COMMERCIAL PEACE AND POLITICAL COMPETITION IN THE CROSSHAIRS OF INTERNATIONAL ARBITRATION

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INTRODUCTION

This article examines the mixed effect of arbitration upon the generation of international law norms; in particular, how arbitration can generate private law norms so effectively and yet still face strong resistance in public international law processes and controversies. The work of arbitration for international commercial litigation has been nothing less than spectacular.[1] In both the private international and domestic civil contexts, arbitration has provided viable remedial solutions and functional adjudication when the law was either non-existent or incapacitated.[2] It has supplied a workable and adaptable trial system, which—on the international side—could also generate substantive legal norms.[3] Arbitration thereby has redressed the fail-

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1. There has been an explosion of interest and writing on the topic of international commercial arbitration. One source lists nearly one thousand websites on various issues in the field of international arbitration. *See* International Council for Commercial Arbitration, Directory of Arbitration Websites and Information on Arbitration Available Online, www.arbitration-icca.org/directory_of_arbitration_website.htm (last visited Dec. 12, 2007). *See also* Charlotte L. Bynum's Research Guide, International Commercial Arbitration, http://library.lawschool.cornell.edu/WhatWeDo/ResearchGuides/Intl-Commercial-Arbitration.cfm (last visited Apr. 8, 2008); Georgetown Law Library International Commercial Arbitration Research Guide, http://www.ll.georgetown.edu/intl/guides/arbitration/ (last visited May 15, 2008); Gloria Miccioli, *International Commercial Arbitration*, *in* ASIL GUIDE TO ELECTRONIC RESOURCES FOR INTERNATIONAL LAW (Kelly Vinopal ed., 2007), http://www.asil.org/resource/arb1.htm (last visited Apr. 8, 2008); Catherine Morris, *International and Domestic Commercial Arbitration, in* CONFLICT TRANSFORMATION AND PEACEBUILDING: A SELECTED BIBLIOGRAPHY, www.peacemakers.ca/bibliography/bib10arbitration.html (last visited Apr. 8, 2008); Jean M. Wenger, *Update to International Commercial Arbitration: Locating the Resources* (May 24, 2004), www.llrx.com/features/arbitration2.htm (last visited Apr. 8, 2008).

2. *See, e.g.*, THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION (2d ed. 2007); ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (4th ed. 2004).

3. *See* Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 804 (2002); Thomas E. Carbonneau, *Arbitral Law-Making*, 25 MICH. J. INT'L L. 1183,

ings of sovereign politics and adversarial justice,[4] achieving its greatest success in circumstances dominated by a commercial ethos.[5]

Arbitration, however, cannot transcend the essential character of the disputes submitted to it. The nature of sovereign relations makes resolution of political disputes exceedingly difficult through any mechanism. Although private commercial parties seek final and binding determinations, States do not. States do not respond to transactional imperatives. They engage in the politics of sovereign autonomy and political independence. They demand adjustments and accommodations even when a law proclaims their culpability. No matter how distinguished and how steeped in *gravitas*, a private arbitral tribunal's orders to the leader of a sovereign nation-State are unlikely to have practical or coercive effect, unless the marketplace and the entire global political community sustains the determinations.[6] The rule of law is less stable and is more difficult to maintain in political relations among States than in commercial transactions between private parties.[7]

1206 (2004). *See also* LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT (Thomas E. Carbonneau ed., rev. ed. 1998).

4. *See generally* Howard M. Holtzmann, *Arbitration: An Indispensable Aid to Multinational Enterprise*, 10 J. INT'L L. & ECON. 337 (1975); Henry P. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42 (1982).

5. *See, e.g.*, RENE DAVID, L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL (1982).

6. International isolation, disapproval, or sanctions may not be enough to achieve the enforcement of ordinary adjudicatory results against States. Even a comprehensive consensus within the global community can be thwarted institutionally by a single vote in the UN Security Council. Because the ICJ judgments have no means of coercive enforcement, they cannot result in the coercive imposition of liability against the defendant State. *See* Francesco Francioni, *International 'Soft Law': A Contemporary Assessment, in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 167 (Vaughn Lowe & Malgosia Fitzmaurice eds., 1996). The proclamation of liability against the injuring State is merely one of the many steps in creating a setting and framework for possible, eventual resolution.

Inter-State conflicts are always in a process of tentative adjustment, and parties must wait for circumstances to yield the right setting for resolution. Circumstances are complex, variable, and unpredictable. The political will must exist to reach an outcome of the conflict. For example, ICSID awards against Argentina will be enforceable only if the domestic political authorities conclude that their interests are served by the concession to liability. That conclusion is potentially dependent upon an enormous number of variables—past, immediate, and future. Similarly, the ICJ's declaration that Iran's taking of American hostages at the U.S. Embassy was illegal under international law will have little, if any, impact upon the development of U.S.-Iran relations. The difficult political relations between the two States involve a multiplicity of factors—from anti-Semitism and domestic politics to regional competition and economic interests capped off by religious sectarianism and intolerance. Even a change of regime may not favorably alter the relationship.

