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International Arbitration in a Time of Global Upheaval

Catherine A. Rogers (Arbitrator Intelligence) · Wednesday, September 17th, 2014 · Arbitrator Intelligence

A few weeks ago, the day before the Obama Administration and the EU announced dramatic new sanctions against Russia, an international tribunal announced a $50 billion award against Russia in favor of a group of oil investors. The current violence engulfing Iraq has multiple satellite arbitration disputes over oil sales to Turkey. Recent violence on the Crimean Peninsula implicates massive oil fields off the coast of Crimea that will soon spawn international arbitration claims against the Ukraine, Russia or both. Last Spring, China positioned an oil rig near islands whose control is disputed with the Philippines. The move triggered not only a Philippines-China diplomatic row, but also an UNCLOS arbitration over the disputed islands.

Looking even further back to earlier, a less-well-known consequence of the Arab Spring is that it triggered a multi-billion dollar international arbitration about a gas pipeline between Egypt and Israel. The list could go on.

In almost uncanny tandem, the most important front-page geopolitical events seem to have a corollary large-scale international arbitral energy dispute attached. In these contexts, international arbitration is not only cleaning up the aftermath of international events. It is affecting how those events play out. While this state of affairs seems normal to international arbitration practitioners, the rest of the world is wondering: Is this a good thing?

In an increasingly globalized world, it is almost inevitable that significant geopolitical developments implicate competing claims to energy resources. For centuries, international arbitration has been the primary means for resolving international economic disputes. In more modern times, it is the forum for virtually all large-scale energy disputes. For many outside international arbitration practice, a largely private system seems like a counter-intuitive venue for such high-stakes controversies with such epic political implications. International arbitration defies conventional wisdom about how international adjudication and international institutions should work.

Most international institutions are top-down, centralized regimes. They are created and empowered through sovereigns working collectively through traditional international organizations and frameworks. Much progress has been demonstrated by some public international tribunals that have been organized under this traditional model. The largest volume of cases and arguably the most enforceable outcomes, however, are being generated by international arbitration tribunals.

As international arbitration practitioners are learning, this effectiveness is not universally

understood or regarded as a positive development. Debates are bubbling over about the impact of arbitration on legitimate national policies. These debates, in turn, raise questions about its inclusion in new and ever-more expansive trade agreements, such as the Trans-Pacific Partnership (TTP) and the Canada-EU free trade pact. Such criticisms must be taken seriously. They must also, however, be evaluated in light of international arbitration's unique effectiveness and the need for effective international dispute resolution.

Adjudication aims to bring independent, neutral fact-finding and legal assessment to resolve competing claims. Legitimate questions exist about whether international arbitration always fulfills these goals. But all adjudicators sometimes reach wrong answers. And even right answers leave some parties and constituencies unhappy. In this respect, at least some of the flaws attributed to international arbitration are problems that are universal to any system of adjudication.

Other critiques of international arbitration may be too quick to throw out the source of its greatest strengths. International arbitration is often criticized for being ad hoc. Arbitrators are criticized as unaccountable to any formal institution. The entire system is criticized for being organized around private interests, lacking transparency, and generally failing to account for political and policy issues that are implicated when States are parties.

There is undoubtedly room to improve on some of these issues. Most specifically, the high stakes increasingly require that, in addition to being capable case managers and legal decisionmakers, international arbitrators must exercise their power with integrity and sensitivity regarding the potentially momentous implications of their decisions. But international arbitration's history suggests that it is capable of evolving to meet even these great challenges.

Arbitration's ad hoc nature and separateness from State apparatus are some of its greatest sources of strength. Individual cases have been an essential incubator. Incrementally over time, international arbitration has bridged conflicting legal cultures and procedural traditions. It has developed its own highly effective international procedures and a robust legal framework that has garnered enough confidence for States to entrust it with their most sensitive regulatory matters.

Today, States are increasingly turning to or permitting international arbitration to enforce their own legal obligations and or vindicate their legal rights. In a world where diplomatic solutions are often limited and economic sanctions take years to take effect, law-bound solutions to large-scale energy disputes are urgently needed. International arbitration is providing such solutions, but not only post hoc. Now, when States take actions, they must consider not only the diplomatic fallout, but also whether such actions will trigger an international arbitration against them. And both States and investors that might be victimized by such actions have a new tool through which to pursue meaningful remedies.

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