeswald W Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World' (1999) 33 *The International Lawyer* 875.

⁷ Patrick Del Duca, 'The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization' (2003) 51 *UCLA* 35, 135.

⁸ Ibid 40.

⁹ Megan J Ballard, 'The Clash between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil' (1999) 17 *Berkeley Journal of International Law* 230, 260.

There are evidently more complex dimensions to the Brazilian reforms. However, they stand as an example of change generated internally and informed by a perception of economic benefits.¹⁰

There is a lot of work to be done on evaluating the external performance of judicial reform programs. The World Bank has observed:

Practitioners and scholars interested in legal and judicial reform are becoming increasingly interested in finding better ways of assessing the performance of legal systems and the success of reform projects. The greater use and greater sophistication of performance indicators is generally a development to be welcomed. However, designing appropriate indicators entails a host of difficult conceptual and practical problems.¹¹

Time does not permit an exploration of the many indices of performance of courts developed around the world. I note that you have a particular session on that topic in a developing country context. Relevant measures are considered in the annual European Union Justice Scoreboard. The 2013 Scoreboard was particularly directed to features facilitating a positive investment climate:

Given the importance of national justice systems for the economy, the scope of the 2013 Scoreboard focuses on the parameters of a justice system which contribute to the improvement of the business and investment climate. The Scoreboard examines efficiency indicators for *non-criminal* cases, and particularly for litigious civil and commercial cases, which are relevant for resolving commercial disputes, and for administrative cases. Administrative justice plays an important role in a business environment for example with regard to delivering licences or for disputes with administration on taxation or with national regulatory bodies.¹²

¹⁰ Organisation for Economic Cooperation and Development, *Brazilian economy is expanding again but long-term challenges remain, says OECD* (22 October 2013) <<http://www.oecd.org/newsroom/brazilian-economy-is-expanding-again-but-long-term-challenges-remain.htm>>; Mihaela Papa, 'Emerging Powers in International Dispute Settlement: From Capacity Building to a Level Playing Field?' (2013) 4(1) *Journal of International Dispute Settlement* 83, 92-95 and 100-102.

¹¹ The World Bank, *Performance Measures, Topic Brief, Law and Justice Institutions* <<http://go.worldbank.org/DNZZUB3WBO>>.

¹² European Union, *The EU Justice Scoreboard: A Tool to Promote Effective Justice and Growth* (2013) 3.

The primary indicators identified by the Scoreboard are familiar; the length of proceedings, the clearance rate and the number of pending cases.¹³ It also acknowledges 'perceived' independence as an indicator of performance.¹⁴

Although it has been debated from time to time and although generalisations are dangerous, it is reasonably safe to say that national judicial systems can enhance or undermine national engagement with the global economy according to the legal environment they create for foreign investment and trade. However, both developed and developing judicial systems may be sidestepped when it comes to the resolution of disputes arising out of economic activity across national borders.

Commercial transactions across different jurisdictions will often include provision for dispute resolution according to internationally accepted rules. The preferred means of dispute resolution in many such cases is arbitration. The High Court of Australia recognised the freedom that parties have, to structure their transactions in this way, in its recent judgment in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*.¹⁵ The case concerned the constitutional validity, which the Court upheld, of Pt III of the *International Arbitration Act 1974* (Cth) giving effect to the UNCITRAL Model Law providing for the enforcement by Australian Courts of international commercial arbitral awards.

In their joint judgment, four Justices of the Court pointed to the choices that those engaging commercial transactions can make:

The exercise of judicial power is an assertion of the sovereign, public authority of a polity. Whilst it is both 'right and important to observe that the determination of rights and liabilities lies at the heart of the judicial function', parties are free to agree to submit their differences or disputes as to their legal rights and liabilities for decision by an ascertained or ascertainable third party whether a person or body. ... [W]here parties do so agree, 'the decision-maker does not exercise judicial power, but a power of private arbitration'.¹⁶

¹³ European Union, *The EU Justice Scoreboard: A Tool to Promote Effective Justice and Growth* (2013) 4.

¹⁴ European Union, *The EU Justice Scoreboard: A Tool to Promote Effective Justice and Growth* (2013) 4-5.

