INAUGURAL CHARLES N. BROWER LECTURE ON INTERNATIONAL DISPUTE RESOLUTION

The inaugural Charles N. Brower lecture on international dispute resolution was given at 4:00 pm, Friday, April 5. The speaker was V.V. Veeder of Essex Court Chambers, and the moderator was Donald Francis Donovan of Debevoise & Plimpton, LLC.

The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator—From Miami to Geneva*

Introduction

There is a new attack on the system of party-appointed arbitrators in both commercial arbitration but, more particularly, investor-state arbitration. This is not the usual criticism of partisan arbitrators, infected with actual bias or rank prejudice, who will vote mechanically for their appointing parties come hell or high water always, but rather an objection in principle directed at the legitimacy of the traditional system of impartial arbitrators appointed by each disputing party, as opposed to arbitrators all appointed by a neutral appointing authority. We start with Miami, before turning to Geneva.

Three years ago, Professor Jan Paulsson delivered his inaugural lecture at the University of Miami School of Law, entitled ''Moral Hazard in International Dispute Resolution.''[1] It had been preceded by Professor Albert Jan van den Berg's supportive article, ''Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration.'' This article contained a striking statistical schedule showing that no known case exists, in the field of investment arbitration, in which a party-appointed arbitrator has ever dissented against the interests of his or her appointing party. Earlier studies in the field of international commercial arbitration had suggested that almost all dissenting opinions—said to exceed 95% of all such dissents—were written by the arbitrator appointed by the losing party. In brief, these two distinguished scholars then both teaching at Miami, collectively sharing a unique experience in the modern practice of arbitration and, significantly, great advocates for and not against arbitration, severely criticized the current system of party-appointed arbitrators on the grounds of legitimacy. Professor Paulsson proposed, as the only decent solution, that all arbitrators should be appointed jointly by the disputing parties or appointed by a neutral body. Professor van den Berg proposed that investment arbitration would function better and more credibly if party-appointed arbitrators observed the principle of *nemine dissentiente*. These views influenced many (including this author). Yet the road to Damascus, with the angel of history, is instructive, and I wonder now whether the proposed solutions are not worse than the ailment, if it be an ailment at all.

First, as Professor Paulsson recognized, the genie—a party's traditional right to appoint an arbitrator—cannot easily be put back into the bottle. Second, the Anglo-Saxon legal tradition greatly values a judge's right to dissent from a collegiate decision as imposing an important intellectual discipline on the full tribunal, with dissenting judgments not invariably

* The author acknowledges, with many thanks, the assistance of Ms. Lesley Whitelaw, the Archivist of the Middle Temple Library, Professor Ladislas Mysyrowicz, formerly of the University of Geneva, the Cantonal Archive Department of the City of Geneva, the Public Record Office (London), Professor Jan Paulsson, Professor Albert Jan van den Berg, M. Jérôme Bürgisser, Mr. James Castello, Mr. Bart Legum and Mr. Sam Wordsworth QC. Nevertheless, all errors and views here expressed are those of the author alone.

[1] The references for these and other principal materials are listed below in the selected bibliography.

illuminating future legal thinking. The same is almost true of arbitrators, particularly for investment disputes and disputes between states. Moreover, dissents are not that common in the field of international commercial arbitration; while becoming more frequent in the field of investment arbitration, their known number does not yet reach the statistics available for dissenting judgments in Anglo-Saxon legal systems. Third, as Professor Paulsson also recognized, only a few arbitral institutions can make credible claims to legitimacy. It would be invidious here to name these singular exceptions (nor did he), but it is a fact that, for one reason or other, most arbitral institutions cannot be trusted with arbitral appointments. And even worse, as he rightly concluded, this important arbitral task could never be entrusted to the institutional equivalent of Ali Baba and the Forty Thieves.

Yet both Professors Paulsson and van den Berg raised serious questions about the present system of international arbitration, now echoed by others. Their analyses do not deserve to be left as ''voices in the desert,'' as they feared, and their criticisms require answers to enhance the essential legitimacy of international arbitration, which is increasingly under threat from special interest groups pressing for a new system of permanent international courts. Others have and will have their own analyses, and no complete answer is here proposed, but we can take the first few steps with two well-known arbitrations, by way of illustrating both the suggested problem and, if it be a problem, its possible solutions.

The *Loewen* Arbitration

The first was cited by Professor Paulsson in support of his thesis: it is the *Loewen* arbitration finally decided by the tribunal in August 2004, following an award made in June 2003. In this NAFTA dispute between two Canadian investors and the United States, the investors complained of unlawful treatment by the state courts of Mississippi. The corporate investor had been held liable by a local jury for US$500 million, which included US$400 million as punitive damages, and it was unable to appeal from that verdict because the local law required the posting of a supersedeas bond equal to 125% of the judgment, an impossible burden for a small foreign corporation facing imminent bankruptcy. The award of the NAFTA tribunal and its subsequent clarification were made unanimously by the three arbitrators, two of whom had been appointed by the parties. The Canadian investors thereby lost the NAFTA arbitration, for reasons which were and remain much discussed academically, but these need not concern us now.

After the NAFTA arbitration, in December 2004, the American arbitrator took part in an academic symposium in New York where he spoke publicly about his experience as an arbitrator appointed by the United States in the *Loewen* case. Professor Paulsson said this in his lecture:

> The symposium happened to be recorded, and the tenor of his remarks was notably made public in a law review in 2009, in a footnote that could easily be traced back to retrieve astonishing verbatim remarks. This included the revelation that the arbitrator had met with officials of the U.S. Department of Justice prior to accepting the appointment, and that they had told him: ''You know, judge, if we lose this case we could lose NAFTA.'' He remembered his answer as having been: ''Well, if you want to put pressure on me, then that does it.''

The American arbitrator, Judge Abner Mikva, was a senior legal figure with extensive experience in the judicial, legislative, and executive branches of the United States. Professor Paulsson castigated this arbitrator's conduct and, still more so, the officials from the U.S. Department of Justice who sought during this interview to pressure him, as an arbitrator

appointed by the United States, into supporting a favorable decision for the United States in the NAFTA arbitration.

