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A Call for Rethinking International Arbitration: A TWAIL Perspective on Transnationality and Epistemic Community

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Abstract

Despite the increasingly diversified discourses in international commercial arbitration, this device of socio-legal regulation remains a relatively under-theorized subject. In particular, far too little attention has been paid to analyzing international commercial arbitration through critical approaches such as Third World Approaches to International Law (TWAIL). TWAIL is broadly understood as a methodological reorientation in international law by highlighting the historical links between the foundations of this field of law and the history of capitalism and imperialism as well as the colonial and Eurocentric legacies in the structure and operation of the current international legal regime. With this in mind, two fronts in international commercial arbitration invite a reexamination through a TWAIL perspective and by drawing on the concept of hegemony. One front is the transnational account of arbitration, and the other one is the epistemic community of arbitration. By examining these two notions through a narrative of hegemony of Western legal traditions, we posit that any effective attempt at redefining or reforming arbitral governance structure towards sustaining diversity requires a deeper understanding of historical and current world power structures and creating a vision for the prospect of dehegemonization.

Keywords Arbitration · TWAIL · Hegemony · Transnational arbitration · Epistemic community

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Introduction

Far too little attention has been paid to analyzing international commercial arbitration from the critical perspectives, including the third world perspective. This gap is worth investigating because of the increasingly significant role of international commercial arbitration in global governance. In particular, the liberal orientation of contemporary global governance is under the influence of arbitration as a significant and predominant mode of dispute resolution in cross-border trade (Muir Watt 2020). A third world perspective, which criticizes the liberal world order (Bianchi 2016), has the potential to bring new light to the critical analysis of international commercial arbitration as a method of international dispute settlement.

There is no coherent and distinctive definition of the Third World Approach to International Law (TWAIL) because it involves distinct strands influenced by critical legal theory and other inclinations (Bianchi 2016). Notwithstanding the diversity of TWAIL perspectives and the heterogeneous group of its scholars and activists, TWAIL scholarship is united in its broad opposition to the current global international legal and economic order as well as promoting the development of an alternative normative legal framework for international governance (Mutua 2000). Specifically, TWAIL aims to advance a methodological reorientation in international law by highlighting the links between the foundations of this field of law and the history of capitalism and imperialism as well as the colonial and Eurocentric legacies in the structure and operation of the current international legal regime (Chimni 2013; Bianchi 2016; al Attar 2020). The focus of TWAIL has been on different areas of public international law and international economic law (Gathii 2011). While public international law is mainly concerned with inter-state relations, international economic law, in its broadest sense, extends to 'all national and international legal norms that affect transnational movements of goods, services, capital and labor' (Paul 1995, p. 609). The broad definition of the latter field of law also covers international commercial arbitration. This poses the question of whether and to what extent international commercial arbitration can be a potential field of study from a TWAIL perspective.

The mainstream legal scholarship of the field of international economic law considers international commercial arbitration as a rule-oriented dispute settlement mechanism, where the influence of ideology or authority is minimal (Chimni 2013). Such an assumption can be put into question from a TWAIL perspective, which has a clear interest in bringing to the foreground the power relationships within the international community reflected in legal constructs. Nevertheless, TWAIL scholarship hardly makes specific references to international commercial arbitration as well as its political economy, institutional structures, and substantive impact. This may be partly explained by the fact that elements of politics and power relationships are not self-evidently at play in private law. In contrast, power dynamics have had more presence in investment arbitration debates. Nevertheless, international commercial arbitration precedes investment arbitration. In particular, the historical oil nationalization arbitrations, which have been considered by some Third World scholars as 'flagrant proof of bias' in arbitration (Shalakany 2000, p. 445), were indeed commercial arbitrations involving state parties. Furthermore, international commercial arbitration is also concerned with allocation of powers between national courts and arbitral tribunals.

Such attributes as well as growing tendencies to harmonize international commercial arbitration across the globe make this field of law susceptible to a TWAIL analysis.

Notably, the focus of TWAIL scholarship on moral equivalency of cultures and peoples and its rejection of universalization of specific cultures (Mutua 2000) is a fertile ground for critically studying international commercial law from the prism of sustainable diversity. Sustainable diversity denotes accepting all traditions of the world and seeing them as mutually interdependent, a perception which in turn enhances the prospect of dispute settlement (Glenn 2007). A TWAIL perspective enables a particular conceptualization of international commercial arbitration that elucidates some of the historical roots of lack of sustainable diversity of the arbitral actors and cultures and may ultimately help with remedying the issue. In particular, TWAIL's attention to the postcolonial nature of international law and asymmetries of power invites a re-examination of how political and commercial power relations are relevant to international commercial arbitration through the advent of constructs and concepts such as transnational law. Relatedly, and from a critical theory perspective, the arbitration system is part of the broader narrative of power dynamics between the global South and North, and its legitimacy is undermined by the fact that it is not representative of the global variety of perspectives (Karton 2022). Although such concerns have mainly been raised with regard to investor-state arbitration, they are also relevant to international commercial arbitration. This is because the perspectives of a dominant group within the society can gradually form a benchmark for views on international commercial dispute resolution. In other words, 'normativity' within the resolution of international commercial disputes may be shaped by a narrow segment of the society to the exclusion of other perspectives (Karton 2022).