¹⁵ (2013) 87 ALJR 410.

¹⁶ *Ibid* 427 [75] (footnotes omitted).

Parties to commercial transactions are obviously free to choose to resolve their disputes in any way they think appropriate. There are, however, public policy implications of the non-judicial resolution of commercial disputes involving international actors. Even though they may be able to be classed as private disputes governed by contract, they may, in some cases, yield outcomes of great importance to national communities. An obvious example might be a dispute about licensing arrangements with respect to intellectual property rights, the outcome of which may affect the availability and price of a range of goods or services within a national jurisdiction. When disputes of that kind are heard by courts and decided in the exercise of judicial power, they are decided in public by publicly appointed judges exercising powers conferred on them by public law and not by private agreement. It can be argued therefore, that efficient courts which offer a viable alternative to arbitration serve not only their institutional interests but, more importantly, the public interest and the rule of law. That being said, there are many advantages to commercial arbitration where international commercial disputes are concerned. The senior judiciary in Australia has generally acknowledged arbitration as a first class resolution mechanism, to quote the present Chief Justice of New South Wales.¹⁷

There is a degree of competitive pressure on the arbitration process. It does not occupy the whole field of international commercial dispute resolution. An international arbitration survey conducted in 2013 reported that for disputes that could not be settled by other means, respondents referred 47 percent to arbitration, 47 percent to litigation and 13 percent to expert determination. The survey also disclosed some dissatisfaction across various sectors about judicialisation of international arbitration on the basis that its processes were seen as becoming more sophisticated and more under the control of law firms than users¹⁸. There is a link to concerns about costs. International commercial arbitration has said to have been engaged in a degree of soul searching concerning costs and delay.¹⁹

¹⁷ Chief Justice Bathurst, 'The Australian Arbitration Option' (Speech delivered to the Australian Centre for International Commercial Arbitration, Mumbai and New Delhi, 27 & 29 February 2012).

¹⁸ PwC and School of International Arbitration, Queen Mary University of London, *International Arbitration Survey 2013: Corporate Choice in International Arbitration* (2013) <<http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>>.

¹⁹ Kimberley Chen Nobles, 'Emerging Trends and Issues in International Arbitration' (2012) 43(1) *California Western International Law Journal* 77, 103-108.

That does not mean that international arbitration is under serious threat. The arbitral community has taken measures to respond to concerns which go to its competitiveness as a dispute resolution mechanism. Overall, arbitration is growing as an industry and particularly in the Asia Pacific region. The question whether international commercial courts of the kind being set up by Singapore will offer an attractive alternative, remains to be seen.

There is a developing mechanism by which national courts can become more attractive venues for commercial dispute resolution. That is the mechanism created by the Hague Convention on Choice of Court Agreements, which was concluded in 2005, but which has not yet entered into force. Under the Convention, States parties can agree to recognise a 'choice of Court agreement' between parties in civil and commercial matters. Courts not chosen in the agreement must stay all proceedings. The choice of court must be 'exclusive' to the courts of a contracting State. Analogously to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a judgment given by the chosen court must be recognised and enforced in all other contracting States. The Hague Convention seeks to make courts an 'equal and viable alternative to arbitration.'²⁰

The Convention offers competitive benefits to participants in international trade and investment by widening their choices of dispute resolution mechanisms. It provides a stimulus to developing the capacities of national courts to deal efficiently and competently with international commercial disputes and to offer advantages that arbitration may not be able to offer. A court which can provide speedy economic justice by judges with relevant expertise and the quality control of an efficient appeal process may be more attractive to some parties than other methods of dispute resolution.