7. The finality and the stability achieved by the rule of law are optimal goals for commercial and other private transactions. For the vast majority of private parties, the ability to have

Nonetheless, arbitration has achieved impressive results in the resolution of diplomatic[8] and foreign investment disputes.[9] The future development of these sectors of arbitral activity depends upon the will of the parties and the evolution, often precarious, of political relations in the affected area and among the implicated States. While the reach of arbitration has become multi-dimensional, the irreducible difference between the types of disagreements produced by political and commercial activity remains. In disputes that incorporate elements of both categories, the success or failure of arbitration as a resolutory process will vary according to which element predominates in the circumstances. Generally, the more commercial the political controversy, the more likely arbitration is to provide a suitable solution.[10]

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your day in court and to make your case constitutes a sufficient opportunity at civilized resolution. State parties do not share this perspective. The disposition of disputes by outside third parties may have some relevance, but is extremely unlikely to provide a dispositive end. Antagonisms and conflicts are the lifeblood of political relations. The political parties are unlikely to delegate conclusive authority to someone else; the *quid pro quo* of turmoil is to capture and maintain control and to force the other party to accede to your demands. Disputes of whatever kind can lead (sometimes readily) to war. Political rule is a matter of being victorious through force. On this topic, see Thomas Buergenthal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for Rule of Law*, 21 ICSID REV.-FOREIGN INVESTMENT L.J. 126 (2006).

8. *See, e.g.*, Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16 ARB. INT'L 393 (2000); Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1416 (2003); David A. Gantz, *Government-to-Government Dispute Resolution under NAFTA's Chapter 20: A Commentary on the Process*, 11 AM. REV. INT'L ARB. 481, 484 (2000); Andreas F. Lowenfeld, *The U.S.-Iranian Dispute Settlement Accords: An Arbitrator Looks at the Prospects for Arbitration*, 36 ARB. J. 3 (1981); Michael P. Malloy, *The Iran Crisis: Law under Pressure*, 3 WIS. INT'L L.J. 15. (1984).

9. *See* Georges R. Delaume, *ICSID Arbitration*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 23 (Julian D. M. Lew ed., 1987); Nagla Nassar, *Internationalization of State Contracts: ICSID, The Last Citadel*, 14 J. INT'L ARB. 185 (1997); LUCY REED ET AL., GUIDE TO ICSID ARBITRATION (2004).

10. Foreign investment in developing or re-emerging States generally involves standard commercial operations and well-settled contract provisions. Unless the foreign enterprises supply security or military training, facilities, or products, they provide infrastructure or natural resource development. The exercise of foreign commercial control over indigenous patrimonial interests and the profitability of such projects make them highly susceptible of criticism by the party in opposition or of reversal by the host government. The winds of political discontent and eventual opposition are easy to launch in this setting. The passion and irrationality of political debate often lead to arbitrary and ill-conceived policies, causing substantial harm and loss to the foreign investor. Once communications break down and the dispute hardens, it may be difficult to retrieve the situation and gain compensation for the losses suffered. In fact, the latter may not be obtainable without some form of political intervention by the investor's home State. Political representation and espousal of claims, however, are exceedingly unlikely. If the relationship cannot be salvaged, private insurance may be the only recourse. At this point, the attrib-

A business dispute about who pays for a commercial loss can be significant and complex and may necessitate intricate adjudicatory procedures.[11] The difficulty of commercial disputes pales in comparison to a dispute between a Western corporation about the future distribution of profits from the commercialization of a natural resource in an emerging country.[12] A business dispute that arises in volatile and intense political circumstances is no longer a standard contract claim. As a result, it is less susceptible to arbitral adjudication or any other form of resolution.

ORIGINS AND CHARACTER OF INTER-STATE RELATIONS

When asked to account for the proliferation of war, conflict, and instability in the world, a scientist once explained that the human race was an "aggressive species."[13] Contemporary events such as the terrorist strikes on 9/11, genocide in Sudan, and "ethnic cleansing" in the former Yugoslavia amply validate the observation. Even nature is inhospitable to humanity, as demonstrated particularly by the Black Death in the Middle Ages, and AIDS and influenza pandemics in contemporary society.[14] The physical universe itself is governed by forces that demonstrate an indifference to, even a complete unawareness of, the human species and its welfare.

Though the brief history of the United States is marked by armed conflict,[15] humanity's warring instinct is hardly unique to U.S. history or foreign policy, or even to the 20th or 21st centuries. The 1400-year reign of the Roman Emperors was founded upon bellicose

utes of an ordinary commercial relationship seem far removed from the transactional circumstances.

11. Arbitration is not simple-minded adjudication, and commercial litigation can be protracted and intricate. Commercial disputes are more susceptible of resolution than their political counterparts because of the values that prevail in these transactions and the nature of business interests and activities. Despite the quest for competitive edge and the infliction of various disappointments, achieving a final resolution of the conflict that makes business sense and enables the parties to move forward is the primary objective.

12. Many of the current ICSID cases involve such circumstances. *See* Jean Kalicki, *ICSID Arbitration in the Americas*, *in* ARBITRATION REVIEW OF THE AMERICAS 2007 3 (2007), *available at* http://www.arnoldporter.com/resources/documents/ICSID%20arbitration%20in%20the-%20Americas.pdf (last visited Apr. 8, 2008).

13. ANTHONY STORR, HUMAN AGGRESSION, intro. (1968).

14. Earthquakes, tidal waves, and hurricanes also attest to the many natural catastrophes that can, and do, befall humanity.