Leaving aside the wisdom of any arbitrator ever disclosing at a public symposium the unknown workings of a recent arbitration (particularly here when ancillary legal proceedings were to begin on December 13, 2004, to vacate the award), does this incident in fact support the criticism leveled at the system of party-appointed arbitrators? We know that pre-appointment arbitral interviews do take place between a party's lawyers and a putative arbitrator. This procedure is not new: for decades, it has been informally regulated by the well-known ''Aksen Rules,'' and also for some more recently by the guidelines established by the Chartered Institute of Arbitrators. It is a procedure practiced by many users in international commercial arbitration, and there is no reason to treat differently state parties to an investment arbitration. Professor Paulsson did not suggest that the American arbitrator, after his appointment, had any improper discussion with the Department of Justice, and Professor Paulsson did not cite it as a case of an illicit ex parte communication between one party and one member of an arbitration tribunal in regard to the tribunal's award. As for the content of the interview, was the putative American arbitrator improperly subjected to pressure by his appointing party? Many of us not remotely involved in the *Loewen* case knew at the time that this arbitration was a significant case for the United States and for Chapter 11 of the NAFTA, and, simply from reading newspapers, we knew also that this same perception was shared by many legislators on Capitol Hill and not a few journalists. It may therefore be doubted that the American arbitrator was told anything that he could not already have learned as an informed member of the general public. As for the American arbitrator's quoted response: ''Well, if you want to put pressure on me, then that does it,'' that statement, by itself, seems insufficient to impute a commitment by that arbitrator to make improper decisions in favor of the United States as his appointing party. As cited, Professor Paulsson took his brief quotation from an article published in 2010 by Professor Schneiderman. In its full context, taken from the audio tape-recording of the symposium, there was clearly no such commitment.

With hindsight, of course, it would have been wiser for the American arbitrator and the Department of Justice to disclose the fact of this pre-arbitral interview to his co-arbitrators and to the Canadian investors, but at the time such interviews were not regarded as matters requiring formal disclosure. Even now, the ethical position remains unclear. Of course, it should not be so—but it was. It is therefore unfortunate that this incident is now entering the mythology of arbitration, being cited by even distinguished scholars as a classic example of misconduct by a party-appointed arbitrator and his appointing party to the detriment of investment arbitration generally. We must remember that the decisions in this NAFTA arbitration were made unanimously by the *Loewen* tribunal, and it is utterly inconceivable that the two other arbitrators—former senior appellate judges from Australia and England—could have been pressured in turn by the American arbitrator into agreeing to that which they were not minded to agree. We might also remember that all three arbitrators were former senior judges of their respective states, who may have found more difficulty with international law providing an effective personal remedy to the Canadian investor under NAFTA, which was absent on well-settled principles long accepted within a national legal system based on common-law principles.

Far from treating the *Loewen* case as a bad precedent for party-appointed arbitrators, it falls into the classic example of a party appointing a well-known senior legal figure who can be relied upon to exercise a strong-minded, informed, and independent judgment. This

is not always solely motivated by that party's desire to win the case. It can also include a measure of self-protection for the persons making the appointment in the event that the case is lost, whether it be an officer of state or an officer of a corporation. In the *Loewen* case, what better example to show Capitol Hill and news media hostile to NAFTA, if the case had been decided against the United States, that the American arbitrator, as a publicly known legal and political figure, had jointly agreed on that adverse award with his two foreign arbitral colleagues? As with most awards, we can never know exactly why the *Loewen* tribunal decided that case in the way it did: to some, its reasons in the award and subsequent clarification raise questions which could only be answered by breaching the secrecy of its deliberations. Fortunately, we have an older case—in Geneva. It was also an international arbitration in which the two-appointed arbitrators, both senior legal figures, dealt directly with their appointing parties (ostensibly with the parties' consent); where the arbitral deliberations were not secret, being attended by the parties' legal representatives; and where, fortunately for us, several of those representatives later wrote their memoirs.

The Alabama Arbitration

The Alabama Claims Arbitration took place in Geneva in 1872 under the Treaty of Washington of 1871 between the United States and Great Britain. The difficulty with saying anything about the Alabama Arbitration, as the late Lord Bingham noted almost ten years ago, is that, like Hamlet, everyone knows the story and its ending. It was, however, an unusual case, still rich in materials from many different perspectives. The award was made in September 1872 by an international tribunal, the first international tribunal of its kind in modern times and the basic model for international arbitration today, with the two disputing parties each appointing one arbitrator as a minority of the tribunal. By that award, the Alabama tribunal decided that Great Britain had failed to use due diligence in the performance of its neutral obligations during the American Civil War, in permitting the CSS *Alabama* and certain of her fellow raiders to be built in England and delivered to the Confederacy for warlike operations; as compensation, the tribunal ordered Great Britain to pay the sum of US$15.5 million in gold to the United States, with simple interest—equivalent, in today's money (taking into account relative British GDPs) to about US$225 billion dollars.

By the Alabama Arbitration, an imminent war was averted between Great Britain and the United States, with untold consequences for both nations, particularly for Canada and other British territories from Bermuda to the Caribbean which faced possible invasion and annexation by the United States, with its large army and powerful navy tempered by the Civil War. For present purposes, the ending of the arbitration is, however, irrelevant. Although the British party-appointed arbitrator strongly dissented from part of the award and issued a lengthy dissenting opinion, including the amount of compensation (for which he has been much criticized, but ultimately proven right), he nonetheless agreed upon Great Britain's legal liability for the CSS *Alabama*, by far the worst of the Confederate raiders; and, despite strong language elsewhere, his dissenting opinion ended with a courteous encouragement to his own countrymen, as well as the citizens of the United States, to accept the adverse award:

> [W]hile the award of the tribunal appears to me to be open to these exceptions, I trust that, by the British people, it will be accepted with the submission and respect which is due to the decision of a tribunal by whose award it has freely consented to abide. The United States, on the other hand, having had the claims of their citizens for losses sustained considerately weighed, and compensation awarded in respect of them, will see, I trust, in the consent of Great Britain to submit these claims to peaceful arbitration,

> an honest desire on her part to atone for any past errors or omissions, which an impartial judgment might find to have existed—and will feel that all just cause of grievance is now removed—so that, in the time to come, no sense of past wrong remaining unredressed will stand in the way of the friendly and harmonious relations which should subsist between two great and kindred nations.

We can leave the award there, because it is the middle of the arbitration, three months earlier in June 1872, which illustrates the important role played by the party-appointed arbitrators in the Alabama Arbitration. At that time, the arbitration almost broke down over the United States' so-called ''indirect claims'' advanced as national losses then calculated at US$2 billion, equivalent in today's money (again adjusted) to about US$30 trillion. These were unprecedented claims by one nation against another undefeated by war.

There were five individual arbitrators in the Alabama tribunal. The first three were Brazilian, Swiss, and Italian (who was elected the tribunal's president), appointed respectively by the Emperor of Brazil, the President of the Swiss Confederation, and the King of Italy. None of these three arbitrators spoke English; none followed the oral submissions made in English by the parties' counsel at the arbitration's hearings; all three worked from the French translations of the parties' written pleadings; the arbitral deliberations were conducted in French; and the arbitrators drafted the operative award and individual assenting opinions in French, with only the award issued in English, as translated jointly by the American and British arbitrators (with the tribunal's English-speaking Swiss secretary). These remaining two arbitrators, American and British, were appointed by each of the two parties: Charles Francis Adams by the United States, the grandson and son of the second and sixth Presidents of the United States and the former American Minister in London; and Sir Alexander Cockburn by Great Britain, then the Chief Justice of the Queen's Bench Division. Both Adams and Cockburn spoke French fluently, as a first language, but that was not their principal contribution to the Alabama Arbitration. It was the fact that they were party-appointed arbitrators. Without the right to party-appointed arbitrators, albeit as a minority of the five-member tribunal, there would have been no Treaty of Washington, no Alabama Arbitration, and, most certainly, no Alabama Award.

