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Introduction to the Symposium Issue on The Americanization of International Dispute Resolution

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With the end of the Cold War and the emergence of the United States as the world's only superpower, we have heard expressions of concern about the great weight of American influence in so many aspects of international life. One area of concern is America's influence on the law and processes of international dispute resolution (IDR). Of all the practice areas in IDR, practitioners and scholars of international arbitration have had the most detailed discussions on this theme to date. Their greatest worry is the growing tendency toward American litigation style in a process that is neither American nor litigation. That discussion inspired the editors of the Journal on Dispute Resolution to investigate further into complaints about "Americanization" of IDR. The Journal held a one-day symposium bringing together prominent practitioners and scholars from the United States and abroad to discuss American influence on IDR. At the end of the day, the conclusions were more positive than the working hypothesis going into to the symposium. The United States is having a major impact on IDR. Yet, American influence, while negative in some respects, is also credited in spurring on some of the huge strides of the last decade.

The articles in this issue and the topics discussed at the symposium all concern the classic processes of IDR: negotiation, mediation, inquiry, conciliation, arbitration, and judicial settlement. These are the means of international dispute settlement identified in the United Nations Charter in Article 33.[1] At the start of the 21st century, these means continue to dominate the peaceful settlement of international disputes. Whether private-commercial, public-intergovernmental, or mixed international disputes, disputants continue to choose these methods or find they are bound to do so

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[1] For more on international disputes resolution, see generally INTERNATIONAL DISPUTE SETTLEMENT (Mary Ellen O'Connell ed., 2003).

by treaty. The means themselves have not changed fundamentally for seventy-five years, but thanks largely to the end of the Cold War and the impact of globalization, the sheer frequency with which international dispute settlement methods are now used would have been unimaginable even twenty-five years ago.

Along with this growth have come two questions. Is America having too great an influence on international processes? Are processes that developed over time to reflect the needs of the whole international community now tending to reflect too greatly American needs, interests, and style? In the debate among international arbitration specialists, the concerns focused particularly on the use of American litigation style in international arbitration.[2] American litigation is associated with aggressive, adversarial tactics; the demand for and production of mountains of documents; preference for oral proceedings—especially cross-examination of witnesses, as well as the development of ever-more detailed rules to govern arbitration, including ethics rules for the arbitrators themselves. These developments are occurring not only in international commercial arbitration but also in mixed arbitration and even in inter-governmental arbitration. They contrast with the more cooperative, polite, diplomatic style of the past. Parties emerged from arbitration ready to do business again, rather than as enemies. Arbitration was simpler and more efficient and so faster and cheaper.

Participants in the symposium concluded, from the arbitration example and others, that a process of "Americanization" is happening. It is the inevitable result of the fact the United States and its citizens are involved in so many activities worldwide. The United States is involved in more cases at the International Court of Justice and the World Trade Organization than any other state. More American businesses are involved in international commercial arbitration than any other nationality. Americans are involved in significant numbers of international family law disputes. Many U.S. citizens have ties to conflict areas of the world and want their government to play a role in helping resolve those conflicts. Eight out of ten "mega"-firms, firms with 2,000 lawyers or more, are American. These firms market their broad expertise and experience so that even the German and Mexican governments called on American law firms to help prepare cases against the United States government at the International Court of Justice. The sheer number of American lawyers, their energetic style, and commitment to the use of law in problem solving all account for the trend toward Americanization of dispute resolution.

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[2] *See* Lucy Reed & Jonathan Sutcliffe, *The 'Americanization' of International Arbitration?*, 16 MEALEY'S INT'L ARB. REP. 37 (2001).

This trend is criticized not only for its impact on arbitration, discussed above, but in other areas as well. In the area of negotiation, for example, the World Trade Organization (WTO) developed a dispute settlement system in 1994 that calls for negotiation or consultation before the use of the binding adjudication mechanism. Yet, observers express concern that the consultation requirement is neglected in favor of the litigation option. This neglect results from the strong American preference for litigation that has now influenced all dispute settlement at the WTO.

Mediation has also been affected. Mediation was once the least regulated of all areas of IDR, but recently the United Nations Commission on International Trade Law adopted a model mediation law to accompany its model arbitration law.[3] It reflects American terminology in place of the classic international law terms and includes principles and practices developed to govern mediation in the United States. In international relations, the view has traditionally been that mediation does not need rules, but now not only does it have a set of rules, the new rules look very American.

Americans have also influenced the development of new international courts. These, too, are characterized by detailed rules, with little flexibility. Proceedings stretch on for months and even years.

While all of these trends are true, they are not the whole picture. The articles in this volume reveal American influence on an international dispute resolution system that is characterized both negatively and positively. All agree that the international community would not have the WTO Dispute Settlement Understanding or the new international criminal courts without American leadership, dynamism, and creativity. At the WTO, the possibility of litigation is actually encouraging better negotiation. Americans have highly developed mediation techniques that are reflected in the new international mediation rules. These new rules emphasize the importance of neutrality and confidentiality. These principles, developed for private mediation, are now being examined for application to important inter-governmental mediation, especially to help resolve some of the globe's most intractable armed conflicts. Further, arbitration may finally move beyond the old-boy network and leave behind the problems that flourish in such an atmosphere, problems like lack of objectivity in adjudicating and lack of transparency.

The conclusion of the symposium is that despite negative aspects of American influence, positive developments have occurred as well. American lawyers are energetic, competitive, creative and trained for problem solving. They have used these attributes to advance IDR. As participants in dispute

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[3] UNCITRAL Model Law on International Commercial Conciliation (2002), *available at* http://www.uncitral.org/english/texts/arbitration/ml-conc-e.pdf.

resolution adapt to these American attributes in the shared fora of international dispute resolution, and as they study law in ever greater numbers in American law schools, they will use the methods promoted by Americans to bring their own preferences for rules and procedures to the international arena. The result could well be a convergence of the best methods for effective and peaceful settlement of all international disputes.

The articles in this volume are further reflections on these themes. The authors of these articles benefited during the symposium from discussions amongst each other, with Moritz law students and audience members. They particularly benefited from the four extraordinary commentators at the symposium: Antonia Handler Chayes commented on negotiating at the WTO; Jacqueline Nolan-Haley commented on mediating armed conflict; Deborah Enix-Ross commented on arbitrating international commercial disputes; and Leila Nadya Sadat commented on adjudicating international crimes. We are grateful to them and to our authors for their joint efforts to better understand and improve the mechanisms of IDR.