15. The warring history of the United States started with the Revolution and the Civil War and continued with the two World Wars, the Korean and Vietnam Conflicts, and the present-day engagements in Iraq and Afghanistan.

imperial politics and the development of increasingly deadly and efficient instruments of war. Leaders such as Alexander the Great, Genghis Khan, Charlemagne, Ivan the Terrible, and to a lesser extent Napoleon, also achieved legendary status through belligerence and subjugation.[16] As these examples demonstrate, aggression may well be the chief defining characteristic of the collective human personality. Humanitarianism is generally an afterthought, ordinarily linked to religious obligation, and practiced by organizations with little, if any, political standing.[17] Once they emerge and become stable, human societies tend to look beyond their borders and espouse conquest as the means of acquiring greater territory and available resources. Conquest also assuages anxieties about possible vulnerability to attack.[18] Human beings are innately competitive and insecure; they are challenged by the mere presence of others, and these emotions tend to breed nearly intrinsic aggression.[19]

16. The most disturbed political leaders have inflicted enormous pain on their fellow human beings in a quest for proverbial world domination, no matter how elusive and illusory that objective has always proven to be. Individual freedom and personal development are distinctly inconsequential as compared to survival when these leaders become dictators pursuing a grand mission. The acts of Hitler, Stalin, Pol Pot, and Mao and, to a lesser extent, Osama Bin Laden, Hugo Chavez, and Mahmoud Ahmadinejad are recent examples of the inhumanity to which unrequited needs and aberrant political views can give rise. Although they represent more sober and rational calculations, the arms race and the international sale of weaponry also fuel the campaign for contemporary supremacy and posthumous recognition. They, too, exploit insecurities. They feed aggression, greed, and paranoid ambition and allow these character flaws to parade as a means of protecting national security, preserving cultural integrity and achieving historical equity among societies. In the nuclear age, civilization will remain vital and humanity will continue (and even prosper) as long as hate is tempered and lunatic beliefs eradicated. Individual demise is inevitable and unavoidable, but death at a collective level is a truly unacceptable outcome.

17. *See, e.g.*, TAYLOR B. SEYBOLT, HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS FOR SUCCESS AND FAILURE (2007); Global Policy Forum, Humanitarian Intervention? Empire?, www.globalpolicy.org/empire/humanint/index.htm (last visited Apr. 8, 2008). To illustrate the point further, both the International Chamber of Commerce (www.iccwbo.org) and the International Bar Association (www.iba.org) were founded in the aftermath of the Great War. Their purpose was to avoid another similar conflagration. While both institutions developed successfully in many respects, their laudable objective was obviously not realized.

18. Human beings, in effect, are impelled by variable and contradictory tendencies. They need to form families and to establish social architectures for satisfying basic needs. These positive propensities, however, are accompanied by an equally strong desire to destroy or appropriate the same foundational structures in other groups.

19. Indeed, both collectively and individually, the human personality is beset by emotional pathologies. *See* HANDBOOK OF PERSONALITY PSYCHOLOGY (Robert Hogan et al. eds., 1997). Conflicted psychological dispositions make the use of force by human beings irrational, exaggerating its necessity and intensity and often transforming it into a bloodlust. The distortion of reality afflicts both the leaders and members of human societies. It is endemic in human beings to be plagued by feelings of dissatisfaction and a sense of void. Life appears simultaneously to

History also teaches that human beings are most irretrievably committed to, and willing to fight about, abstract beliefs such as religious or political convictions. With the exception of the ancient world, human societies often unilaterally and coercively seek to impose their inalterable views of divinity upon others. When others reject our beliefs, we are particularly threatened because these beliefs are acquired early in life, and have become fundamental existential tenets and part of our psychological core.[20] At a community level, the strength of these beliefs is demonstrated in the emotions that surround rituals and traditions that constitute society's cultural *persona*. Disagreements about the place and significance of iconic manifestations are likely to be vehement and can readily escalate and explode, and may also express other, more political, ideological, or economic antipathies and antagonisms. Political rhetoric can cloak the underlying motivation for aggression and make it appear more justified. In many respects, "plausible deniability" is the ultimate political maneuver or "trick."

Thus, the historical expression of the human personality establishes the political relations among States. Politics represents a merger of the human warring instinct with belief systems and emotional dispositions. The often-intoned supplications for peace and harmony remain unfulfilled entreaties and rhetorical reflexes in humanity's political experience. Competitiveness, insecurity, and aggression not only bring us to engage in murderous practices, but also to the brink of self-extinction. Battles about sovereignty, territory, cultural or religious beliefs, and basic necessities trace the "flat-line" progression of humanity through time.[21] The conflicts are ordinarily intractable, compulsively repeated, and completely resistant to effective resolution. If it is attempted at all, dispute resolution is generally lengthy, riddled with obdurate positions, and filled with suspicions and calumnies. The process involves unyielding and uncompromising contests of self-interest. Therefore, though it is frequently and gener-

be purposeful and purposeless. The anxiety of existence is quelled by constant efforts to outdo death by leaving an immortal legacy or at least by becoming so preoccupied with temporal ambitions that mortality is forgotten or recedes into the background. Historical figures are remembered, revered, or reviled by people who never knew them or lived with them. Even immortality is an impersonal imagery and good only until the next epoch emerges from a celestial cataclysm.

20. Because it takes great effort, pain, and time to assess, question, and adjust basic beliefs, rational reconsideration of beliefs is generally ignored.