The Treaty of Washington, with its provision for arbitration, emerged after almost eight years of difficult diplomatic negotiations. By letter dated October 23, 1863, during the Civil War, the American Minister in London (the same Charles Francis Adams) had indicated to Lord Russell, the British Foreign Secretary, that the United States was ready to agree to any fair and equitable form of arbitration to settle the Alabama Claims. This idea found no favor with the British government because, among other factors, the Alabama Claims impugned the honor, if not also the integrity, of the law officers and senior ministers in the British government, including Russell, Gladstone, and Palmerston. By letter dated August 30, 1865, Lord Russell finally rejected any idea of arbitration and instead proposed the appointment of a joint commission. It was an undiplomatic rebuff that the British government were later much to regret. After the end of the Civil War, the unresolved dispute over the Alabama Claims increasingly soured relations between the United States and Great Britain.

The suggestion of arbitration as means of resolving the Alabama Claims had also been raised by a private American lawyer in Paris, the historian Thomas Balch, who had witnessed the sinking of the CSS *Alabama* off Cherbourg in June 1864 by the U.S. Navy. In November 1864, Mr. Balch took his idea of an ''ad hoc international court of arbitration'' to President Lincoln during a visit to Washington. President Lincoln said that he thought arbitration was ''a very amiable idea but not possible just now, as the millennium is still a long way off.'' But, less discouragingly, Lincoln added: ''Start your idea. It may make its way in time, as

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it is a good one.'' Mr. Balch then formalized his proposal in a letter to the *New York Times*, published on March 31, 1865. Paragraph IV of his proposal provided for each party's appointment of two competent jurists as arbitrators, with these two appointing a third arbitrator to form an international arbitration tribunal to decide the Alabama Claims. Mr. Balch discounted the traditional idea of a third sovereign appointing a sole arbitrator or tribunal as anti-republican and undemocratic in modern times. His ideas were developed by the German-American military jurist and war veteran, Francis Lieber, in an open letter to William H. Seward, the U.S. Secretary of State, published in the *New York Times* on September 22, 1865. Like Mr. Balch, Mr. Lieber rejected the appointment of a sovereign as an arbitrator or appointing authority. Instead, he proposed as a tribunal, not private individuals, but the law faculty of a foreign university appointed jointly by the parties, such as the law faculties at the Universities of Berlin, Heidelberg and Leyden. This achieved nothing at the time, because on October 17, 1865, the United States formally withdrew its long-standing offer of arbitration to Great Britain, and on November 21, 1865, the United States also rejected Lord Russell's suggestion of a joint commission. Nonetheless, several later political commentators find the origin of Treaty of Washington's arbitration provision in the campaigning work of Thomas Balch and Francis Lieber.

In 1866, there was a change of government in London, with a new Foreign Secretary (Lord Stanley) and a new Prime Minister (Lord Derby). This British government was now much concerned to find an amicable solution to the increasingly troubled relations with the United States over the Alabama Claims (together with other disputes). In January 1867, in its turn, the British government proposed arbitration, provided that a fitting arbitrator could be agreed upon and agreement also reached on the points to be decided by that arbitrator. Inevitably perhaps, by letter of January 12, 1867, the U.S. Secretary of State, Mr. Seward, summarily rejected the British suggestion of arbitration. To cut short this awkward diplomatic story, the two governments, subject to ratification, eventually agreed upon a form of arbitration for their respective claims in the Johnson-Clarendon Treaty of January 14, 1869. This treaty was never ratified by the United States. It provided first for a joint commission of four members, two appointed by each party, with any disagreement to be referred to a sole arbitrator to be jointly appointed by the four commissioners, or, in default of such appointment, by one of two nominees appointed by each party and then chosen by lot. In April 1869, the Johnson-Clarendon Treaty was rejected by the U.S. Senate, with strong opposition from Senator Sumner, then the powerful Chairman of the Senate's Committee on Foreign Affairs, especially in regard to the Alabama Claims. During his speech, Senator Sumner also advanced a powerful case, in strident and uncompromising terms, for ''indirect claims'' also to be made by the United States against Great Britain, with the strong inference that an appropriate remedy, in default of full compensation, would be the seizure by the United States of British territories in the New World, from Canada to South America. These suggestions horrified the British government, it then being erroneously considered that Senator Sumner, from his senior position in the Senate, was also speaking for the new President, Ulysses S. Grant, and the new Secretary of State, Hamilton Fish. In passing, Senator Sumner also attacked the treaty's provisions for the appointment of the sole arbitrator, particularly the use of a lottery inconsistent (he said) with the solemnity which belonged to the Alabama Claims.

In May 1869, Thomas Balch was back in Washington, pressing his idea of an arbitration tribunal of jurists in meetings with President Grant, Secretary Fish, and Senator Sumner. At the same time, the idea of an international arbitration before a legal tribunal to decide the Alabama Claims was being promoted by the Swiss lawyers, J.K. Blüntschli and Gustave

Moynier (the former later founding the Institute of International Law and the latter a co-founder and president of what became the International Committee of the Red Cross). The case for arbitration as a means of addressing the Alabama claims was by now becoming irresistible. From the summer of 1869 onwards, confidential initiatives from both governments led eventually to the meeting of their joint negotiating commission in Washington in February 1871, leading in turn to the Treaty of Washington of May 8, 1871, which was approved by the Senate (including support from Senator Sumner), with a significantly new provision for arbitration. As regards the Alabama Claims, as we have seen, that treaty provided for a tribunal of five arbitrators to be appointed as to the first three by three Italian, Swiss, and Brazilian sovereigns, with a fourth sovereign, the King of Sweden and Norway, as a default appointing authority. For the first time in an international arbitration, each of the two disputing parties appointed its own arbitrator to an international tribunal comprised of a majority of jurists having other ''neutral'' nationalities (unlike the 1783 Jay Treaty under which tribunals were to act as joint commissioners). Thus was the concept of party-appointed arbitrators introduced into the modern world of international arbitration to decide a dispute which touched the vital interests of two nations on the brink of armed conflict, with the last war (the War of 1812) still a living memory.

