Kluwer Arbitration Blog

Commercial Diplomacy as a Ways Forward to Resolving Disputes When They Arise in International Trade

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In the world of International Arbitration ("IA"), one distinguishes between commercial arbitration and investment arbitration, the latter widely referred to as Investor-State Dispute Settlement or ISDS, as a dispute resolution mechanism based on bilateral treaties, multilateral treaties, and free trade agreements. IA is lauded as the best method for dispute resolution in international trade. This is where we have derailed from the origins of the manner in which relations between parties in trade were handled, which is – *amicably*. If parties were not able to settle disputes amicably, they would resort to two possible methods. With State respondents involved, one could be confronted with what is called gunboat diplomacy, i.e. bringing in the army to put pressure on an investor. It is what should be avoided at all cost. On the other side of the spectrum, parties would resort to third-party assisted settlement. The latter includes methods such as mediation and conciliation. Another third-party assisted settlement method is commercial diplomacy.

Today, IA is still the preferred method for resolving disputes. However, it could simply be because over the last two decades ISDS cases have significantly increased and the method has very much been promoted by the IA community. Users – investors and clients – have not always been consulted as to what their overall needs are. Many organizations try to involve the investors by setting up users' councils and task forces. From a user's perspective, costs, the lack of efficiency, duration, post-arbitration enforcement and execution phase, corruption, dilatory tactics, and the prospects of actually collecting under the award and when *are* important. Meanwhile, the IA community – under the leadership of institutions – focuses on improving ISDS with reforms focused on transparency, efficiency and matters such as arbitrator selection. Yet, sovereigns saw an opportunity to use criticism for radically doing away with it.[1)]

Courts and tribunals ought to rethink their role and define their mandate in changing times towards a new world order, a re-shifting of powers. Actors and influencers in international law should hold sovereigns accountable and persuade them to be mindful of obligations entered into under international instruments such as bilateral and multilateral treaties.[2)]

Sovereignty has always been an obstacle to the flourishing of international law. Today, a discussion about a world court has taken a centre stage but the question is whether that is really a solution:

> At the London Court of International Arbitration Centenary Conference in London (in 1995) some old stalwarts – Judge Howard Holtzman and Judge Stephen Schwebel (then a Sitting Judge of the ICJ) envisaged the prospect of a new international Court for resolving disputes in the 21st century. But these worthy gentlemen being experienced Arbitrators and men of the world also recognized that setting up an International Court of Arbitration would be tilting at the windmills of national sovereignty.
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> Judge Schwebel recalled the theme of a song of a popular film at the time "the Man of La Mancha" where the principal character Don Quixote, who is a dreamer – always dreamed, "the impossible dream". An International Court of Arbitration, Schwebel said, was like an impossible dream. Is it still? The proposed permanent investment arbitration court in the EU-Canada Comprehensive and Economic Trade Agreement (CETA) seems to be that impossible dream of the Man of La Mancha, or even worse, a deception. Article 8.29 of the CETA provides that the Contracting States to the treaty shall establish a multilateral investment tribunal. On the basis of Article 8.27 the CETA Joint Committee shall appoint fifteen members to the tribunal. Yet, they remain sovereign appointments.[3)]

Resolving investment disputes with sovereigns through arbitration is now not only costly and lengthy, it comes with a collateral damage. Once the notice of arbitration is filed, let alone the award rendered, it is hard for an investor to preserve its original relationship with the State. Furthermore, IA leads mostly to monetary damages, and not so often to tailored non-monetary and creative solutions. Also, what those in IA overlook is that investors do not only look at what could be awarded in arbitration but when it could be collected and what percentage of what was awarded. Many investors look to more amicable methods of preventing or resolving disputes. Methods such as mediation and commercial diplomacy focus on negotiating with governments to seek constructive conditions that are persuasive for both investor and State. The investor can continue its business operations whereas the State preserves its reputation for being an attractive place to invest and will continue to attract FDI. For States, disputes are not merely legal: they are political and commercial and sometimes have an impact on cultural and environmental aspects as well. Sometimes, parties in international commercial arbitration agree to multi-tiered or hybrid dispute resolution clauses that provide for attempts to amicable settlement through direct negotiation first, followed by mediation and if all fails, international arbitration. It is a sequenced set up of dispute resolution methods.