The impact of power dynamics and the role of dominant groups in the development of international commercial arbitration and its conceptual apparatus is directly related to the concept of hegemony, which is a central theme of TWAIL scholarship in rethinking the resistance to international law (Rajagopal 2003). Inspired by Antonio Gramsci, hegemony is understood as production, reproduction, and mobilization of popular consent constructed by any dominant group by relying upon the confluence between force and moral ideas (Rajagopal 2003). Such consent is secured via a process through which the dominant powers exhibit their own interests as universal (Knox 2019).

More specifically, Western hegemony denotes a historical and cultural influence of colonialism leading to the dispersal of Western customs throughout the world (Worth 2015). As a corollary, Western legal traditions can also be considered as an instrumental part of the hegemony in this sense. For example, European laws used to be extensively deployed in the imperial project and subjecting the colonized territories into foreign political and cultural norms (Roy 2008). Notably, colonial laws continue to have contemporary relevance as an instrument of hegemony (Roy 2008). The prominent example of such relevance in the commercial arbitration domain is legislations influenced by the colonial laws even after independence (Asouzu 2004). For instance, the 1889 English Arbitration Act was extensively adopted by the Com-

monwealth nations[1] (Kidane 2017). This is while arbitration (and similar institutions) in former colonies was not an unrecognized phenomenon.[2]

Against this background, this paper seeks to revisit transnational autonomy of international commercial arbitration by drawing on the concept of hegemony as viewed from the TWAIL perspective. Accordingly, the central question that this paper attempts to answer is to what extent the transnational authority of international commercial arbitration, as a private method of dispute resolution backed by the imperium of states, is a hegemonized legal institution from a TWAIL perspective.

Before we turn to the main analysis, it is necessary to discuss a methodological point as well as a clarification on terminology. As regards methodology, the line of approach taken in this work is built, mainly, around the concept of hegemony as understood by Gramsci and later borrowed in TWAIL scholarship. Given the counter-hegemonic political economic approach of TWAIL, the analysis also draws on the literature on the political economy of international commercial arbitration to highlight the role of legal constructs in perpetuating existing global power and wealth disparities.

For definitional purposes, we use the term 'international commercial arbitration' in this paper to refer to a method of dispute resolution whereby the parties to contracts agree (through arbitration clauses or separate submission agreements) to have their disputes arising from all relationships of a commercial nature, whether contractual or not, resolved by one or more private individuals, i.e., the arbitrators rather than by a court of law. What distinguishes this method of dispute resolution from investment treaty arbitration is the legal frameworks in which they operate. Investment treaty arbitration is based on a standing offer to arbitrate in a treaty between the states concerning disputes related to the breach of the obligations provided in the treaty. Conversely, international commercial arbitration is based on the consent of the parties (of which one may be a state) typically given in an arbitration clause contained in a contract between the parties for resolving disputes arising out of commercial transactions.

Informed by the foregoing considerations, the discussion in this paper is divided into three sections. The first section lays the conceptual groundwork for the central idea of the paper. Sections 2 and 3 address the two selected themes to be explored through a narrative of hegemony in international commercial arbitration briefly developed in the first section. These two themes, namely the claims on transnationality of commercial arbitration and the concept of epistemic community in international arbitration, have been chosen on account of their potential relevance to the debate on how concepts and practices in international arbitration have been shaped under the hegemony of Western legal traditions.

[1] On the influence of colonial arbitration laws on Southeast Asia see: (Schaefer 2000).

[2] For example, in Africa, there was a long-standing tradition of customary arbitration, which had been largely marginalized by colonization (Kidane 2017; Asouzu 2004). Arbitration-like structures were also used among Parsis in India during the colonization period. (Sharafi 2014).

A Narrative of Hegemony in International Commercial Arbitration

Is Commercial Arbitration Truly Apolitical?

There is a tendency to distinguish between economics and politics in commercial arbitration debates. It is commonly believed that arbitration is always about resolution of contract disputes arising from property rights, and therefore apolitical[3] (Shalakany 2000). This is based on the prevailing perception that juxtaposes private law as 'quintessentially legal, rational, scientific, and individualistic' (Kennedy 2001) with public law as political. Nevertheless, as stated by Cutler, the belief that the settlement of international economic disputes requires a 'depoliticized' environment through impartial experts is one of the foundational myths of international commercial arbitration (Claire Cutler 2014). Most strikingly, international arbitration, from the outset of its modern history, has been complexly intertwined with political dynamics[4] and, in particular, has been dealing with North-South relations.