So who were these two party-appointed arbitrators? Charles Francis Adams was said to be a cold fish, with the room temperature dropping ten degrees whenever he made an entrance. He was a lawyer by training, although he never practiced law. More significantly, as we have seen, he had been the American Minister in London for most of the period of the Civil War at issue for the Alabama Claims, not only well-acquainted with the facts but also well-informed as a personal witness, if not also an interested actor, in the dealings (or non-dealings) of the British government in regard to the Confederate cruisers. Mr. Adams was, by any account, a highly successful minister in dealing forcefully with the British government in London, particularly Lord Russell; he was to become the undoubted hero of the Alabama Arbitration; and he maintained throughout good personal relations with his British counterparts, even visiting Lord Russell in England after the Alabama Arbitration. He is the subject of many memoirs, including those written by his sons, Henry Adams and Charles Francis Adams, Jr., and so we need not spend time here on his many attributes, save two. First, as already mentioned, Charles Adams spoke French fluently, having learned it when he lived as a young child in St. Petersburg where his father, John Quincy Adams, was then the American Minister to Russia. Second, as to the strongest and weakest characteristics of his nature, Adams' obituary published in the *New York Times* on November 21, 1886, concludes with this passage:

> Independent and self-reliant to the last degree, no fear of partisan criticism and no considerations of propriety would moderate the expression of a view which he had once formed. At the same time his temper, not unlike that of his paternal grandfather, caused him to couch his opinion in the most offensive terms and to announce it with scornful indifference to the feelings which it might wound in others. Throughout his career there are to be seen frequent examples of these traits which render his undoubted success in diplomacy, the art of all others requiring most self-restraint—the more remarkable.

In Geneva, Mr. Adams kept his bad temper, even under the most trying of circumstances, and he also put his fluent French to good diplomatic use towards his francophone co-arbitrators. Regrettably, his arbitral colleague from London did not, expressing by the end of the arbitration angry and open contempt for both parties' counsel (he was not in the least

partisan in his disaffections) and all but one of his co-arbitrators—that exception being Mr. Adams, whom he held to the end in high regard.

Sir Alexander James Edmund Cockburn was certainly no Adams, but they had much in common. Like Charles Adams, Cockburn was the son of a diplomat living abroad, and before becoming a judge, Cockburn had gained experience in both the legislative and executive branches of the British government. He was born in 1802 in Hungary to a British envoy and his French wife, who was the daughter of a former French aristocrat, the Vicomte de Vignier. Cockburn's paternal uncle was Sir Geoffrey Cockburn, one of Nelson's youngest captains, who later, as an English admiral, took part during the War of 1812 in the punitive attack on Washington, D.C., which resulted in the burning of the White House in August 1814. Cockburn was educated on the European continent and spoke French, German, Italian, and Spanish. After attending Cambridge University and teaching law as a Fellow at Trinity Hall, he was called to the English Bar in 1829. From all reports, Cockburn was a man of great accomplishments outside the law—a linguist, musician, and sailor, and, it is said, of exceptional literary and social acquirements, a friend of Charles Dickens and a great raconteur. It is also said that he had an ''ardent temperament'' with feelings ''quick and excitable,'' which was probably a kind way of saying that he had a hot temper which was easily lost. This was not the best character trait for any judge, but it was particularly unfortunate for an international arbitrator in Geneva, with the arbitral deliberations open to the parties and their memoirs.

After a slow beginning at the English Bar, Cockburn had made his legal reputation as a master of difficult cases with factual and expert complications, including his successful defense of the assassin McNaughten on the ground of insanity in 1843, thereby establishing the ''McNaughten rules.'' Politically, he was a liberal reformer and entered Parliament in 1847, later becoming successively Solicitor-General and Attorney-General. In 1856, he was appointed Chief Justice of the Common Pleas; in 1859, the Chief Justice of the Queen's Bench; and after the judicature reforms in 1875 (which he opposed), the first Lord Chief Justice of England and Wales where he presided until his death in 1880. There is no biography of Sir Alexander Cockburn, and, so far as is known, he never wrote his own memoirs of the Alabama Arbitration. There is a sympathetic article on his judicial accomplishments written in 1900 by an American legal historian, then a U.S. federal judge in New York, published in the *Harvard Law Review*. That author, my grandfather, never met Cockburn personally, but he probably met Cockburn's younger colleagues in England, and he may have had access to papers not now publicly available. This article starts apologetically: ''The large measure of public attention which Sir Alexander Cockburn commanded during his lifetime probably led to an undue estimate of the permanent value of his judicial services.'' Unfortunately, for present purposes, the article does not address further his conduct in the Alabama Arbitration. More unfortunately, Sir Alexander Cockburn's reputation, not good to begin with even in England, also weathered badly at the hands of the American counsel writing their memoirs of the Alabama Arbitration, in particular the writings of General Cushing who was described, even by his countrymen, as an Anglophobe. Regrettably, these contemporary materials have influenced later historians: even Gladstone's distinguished British biographer, Lord Jenkins, described Cockburn less than fairly ''as a natural illiberal British chauvinist.'' It is time to redress the balance—to the extent possible.

Sir Alexander Cockburn was certainly no Victorian. He was born into the moral standards of an earlier time. A notorious ladies' man, he later lived openly with one mistress and with one or possibly two of their children, along with his paramour's mother and sister. Cockburn

also lived well, apparently beyond his means. There is a story of the young Cockburn escaping through the window of the barristers' robing room at Rougemont Castle at Exeter in Devon, to evade his creditors' bailiffs awaiting him outside court. Alexander Cockburn was knighted upon his first political appointment as Solicitor-General, and he later became a baronet, an inherited family title of Scottish origin. However, most unusually for a Lord Chief Justice, he was never elevated to the peerage or granted any other honor in the gift of the Crown. Some say he refused such honors, but others say Queen Victoria flatly refused to honor a man she regarded (with others) as morally despicable.

Sir Alexander Cockburn had written a dark and morally troubled novel in his early days at the English Bar, sometime between 1827 and 1831, when his legal practice was almost non-existent. The novel was never published; it bears no title; and it is never mentioned in any public account of his life. It is now to be found in 19 bound notebooks written in his own handwriting, in the archives of the Middle Temple in London. The manuscript seems untouched, save for one and a half readers over the last 150 years. The novel is supposedly a personal memoir found in a trunk in Germany and translated into English from the original French. It starts with this passage: ''During an excursion in France in the summer of 1801, it was the good fortune of the publisher of the following memoirs to become acquainted with the younger brother of Count S..., a German nobleman whose talents in character were as distinguished as his family was rich and his properties extensive. . . .'' It continues with a complicated love story, entangled relationships, and multiple betrayals amid the horrors of French autocracy, the French revolution, and Napoleon, as told by an old man, Monsieur Auguste de Morbière, now a refugee living with the German nobleman. The novel finishes with a flourish featuring the much-younger Auguste:

> On a sudden (the) door of (the) boudoir flew open. Félicie, whose visage had just before been refreshed in my heart by the portrait of her mother, rose blushing from her seat, at the foot of which stood [the] cradle of my son. Overpowered by a thousand emotions I rushed towards her, and falling at her feet embraced her knees. I thought I felt her lips touch my brow—I know not if it was so, for my senses reeled with the excess of my joy. . . .''

