ISSN : 1875-4120
Issue : Vol. 6, Issue 1
Published : March 2009

Transnational Dispute Management
www.transnational-dispute-management.com

The Democratization of the Invisible College
by J.E. Alvarez

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

IL post
The American Society of International Law
President's Column
November 8, 2007

The Democratization of the Invisible College

José E. Alvarez [1]

The late, great Oscar Schachter was not an elitist. One of the central premises of his article, "The Invisible College of International Lawyers," was that the active "professional community" of professors, students, government officials and international civil servants was capable, through "heterogeneity and representativeness," of balancing out "the particularistic influences" of national biases to "avoid the misperceptions and omissions that accompany them."[2] His invisible college was simply a group of professionals capable of reaching international consensus precisely because, although each member was, as an individual, deeply enmeshed in the interests of his or her nation state, as a group they shared a common intellectual enterprise and a preoccupation with certain principles of justice.[3] To accomplish this goal, it was essential, he wrote, that the invisible college "aim at a wide international participation embracing persons from various parts of the world and from diverse political and cultural groupings."[4] There was nothing about Schachter's conception of the invisible college that required limiting its membership or keeping out those who had not gone to elite institutions of higher learning.

Yet, in 1977, when Schachter coined the term, the invisible college was in fact a small group, most of whom shared quite a number of social and (one strongly suspects) class connections and indeed had gone to a few select schools. The invisible college of Schachter's day consisted of a close knit group of (mostly) men – who tended to travel in the same circles, write in the same journals, and participate in the same conferences. They tended to belong to a small set of learned societies, including the ASIL and comparable bodies in Europe or Japan, the Institut de Droit International, and the International Law Association. A handful of such persons could credibly identify themselves as "international law litigators" – a category then essentially restricted to repeat players before the International Court of Justice. An exceptionally limited number of those few could call themselves "international judges."

There are obvious reasons why this exclusive invisible college has changed beyond all recognition. The invisible college circa 1977 preceded the proliferation of international dispute settlers established by the American Convention of Human Rights, the Optional Protocol to ICCPR, the Security Council's ad hoc war crimes tribunals, the Iran-United States Claims Tribunal, the UN Compensation Commission, or the WTO's Appellate Body. It was a time before anyone could put on their resume that they had been a judicial clerk to one of half a dozen international courts or tribunals. And while the World Bank's International Convention on the Settlement of Investment Disputes and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards both were in effect in 1977, the world of international arbitration – and of international investor-state arbitration – was at the time still a rarified domain involving only a few members of the private bar or government legal advisers. In 1977, those practicing international law on behalf of the U.S. government consisted of a few dozen attorneys within the U.S. State Department, a world dominated by male Ivy League graduates in pin-stripes. The State Department's Legal Adviser's Office had not grown to over 100 attorneys – nor yet lost abundant turf to other parts of the government or to an alphabet soup of transnational government regulators, all staffed with lawyers.[5] States of the United States, never mind, municipalities, had for the most part not tried to test the limits of the federal government's hold on foreign affairs (as affirmed by *Zschernig v. Miller* (1968)).[6] Non-governmental organizations, even with respect to human rights, had not yet been granted a prominent role in UN human rights treaty regimes, much less U.S. courts. (*Filartiga* was still two years away.) International law was also at that time a rarefied domain within academe with many fewer law schools attempting to fill a "global" niche and fewer law journals devoted to the subject.

Given all the venues where international law now gets made, interpreted, or enforced, international law is no longer the exclusive prerogative of a limited number of "statesmen" shuttling between a handful of academic and policy making posts. There are mountains of scholarship attesting to the international legal impact of non-traditional actors (including transnational regulators, quasi-public entities such as the International Organization for Standardization (ISO), international organizations in full-fledged 'mission creep,' as well as NGOs). Many have also addressed the power of transjudicial communications among a growing "international judiciary" and among those dispute settlers and national judges. Yet, there has been less attention paid to how all this activity has affected the sociology of the invisible college.

Today, there is little question that more people than ever before, all over the world, can credibly claim membership in Schachter's college. Nor is there doubt that the increasing legalization of societies that have heretofore resisted it has resulted in a more heterogeneous participation in Schachter's "common intellectual enterprise."[7] Given the depth and breadth of contemporary "transnational practice," there are many more lawyers (with far more diverse portfolios of governmental or non-governmental prior experience) who can claim engagement in "*dedoublement fonctionnel*." Given the rise of law schools, here and abroad, claiming expertise in the field, there are more (and more diverse) mentoring options for prospective international lawyers. As is suggested by the recent establishment of Asian and European societies of international law and the re-invigoration of others (such as the Russian Society of International Law), international lawyers also now have many more socialization options.

