The Abiding Role of State-State Engagement in the Resolution of Investor-State Disputes

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It is a truism among observers of trends in international investment dispute resolution that the conclusion over the past 30 years of thousands of bilateral investment treaties, most of which give investors a private right of action against host States, has all but eliminated the role of diplomacy and other modes of State-to-State engagement in the resolution of international investment disputes. In reality, the picture is considerably more nuanced. Current developments suggest not only an abiding role for State-to-State engagement in the resolution of investor-State disputes, but perhaps an increasing role for such engagement. Several factors support this trend, including: host States resisting arbitration or the enforcement of awards against them; a greater variety of international economic treaties, giving rise to the possibility of defining international law norms in one (State-State) forum (e.g., the World Trade Organization (WTO)) and relying on them in advocacy in a different (investor-State) forum; and investor recognition that certain kinds of disputes in certain relationships may be better addressed through State-State mechanisms even where the investor-State option may be available (e.g., ‘pre-establishment’ disputes, disputes involving relatively small investments, disputes over ‘forced localization’ and other performance requirements, and disputes involving investors who hope to stay in the host State’s market and therefore wish to avoid high-profile confrontations with the State).

By many accounts, we now live in a golden age of investor-State arbitration. As of this writing, there are more than 3,100 BITs and FTAs containing

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investment provisions in force around the world, compared with barely 500 just two decades ago.\footnote{See United Nations Conference on Trade and Development, International Investment Agreements Research and Policy Analysis, http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/Research-and-Policy-Analysis.aspx. According to UNCTAD, the 3,100 mark was reached in 2011.} In addition to these well-known instruments of consent, some States have agreed to have foreign nationals submit claims against them to arbitration pursuant to foreign investment statutes and contracts. The International Centre for Settlement of Investment Disputes (ICSID) reports that it registered 50 new cases in 2012 (the most in any one year since ICSID’s establishment in 1966), and that as of the middle of 2014 it had registered a total of 473 cases.\footnote{ICSID, The ICSID Caseload—Statistics, Issue 2014-2 at 7, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics. This figure includes cases registered under ICSID’s Additional Facility Rules.} When one adds other, non-ICSID-administered arbitrations to the mix, the number is even higher.\footnote{See United Nations Conference on Trade and Development, International Investment Agreements Research and Policy Analysis (indicating that total number of known investor-State cases as of the end of 2013 was 568), http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/Research-and-Policy-Analysis.aspx.}

And the kinds of arbitrations being initiated have grown more diverse. No longer are investor-State arbitrations confined to cases involving infrastructure projects and similar hard asset investments. Today we also see investor-State cases involving intellectual property rights, financial instruments, and other tangible and intangible investments. Not only has there been a proliferation of legal instruments allowing companies to sue foreign governments, but the willingness to bring such suits also appears to have grown, as has the availability of resources (often provided by third-party funders) to support such suits.

Having reached the point where the means and the will of private parties to take control of the resolution of their disputes with foreign governments is at an all-time high, one might expect that recourse to diplomacy and other forms of State-to-State interaction to resolve investment disputes would be at an all-time low. And yet, the opposite seems to be true. Despite our being in a golden age of investor-State arbitration, several high-profile cases in recent years have shown the continued relevance of State-to-State interaction in the resolution of disputes between States and investors of other States.

What this means for companies and their counsel in resolving disputes with foreign governments is that it pays to be aware of the extent to which policy and diplomacy may affect the dispute resolution process. In some cases, investors may be able to leverage their home State’s diplomatic interest in resolv-