21. The best contemporary illustration is the apparently endless quest to achieve peace and stability in the Middle East, the so-called Arab-Israeli Conflict.

ously described as the "art of the possible,"[22] politics is far from being the highest expression of human development. It borrows much from the base and instinctual human personality.

THE CHOICE BETWEEN INSTINCT AND REASON

Fear, insecurity, and the need to establish control by domination are akin to untamed nature and the mechanical operation of the physical universe. They are estranged from the use of reason and unaffected by the right of choice possessed by free beings. They take place automatically and inevitably, as a result of fixed and irresistible patterns. This natural determinism can be overcome or, at least, subdued by human reason. Understanding is humanity's most redemptive attribute because it provides a means by which the species can be salvaged, maintain its existence, and even acquire a level of success. Plainly, human existence consists of a constant pull between reason and instinct. Comprehending the express and underlying meaning of circumstances, the interests at play, and the costs of accomplishment or of the lack of accomplishment can engender enlightened and intelligent action and more desirable and durable outcomes. Prescient insight can lead to magnanimity, constructive policies, and rational practices, allowing humanity to escape its destructive instincts and avoid its own progressive annihilation.

Dispute resolution is constructed on the same dynamic. Cardozo once described the act of judging as intermediating between history, social needs, practical consequences, long-standing legal rules, and basic fairness.[23] A true judgment or decision cannot be rendered without a meaningful understanding of these inter-related factors. Reconciliation and accommodation of conflicting interests in order to produce consensus do not imply surrender to mediocrity or abdication of principle. Rather, consensus-building establishes a foundational platform upon which human resourcefulness and adaptability can advance the ends of civilization. A lucid understanding of the deficiencies and expanse of human personality and the emergence and dynamics of conflict is a necessary first step to creating the stability that leads to civilization.

Making a conflict adversarial has the opposite effect. It has the same impact as politicizing a conflict. Polarization sets in almost instantly. Reasonableness and rationality are replaced by a strident and

22. Quote attributed to Otto von Bismark.

23. *See* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

uncompromising desire to win, essentially at any cost. Any concession or possible lack of determination to win is seen as weakness. Mixed considerations are confusing; unequivocal positions are convincing. Truth is not a limitation on argumentation—"spinning" propositions and deluding the decision-maker are the real objectives of advocacy. Adversarial dialogue represents, in effect, a declaration of war. The stakes and interests at issue are the same as in a military confrontation; victory and peace are synonymous. Trials are based upon aggression, the intensity of which is exacerbated by the opposing parties' insecurity and apprehension that the other side might be stronger and more likely to triumph. Controlling perceptions, no matter how deceptive and false the result, is the primary goal of the confrontation.

Adversarialism not only dominates the system of trial, but also is present to varying degrees in political debate, journalism,[24] and education in American society.[25] The introduction of an adversarial ele-

24. Generally, adversarialism extinguishes the informational function of news reporting. For example, Michael Barone, a senior writer for U.S. News & World Report, asserts that 90% of journalists in the United States are Democrats. Michael Barone, *The News Media*, REAL CLEAR POLITICS, Apr. 3, 2006, http://www.realclearpolitics.com/articles/2006/04/the_news_media.html. Fox News buttresses its claim of being "fair and balanced" with its hiring patterns. According to Barone, 65% of the Fox News journalists are Republicans. Mr. Barone illustrates the taint in the news media (and also, I would argue, in the schools) by relating an anecdote. Speaking with a CBS News executive, Barone alleged that the news media was biased because of its overwhelming Democrat affiliation. The executive responded that, although the tilt was undeniable, journalists were professionally objective. Replying, Barone asserted that, if journalists functioned without regard to their personal political beliefs, why not hire Republicans? The executive made manifest the depth of his ideological conviction and leanings by responding that news reporting would then be biased. *See* Michael Barone, *Happy birthday; the new media,* U.S. NEWS & WORLD REPORT, Aug. 2, 2006, http://www.usnews.com/blogs/barone/2006/8/2/happy-birthday-the-new-media.html (last visited Apr. 9, 2008). The selection and presentation of "news" topics are twisted and tailored to express the partiality underlying the conveying of facts. It is more important to manipulate and mislead the public than inform it.

25. Today, some "politicized" schools began to stand between students and parents on the basis of social policy issues. For example, a middle school in Maine dispensed contraception to twelve and thirteen year olds without parental consent or notification. *Maine middle school to offer birth control,* CNN, www.cnn.com/2007/HEALTH/10/18/middleschool.contraception.ap/index.html (last visited March 25, 2008). Ironically, these schools feared developing independent minds capable of analyzing reality and reaching their own conclusions, thereby creating their own sense of values. Although the fall of the Berlin Wall and the collapse of the Soviet Union exposed the historical fallacy of communism, many of the blunt and intrusive tactics of the defunct empire have been introduced and are practiced in this country. These educational enclaves substitute counseling and "appropriate" behaviors for the competition of academic achievement and distinction, just like Soviet courts would command ordinary citizens to attend so-called trials to experience and benefit from their socialist teachings. *See* Tait Trussel, *Political Correctness Suppresses Education, available at* www.mackinac.org/article.aspx?ID=6460 (last visited March 25, 2008); Augustin Blazquez and Jaums Sutton, *Political Correctness: The*

ment into these fields degrades their integrity and the outcomes they yield. When it engages in adversarialism, humanity, although adorned in the garb of sophistication, is only a few steps removed from its primitive origins; conquest and the acquisition of advantage are the sole purpose of the exchange.

