Standing Weekly Assignment 7: Binding Arbitration

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Gent & Shannon, 2011

The authors' hypothesise that unbiased brokers for adjudication in territorial disputes are more successful. This runs contrary to a body of literature suggesting that biased brokers are no worse in this regard. Furthermore, they conclude that the method of conflict resolution matters more than who or what the third party is. They focus on source-bias in the third-party as a variable.

They use the border dispute between Colombia and Venezuela to illustrate their point. The successful resolution of the dispute only happened after relying on Switzerland to arbitrate, which had no historical ties to either country unlike Spain. The reason is that a biased negotiator can't be truly trusted to adjudicate impartially, not because both parties expect an impartial broker to be more effective.

They find that non-binding arbitration agreements are not as effective because binding agreements create high reputation costs for defection. Even in the Guiana dispute, Venezuela accepted the clearly unfavourable terms for this reason. This provides domestic political cover for the negotiators on both sides. Binding resolutions carry more weight because they also establish international precedent, or at least the resolution refers to broader international customs and thus reinforces the importance of the agreement.

One point which I think deserves to be raised is that inter-state disputes are fundamentally different animals from intra-state conflicts like a civil war. In the former, binding arbitration works because both sides, at least initially, recognise the right of the other to exist. Whereas sovereigns aren't risking their own existence, intra-state conflicts such as those discussed last week are much higher stakes. Disputants might not even want to recognise the other party at all, and binding resolutions, however effective they are in practice, would thus be off-the-table.

Another limitation of their study is the sample size. This isn't to dismiss their claims categorically; studying the small-ish group of binding settlements in territorial disputes might be hard to generalise as a result.

On the theoretical scale, there isn't much attention given to structural biases within the world international system, seeing as they encode international courts as unbiased. Specifically, when they code the bias of IGOs, they rely on the biases of each member's own country but don't extend this practice to courts. The problem, as I see it, is that institutions in international courts may be less

overtly biased to one state or another, but they undeniably must have a bias to the perpetuation of the international system. This becomes problematic when one or another claimant in a dispute views the structures of the international system as an obstacle, even if it allows them sovereign rights. So I'm not so certain that the impartiality of courts is valid, but I concede that it makes only a minor difference in their final analysis.

Mitchell & Hensel, 2007

The authors argue that when International Organisations are actively involved in binding arbitration agreements, compliance of the disputants is more likely. Passive membership in institutions also promotes compliance with peaceful resolutions. Importantly, *how* these international institutions participate can alter how successful any deal will prove to be. Mitchell and Hensel use the same sample as Gent and Shannon, the ICOW. They likewise control for bias preferences using the same S-score method as Gent and Shannon. One last methodological contribution they make is to control for the inequalities *within an agreement*, to correct for non-compliance when a state feels the terms do not correspond to its prestige.

They discuss the possibility that the proliferation of IGOs since the Second World War might have an effect on successful resolutions. They find no correlation when testing it along a dummy variable hinging on the year 1945, grouping the conflicts of their sample into ante-bellum and post-bellum.

Mitchell/Hensel and Gent/Shannon, were they to talk to each other, would likely disagree over which is most important: the fact that institutions are involved, or that the institutions involved are impartial to disputants. For one thing, Gent and Shannon's conclusions regard a specific category of conflicts (territory) and not contentious issues more generally. Where they would undoubtedly agree is that *how* the adjudicator gets involved matters more to a successful outcome than any qualities they may have.

One particular area in which they would all agree is the way that arbitration can create domestic political cover. Mitchell and Hensel write on page 374 that IOs make "convenient scapegoats" if agreements turn out to be sour, allowing leaders to save face while still adhering to terms. Gent and Shannon write about this as well on page 369 of their piece, since international law sanctifies otherwise untenable concessions.

The issue with the "passive" hypothesis is that it confronts what Gent and Shannon discussed at the end of their paper, namely, the possibility that states arbitrate on the easy issues and prefer non-binding mediation on tough ones. Pre-empting this, the authors actually employ the Heckman censor which Gent and Shannon wrote off as impossible for their purposes.[1]

[1]Note to self: What is Heckman selection? Some theoretical models miss data points because of the value of the particular data points – as in, non-random "missingness." Using a Heckman correction method, they can account for the "missing" cases where dyads did *not*

At the end, Mitchell and Hansel discuss the effect of institutional membership networks on compelling disputants towards settlement out of court, arguing that although those cases aren't captured by the model, there is a strong case to be made that their findings are relevant in research on this topic.