To the distress of some who are nostalgic for the cozy circle of like minded souls who once congregated only around The Hague, even the elitist field of public international law has undergone a revolution from below.

But there is a more significant change from 1977 that is dramatically affecting the sociology of our profession: the technological changes bearing the label "Web 2.0."[8] Today, most international lawyers with daily web access are at least passive web "lurkers." Most of us are at least consumers, if not producers, of web-based resources that permit active interaction, such as **Opinio Juris**, **International Law Girls**, **World Trade Law**, or OGEMID. Some of us have fashioned our own blogs or regularly contribute international law insights to web sites generally devoted to national law (e.g., **Balkanization**. The possibility that any of us, at the click of a button, has ready access to legal developments, even while these are occurring, and to practically instantaneous commentary on their significance, is radically altering the invisible college -- at least as much as the rise in the sheer numbers of international lawyers.

Consider as just one example the range of issues routinely addressed in the OGEMID electronic discussion forum, devoted to developments in international dispute settlement and particularly investor-state arbitration. Over recent weeks, members of that forum have exchanged information: on when OPIC settlements of claims have been published and subject to what conditions; on whether "economic emergencies" constitute a viable exception to investment protections under bilateral investment treaties (BITs); transmitting transcripts of awards (often on the day they are rendered and sometimes accompanied by instant commentary by renowned authorities); on various academic or other career opportunities; and concerning the numbers of Africans, women, or other minorities involved in arbitral disputes. OGEMID subscribers have also seen competing views on a full range of "hot" issues in the field, including the desirability of increased transparency (via publication of all relevant documents, access to amici, or televised proceedings) or of an appellate mechanism for investor-state disputes. They have exchanged multiple emails concerning the criteria that ought to apply when criticizing an arbitral award as "notorious," on whether LDCs face a level playing field under investor-state arbitration, on why LDCs either ratify BITs or settle investor claims, on whether BITs increase FDI flows or otherwise enhance economic development, or why the United States has not adhered to the Energy Charter. Scarcely a day goes by that my email "in" box does not receive 2-3 such messages stemming from that forum alone. In some cases, OGEMID exchanges become the functional equivalent of an extremely timely law review article or essay, albeit one produced without the intermediary of student or peer editors.

The consequences of Web 2.0 -- of such access to unprecedented and abundant information, sometimes exchanged anonymously but more often accompanied by a signature from a well known academic authority or renowned practitioner -- to the legal profession is beginning to draw attention, including from ASIL members and the President of the American Association of Law Schools (AALS). As Opinio Juris contributions, by ASIL members Peggy McGuinness (see http://www.opiniojuris.org/posts/1175874047.shtml) and Roger Alford (see http://www.opiniojuris.org/posts/1146345232.shtml), respectively, suggest, there is increased speculation about the possible consequences on the legal professorate. It is possible, as noted by Alford's summary of a recent Harvard Blogging Conference, that Web 2.0: will encourage more law professors to seek to become "public intellectuals," prompt law school deans to reward faculty members whose scholarship generates significant internet traffic or electronic downloads, cause more scholars to target their audiences directly without law review editors as intermediaries, promote more short form scholarship in

law journals, or help diminish the "closed loop of scholarship targeting an exclusive audience of professors at top American law schools."

And what of the invisible college? Does ready access to what once was privileged or severely restricted information mean that our 'college' has now dramatically reduced its tuition or permanently lowered the right of entry or, given technological restrictions on web access, will new barriers to equal participation, including for those living in the Global South, replace the old ones of wealth and geography?[9] What are the gender politics of Web 2.0? Does the web make increasingly irrelevant such matters as law school background, social background, or "old boy" ties or do they, on the other hand, encourage new ways to balkanize the profession, including along gender or political lines? Is it still viable to suggest, as Schachter did, that the invisible college remains a "like-thinking" group of experts?[10] That, as he thought, there still exists a single "unified discipline, notwithstanding its wide range of subject matter and its many subdivisions"?[11] And what about Schachter's contention that our profession has been able to resist the specialization that has become endemic in other fields (natural science, political science) such that our public international law generalists can still be counted to examine and challenge the conclusions of our specialists?[12]