A political economy perspective can bring more light to the distinction between private and public law. Indeed, such distinction, driven immensely by liberalist views, has been influential in camouflaging the process through which private law tools and constructs shape and justify power (Muir Watt 2020). Interestingly, the public/private distinction underlaid the outcome of arbitrations in the highly influential oil nationalization cases[5] in the past century, which were essentially private arbitrations in nature (Lim et al. 2021). In these cases, the question of applicable law, which until then had been hardly posed in the context of the north-south economic exchange, was particularly highlighted and incited the development of *lex mercatoria* (Dezalay and Garth 1996).[6]

While the liberalist view considers transnational corporations and their law as apolitical and neutral (Claire Cutler 2003), it is arguable that *lex mercatoria* or transnational merchant law, which is often accompanied by private arbitration, is mistakenly regarded as technical and apolitical. Transnational merchant law and arbitration are intertwined in an effort towards possible dissociation of transnational corporations form judicial policies as implemented by state courts. The notion of modern *lex mercatoria* is in itself inseparable from its political context, which is the preference for a liberal order of international commerce based on the primacy of the freedom of the individuals (Elcin 2012). Modern *lex mercatoria* is developed by a global meritoc-

[3] Rejecting the institutional bias (namely configuration of arbitration to the satisfaction of economic interests of the North) and doctrinal bias (namely applicable law configuration), Shalakany (2000) observes that disciplinary bias accounts for favoring economic interests of the North in arbitrations (particularly those involving state contracts between North and South) through a public-private distinction and apolitical representation of the private sphere coupled with the depoliticization of contract law.

[4] The colonial period has been highlighted in the recorded history of commercial arbitration in many parts of the world, e.g. Africa and Asia, through the import of the use of commercial arbitration by Europeans into the colonized regions or otherwise (Born 2020).

[5] Oil nationalization cases generally refer to cases in which interests and assets Westen petroleum companies had acquired pursuant to concession agreements were nationalized by the sovereign party subsequent to which, petroleum companies resorted to arbitration agreements in those concession agreements.

[6] See 1.b below.

racy, which has been defined as 'an elite association of public and private organizations engaged in the unification and globalization of transnational merchant law' (Claire Cutler 2003, pp. 180–181). This expansion of the role of private authority is reinforced with the coercive power and support of political authorities. Nevertheless, the shift towards the authoritative function of the global meritocracy is masked by the liberalist ideology, which defines private as apolitical (Claire Cutler 2003).

At a more concrete level, the impact of political factors may also appear in the most technical aspects of commercial arbitration. An illustrative example of how the most practical aspects of arbitration might be affected by non-legal considerations can be found in a 1999 ICC arbitration. This case arose pursuant to the dispute settlement provision in a 1996 contract between an Italian company and Addis Ababa municipality, in which Addis Ababa had been fixed as the place of arbitration. However, under the terms of reference, the arbitral tribunal was empowered to decide to conduct hearings at any other appropriate place after consulting with the parties. While the respondent submitted that the appropriate venue was Addis Ababa, the claimant argued that since the majority of the participants in the hearing were based in Europe, it would be more appropriate to hold the hearing in Paris. The tribunal agreed with the claimant's position and pointed to the significant travel time from Europe to Addis Ababa and the relative difficulty of coordinating travel arrangements for the non-Ethiopian party, counsel, the arbitrators, and the non-Ethiopian witnesses0.[7] Viewed in a broader context of African relationship with international arbitration, this decision has been heavily criticized by Kidane: 'The level of disregard for the African party was such that the tribunal refused to go to the seat of the arbitration, instead choosing to write a 82-page justification from Paris on how the parties granted it the discretion to stay in Paris in the Terms of Reference that they all signed' (Kidane 2017, p. 62).

The tribunal's decision on the venue of proceedings becomes more questionable in view of the fact that the tribunal also delayed its decision on jurisdictional objection for two years. Kidane poses the critical question: '[w]as the respondent justified in thinking that the arbitrators were not fair for delaying the jurisdictional decision and refusing to get out of Europe for a hearing?' (2017, p. 62).

With the benefit of hindsight concerning colonial relations, one might be inclined to revisit the rationale underlying the claims as to the depoliticized nature of international commercial arbitration. Viewing arbitration as an instrument of hegemony might bring some light into the debate.

Arbitration as an Instrument of Hegemony

The rise of commercial arbitration in the contemporary era can be traced back to the mid-twentieth century. From the 1980s, the universalizing logic of arbitration and accelerating economic globalization resulted in the expansion of international commercial arbitration (Nottage 2000). While this does not mean that the use of arbitration in resolving international commercial disputes was unprecedented, dynamics

[7] Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority, ICC Case No. 10,623/AER/ACS, paras 48–49, 6.

and characteristics of commercial arbitration in the past – including the colonization period – are not identical with those of the contemporary.

The history of commercial arbitration is indeed closely related to the political developments such as decolonization, and simultaneous economic changes (Kidane 2017). Certain prominent theorists have, in the framework of center-periphery analysis, addressed the question as to how the commercial arbitration regime reinforces the centrality of the North, the private and the economic vis-à-vis a periphery of the South, the public and the political (Kennedy 2014). Historically, the contribution of arbitration to such centrality, might be, at least in part, attributed to the changed patterns of economic interactions during the colonial period and incompatibility of those patterns with the customary means of dispute resolution in the colonized territories. These historical dynamics have led some authors to characterize modern arbitration legislation as a colonial legacy[8] (Asouzu 2004).