And, so magnificently reunited after so many vicissitudes, the couple were then happily married, in accordance with Adèle's deathbed wish.

Who was the departed Adèle, who was the blushing Félicie, who was the mother of the baby son, and what happened to Auguste in the middle of this novel? I regret that I cannot tell you myself—because Cockburn's handwriting became increasingly unreadable, and I had to stop halfway. The only person known to have read every page is the late novelist and social historian, Siân Busby, and I have permission to reproduce part of her wonderful summary:

> The (untitled) novel is fairly typical of the gothic romances popular in the late Regency period—the sort of work Jane Austen mocks in 'Northanger Abbey', with nuns, wicked stepmothers, thwarted lovers, ghosts, intrigue and dungeons. It is epistolatory in structure. It tells the story of Auguste de Morbière, a young man living in France in the last year of Louis XV's reign. He tells the story in flashback from the vantage point of 1801, having read an unflattering version of his story in a book by someone else. He falls in love with the ward of his profligate father, Félicie, who he fears for much of the early part of the book might be his sister, and then his father's mistress. He is wrongfully imprisoned when taken at the house of a revolutionary (a scene written with a great deal of radical fervour—Cockburn was a lifelong reforming liberal Whig). A ghost appears to him in his dungeon pointing him to a series of letters concealed in the bricks of the cell wall. These point to the true identity of Félicie, and also imply an intrigue

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> against her parents and the King which turns out to have been instigated by Auguste's father's mistress, the scheming Madame de Mainville.
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> There are many twists and turns in the convoluted plot, which eventually leads to Auguste witnessing what he believes to be his father's marriage to Félicie (always described as 'pale and trembling'), and Auguste's own love affair with Adèle, another victim of Madame de Mainville's intriguing. We also learn that the scheming Madame de Mainville has been a mistress of the King, and has something to do with his poisoning at the hands of Madame du Barry . . . Eventually Auguste ends up in another dungeon, but his lover Adèle sacrifices herself by agreeing to enter a convent so that he might go free. This satisfies the intriguers who want to get their hands on the orphan's family's estates. While in the convent Adèle gives birth to Auguste's natural son and dies, but not before she has made the acquaintance of Félicie, who has also entered the convent, and tells her the whole story. Auguste is recovering from one of those deliriums that heroes of this kind of novel invariably fall into—mentally and physically exhausted and also confused about which of the two women he loves most—is introduced to his baby son without realising who the child is, and then learns the entire story (again in a series of letters, this time written by Adèle before her death). He is eventually reunited with Félicie and restored to his father (who it seems was an unwitting instrument of the evil Madame de Mainville) and acknowledges Adèle's son as his own. As he and Félicie prepare to marry she hands him a final letter from Adèle: 'If you have ever loved me let your unceasing study be the happiness of Félicie. She, I know, will not fail to make you happy'. With that the novel concludes with Auguste de Morbière, back in 1801, announcing: 'This is the true history of my youth. My tale is done!'
>
> The novel does not have a great deal of literary merit, but it is written with a certain degree of verve and consistent in tone and style. It offers a fascinating insight into Cockburn for any future biographers. . . . It is the novel of a young man with a bit of time on his hands, and with a young man's romantic notions of sex, love and women. There is nothing especially learned about the book, either in its style or content; not much sense of the historical setting, and very little maturity of insight into characters and their motivations. Apart from one passionately written passage denouncing 'Universal Corruption' and predicting the blood-letting to come in the French Revolution ('Tyrants will tremble in their palaces, long and bloody will be the struggle, but it will not be doubtful!'), there is very little social or political commentary. But it is well-paced and a good, light read.

At the very least, for present purposes, this novel shows Sir Alexander Cockburn to have been a warm-blooded human being and therefore a useful complement to his fellow party-appointed arbitrator, the cold-blooded Charles Francis Adams, in regard to the crisis confronting the Alabama Arbitration in June 1872 threatening its imminent demise.

That crisis arose from the wording of the Washington Treaty. It had effectively fixed, with its three rules on neutrality, the liability of Great Britain retrospectively for certain of the ''direct claims'' made by the United States; but it did not expressly address any ''indirect claims.'' The direct claims arose from the destruction of vessels and cargoes by the CSS *Alabama* and her fellow cruisers, causing loss to American citizens in relatively modest sums. The United States' indirect claims had been pleaded in the written *Case of the United States* submitted in December 1871 in the Alabama Arbitration, without prior notice to Great Britain (thereby preventing any adequate written response under the arbitration's procedural timetable).These indirect claims were advanced as a national claim for the increased costs of marine insurance, for losses in the transfer of U.S. tonnage to the British and other flags, and, most controversially of all, for the full costs incurred by the United States from the prolongation of the Civil War by two years, from the battle of Gettysburg in 1863 to the end of hostilities in 1865, in a total amount (with interest) that would have bankrupted Great

Britain at that time. It was these indirect claims which had been and were still being pressed by Senator Sumner (from whom they had originated), with strong popular support in the United States.

The case pleaded by the United States raised an immediate diplomatic storm in England because the British Commissioners negotiating the Treaty of Washington had been left with the firm impression that no such indirect claims claim would be made by the United States and that the treaty conferred no jurisdiction on the Alabama tribunal to decide anyindirect claims. There was also a general sense in England that the British Commissioners had somehow been duped by the American Commissioners during the treaty's negotiations, and that both the Secretary of State (Hamilton Fish) and President Grant were guilty at least of shabby and ungentlemanly conduct. Accordingly, the British government expressed the firm opinion that the Alabama tribunal could enjoy no jurisdiction to receive any of these indirect claims. Secretary Fish, supported by President Grant, expressed a diametrically opposite opinion, and it was firmly contended, not entirely without justification, that the wording of the Washington Treaty supported the position of the United States.

Over the next six months, the two governments exchanged lengthy and learned memoranda advancing jurisdictional and other arguments, to no effect. The jurisdictional issue was thus entirely unresolved diplomatically when the tribunal opened its first hearing in Geneva on Saturday, June 15, 1872. At this point, the British government was ready to walk away from the arbitration if the tribunal assumed jurisdiction to decide the indirect claims, but the government also knew that the United States would insist that the tribunal should continue its work in the absence of Great Britain (as it could). Nonetheless, at this hearing the British government's Agent, Lord Tenderden, refused to present Great Britain's final written argument and requested from the tribunal an adjournment of eight months to enable a supplementary treaty to be negotiated and concluded between the two parties. There was then a great stillness in the room, according to the participants present, because everyone there knew that if the arbitration adjourned for eight months, not only would there be no supplementary treaty but that the arbitration would never resume, with the inevitable prospect of war between the United States and Great Britain. To this request, the American Agent, Mr. Bancroft Davis, calmly replied that he was unable to state the response of the U.S. government to Lord Tenderden's request and asked in turn for a short adjournment to receive instructions from the State Department, until the following Monday afternoon, June 17, 1872, a delay which was granted by the tribunal (it was later extended to Wednesday, June 19).