While I do not know the answers to these questions (but would welcome ASIL members' responses), I doubt that our invisible college needs to worry quite as much about the kinds of concerns raised by some critics of the web, such as Andrew Keen, author of *The Culture of the Amateur: How Today's Internet is Killing Our Culture* (2007)(for a video link to Keen's talk at Google, see http://www.youtube.com/watch?v=IN_n7I0PM3w). Keen and others have generated a contentious debate about whether or not the rise of Web 2.0 is, within the United States or elsewhere, a positive "democracy-enhancing" development. On one side, web defenders have argued that unrestricted, ready access to the web frees us from traditional intermediaries (whether music companies or peer-reviewed law reviews), thereby enabling enhanced and more egalitarian access to information and opinion uncorrupted by corporate or other structures that in the past served as biased, overtly commercial, or even corrupt filters. Critics like Keen contend, on the contrary, that it is not a good thing that the web has given the world's "amateurs" the functional equivalent of their own Guttenberg press. That everyone has their very own vanity press has led, in his view, to superficial observations displacing deep analysis, shrill opinions in lieu of considered expert judgment. That anyone can create, market, and sell their version of the "truth" without intermediaries with the resources to engage in fact-checking has, in Keen's view, unleashed a stream of vulgar and/or inaccurate polemics disguised as information, frequently channeled into partisan blogs that replicate political or other cleavages in societies such as the United States. Far from enhancing "democracy," Keen argues, Web 2.0 threatens to undermine it by exacerbating political or cultural divides -- by encouraging all to turn to untrustworthy information chosen from web sites apt to publish what we want to find. A democracy whose young increasingly rely for information on *Wikipedia* or *YouTube* – and without the training in research or real literacy to identify the trustworthy from the unreliable, spin from fact – is, he argues, a poorer democracy.

Yet, as applied to our invisible college, the promises of the web appear to me more appealing than its risks. I learn much from and am inspired by what I read on *OGEMID*. The *OGEMID* exchanges above undermine some of the most notoriously negative aspects of international arbitration, especially its lack of transparency and alleged insider bias. At a time when many question whether investor-state arbitration, for example, truly levels the playing field as between North and South or between government lawyer and private practitioner,[13] it is hard to object to instant access to arbitral precedents, career opportunities, learned expert advice sans fee, or even unsubstantiated rumors formerly available only to those who belong to elitist (or at least pricey) associations.

Websites like OGEMID also change, I think for the better, what our law-makers and adjudicators do. A world of instantaneous world wide communications is also one that virtually requires someone in the position of the U.S. State Department Legal Adviser to respond to charges of alleged U.S. legal malfeasance in the same public fora that gave raise to some of the gravest critiques. (See, for example, http://www.opiniojuris.org/posts/chain_1169503291.shtml (guest blogging by U.S. Legal Adviser John Bellinger).) The wider readership assured to virtually any international adjudicator's decision is likely to improve the responsiveness and accountability of those decision-makers. It is hard to believe that the quality of ICSID investor-state arbitral opinions has not improved now that these opinions are scrutinized by thousands of sophisticated OGEMID readers who are more than happy to address the logical or other flaws in such decisions or to compare them to decisions rendered elsewhere. Bloggers may also force WTO adjudicators (eventually) to write judicial opinions written not only by and for a narrow trade technocracy but in a reader-friendly style that acknowledges their wider expressive impact (as did the U.S. Supreme Court when it wrote its eloquently simple judgment in *Brown v. Board of Education*).

Web 2.0 developments would appear to have brought us a more democratic invisible college.

Some of the graver risks suggested by Keen are ameliorated by the remaining entry barriers and costs of our field. Knowledge

of (and even to a considerable extent interest in) international law still requires a fairly extensive degree of advance training. Even "lurkers" on sites like *OGEMID* or *Opinio Juris* are likely to have graduate degrees in law or related fields. While there is no guarantee that the information conveyed on such sites is accurate, given their expert webmasters and/or readership, it is unlikely that a clearly erroneous transmission (such as a doctored transcript of an arbitral award) will survive the scrutiny of the sites' readers. And while the more subjective content in such sites has not undergone fact/cite-checking by a group of law students editors or peers on an editorial board, the relevant community is doubtlessly aware of, and hopefully has the training, to distill competent from incompetent commentary. Further, there are even higher entry barriers imposed by some electronic forums. While *Opinio Juris* manages to sustain a high level (and usually courteous) level of discourse even though the content of the discussion is reportedly only lightly pre-screened by its creators, OGEMID is a more tightly controlled discussion group, available only upon a subscription. (See here for observations by OGEMID's Thomas Wälde on how he manages that discussion group and note its "suggestions for new members" (including with respect to quality and style of contributions) at http://www.transnational-dispute-management.com/ogemid/. See here here for observations by Peggy McGuinness, one of Opinio Juris's creators, on the positive contributions of that site.)