Until not too long ago, Western powers tended to protect the economic and commercial interests of their nationals through their coercive power (gunboat diplomacy) (Miles 2013), and the forced unequal capitulation treaties giving European powers jurisdiction over the activities of their nationals in the non-European states justified by inadequacy of local justice systems (Anghie 2005). During the colonial period (and even after independence), the colonies were the suppliers of primary products and raw materials to the metropolitan countries. This led to the expansion of international trade to the benefit of European metropolitan countries. For the most part, the commodity associations and exchanges in these countries closely controlled dispute settlement mechanisms in terms of devising the rules and enforcement of (mostly unreasoned) awards through their internal sanctions (Anghie 2005).

After the surge of decolonization post-World War II, the capital exporting states, which had lost their dominance over former colonies to a large extent, could not impose their will in commercial relations with the former colonies in respect of applicable law and national court jurisdictions (Lew 2006). This decline of influence created a need in Western powers for protection of economic interests of their nationals abroad (Salacuse 2010). In other words, the end of formal colonialism was contingent upon the enforcement of a cross-border capitalist economic order for protection of the interests of Western powers in foreign lands (Haskell 2019). Accordingly, the expansion of international commercial arbitration has been attributed, in part, to the inappropriateness of the use of coercive power to protect the economic interests of the nationals of Western states (Sornarajah 1991).

The abovementioned historical dynamics can explain how political and economic conflicts between the North and South have been translated into business conflicts capable of being managed by international commercial arbitration (Dezalay and Garth 1996). The historic oil arbitrations of the last century are a prominent illustration of this point. These influential oil nationalization disputes mark the commence-

[8] This was a consequence of exporting laws in different forms from colonizing States to colonized countries. 'Imperialism was not only about military conquest, but also about spreading the legal system of the European States to the colonies they created in Africa, Asia, and the Americas.' (Pistor 2019).

ment of the blossoming of international commercial arbitration.[9] Metaphorically, such arbitrations have been depicted as the opposition of the North and South, multinationals and third-world states, encompassing political stances and private commercial interests (Dezalay and Garth 1996).

International arbitration was employed in these oil conflicts as an intermediary to develop ideas based on which contracts entered into between private parties and states were detached from the realm of domestic laws. Notably, arbitral rules and procedures were also imposed and inspired by Western legal cultures. This process was in essence an attempt to legalize political and economic conflicts.[10] Such a transforming process might be considered as an influential strategy consciously adopted by the Western powers at the time to continue to maintain the hegemony over former colonies and developing countries. Extrapolating the broader context of North-South economic and political relations to the international arbitration can be seen as a continuation and revival of commercial relations between the nationals of metropolitan countries and former colonies in the colonization periods. The major difference between the two periods stems from the fact that decolonization and subsequent abolishment of the capitulation mechanisms no longer allowed the nationals of colonizing powers to dominate the commercial relations by the same instruments.

By the same token, Dezalay and Garth (1996) attribute the legitimacy of transnational legal order to the setting of a legal scene which revolves around the North-South conflict. Simply put, the transnational legal order is based on the opposition between dominated and established interests. Such an opposition was manifested in the third world countries' effort to exercise sovereignty over natural resources and thus undermining multinationals' concessions. The opposition served to produce efforts as to the development of legal rules and practices related to the north-south economic disputes accompanied by efforts directed at the universality of law–*lex mercatoria* (Dezalay and Garth 1996). Beyond the renowned oil arbitrations, arbitration was also an intermediary for a new commercial order[11] (Dezalay and Garth 1996) involving capital exporting and developing states, which juxtaposed North and South. This was (and to a large degree has been) for decades the major pattern of economic relations in the world.

The foregoing analysis is linked to the broader relationship between international law and world power structures. Hegemonic accounts of law are by no means unprecedented in the international law scholarship. Martti Koskenniemi, a prominent international law scholar, has exquisitely depicted the process in which international law

[9] Dezalay and Garth (1996) argue that 'the petroleum disputes were founding acts. They made arbitration known and recognized. The importance of financial, political (the definition of colonial relations), and legal (the relationship between sovereignty and the respect of contractual obligations) stakes incited a certain number of important actors from the legal field (high judges, noted practitioners and academics, leading law firms) to become interested and to invest in this mode of dispute resolution. The efforts and intellectual activity that they deployed for resolving these new, exceptional conflicts in a legal manner served to construct the minimum base of knowledge necessary to build a field of practice.'

[10] Dezalay and Garth (1996) also observe the process of translating the economic conflicts to arbitration as a gradual legalization.

[11] As a significant component of the new commercial order, arbitration facilitated the trade between East and West because domestic courts of each side were not trusted by the other side (Hale 2015).

appears through the positions of political actors. Such a process takes place through articulating political preferences into legal claims, in the conditions of hegemonic contestation, namely invoking legal rules to which they have ascribed meanings that challenge the contestant view (Koskenniemi 2004). It can be argued that shifting to international commercial arbitration as a system swinging between domestic and international legal environment for the settlement of private commercial disputes, is susceptible to be seen as an imposition of Western powers' own preferences as the total (universal) view[12] through a hegemonic contestation and legalization. Furthermore, having in mind the developments leading to the initial blooming of international commercial arbitration, the rise of arbitration resulting from the wave of petroleum disputes may also be understood in Gramscian terms. According to the latter, the concept of hegemony describes a condition in which the supremacy of a social group is achieved not only by physical force but also through consensual submission of the very people who were dominated (Litowitz 2000).

