The Global Arbitrators

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The Trade Explosion

The explosion of world trade in the last 30 years has meant a meteoric increase in the number of transactions—private contracts—which, most of the time, provide for recourse to international commercial arbitration in case of disputes. It has meant as well a marked increase in foreign direct investment. As foreign direct investment surged, the probabilities that States would become embroiled with one another in quarrels over diplomatic protection of investors grew as well, as States had traditionally considered it their duty to intervene on behalf of their nationals who had invested in foreign countries and whose investment was jeopardized by the actions of the host States. As is well known, this duty of diplomatic protection had led to many international political crises, if not actual wars, caused by “gunboat diplomacy” (the Opium Wars between Britain and China in the nineteenth century are well remembered).

In 1914 and 1916, Mr Mavrommatis, a Greek citizen, obtained concessions from the Ottoman Empire to provide certain public services in Jerusalem and Jaffa. After the First World War, the British government granted duplicate concessions to different persons. A dispute ensued. The Government of Greece eventually espoused the claim of Mr Mavrommatis, its national, against the British government on the basis of diplomatic protection. Ultimately, the claim was addressed on the public international law level by the Permanent Court of International Justice.

Many arbitrations at the turn of the twentieth century, like the Mavrommatis case, involved claims of individuals based on diplomatic protection, which means that these disputes were not really between the two States named as parties. As a consequence of two world wars, governments became more and more reluctant to intervene on behalf of their nationals in investment or trade disputes, considering that investors’ or traders’ private interests were quite often not worth an international political crisis or, worse, a casus belli. Another reason for their reluctance was the increased difficulty in determining the nationality of an investor in a globalizing world where large investors frequently had a diversified capital base, a diversified management and possibly several centers of

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This article is based on previous studies published in The Journal of World Investment & Trade and The Geneva Post Quarterly.
control for their operations. Drawing investment disputes outside the ambit of inter-State dealings and transferring them to a credible depoliticized dispute settlement mechanism became a definite policy goal of a number of States, to be achieved through the new-generation investment conventions.

If the expansion of investment arbitration over the last decades corresponded in the first place to the political imperative of preventing investment disputes from turning into political disputes, it corresponded as well to an economic imperative: to facilitate the meteoric rise of the flow of world trade and investment by settling the disputes which unavoidably would arise along the way.

However, and despite its impressive advances over the last decades, international arbitration has been and remains a fragile institution. As an exception to the normal jurisdiction of State courts, international arbitration sees the quality of the services it delivers to the business community compared on a continuing basis with those of State courts; arbitral institutions and arbitrators have to make sure that that comparison is in their favor if they want to remain in business.

Commercial arbitration rests on firm ground. Its function is to oil the wheels of international commerce by removing the little stones—the disputes between contracting parties—which might cause the system to malfunction and which the national State courts are ill-positioned to deal with. Through a network of arbitral institutions, the main one being the International Chamber of Commerce (ICC) in Paris, it administers several thousands of arbitral cases each year through a process which is basically a one-stop shop—no recourse, except in some very limited circumstances. This is what the parties want: they know that arbitrators can err—they are just human after all—but find that bad decisions by arbitrators are a lesser evil than having a system of appellate proceedings which can drag on and on over many years, preventing the parties from putting the dispute behind them.

In disputes pitting investors against their host States, the frailty of the arbitral process takes on another dimension. Here there are not only private business interests at stake, but actions taken by the legitimate and quite often democratically elected governments of host countries which may be declared unlawful by an arbitral tribunal composed of three arbitrators without any elective mandate, nor even the public mandate conferred on the judiciary. Any decision rendered by an arbitral tribunal must be convincing enough to overcome the suspicion that investment arbitration is nothing but a ploy to derail the political will of a legitimate government or, conversely, is too timid to redress the wrongs suffered by an investor for fear of confronting a powerful host country. Otherwise, the clamor to have different systems of dispute settlement put into place might become deafening.

Optimists will say that the countries wishing to attract foreign investments have no choice, as evidenced by the over 2,500 bilateral investment treaties in existence...