These five days were crucial for the history of international arbitration. When the hearing resumed on the fifth day, the tribunal declared as regards the indirect claims, in the words recorded in the official English protocol after the necessary recitals:

> The Arbitrators think it right to state that, after the most careful perusal of all that has been urged on the part of the Government of the United States in respect of these claims, they have arrived, individually and collectively, at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should upon such principles, be wholly excluded from the consideration of the tribunal in making its award, even if there were no disagreement between the two Governments as to the competency of the tribunal to decide thereon . . .

This was not an arbitration order or award: it was ostensibly a spontaneous ''declaration'' issued unanimously by the tribunal within the Alabama Arbitration, without any hearing, and with no argument or request from any of the parties' counsel. What happened during those five days? The story is told by Mr. Davis, the American Agent, by Mr. Hackett, the

private secretary to General Cushing (one of the three counsel to the United States), and by Sir Roundell Palmer (later Lord Selbourne), the English Attorney-General and the senior Counsel for Great Britain, supplemented by other contemporary materials.

The First Day

On this first day, Saturday, Mr. Davis privately suggested to Mr. Adams after the hearing that the tribunal should address the direct claims before addressing the indirect claims; Mr. Adams responded that the same idea had occurred to him. Mr. Adams said that he would ask Mr. Evarts, the senior American Counsel, to speak to Sir Roundell Palmer, the English Attorney-General. (Mr. Evarts had acted as Adams' legal adviser in London on the Alabama Claims and was later U.S. Secretary of State and subsequently a U.S. Senator for New York.) Later that same day, Mr. Davis wrote accordingly to the Secretary of State, Hamilton Fish:

> [Mr. Adams] told me that he had no doubt himself that the indirect claims were within the scope of the Treaty; and that he had thought of the same way as cutting the knot, and letting the arbitration go on. It would be a way most unpalatable to England, but if there is pluck enough in the tribunal, it might be done. I have not much faith that it will be. . . .

That afternoon, after meeting with the American Counsel, Mr. Davis visited Mr. Adams at his villa outside Geneva, where he was staying with his wife and family. Mr. Adams, who had already spoken to Mr. Evarts, requested that Mr. Davis now visit Lord Tenderden (the British Agent), which Mr. Davis did that same evening. Mr. Davis then told Lord Tenderden what Mr. Adams had told him, namely that the indirect claims should be put aside by the tribunal pending further discussions between the two governments so as to allow the tribunal to continue its work on the direct claims, without the lengthy adjournment requested by Great Britain. Mr. Davis also said that he had come at the request of Mr. Adams, but not officially. Lord Tenderden, after necessary diplomatic equivocations, replied that Mr. Adams would have to go much further, by having the tribunal decide now to reject the indirect claims as beyond its jurisdiction. This was, of course, an unacceptable proposal for the United States: it had always considered that the indirect claims were covered by the Treaty of Washington and accordingly had been properly referred to the tribunal. However, there was a good relationship between Mr. Davis and Lord Tenderden; they had become friends during the negotiations for the Treaty of Washington, and they trusted each other. There was therefore a conversation between the two in an effort to find a possible compromise.

That same evening, Mr. Davis discussed the matter with the American Counsel, Mr. Waite (later Chief Justice of the U.S. Supreme Court) and Mr. Evarts. (General Cushing had already gone to bed.) Later that night at about midnight, Lord Tenderden knocked on Mr. Davis' bedroom door at his hotel in Geneva. (The American Agent and Counsel were then staying at the Hotel Beau Rivage, before moving to an elegant villa outside Geneva for the remainder of the arbitration, with the British staying throughout at the nearby Hotel des Bergues, including Sir Alexander Cockburn.) After his earlier meeting with Mr. Davis, Lord Tenderden had discussed the matter with the English Attorney-General, Sir Roundell Palmer, just as he was preparing to leave Geneva for London believing the arbitration to be adjourned indefinitely. The Attorney-General had in turn discussed the matter with Sir Alexander Cockburn; subsequently the Attorney-General had listed three points for Lord Tenderden, which Lord Tenderden now dictated to Mr. Davis at this midnight meeting.

The first point was to preclude the tribunal from giving any judgment on the indirect claims, as not having been submitted by the parties to the tribunal. The second point was

to preclude Sir Alexander Cockburn, as the arbitrator appointed by Great Britain, from taking any part, directly or indirectly, in any expression of opinion on the indirect claims. (This was readily agreeable to the American Counsel, who had already formed an adverse opinion of Cockburn, and the British Counsel were by now probably aware of Cockburn's intense distaste for the Trewaty of Washington.) The third point was to preclude the tribunal from making any expression of opinion on the indirect claims binding on the parties, without the assent of both parties. During this midnight meeting, an idea emerged between Mr. Davis and Lord Tenderden that the tribunal might make, with the assent of both parties, an extra-judicial expression of opinion on the indirect claims, short of an actual award.

The Second Day

On Sunday, Mr. Davis submitted Sir Roundell Palmer's three points to the American Counsel, who decided that negotiations should continue between Mr. Evarts and Sir Roundell Palmer. Mr. Evarts and Sir Roundell Palmer met that evening, and they confirmed that the principal obstacle concerned the third point: What kind of extra-judicial expression on the indirect claims could be made by the tribunal, by consent of the parties, as regards jurisdiction and the merits? In the meantime, during the afternoon, Mr. Evarts and Mr. Davis went to see Mr. Adams, reporting to him in full the events of the previous 24 hours. Here it is best to record the actual words used by Mr. Davis in his contemporary memorandum for the State Department, recording Mr. Adams' response:

> He [Mr. Adams] said that he had had some conversation with Mr. Fish, before leaving Washington, in which Mr. Fish had told him that he was willing to have the indirect claims decided adversely, and that he had said to Mr. Fish that in his judgment they ought to be so disposed of—that Mr. Fish had felt so much interest in the matter that he had sent a special message to him in Boston, by Mr. Boutwell [Mr. Boutwell had been Governor of Massachusetts and was now U.S. Secretary of the Treasury], to see Sir Alexander Cockburn in London and endeavour to arrange some way to have it done; that he [Mr. Adams] had seen some influential persons in London on the subject, but had not seen Sir Alexander, because he did not think him the best person to see for that purpose. . . .

Despite their demerits, Mr. Adams also repeated his opinion to Messrs. Evarts and Davis that the indirect claims lay within the tribunal's jurisdiction.