Case Study: Bahrain & Qatar

After failed attempts at mediation through the Saudis, the Hawar islands dispute was adjudicated by the ICJ, the first such case between Arab states to come before the court. The dispute between former British protectorates only became salient with the discover of petroleum in the Gulf, when Qatar claimed the islands to pre-empt Bahraini claims to oil rights. The UK mediated the dispute, granting the Hawar claim to Bahrain, which annoyed the Qataris but they were in no position to do anything about it until the British withdrew in 1971.

In the 1980s, the Saudis mediated a settlement framework that was immediately nullified when the Bahrainis attempted to build a coast guard station on the disputed islands, leading to Qatar occupation. The Saudis once again returned to mediate the issue, averting war but making little headway. Despite the agreement that the issue would be referred to the ICJ if the framework didn't work, nobody wanted to tacitly undermine the competence of the Gulf Cooperation Council.

Finally, in 1991 Qatar gave up and approached the ICJ to hear the case, citing the terms of the Saudi mediators which would give the ICJ jurisdiction in the matter. This was a bold move: while the ICJ considered the question of jurisdiction, Qatar made further advances into Bahrain's claimed waters as a tactic to force Bahrain to court. Bahrain's counter-offer was a joint submission of the case to the World Court, but the submission would have included Zubarah, an island which Qatar wanted off the table. The court decided that Qatar's petition was 'incomplete,' but nonetheless agreed to hear the case in 1994. This split the Gordian Knot: Qatar had successfully forced the issue but the whole of the dispute, not just the parts Qatar wanted, was on the table.

During preparations for the hearings, Hamad bin Khalifa al-Thani overthrew his father in 1995. The Emir of Bahrain died in 1999 and was succeeded by his some, Hamad bin Isa al-Khalifa (confusingly named for Western readers such as myself). Both sought to differentiate their reigns from their predecessors, but the Hawar dispute didn't thaw. Last-minute mediation through the UAE and SA failed once again, until finally the two countries resolved to await the ruling of the ICJ before resuming non-binding talks.

Opening arguments indicated that Bahrain and Qatar wanted the same things from the same islands, and that the counter-claim would be unacceptable. Bahrain's argument was based on the legacy of British mediation, which gave legal weight to their claim. Qatar held that they didn't consent to British

reach a settlement, ie, the "non-easy" issues which don't make it to arbitration.

mediation in the first place, claiming that the Bahrain's claim to the Hawar islands was extra-territorial and tenuous. Even the status of many islands was disputed, since they were completely submerged at high-tide. Bahrain staked its claim to Zubarah on ethno-historical grounds, while Qatar claimed it based on international arrangements between the English and Ottomans.

The court found that Bahrain had no effective claim to Zubarah, Fasht ad-Dibal, and Janan-Hadd Janan, but main Hawar group and Qit-at Jaradah were granted to Bahrain based on the language of the 1939 British Agreement. As a pragmatic measure, dividing the spoils was a workable solution, but it established an ill precedent by relying on the dicta of a foreign coloniser. Nonetheless, both disputants accepted the outcome with relief if not jubilation. I must conclude that after a century of contention, both sides looked forward to clearly delineated boundaries to facilitate economic development, rather than conclusive winning the struggle.

The ruling also allowed Emir al-Thani to save face and magnanimously allow Bahrain to have Hawar under a binding arrangement. This point was discussed in both of the academic pieces, which emphasise that national prestige can override the objections of domestic elements who object to unfavourable binding arrangements.

One might be tempted to argue that after the regime shake-ups in the '90s, the S-score preferences of the two countries became more aligned, despite their rhetoric. Their foreign policy priorities had changed under the surface, and only after the fact was this change discovered. Observing the rapid pace at which joint Bahrain-Qatar projects developed after the decision, one might be tempted to say this was an "easy case" because no real ego was at stake when claiming submerged reefs for oil rights. Despite the venom issued in the press by Qatar and Bahrain, nobody was staking their national pride on some of these islands, and economic interests were pushing both sides to make amends.

The ICJ's ruling was also said to have benefited the solvency of the GCC; one might connect this notion to Hensel and Mitchell's argument that institution membership networks passively heighten the likelihood of successful compliance.

To speak to Gent and Shannon's claim that disputants prefer unbiased parties because they wish to avoid a biased outcome, we see some evidence against that in the case study. The ICJ was a mediator of last resort based on previous arrangements, all of which failed right up to the beginning of the hearing. Secondly, Qatar pushed for the ICJ hearing not because of any belief in impartiality, but because it believed it had a stronger bargaining position. After moving into Bahrain-claimed areas, Qatar presented the ICJ as the least-unfavourable option to Bahrain, only for the strategy to partially backfire. Nonetheless, Gent and Shannon were likely right that the impartiality of the court informed the compliance with the verdict. I have to give some voice to the realists though: dividing the spoils effectively "bought off" both sides.