One could imagine a parallel track: the so-called "carrot and stick" approach. In order to place pressure on a State, an investor could initiate the arbitration based on a BIT, for example. Not only is it a way for an investor to signal that it contends to have a merit-based claim, it also enables a government to take action. On a parallel track – and perhaps more in cloak-and-dagger style – an investor could employ a strategy of commercial diplomacy to deal with the government directly. Commercial diplomacy factors in geopolitical risk at all stages of a pending dispute. As mediation, commercial diplomacy has been around for centuries. As far back as the 1920s, the ICC in Paris promoted diplomacy to resolve investment disputes. As IA is called alternative dispute resolution ("ADR") to courts, commercial diplomacy is perhaps a form of complementary dispute resolution ("CDR"). More amicable dispute resolution processes create a win-win that allows future growth in the host State.

Commercial diplomacy, like mediation and conciliation, consists of some core stages and competencies albeit it is not subject to mediation or conciliation rules nor does one need certified mediators or conciliators. The core stages focus not only on a legal assessment of the merits of a claim, but the focus is expanded to scoping any economic incentives and political pressure points or policy matters that weigh heavily in a State-Respondents assessment of its willingness to settle. Negotiators would scale out those pressure points to engage with stakeholders taking on the honest broker role. It is focused on an efficient execution – the so-called money in the bank strategy – without having to face lengthy and frustrating enforcement and execution hurdles under the New York Convention, the ICSID Convention and local laws on seizing and executing assets. The settlement is not only focused on financial compensation but also non-monetary ways of bringing parties together and preserving their relationship.

Settlements take place more and more as one saw in the Chevron v Ecuador case.[4)] Argentina has settled a string of cases in order to attract more FDI.[5)] Therefore, there is momentum as States are willing to look into other processes to handle conflicts with investors. At the same time, one must remember that States only enter into BITs for their own interest, so that investors will invest at a lower cost because there is a dispute resolution protection in place. However, many States are not sophisticated enough to understand the intricacies and impact of treaties. Diplomatic efforts though are less foreign to them.

So when is a case most likely to settle? What is important in these settlement efforts, is, among others, whether the timing is good. If it is early in the case, a claimant would not have much ammunition on the merits. In that case, it could consider the idea of an authoritative opinion. Thus a settlement could be negotiated early in the case, or at certain points during the procedural timeline. Even after the award is rendered, settlement through diplomatic channels is most effective when one wants to collect under the award.

Important factors to consider are who are the counsels for both the investor and the State, and their willingness to look for holistic and alternative approaches that complement a strategy. The timing and geopolitical factors such as upcoming elections and the pro-investor attitude of a new government are crucial. One would also do research in order to determine how important the presence is of a particular investor in a market such as the energy market. Key stakeholders at the government level need to be able to trust negotiators when engaging in commercial diplomacy. The position those negotiators hold vis-à-vis the investor and the government is important. They need to be able to operate at arm's length so that they are in fact, what one would call, an honest broker. In a climate where IA is being subject to reforms and even radical replacement, one ought to go back to the origins of dispute settlement: a more amicable way of resolutions which is a step forward towards the flourishing of international trade that complements, and not replaces the traditional idea of IA.

References

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?3 Marike Paulsson, *Conflict Resolution in a Changing World Order*, Trade, Law and Development, National Law University, Jodhpur, India.

?4 Laura Roddy, *Conoco and Ecuador settle ICSID Feud, Global Arbitration Review* (December 4, 2017).

?5 See, for instance, Douglas Thomson, *Argentina and Total settle, Global Arbitration Review* (July 19, 2017).

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