Later that afternoon, after seeing Count Sclopis (the tribunal's Italian president), Mr. Adams delivered to Mr. Davis a draft declaration which might be made by the tribunal, together with an expression of the tribunal's view that it was inadvisable for the arbitration to be adjourned. This draft was to the effect that the arbitrators must decline to assume any jurisdiction over the indirect claims but, if jurisdiction were assumed, that the indirect claims would not succeed under recognized rules of international law. Mr. Davis carried the draft to the American Counsel. They decided that the draft was unacceptable given its statement that the indirect claims fell outside the scope of the Treaty of Washington and beyond the tribunal's jurisdiction.

The Third Day

On Monday, the American Counsel re-drafted Mr. Adams' draft declaration and asked Mr. Evarts and Mr. Davis to deliver this revised draft to Mr. Adams. It was to the same effect that the indirect claims would fail as a matter of international law; but, significantly, that the tribunal would not decide upon its jurisdiction to decide such claims, one way or

the other. When Mr. Evarts and Mr. Davis arrived at Mr. Adams' villa, they found him with M. Stämpfli (the Swiss arbitrator). Mr. Adams indicated that he had already spoken to Baron d'Itajuba (the Brazilian arbitrator) and was soon to speak again with Count Sclopis (the Italian presiding arbitrator) at the tribunal's private meeting fixed for that afternoon and before the resumed hearing with the parties. Mr. Adams later called upon Mr. Davis, with a further revised draft, as to which Mr. Davis expressed his disappointment, again because it stated that the tribunal considered that the indirect claims fell outside its jurisdiction.

At the resumed hearing that day, Mr. Davis explained to the tribunal that he had not yet received instructions from his government responding to Lord Tenderden's application to adjourn the arbitration for eight months, requesting further time to Wednesday, June 19. This was, of course, a half-truth which deceived no one. When the president turned to Lord Tenderden for his response, Lord Tenderden said, doubtless with a straight face: *''Je ne puis faire aucune objection.''* Later that same Monday afternoon, in a private meeting, the tribunal decided unanimously not to adjourn the arbitration but to dispose of the indirect claims by an extra-judicial declaration, at the joint suggestion of Sir Alexander Cockburn and Mr. Adams, with the precise form of that wording still to be settled.

The Fourth Day

On Tuesday morning, Sir Roundell Palmer delivered to the American Counsel his own revised draft of the American re-draft which had been submitted by the American Counsel to Mr. Adams the previous day (Monday). That American re-draft had come to Sir Roundell Palmer from Sir Alexander Cockburn, via Mr. Adams, and it had provided the basis for Sir Roundell Palmer's revised draft intended as a compromise acceptable to both parties. Although Sir Alexander Cockburn left no personal account of his own, he described these events to Sir Roundell Palmer, as recorded in the latter's memoirs:

> During the pause afforded by these adjournments, Sir Alexander Cockburn told me that the idea of getting rid of the difficulty by a spontaneous declaration of the Arbitrators against the indirect claims had been suggested by Mr Adams, and that the rest of the Arbitrators were inclined to entertain it; and he desired me to consider in what form it could be done, so as to leave the position assumed by our Government untouched, without shutting the door against its acceptance on the other side. Accordingly I drew up a form of declaration, which I thought might be accepted on both sides, unless the United States preferred the failure of the Treaty to the abandonment of those claims; and this being communicated by Sir Alexander Cockburn to the other Arbitrators, was adopted by them.

This compromise draft was indeed agreeable to the American Counsel, and it was submitted to the full tribunal by Sir Alexander Cockburn with Mr. Adams' approval that same day. At a private meeting of the tribunal in the house occupied by Count Sclopis in Geneva, the tribunal unanimously approved the revised draft declaration to which the parties' counsel had assented, with the joint support of Mr. Adams and Sir Alexander Cockburn.

The Fifth Day

Accordingly, when the arbitration resumed the following day, Wednesday June 19, the tribunal made its extra-judicial declaration in a form of words which had been quietly agreed by counsel for both parties, with the active intermediation of Mr. Adams and Sir Alexander Cockburn as party-appointed arbitrators. It was not an award, order, or any form of judgment, and it remained ostensibly subject to the assent of both parties. Subject to formalities as to

each government's instructions and further negotiations over the precise wording of these two assents, both parties accepted the declaration as binding upon them and determinative of the indirect claims, the United States on June 25 and Great Britain on June 27. The British Counsel then filed their final written argument; Count Sclopis delivered an opening address in the tribunal's name; the arbitration continued un-adjourned with the direct claims only; the tribunal issued its award on September 14; and Great Britain promptly paid in full the compensation thereby awarded to the United States. The rest is history.

The tribunal's declaration in June had cleverly preserved the essential positions of both parties; neither had compromised what, politically, they could never compromise, particularly with presidential elections imminent in the United States and a likely change of government in London. Great Britain had finally rid itself of the indirect claims; the United States had won the acknowledgment by the tribunal within the arbitration, albeit extra-judicially, that the indirect claims were not necessarily outside the scope of the Treaty of Washington but were in any event devoid of any substance on the merits, contrary to populist sentiments; and the Alabama Arbitration was saved as regards the direct claims. Significantly, for present purposes, it was saved by the active intervention of the two party-appointed arbitrators. Although both saw themselves as representatives of their two countries, neither in fact represented his country's case in the Alabama Arbitration. Charles Francis Adams was always opposed to the United States' indirect claims (albeit on the merits and not on jurisdiction), and Sir Alexander Cockburn could not hide his contempt for the retrospective effect of the Treaty of Washington's three rules on neutrality, to the dismay and increasing irritation of the British government. Indeed, in response to the publication of Cockburn's dissenting opinion, the Chancellor of the Exchequer (Robert Lowe) attacked Cockburn publicly for not ''simply signing the award with the other arbitrators.''

Conclusion

It may be said that the Alabama Arbitration is only a story from olden times, that it could never happen now, and that it should therefore be discounted as completely inapt to the new demands for dispute settlement in modern times. The first and second statements may be true, but as to the third, I suggest otherwise, for several reasons.

First, the Alabama Arbitration is the origin of what international arbitration is today, with the system of party-appointed arbitrators recognized by many arbitration rules and treaties, including the ICSID Convention, NAFTA, the UNCITRAL Model Law, and the UNCITRAL Arbitration Rules (1976 & 2010). The system worked successfully then, in untried but testing conditions, and for the most part it does still. We should be wary of abandoning a well-established tradition without good cause. Arbitral reform remains desirable, after reflection and consensus, but it is certainly not a necessary solution to switch now to a new, untested, controversial, and radically different system where all arbitrators are appointed by institutions, in default of the parties' joint agreement. If it were, then why not establish a permanent international court for investment disputes and even abandon international arbitration altogether? This question answers itself. For good reasons, the parties to the Alabama Arbitration chose international arbitration and rejected the idea of a sole arbitrator appointed by a sovereign or other institution, and for most users those same reasons hold true today. As Shakespeare (almost) said, ''Put not your trust in princes—nor arbitral institutions as appointing authorities.''