At the same time, as anyone who has read some of the more pungent comments filed on sites such as *Opinio Juris* well knows, the wide availability and anonymity afforded by some web sites threaten, as Keen argues, to coarsen the discourse (not to mention the civility) of our invisible college, no less than it does elsewhere. Keen may be right to call for greater screening of what gets blogged and more active discouragement of anonymous commentary. In some instances, vituperative and unprofessional blogging or email exchanges may, as he fears, exacerbate the all too evident partisan divides within the invisible college.

Keen is also correct to defend the continuing need for knowledgeable intermediaries (such as our law reviews). For all the criticisms of the biases and even incompetencies of such journals, government legal advisers and others in positions of authority who want their legal arguments to withstand critical scrutiny, need to continue to expose their writings to the challenges of traditional peer-review. Even in the age of *Opinio Juris*, there is still plenty of need for the less timely (but heavily scrutinized) products contained in the *AJIL*. Further, as anyone who has read some of the research projects of a young law firm associate or law student would surely acknowledge, Keen is right to warn of the need to continuously train the Web 2.0 generation in functional literacy and rigorous research methods, lest our invisible college end up replacing the *Recueil Des Cours* with *Wikipedia*.

The jury is still out on whether access to the web, in addition to all the other changes in the size and diversity of our profession, is truly "democratizing" the invisible college -- or turning it into a raucous, immature, and uninformed junior high school for a (still) privileged elite living in the wealthy environs of our planet. For the moment, I, along with Wälde and McGuinness, would bet on the former.

Footnotes:

[1] Comments welcome at jalvar@law.columbia.edu. Translation with the assistance of Elizabeth Briones Gomez.

[2] Oscar Schachter, "The Invisible College of International Lawyers," 72 Nw. U. L. Rev. 217, at 223 (1977). See also ASIL, Proceedings of the 95th Annual Meeting, "The Visible College of International Law," Apr. 4-7, 2001.

[3]Schachter identified these as including reciprocity, good faith, abuse of rights, nonretroactivity, prescription, res judicata, proportionality, and estoppel. Schachter, supra n. 2, at 225.

[4]Id., at 222.

[5] The Basel Committee on Banking Supervision, for example, had only been formed in 1974. See generally, Anne-Marie Slaughter, *A New World Order* (2004).

* Zschering v. Miller, 389 U.S. 429 (1968). Although in 1977, the Security Council Resolution's 418 invoked an arms embargo against South Africa, sanctions on that country by U.S. states and municipalities had not yet become popular and indeed the U.S. Office of Legal Counsel did not issue its famous opinion on the "Constitutionality of South African Divestment Statutes Enacted by State and Local Governments" until 1986.

* Schachter, supra n. 2, at 217. According to one survey, the number of lawyers in the People's Republic of China has grown from 3000 to 125,000 in a single generation. William P. Alford, "Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's Republic of China," in East Asian Law -- Universal Norms and Local Cultures 182 (Arthur Rosett, Lucie Cheng and Margaret Y.K. Woo, ed. 2003). For my own assessment of how even the United States, despite its schizophrenia on the subject, has "internationalized" its law, see "The Internationalization of U.S. Law" at **http://www.asil.org/aboutasil/documents/ILAweekend061221.pdf** .

*The era known as "Web 2.0" is loosely defined as consisting of web-based participatory sites emphasizing user-generated content, social networking, and interactive sharing. For a prescient look at the web's implications for the invisible college, see the panel on "The New Cyber College of International Lawyers" at the ASIL Annual Meeting noted at note 2 supra.

* Technological developments may yet undermine the prospects of real international communications via the web. Consider Larry Lessig, "The Balanization of the Internet" at **http://lessig.org/blog/2004/08/the_balkanization_of_the_inter.html** (discussing the rise of geolocation software that may restrict or limit web access across national boundaries).

* Schachter, supra n. 2, at 222.

*Id., at 221.

*Compare id., at 221 (arguing that increasing specialization was neither likely in the near future nor desirable).

*See, e.g., Eric Gottwald, "Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?," 22 Am. U. Int'l L. Rev. 237 (2007); Gus Van Harten, *Investment Treaty Arbitation and Public Law* (2007).