It is, therefore, arguable that depoliticization of deeply political questions and transposing them into purely technical legal fields has been a scheme constantly employed in commercial and investment arbitration. Indeed, international commercial arbitration –mainly inspired by the Western legal cultures– could be an ideal venue for the time when the use of coercive power was no longer practicable. In principle, designing the structure and function of an international system of private dispute resolution as well as manipulation of legal rules and institutions to the satisfaction of own benefits and objectives is much easier for the main players and stakeholders of the system.

Nevertheless, many commentators claim that bias against the developing countries is not the case anymore; the colonial period has gone, and arbitrations are taking place in many non-European or US venues (Paulsson 1987; Lew 2006). A hegemonic account of international arbitration casts doubts on such assertions. Having set the scene in that way, we will now turn to the more specific manifestations of hegemony in international commercial arbitration with reference to the two interconnected issues which have been lately the subject of renewed interest: transnationality and epistemic community.

Commercial Arbitration and Claims of Transnationality

Transnational Law Discourse and Arbitration

Within the context of legal pluralism, the transnational law discourse has been largely widespread with an abundance of academic literature surrounding it. Transnational law in the contemporary age is widely known to have been first proposed by the US international lawyer, Philip Jessup, to include all law regulating cross-border actions

[12] This is also in line with the Gramscian perspective under which, 'the establishment of a ruling worldview requires the mechanisms of universalization, naturalization, and rationalization. By universalism, the dominant group manages to portray its parochial interests and obsessions as the common interests of all people.' (Litowitz 2000).

or events (Vagts et al. 2014). The main directions in theorizing transnational law have been summarized as follows: the mainstream direction comprises a network of treaty bodies, governments, and international lobbying; the second direction adopts a socio-legal and critical approach that understands law as a phenomenon in transnational settings; the third direction benefits from comparative legal studies (Baer 2011).

In recent decades, a new lease on life has been given to transnational commercial arbitration in the legal scholarship. The Dijon School of thought, which embraced prominent scholars such as Berthold Goldman, Philippe Kahn, and Philippe Fouchard has been known as the starting point for the discourse on the transnational arbitration regime (Schultz 2011a). A leading figure in the more recent revival of transnational arbitration debates was Emmanuel Gaillard. Gaillard (2010; 2020) proposed three distinct structuring representations of international arbitration. The first assimilates an international arbitrator to a judge acting within a single national legal system (monolocal approach). The second relates arbitration to a plurality of national systems which recognize the arbitral award (the Westphalian model). Finally, the third representation, of which he was a strong adherent, attributes the juridicity of the arbitration to a transnational legal order as opposed to national legal orders. In support of the transnational approach, reference has been made, for instance, to the strong perception among arbitrators that they do not exercise a judicial mandate on behalf of any national system, but rather a judicial role benefiting the international community (Gaillard 2010). Nevertheless, Gaillard (2020a, p. 558) goes on to clarify that 'the existence of an arbitral legal order does not imply that national legal orders play no role in international arbitration. In fact, the existence of an arbitral legal order relies on the notion that the laws of various states, when considered collectively, make up the common rules of arbitration law in which the source of the arbitrators' power to adjudicate is rooted'. More specifically, transnational law has been considered capable of being the law applicable to the arbitral procedure, merits of the dispute, and as criteria for defining public policy (Gaillard 2020a).

When it comes to the arbitral procedure and the interaction between national courts and arbitration, the adoption of UNCITRAL Model Law on International Commercial Arbitration by many jurisdictions has been considered as a dynamic contribution to the transnational commercial arbitration (Gaillard 1995). In addition, the New York Convention has been recognized as 'the normative, collective activity of the States in which the legitimacy and validity of the transnational arbitral legal order is anchored' (Gaillard 2012, p. 73).

Regarding the merits of the disputes, it has been pointed out that arbitrators believe that their awards will be more persuasive if they are based on non-state law (DeLy 1998). Some authors speak of growing reference by arbitration tribunals to transnational law instead of national law and cite cases in which arbitral awards applying transnational law have been upheld (Ali 2020). Similarly, when it comes to public policy exception, it has been argued that arbitrators are only bound by transnational public policy since they have no forum and are not held to allegiance to any state's public policy (Gaillard 2010).

It has been proposed that establishing the content of transnational rules requires the systematic use of comparative law resource (Gaillard 2020b). According to Gaillard, by engaging in a comparative law analysis, arbitrators seek to find points of

convergence in different national laws and ultimately 'ascertain the existence of a broad consensus among States on the content of a specific rule' (2020b, p. 17). Gaillard attempted to respond to the critiques as to the vagueness or incompleteness of this method: '[i]f the analysis of comparative law has not already been carried out, it must be undertaken by counsel, a task that is no more arduous than, say, researching the content of various national laws connected to a dispute' (1995, p. 226). Nevertheless, this position does not seem to fully dispel the critiques since comparative law might be best understood as a scientific endeavor not particularly directed at identifying concrete solutions to questions of law in real life disputes.

