# Do We Really Need A World Financial Court?

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On September 9th, 2009, an intriguing editorial penned by Jeffrey Golden, a special US Counsel and global derivatives senior partner at Allen & Overy LLP, appeared on the Financial Times. It was titled "We Need a World Financial Court with Specialist Judges". The reason why I bring this article to the attention of the readers of this blog is that hitherto the settlement of international financial disputes has been the almost exclusive domain of diplomacy and, when needed, arbitration. How should the international arbitration community react to such an idea?

The need for such a court, Golden argues, stems from the need to "…ensure (1) that courts stay up to date with global financial market developments, (2) that judges have the requisite competence to unravel facts and apply laws that often pre-date and did not anticipate current practices, or that were too hastily drafted in response to political pressure and (3) that the risk of a wrong decision contributing to systemic risk in a global, highly interconnected marketplace is mitigated". Common standards and legislation to be adopted by all international financial players is not sufficient because "…it could amplify any mistake that a court makes in deciding a term's meaning".

Yet, the fundamental reason such a new world court is needed is because "…[t]he reliance on national tribunals of general jurisdiction and ad hoc arbitration is unsatisfactory. It is too decentralized, too inefficient and expensive and, perhaps most importantly, it is failing to produce a settled, authoritative body of law or the

predictability that the markets crave and on which financial stability depends".

Golden's criticism of arbitration is, per se, nothing new. The problems created by the difficulty of finding and researching arbitral awards, oft their secrecy, and the difficult of establishing true and reliable precedents from the congeries of awards, have been discussed at length, including in this blog. One could quip that the jurisprudence of international courts is often no more predictable than that of arbitral tribunals and that international courts case law is no less balkanized and full of small and big contradictions.

However, international courts and tribunals, the permanent ones of the kind advocated by Golden, have one crucial advantage over international arbitration that is generally ignored and should give us pause. While arbitration is a private exercise in justice, adjudication by way of international courts is a public one. In economics, permanent international courts and their decisions are public goods, global public goods to be precise. They meet the two basic requirements to be classified as public goods: they are non-rivalrous and are non-excludable. This means, respectively, that consumption of the good by one individual does not reduce availability of the good for consumption by others; and that no one can be effectively excluded from using the good. Arbitration is a club good, as it is non-rivalrous but excludable.

This is not the place to go into the details of what the simple but crucial distinction between public and club goods entails, both in economics, law and politics, but suffice to say here that the key insight that lies at the core of Golden's op.ed. is that "the market could have a greater interest in the outcome of a case than two private parties who are litigating it." Since global financial markets are global public goods adjudication of disputes arising out of it should be entrusted to global public goods such as permanent international courts. As Golden concludes "Think about it … World trade benefits from the existence of the WTO tribunal and the dedicated bar that it has nurtured. International financial market law is no less global or systemically relevant than international trade law". The point is straightforward and of sure public appeal.

Add to this that, while considerable progress has been made in ensuring a satisfactory degree of transparency of the processes of selection and election of international judges, international arbitration is still the domain of a rather closed and often unknown-to-the-public guild. In this respect, permanent international

courts enjoy greater legitimacy that ad hoc arbitral panels. They are more suitable to take decisions that in the end affect millions across the globe.

To the extent international courts and arbitral tribunals are considered substitute goods (like tea and coffee) and not complementary goods (like hot dogs and buns), these considerations spell trouble.