Second, the right of each party to appoint an arbitrator makes the arbitration the *parties'* arbitration, deciding *their* dispute with *their* tribunal. The preference by users for arbitration

over litigation has many explanations, but one manifest reason is the sense of ownership by a party over the arbitral process because it has participated in the formation of the tribunal as to which all parties have consented. This also explains why, despite the risk of increased costs and delays, users still prefer an international tribunal comprising three or more arbitrators and not a sole arbitrator appointed by an appointing authority. This is much more than a ''genie,'' but a deeply ingrained reality in the settled practice of international arbitration.

Third, let us not be too ''Victorian'' over party-appointed arbitrators and their dissenting opinions: arbitrators should not all be men or women regimented in grey suits. There is room and indeed a need for characters, just as ''Rumpole of the Bailey'' is not entirely a work of fiction for English barristers or trial lawyers everywhere. The Alabama Arbitration probably benefited overall from Sir Alexander Cockburn, a most unusual but colorful, if not also choleric, Chief Justice. It undoubtedly benefited from Charles Francis Adams, as a cold and calculating diplomat. So too the current system of international arbitration usually benefits from a wider, not smaller, pool of arbitrators, and myths should not diminish the arbitral pool. Moreover, dissenting opinions by party-appointed arbitrators remain a modest issue. Adopting Alan Redfern's famous triage, arbitration can benefit from ''good'' dissenting opinions, which almost inevitably will be made by a party-appointed arbitrator. Such dissents are more often (if rationally and courteously expressed) a sign of healthy intellectual vigor within arbitral deliberations, rather than evidence of any fatal malady in the system of party-appointed arbitrators. For all that, the other relatively few ''bad'' or ''ugly'' dissenting opinions are a small price to pay.

Fourth, what may be wrong today, if anything, is not the principle of party-appointed arbitrators, but rather their appointment in some cases to a three-arbitrator tribunal, potentially ensuring an undue significance in their relations with the presiding arbitrator, particularly in highly controversial disputes involving one or more states. That factor would be absent if there were not three but five arbitrators with the majority not appointed by the parties, as took place in the Alabama Arbitration. Historically, that greater number has often been agreed in arbitrations involving states. In the ILC's 1958 Model Rules on Arbitral Procedure, the default number of arbitrators was codified as ''preferably five,'' a provision apparently so uncontroversial that it there required no commentary or published travaux (Article 3.3). In the pending arbitration between Mauritius and the United Kingdom, part of the increasingly acrimonious dispute over the Chagos Archipelago in the Indian Ocean, the tribunal is composed of five arbitrators under Article 3(a) of Annex VII of the 1982 United Nations Convention on the Law of the Sea, requiring ''five members'': the claimant and the respondent each appointed one arbitrator, with the other three arbitrators being appointed by the President of ITLOS. For complex arbitrations between states, there remain good reasons for preferring more than three arbitrators, and, since there must be an uneven figure, five (not one) is the obvious solution. With such a five-arbitrator tribunal, any possible disadvantages in party-appointed arbitrators are diminished, without losing any of their actual advantages.

Lastly, let us apply in our minds the following litmus-paper test to a longstanding dispute almost as potentially troubling as the Alabama Claims: the ancient claim by Argentina against the United Kingdom over the sovereignty of the Falkland Islands or Las Malvinas, which has already led to warlike operations between the two countries. Put yourself in the position of these two states and assume (which we cannot yet) that both states jointly wished in good faith to have that claim and its consequences determined finally by international arbitration. Would either of these two parties agree to an arbitration tribunal composed of one or more arbitrators *all* appointed by an arbitral institution, or would they follow the model established

by the Alabama Arbitration, with the right of each to appoint an arbitrator of its own choice to the tribunal? I am certain that it would not be the former, but rather that arbitral history would repeat itself—for good reasons.

All this, I suggest, demonstrates that the traditional system of party-appointed arbitrators remains today the robust keystone to international arbitration, without which arbitration would assume a significantly different form adverse to the interests of its users. Moreover, if international arbitration were to fail as a legitimate procedure for dispute resolution in the 21st century (as it may, particularly for investment arbitration), the effective cause will be quite other than the system of party-appointed arbitrators, with or without their dissenting opinions.

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identity from the date of the events giving rise to the claim . . . through to the date of the resolution of the claim'' (para. 225). However, as regards the continuous nationality of a natural person with a claim against a respondent state, Article 5(1) of the 2006 ILC Articles on Diplomatic Protection was later to provide: ''A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. . . .''; and Article 5(4) provides: ''A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim.'' The ILC Commentary applied these provisions to the Loewen case without any material criticism of the award on the ground that the Loewen claimant's new nationality was that of the respondent state and hence its claim could not require the United States to pay compensation to its own national (Report of the International Law Commission 2006 on Diplomatic Protection, Supp No 10 A/61/10, pp. 35 & 67).

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> I was called by [the Department of] Justice and asked whether I'd be interested in this international arbitration which involved a dispute between a Canadian investor and the United States under NAFTA, and I said ''Yes, that sounds interesting,'' and I met with the Department of Justice lawyers. Under the arbitration procedures, you're allowed to meet with the parties up until the time that the panel is constituted and at that point everyone is supposed to act as a neutral and avoid ex parte contacts. This was before the panel was constituted, and I met with the Justice Department lawyers and one of them said to me, ''You know, judge, if we lose this case, we could lose NAFTA,'' and I said ''Well, if you want to put pressure on me that does it, but why is this so important?'', and he said ''Well, they're seeking 400 million dollars damages or 300 million dollars damages under a provision that I'll bet you didn't know was in NAFTA when you voted for it,'' and I said, ''You're talking about an arbitration procedure,'' and he said ''Yes,'' and I said, ''You're right. Not only didn't I know about it but I would venture that most of the Members of Congress who voted for NAFTA had no idea that there was an arbitration procedure in it or how far that arbitration procedure extended.'' The fights that were going on about NAFTA was [sic] whether we were maintaining a free and level playing field for our workers, whether we were preserving environmental conditions, whether the pact was going to lead to the exporting of jobs to Mexico and perhaps to Canada, and whether in fact this was an appropriate treaty for three countries that have

different levels of economic activity. Those were the debates. No one ever talked about arbitrations, no one ever talked about investor disputes. I had heard of bilateral investment treaties before, but I never even conceived that NAFTA had provisions that paralleled some of those BITs' specific provisions. Well, I agreed to do it, and the panel was duly constituted. . . .

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