There is an abundance of literature on the use of comparative law in arbitration (Bell 2021; Gaillard 2020b; Karton 2020), and some comparatists consider developing common solutions using comparative law method as one of the purposes of comparative law (Siems 2018). A recent empirical study focusing on the use of comparative law methods by arbitral tribunals in a small sample of publicly available arbitration awards confirms that the use of comparative law by arbitrators is indeed outcome determinative (Bergolla and Goertz 2020). Nevertheless, this study suggests that arbitrators are not rigorous users of comparative law methodology in the classic sense. Rather, they either refer to other arbitral, international, and national cases, or engage in comparative law analysis to determine the substantive law applicable in the absence of the parties' choice (Bergolla and Goertz 2020). Despite the discussion on the prevalent modality of the use of comparative law in international arbitration far from being settled, comparative law has been described as the 'ethos of the field', 'a core aspect of [arbitral] professional culture' (Karton 2020, p. 295), 'a common culture among arbitrators', and 'deeply ingrained in modern arbitral practice' (Gaillard 2020b, p. 35).

Transnationality Claim Viewed in Hegemony Perspective

Conspicuously, TWAIL views international law as a universalization project in order to naturalize the existing order (Knox 2019) particularly by maintaining a dichotomy between civilized and universal on one hand, and uncivilized and particular on the other (Anghie 2005). As previously pointed out, in Gramscian terms, the formation of a dominant view requires universalization, naturalization, and rationalization through which a dominant group reflects its interests as the common interests. In the same manner, a process of rationalization, universalization, and naturalization must be undertaken in order to exhibit international commercial arbitration laws and practices as 'common sense' serving public purposes. Such undertaking of rationalization is performed by the international commercial arbitration community of arbitration lawyers, judges, multinational law firms, and related professionals who promote international commercial arbitration as a public good benefiting the world community (Claire Cutler 2014). This process is indeed an integral dimension of the constitution of hegemony through the apparent transformation of the private enforcement of commercial agreements into a matter of public interest and responsibility.

Justifying the promotion of international commercial arbitration as necessary in the age of proliferation of trade and investment relations has made it easier for the international commercial arbitration community to make the arbitration system self-

contained to the extent possible, and more and more detached from national legal systems. For this purpose, a trend was started to modernize the national laws on international commercial arbitration. Before that, states' accession to the New York Convention was encouraged to the extent that it has turned into a success story in international unification of law.

The concept of transnational legal order, like any other law, is constituted by power and reason, and it is also applied through both coercion and a normativity grounded in legal reasoning and process. Accordingly, the actor's ideal law would reflect their perception of their interest and normative goals. Viewed from this perspective, US and European legal cultures would constitute the main inspiration of the content of transnational law (Halliday and Shaffer 2015). In a similar vein, it has been argued that 'the so-called *lex mercatoria*[13] is largely an effort to legitimize as 'law' the economic interests of Western corporations' (Toope 1990, p. 96). This is in line with a defining characteristic of the TWAIL scholarship which heavily criticizes law making and formation of international law as well as its hierarchical nature. Most strikingly, according to the TWAIL, identification of customary international law is mostly driven by state practice of advanced capitalist nations and the opinions of their scholars (Chimni 2018). A similar line of reasoning can be developed with regard to the formation and development of *lex mercatoria.*

While power and reason are in a constant tension in every legal system (Halliday and Shaffer 2015) the modality of such interaction might be contentious with regard to the allegedly existing transnational law and transnational arbitration systems: dynamics of transnational law and arbitration are mostly driven by Western hegemonic power. The comparative law analysis method, which was proposed as a technique to apply transnational substantive rules, is prone to be based on implied superiority of the global North. Conventional comparative law, which originated from Europe around the nineteenth century, mainly employs the law of the global North as the benchmark (Salaymeh and Michaels 2022). Consequently, it has been argued that the discipline of comparative law is historically intertwined with colonialism and has been largely employed in pursuit of Western imperialist agendas (Salaymeh and Michaels 2022, p. 169; Amoo 2018, p. 318). This context leaves questions as to the adequacy of such a paradigm for our globalized world.

Part of the process of formation of transnational norms, in keeping with the Gramscian concept of hegemony, involves rationalization, universalization, and naturalization. With respect to international commercial arbitration, such a process has always taken place through a constant relationship of learning and teaching:

> '[t]heoretical origin and development of contemporary international arbitration, like most principles of law, has its roots in the dominant Western legal traditions. Western laws and institutions have a long history of transplantation into other societies around the world. The rest of the world has always been in

[13] The term *lex mercatoria* has been used interchangeably with transnational rules. However, it has been suggested that the concept of *lex mercatoria* emphasizes on the content of these rules by suggesting that these rules are specifically tailored to the merchant community. The term 'transnational rules', on the other hand, focuses on the sources of these rules and implies that such rules originate from national law systems (Gaillard 1995).

> a constant state of learning Western law, and the Western world has constantly been teaching the law. For better or worse, the teacher-student relationship did not end along with colonialism. This hierarchical relationship created the illusion of not only the superiority of the mechanics of dispute settlement, but also justified the economic class of elite arbitrators who do not lack the theoretical sophistry to justify their privileged position' (Kidane 2017, p. 287).