THE LIBERALITY OF COMMERCE

In his celebrated lectures on "The Western Tradition,"[26] the late Professor Eugene Weber described the gradual rise in Europe of the mercantile and financial communities between the 14th and 17th centu-

Scourge of Our Times, www.archive.newsmax.com/archives/articles/2002/4/4/121115.shtml (last visited March 25, 2008); Anita Vogel, *Textbook Change Draws Charges of Political Correctness,* www.foxnews.com/story/0,2933,85594,00.html (last visited March 25, 2008); THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 35, 53 (1989).

In some schools, adopting "correct" values is far more important than the objective pursuit of knowledge. Future voters are more valuable than future thinkers. *See generally* Paul M. Weyrich, *The Islamic School Book Controversy,* Apr. 9, 2003, http://www.cnsnews.com/ViewCommetary.asp?Page=%5CCommentary%5Carchive%5C20030 4%5CCOM20030409c.html (last visited Apr. 9, 2008). *See also* AFTER POLITICAL CORRECTNESS: THE HUMANITIES AND SOCIETY IN THE 1990S (Christopher Newfield & Ronald Strickland eds., 1995). In some universities, it is sport to attack mainstream American values. American capitalism is seen as a form of savagery rather than a creator of prosperity for the greatest number. War is always wrong when undertaken by America, but never criticized when its enemies engage in it. Guns, Christianity, and the belief in the traditional family are all indicators of the intolerance and moral degeneration of American society, while Hollywood obscenities that masquerade as art, the mutilation of women by the indigenous practices of foreign cultures, and the beheading of innocent people are all acceptable practices because they take place elsewhere. The lunatic belief that the Bush Administration was complicit in 9/11 is another illustration of the disinformation that cascades within the academic and entertainment left. The critique generally becomes diatribe— a unilateral and unfair evaluation. The opponents of the United States are always more persuasive than our own public officials who take pride in, and defend, our country. *See, e.g.*, Bill Lind, The Origins of Political Correctness, www.academia.org/lectures/lind1.html (last visited Apr. 9, 2008); Philip Atkinson, Political Correctness, www.ourcivilisation.com/pc.htm (last visited Apr. 9, 2008); ANTHONY BROWNE, THE RETREAT OF REASON: POLITICAL CORRECTNESS AND THE CORRUPTION OF PUBLIC DEBATE IN MODERN BRITAIN (2006); OUR COUNTRY, OUR CULTURE: THE POLITICS OF POLITICAL CORRECTNESS (Edith Kurzweil & William Phillips eds., 1995). This approach, which is more widespread than is tolerable or fair, betrays the trust that tenured professors owe students and their families. Though the students who suffer these systems are often bright enough to learn on their own, they are deprived in substantial part of the benefit of the original bargain for intellectual development and analytical understanding, which are the essential offerings of education.

26. *See* EUGEN WEBER, 2 THE WESTERN TRADITION: FROM THE RENAISSANCE TO THE PRESENT (5th ed. 1995); EUGEN WEBER, 1 THE WESTERN TRADITION: FROM THE ANCIENT WORLD TO LOUIS XIV (5th ed. 1995); Eugene Weber, *The Western Tradition* (WGBH Boston television broadcast 1989), *available at* www.learner.org/resources/series58.html (last visited Apr. 9, 2008) [hereinafter *The Western Tradition*].

ries.[27] Venice and Amsterdam were the centers of European commercial activity and development. London, comparatively speaking, emerged more slowly as a trading city. Eventually, England would become known as the "nation of shopkeepers."[28] The birth of a commercial class in society represented a landmark event that would alter the distribution of power and promote a new image of humanity grounded in peace and prosperity. Competition would shift in part from a military landscape to the higher, less turbulent plains of capital markets and urbane culture.[29]

In his discussion, Professor Weber emphasized the striking contrast between the dynastic policies of European princes and the protocol and practices of the mercantile class.[30] The royals responded to, and exacerbated, religious divisions among peoples and countries in order to engage in war, thereby enhancing the appearance of their omnipotence. Financiers and traders avoided the assault on belief systems then in vogue, deeming it transitory and counterproductive in a business environment. Merchants did make money from the political exploits of princes by providing them with capital to conduct military campaigns. Mercantile activities, however, had a much wider, longer, and more creative scope. Loans and insurance were made available for all types of adventures and projects, near and far. In effect, through its private activity, the merchant class established urban and regional economic centers and financial practices that at least rivaled, and supplanted to a degree, the State and its hegemony.[31] Both government and the people needed money to pursue their ambitions and build a more productive existence. Those who supplied the operating capital became vital and, therefore, very powerful. Succinctly stated, merchants put hate and political bickering to the side and concentrated on profit.

Desisting from political wrangles was the first characteristic of the nascent merchant class. Additionally, it was transborder in character.[32] The centers of European commerce reached out to one another and to the existing global marketplace. Capitalism, almost intrinsically, had an international reach. The betterment of self and

27. *See The Western Tradition*, *supra* note 26, Lecture No. 24: The National Monarchies. In the following account, I have interpreted Professor Weber's lecture at various points.