Finally, reference should be made to the use of arbitral tribunals under bilateral investment treaties, multilateral investment treaties and free trade agreements. Typically, such treaties impose obligations upon States parties which include fair and equitable treatment of foreign investors and protection against expropriation of their property. The dispute resolution mechanisms settled upon between States who enter into such agreements,

²⁰ Louise Ellen Teitz, 'The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration' (2005) 53 *The American Journal of Comparative Law* 543, 548.

may or may not involve recourse to their judicial systems.²¹ The use of arbitral mechanisms is common. Importantly, such treaties confer rights upon private investors to bring action against a State for breach of the treaty.²²

ISDS processes have also been used to call into question decisions of national courts. For example, decisions of courts refusing to enforce or setting aside arbitral awards in international commercial arbitration between private parties have been the subject of challenge under investment treaties. An Arbitral Tribunal appointed under a bilateral treaty between Bangladesh and Italy in 2009 held that a decision of a court in Dakar setting aside an arbitral award amounted to expropriation of the awardee's property without compensation contrary to the bilateral investment treaty. The arbitral claim succeeded. The Tribunal said that the Bangladeshi Courts had abused their supervisory jurisdiction over the arbitral process. Similar decisions have been made in relation to other courts.²³

A more direct and striking example is the claim brought by the drug company, Eli Lilly, in arbitration under the North American Free Trade Agreement complaining of Canadian judicial decisions holding that its patents for two drugs were invalid for want of utility. Eli Lilly alleges in its notice of arbitration that the judiciary in Canada has created a new doctrine to assess whether an invention meets the condition of being 'useful' or 'capable of industrial application'.²⁴ More recently, the Al Jazeera media network has initiated arbitration proceedings against Egypt pursuant to a bilateral investment treaty concluded between Egypt and Qatar in 1999. It claims compensation based on the breach of that agreement by Egypt arising out of the alleged harassment and imprisonment of its journalists working in that country.²⁵

When negotiating investment treaties or free trade agreements, States with developed judiciaries may be reluctant to subject their investors to the less developed domestic courts of

²¹ August Reinisch, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements' (2013) 21(1) *Asia Pacific Law Review* 3.

²² *Ecuador v Occidental Exploration and Protection Co* [2006] QB 432.

²³ *Frontier Petroleum Services v Czech Republic* (UNCITRAL, 12 November 2010); *ATA Construction International Trading Co v Jordan* (ICSID Case No ARB/08/2, 18 May 2010).

²⁴ *Eli Lilly and Company v Government of Canada* (Notice of Arbitration) (12 September 2013) [9].

²⁵ Al Jazeera, *Al Jazeera demands \$150m damages from Egypt* (29 April 2014) <<http://www.aljazeera.com/pressoffice/2014/04/al-jazeera-demands-150m-damages-from-egypt-20144281320872282.html>>.

the other States. Parties in cross-border disputes may be unfamiliar with the procedures and language of a foreign national court. Investors may not trust the national court of another country. In some countries the independence of the judiciary may be in question with the possibility of executive interventions in court proceedings likely to influence the outcome.²⁶

There is a particular problem for developing States when negotiating dispute resolution mechanisms. As Professor Leon Trakman has pointed out:

On the one hand, they worry that international investment tribunals may support foreign investors' proclivities at the expense of the states' fledgling economies and natural resources. On the other hand, they fret that foreign courts exercising jurisdiction might favour local interests over investors from developing states.²⁷

It follows that the characteristics, the competencies, the independence and the efficiencies of national judicial systems may be relevant to the design of investment treaties and free trade agreements.

The connections between efficient judicial systems, economic benefits and national engagement with the global economy are difficult to verify empirically even though some kind of causal relationship seems intuitively to be likely. So should the court administrator simply throw up his or her hands and say — 'well my job pays the mortgage and my children's school fees but I don't know if it's good for anything else.' The short answer is that we all commit ourselves to our respective tasks as judges and administrators on incomplete information. That is a feature of the human condition. We do not have time to wait for the definitive social and economic studies to tell us whether what we believe is true, namely that efficient courts deliver social and economic benefits which outweigh their costs. We proceed on the strong intuitive foundation that our society operates on certain assumptions about what our legal and judicial systems should aspire to and can achieve and it is our job to meet, and if we can, to exceed those assumptions.

²⁶ Sameer Sattar, 'National Courts and International Arbitration: A Double-edged Sword?' (2010) 27(1) *Journal of International Arbitration* 51, 51.

²⁷ Leon Trakman, 'Foreign Direct Investment: Hazard or Opportunity?' (2009) 41 *George Washington International Law Review* 1, 27.