Apart from the doubts as to the content of transnational law as the law applicable to the substance of the dispute, prevailing practices and rule making efforts with regard to procedure in international arbitration might also be called into question. Since the 1980 and 1990 s, international commercial arbitration has been to a large extent monopolized by big Anglo-American law firms (Moreno Rodríguez 2018). This has led to a phenomenon known as 'technocratization of arbitration', which also entails increasing judicialization with a particular emphasis on Anglo-American devices of procedural management (Dezalay and Garth 1996; Moreno Rodríguez 2018). The general predominance of common law procedural tools in international commercial arbitral practice (Ferreres Comella 2021) is accompanied by the specific dominance of American style procedure in rules of evidence. It has been observed that a revolutionary transformation has taken place in the past decades in the context of taking of evidence in international arbitration which requires practitioners to 'master fundamental precepts of US common law discovery' (Martinez-Fraga 2009). While some authors speak of the development of a standard arbitration procedure as a set of arbitral rules having the merit of merging different procedural cultures (Koffmann-Kohler 2003), an American commentator, despite noting that Americanization of arbitral procedure is 'too much to claim', observes that:

> 'the trend in international arbitration is to move towards the American style of litigation. For example, procedural disputes have multiplied, jurisdictional objections are common, and cross-examination is prevalent. While American style discovery remains anathema, the limited discovery procedure discussed in Article 3 of the International Bar Association Rules of Evidence has become commonplace. International commercial arbitrations also permit the interviewing of witnesses, which was traditionally considered unethical. Furthermore, there are many additional procedural issues that have been introduced by American lawyers into international commercial arbitration in recent years' (Bergsten 2006, p. 301).

Epistemic Community in Commercial Arbitration

The Concept of Epistemic Community

The concept of epistemic community was first developed in international relations (Haas 2008) and refers to 'a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant

knowledge within that domain or issue-area' (Haas 1992, p. 3). Members of such–often transnational–communities share a common set of normative beliefs and enjoy an authoritative claim to policy-relevant knowledge within their field (Haas 2008). The distinctive traits of epistemic communities from other types of groups active in policy making are in particular 'the socialized truth tests and common causal beliefs' (Haas 2008). The existence of such internal criteria for validating knowledge provides epistemic communities with a reputation for impartial expertise (Bianchi 2020).

A Critique of Epistemic Community in International Commercial Arbitration

As one of the main tenets of the TWAIL, knowledge production in international law has been called into question. 'Since TWIAL aims at challenging the hegemonic structures, it must also do so regarding the production of knowledge itself and challenge where and how knowledge is produced and valued' (Justin Bendel 2021, p. 411). Knowledge production and practice shaping in international commercial arbitration may be viewed along similar lines. The international community of arbitral scholars and practitioners has been characterized as an epistemic community (Dezalay and Garth 1996; Lynch 2003; Kidane 2017). This concept can be employed to explain the control over and dissemination of knowledge and information (Lynch 2003) within the field of international commercial arbitration.

Significantly, the scholars of the field of origin of the concept of epistemic community have put forward that this community 'should not be mistaken for a new hegemonic actor that is the source of political and moral direction in society. Epistemic communities are not in the business of controlling societies; what they control is international problems. Their approach is instrumental, and their life is limited to the time and space defined by the problem and its solutions' (Adler and Peter Haas 1992, p. 371). It is indeed questionable whether the epistemic community of international arbitration has remained within this defined scope of activity.

The epistemic community in international commercial arbitration is said to be originally composed of mostly European academics, judges and barristers, who could act as arbitrators due to their high statuses (Dezalay and Garth 1996; Lynch 2003). Notably, Dezalay and Garth (1996) borrow the concept of 'symbolic capital' from Bourdieu to explain the significance of elements such as career path, expertise, social class and education in the market for international commercial arbitration.

It has been argued that the professional community of arbitrators has gradually gained authority through promoting treaties on enforcement of commercial arbitral awards and thereby, commercial interests of multinationals have secured greater representation in arbitral proceedings, and at the same time, national judiciaries have been disempowered (Kennedy 2018). Some scholars point out that powerful transnational businesses have circumvented the states' coercive powers through transformation of the law enforcement mechanisms, for instance by the use of arbitration to scrutinize the states exercise of regulatory power (Pistor 2019). Pistor (2019) mentions New York Convention, the 1966 Washington Convention (ICSID), and the

interpretative tools contained in the 1969 Vienna Convention on the Law of Treaties[14] as the pieces of the puzzle of such transformation of law enforcement mechanisms. Indeed, as a global community with a particular interest and expertise in legitimating arbitration, the arbitration community has shaped its social rules and norms. These community-specific norms guide the behavior of the members of the group in carrying out their tasks. One prominent example of such a process is the development of common interpretive policies which influence the meaning and application of legal rules (Schultz 2011b).