28. ADAM SMITH, THE WEALTH OF NATIONS 253 (T. Nelson and Sons 1884) (1776).

29. *The Western Tradition*, *supra* note 26, Lecture No. 24: The National Monarchies.

30. *Id.*

31. *Id.*

32. *Id.*

station had universal appeal. Political boundaries were not a significant or limiting factor to the enterprise. Although the commercial centers competed for international business, they also reinforced each other in self-interested cooperation. Everyone who contributed to the transaction could share in the profits it yielded. Commercial values were defined and prevailed. The private agreement was the primary source of regulation.[33]

A third and final attribute of the merchant class and its endeavors was the development of a rich community culture and a pervasive ethic of tolerance.[34] These aspects contrasted sharply with the need of princes to control people and events and to glorify their own personalities in an unending quest to maintain power. As commercial activities increased, trade practices became more sophisticated and the environment in which business was conducted gained importance. The bankers in Venice left their benches and created arcades or galleries in which to conduct their transactions.[35] Trading companies were formed and the selling of shares and payment of dividends provided the supply of necessary capital, enhanced profitability, and distributed the risk of commercial ventures over a larger group.[36] Amsterdam solidified its standing as the frontispiece of mercantile capitalism by constructing magnificent buildings and sponsoring cultural events and sophisticated forms of entertainment.

With wealth came culture—art museums, splendid public gardens, and grandiose architectural structures to maintain—which attracted even more business.[37] The trading cities were cosmopolitan and practiced tolerance. Entrepreneurs needed to be free to engage in their transactions, engage in trade, move capital, and follow their instincts on the market. They required the freedom to do as they pleased in the context of their enterprises, to take the risk of realizing their full potential, and to be creative in their pursuit of wealth.[38] Averseness to external regulation was present at the very inception of mercantile activity. Individual liberty was not a political ideal, but a remarkable boon of business necessity. In effect, the yearning for prosperity engendered the miracle of tolerance.[39] Government's task

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

was to maintain the order required by social stability and avoid the disruption of the marketplace by the untoward, unnecessary, or even impolitic use of force.[40] The impact of piracy, which has resurfaced in the contemporary age, upon maritime interests illustrates the useful role of government in the conduct of national and global business. The hijacking of ships and cargo raised substantially the cost of transportation and made transactions less tenable and efficient. It further compromised consumer interests and lessened prosperity by reducing economic activity. General security is necessary to the conduct of business. Making money, in effect, defanged controversies about beliefs and harnessed human instincts, thereby erecting a basis for the cooperative intersection of self-interests.[41] Wealth-creation competed with historical immortality for the energies of humankind.

In sum, freedom of action is a hallmark of commercial activity. Entrepreneurial commerce generates prosperity and thereby benefits the larger community. Commercially vibrant communities are attractive places to live and establish businesses. It goes without saying, however, that commerce has its own blemishes and imperfections.[42] The conduct of business is a competitive, sometimes ruthless, enterprise; the anxieties of risk-taking can lead to ugly, and even illicit, behaviors. Transactions can generate conflicts and problems between partners and result in failure.[43] In contrast to political activity, where the most primal instincts of the human personality are dominant, commerce embodies a view of humanity that is more balanced between instinct and civilization, that draws as much, if not more, energy from the latter than the former. Humanity acting in its role as a merchant is less prone to destructiveness and, ironically, is less driven by avarice. Commercial competition needs others, and business be-

40. *Id.*

41. *See id.*

42. *See, e.g.*, AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE (1993); LOREN FOX, ENRON: THE RISE AND FALL (2002); ROBERT BRYCE, PIPE DREAMS: GREED, EGO AND THE DEATH OF ENRON (2002); Ameet Sachdev, *Unbowed Black Gets 6 1/2 Years*, CHI. TRIB., Dec. 11, 2007, at 1 (discussing Ex-Sun-Times chief who was ordered to forfeit $6.1 million in fraud proceedings); *Martha Stewart Will Pay $195K To Settle Civil Insider Trading Charges with SEC*, COURTTV.COM, Aug. 7, 2006, http://www.courttv.com/trials/stewart/080706_ap.html (last visited March 25, 2008) (explaining that Martha Stewart had to pay about $195,000 and became ineligible to act as the director of a public company for five years under a settlement on civil insider trading charges with the Securities and Exchange Commission).

43. *See, e.g.*, ROBERT W. HILLMAN, LAW FIRM BREAKUPS: THE LAW AND ETHICS OF GRABBING AND LEAVING (1990); ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS (2d ed. 1998).

comes, in effect, a way of life for entire communities. Difficulties fueled by unrelenting antagonism are resolved not by military force but by the urge to discover workable solutions to conflict.

In its purest form, commercial behavior is simultaneously self-centered and other-regarding. The world need not be conquered, but can be accommodated through pragmatic exchanges, creative adaptations, and workable solutions. Profit and prosperity demand that business parties seek broad-gauged, constructive dispute resolution that maintains the participants' dignity, preserves goods and property, and proffers a basis for continued relations. As a general proposition, when humanity practices commerce, it exhibits more responsible and mature behavior. Politics and other adversarial struggles are based upon infantile perceptions, conflicts, and aspirations. In these settings, the contest is a singular undertaking, the conflicts involve life-and-death stakes, and the would-be resolution must be completely fulfilling to the one winning party. They reflect the love-hate dilemmas that characterize early existence.

DISPUTE RESOLUTION PURSUANT TO THE BUSINESS ETHIC

Merchants have never much prized adversarial litigation as a means of dispute resolution.[44] The features of the process respond to political values and convictions. Instead of a public proceeding with results reflecting lay views, merchants prefer a confidential and expert process. The politically commanded form of adjudication is ill-suited and impractical for the resolution of commercial disagreements.[45] Merchants want those disagreements resolved by other, equally knowledgeable merchants who apply trade practices and respect the expectations of the marketplace. Simple commercial sense argues strongly against subjecting commercial interests to the risk of courtroom theatrics.[46] Jurors constitute one evident problem; lawyers and judges—who are versed principally, if not exclusively, in the law—

44. *See generally* ERIC HELLAND & ALEXANDER TABARROK, JUDGE AND JURY: AMERICAN TORT LAW ON TRIAL 2 (2006); Klaus Peter Berger, *Lex Mercatoria and Lawyers—Moving Away From Traditional Legal Theory*, OIL, GAS, & ENERGY L. INTELLIGENCE, Feb. 2004, *available at* http://tldb.uni-koeln.de/php/ogemid.php?page=ogemid.php (last visited Apr. 10, 2008); ALAN STITT, MEDIATING COMMERCIAL DISPUTES (2003); KARL MACKIE, DAVID MILES, & WILLIAM MARSH, COMMERCIAL DISPUTE RESOLUTION: AN ADR PRACTICE GUIDE (2000).

45. *See generally* CARBONNEAU, *supra* note 2, at 1-5.

46. *See id.*

another.[47] Remaking commercial problems into legal issues is dangerous.[48] It could lead to ill-adapted judicial outcomes, far removed from mercantile realities.

Accordingly, the merchant class' proclivity for freedom and tolerance brought about a need for self-administered, adapted justice. Party negotiations, obviously, should prevail if possible.[49] Third-parties could assist the disagreeing parties in reaching an accommodation.[50] In situations in which the disputes were unresponsive to these efforts and involved large sums of money or were otherwise critical, final and binding adjudication was the only means of unraveling the impasse. Arbitration had always been attractive to the business community.[51] Unlike court proceedings, it achieved many commercially desirable objectives.[52] Arbitrators are appointed by the parties and are generally commercial people with a good understanding of the trade and party dealings. Their experience and expertise allow them to render decisions that reflect commercial exigencies. Procedural maneuvers do not dictate the outcome. The fate of a commercial bargain should not turn upon advocacy's traps and ambushes. In an economic and disciplined proceeding, the arbitrators give each party a reasonable opportunity to address allegations and to make their case. Once the evidence is in place and final statements have been made, the arbitrators deliberate and render a succinct determination. Appeal of the ruling is available only upon truly exceptional grounds that betoken procedural corruption or another form of injustice.[53] The bargain for arbitration is for a reasonably fair but expedited adjudicatory proceeding and a binding expert determination. Disputes should not fester and their resolution linger.[54] Protracted, obdurate adjudication squanders limited resources and valuable opportunities. There is even a risk of losing the contest.[55] The trade will not wait for otherwise occupied business parties.

47. *See id.*
48. *See id.*
49. *See* sources cited *supra* note 44.
50. *See id.*
51. *See* CARBONNEAU, *supra* note 2.
52. *Id.* at 1.
53. *See id.* at 30-33.
54. *See id.* at 2.
55. *See id.*

These features of arbitration are well-established and have been well-documented.[56] Expertise, efficiency, and effectiveness in dispute resolution suit the commercial spirit. What is new about arbitration is its enhanced scope of application.[57] In fact, arbitration's new jurisdictional reach portends a new standing and systemic function for the process. Broader application, however, brings new hazards and is not necessarily likely to be accompanied by arbitration's traditional seamless remedial success.[58] On the domestic side, thanks to the rulings of the U.S. Supreme Court,[59] arbitration escaped its commercial isolation and spread to all areas of civil dispute resolution.[60] With the Court's enthusiastic blessing, it began to be applied in disparate-party transactions and to the resolution of public law controversies.[61] In effect, consumers and employees were required to arbitrate by manufacturers and employers. Compulsory recourse to arbitration generated criticism and brought about challenges to the enforceability of arbitration agreements.[62] Some groups perceived the displacement of judicial authority in adjudication as an untoward use of contract power. Despite the manifest failings of the judicial process, critics saw the use of arbitration as an intrusion upon the public mandate and its unilateral imposition a fundamental unfairness. Political turf is not easily surrendered or readily shared and distortions abound when ideologies clash.

Internationally, arbitration also superseded its traditional status as a private legal system for Euro-American commercial transactions.[63] It extended its reach to all multinational commercial disputes

56. There are now comprehensive bibliographic guides to the literature in the area. The volume of the literature has grown exponentially. *See, e.g.*, HANS SMIT & VRATISLAV PECHOTA, COMMERCIAL ARBITRATION—AN INTERNATIONAL BIBLIOGRAPHY (2d ed. 2002).

57. *See* CARBONNEAU, *supra* note 2, at 248-95, 305-51.