More specifically, the participants in the epistemic community have been able to influence policy making in international commercial arbitration at national and international levels (Lynch 2003). Using the terminology of Katharina Pistor (2019, p. 162), these legal experts are 'the masters of the code' who 'actively fashion new law' and they are 'central to the coding of capital and distribution of wealth in society'. The masters of the code, regardless of their ethnic background, are often trained at Western elite law schools and are later employed by top law firms (Pistor 2019). Indeed, despite attempts to address ethnic and gender diversity of key players in international arbitration, teaching and training in international arbitration law is predominantly shaped by a Western outlook.[15]

Furthermore, many of these experts employ scholarly work as a channel of learning and communication, which makes their role as the value providers of the social field of arbitration even more explicit (Schultz and Niccolò Ridi 2020). These players have a clear collective interest in the protection of the industry of arbitration. This collective interest creates incentives for producing studies that protect the *status quo* or advocate the expansion of the field.

The phenomenon of the epistemic community of arbitration and its authority is closely linked to the transnational law discourse in arbitration. In arbitration a special recognition and value is given to those who adhere to the universality of law (Dezalay and Garth 1996). Specifically, the development of transnational norms is mainly furthered and advocated by the recognized community of scholars and practitioners of arbitration. Certainly not to be overlooked is the authority attached to the label of transnational law. By granting the status of 'law' to a subset of norms, we empower certain individuals and institutions as law makers and thus redistribute political power (Schultz 2014). Simply put, characterization of a regime as law results in the superiority of the normative power of the chosen regime over all other social or moral norms. Affixing the label of law to certain norms in the legal academic discourse, can orient practical behavior and ultimately translate into real power for those who generate norms to be regarded as law (Schultz 2017). Significantly, theorizing about transnational law in arbitration can be used to advance the interests of the epistemic community in the protection of the industry of arbitration, which in turn is arguably tied to the interests of the global capital market.

[14] Mainly, Pistor (2019) points to the provision of Article 27 of the Vienna Convention according to which, a state may not invoke the provisions of its law as justification for its failure to perform a treaty.

[15] In his study of arbitration through the prism of sociology, Emmanuel Gaillard (2015) sketches different social actors within the field of arbitration. Value providers are a category of actors that provide guidance as to the development of the field. Among the value providers are professional and academic institutions. Most of these institutions are based in Europe and North America.

Conclusion

Historical and contemporary world power structures cannot be overlooked in critical studies of international arbitration. This paper has sought to demonstrate that while international commercial arbitration is commonly viewed as a meeting point and place of convergence for different legal cultures, Western hegemony is deeply ingrained in its formation and development.

Although discussions regarding gender and ethnic diversity in arbitration have dominated research in recent years, the historical roots of international commercial arbitration in colonialism and imperialism and its relationship with lack of diversity of the actors in this field have remained relatively unexplored. Yet the recognition of Western hegemony embedded in modern international commercial arbitration serves as a first step towards enhancing inclusivity and sustainable diversity in this field. Sustainable diversity of international commercial arbitration presupposes the identification and embracing of all potential actors and legal cultures. This concept underpins the acceptability of commercial arbitration as a central element of the legal order of contemporary global governance. Such centrality would be faced with legitimacy challenges if marginalized cultures and actors continue to be overlooked through a hegemonized construction of the legal order of global governance.

We posit that any effective attempt at redefining or reforming arbitral governance structure requires an understanding of the hegemonic account of arbitration with the aim of sustaining diversity in international arbitration. Particularly, in a field of law where prominent theorists are often also practitioners, it is crucial to revisit, from a Third World perspective, the historical and political power structures that reinforce the *status que* of the field. For this purpose, two of the main theoretical components of the international commercial arbitration literature, which also carry practical implications, were critically explored. More specifically, an inquiry into the influence of hegemony of Western legal cultures and communities was the focus of the exploration of transnational authority and epistemic community of arbitration.

There is a persuasive argument that the transnational authority of arbitration has been shaped and developed under the hegemony of Western legal traditions. Further, both the demographics of the epistemic community of arbitration and their normative convictions reinforce this hegemony. As a result, even parties from developing countries often have a preference for counsel and arbitrators from Western countries. A corollary to these observations is that revisiting the transnationality and epistemic community of commercial arbitration and envisaging the prospects for dehegemonization is essential in the future perspective of the agenda of debates on sustainable diversity in international commercial arbitration.

Indeed, dehegominizing international commercial arbitration requires a concerted effort from a range of stakeholders, including governments, arbitral institutions, and legal practitioners to promote greater inclusivity for a diverse range of legal traditions and cultures. For instance, growing engagement from the global South through regional arbitral institutions and participation in soft law design can provide a counterbalance to the current hegemonic position of international commercial arbitration. In addition, leading textbooks and treatises written from the perspective of underheard legal systems in international commercial arbitration literature may also contribute to

challenging the monopoly of prevalent national legal systems in international arbitral procedures and practice.

In conclusion, this article is a starting point, rather than an endpoint, for rethinking the discipline of international commercial arbitration through the TWAIL perspective. We admittedly do not claim that the current regime of international commercial arbitration as a means of global governance must be wholly transformed. This paper is rather an attempt to call for further inquiry into the subject in order to identify and substantiate the potentials for reform, and consequently remedy the grounds upon which the existing order of the international arbitration has been premised, with the prospect of furthering sustainable diversity in international arbitration.

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