58. *See id.*

59. The Supreme Court has decided more than 35 cases dealing with arbitration in the past 55 years, beginning with *Wilko v. Swan*, 346 U.S. 427, in 1953, to its most recent decision, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

60. *Id.*

61. The arbitrability of statutory rights is evidenced in the Supreme Court's statement that, "'we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals' should inhibit enforcement of the act 'in controversies based on statutes.'" Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987) (citing Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 626-27 (1985)).

62. *See, e.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000).

63. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9-14 (1972). *See also* Elizabeth Jackson, Recent Development, *The Enforceability of Forum Selection Clauses under M/S Bremen v. Zapata Off-Shore Co.,* 25 AM. J. TRIAL ADVOC. 377 (2001).

and became a mechanism for processing commercial claims with sovereign parties.[64] Further, arbitration attenuated the commercial consequences of political revolutions and changes of political regime.[65] Finally, it made global business possible between Western parties and emerging States and countries that embrace different political ideologies and legal traditions.[66]

See Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). *See also* Gail Elaine Papermaster, Note, *Will the Courts* Scherk *the Little Old Lady in Dubuque? The Impact of* Scherk v. Alberto-Culver *on the Individual Investor in a Global Securities Market*, 21 TEX. INT'L L.J. 129 (1985).

See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). *See also, e.g.*, Charles H. Brower II, Mitsubishi*, Investor-State Arbitration, and the Law of State Immunity,* 20 AM. U. INT'L L. REV. 907 (2005); Lisa M. Ferri, Note, *Arbitrability of Antitrust Claims Arising from International Commercial Disputes Recognized Under Federal Arbitration Act*, 17 SETON HALL L. REV. 448, 471-72 (1987); Ronald E. M. Goodman, Note, *Arbitrability and Antitrust:* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,* 23 COLUM. J. TRANSNAT'L L. 655, 655-56 (1985).

See also Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533-39 (1995). *See, e.g.,* Elizabeth A. Clark, Note, *Foreign Arbitration Clauses and Foreign Forum Selections Clauses in Bills of Lading Governed by COGSA:* Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*,* 1996 BYU L. REV. 483, 489-94 (1996); Stuart C. Gauffreau, Note, *Foreign Arbitration Clauses in Maritime Bills of Lading: The Supreme Court's Decision in* Vimar Seguros Y Reaseguros v. M/V Sky Reefer*,* 21 N.C. J. INT'L L. & COM. REG. 395, 411 (1996).

64. *See* Barton Legum, *Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions*, 19 ICSID REV. – FOREIGN INVESTMENT L.J. 344, 344-48 (2004); Sophie Lemaire, *Treaty Claims et Contract Claims: la compétence du CIRDI à l'épreuve de la dualité de l'Etat*, [2006] REVUE L'ARBITRAGE 353; Julian D.M. Lew, *ICSID Arbitration: Special Features and Recent Developments*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES 267 (Norbert Horn & Stefan Kröll, eds. 2004); Ucheora Onwuamaegbu, *The Role of ADR in Investor-State Dispute Settlement: The ICSID Experience*, NEWS FROM ICSID, Winter 2005, at 12-14; Giorgio Sacerdoti, *Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards,* 19 ICSID REV. – FOREIGN INVESTMENT L.J. 1, 3-34 (2004); Ole Spiermann, *Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties*, 20 ARB. INT'L 179 (2004).

65. *See* Bernard Audit, *Les "Accords" d'Alger du 19 janvier 1981 tendant au règlement des différends entre les Etats-Unis et L'Iran,* 108 J. DE DROIT INT'L "CLUNET" 713 (1981); RAHMATULLAH KHAN, THE IRAN – UNITED STATES CLAIMS TRIBUNAL, CONTROVERSIES, CASES AND CONTRIBUTIONS (1990); THE IRAN – UNITED STATES CLAIMS TRIBUNAL 1981–1983, 104-35 (Richard B. Lillich ed., 1984).

66. *See* Michael Moser, *China – Hong Kong Enforcement Arrangement Becomes Effective*, 15 MEALEY'S INT'L ARB. REP. 24, 24-28 (2000); Vratislav Pechota, *China International Economic and Trade Arbitration Commission (CIETAC)*, 4 WORLD ARB. REP. 4315 (2000); Le Cong Dinh, *Arbitration in Vietnam*, 11 WORLD ARB. & MED. REP. 164, 167 (2000); Komar Mulyana & Jan K. Schaefer, *Indonesia's New Framework for International Arbitration: A Critical Assessment of the Law and Its Application by the Courts*, 17 MEALEY'S INT'L ARB. REP. 39 (2002); Vincent Godbillon, *La Problématique Actuelle de l'Arbitrage Commercial International Russe*, 17 BULL. SWISS ARB. ASS'N 285 (1999).

The success of arbitration in each of these new sectors has been, and may continue to be, variable.[67] The imperative for arbitration between North American and European parties may not be so unequivocal in other contexts that are influenced by a multitude of different considerations. In the North American-European sector, without a willingness and ability to arbitrate, parties could only engage in self-help or have recourse to municipal court litigation.[68] The latter approaches are inapposite because each of them represents an expensive means to a generally ineffective end.[69] In this regional sector, arbitration facilitates trade by supplying a workable international trial system—a trial process that is neutral, expert, reasonably efficient, effective, and final. The success of international arbitration is also due to its autonomy from domestic regulatory authority.[70]

Transborder arbitration is not as popular or effective where parties' differences outweigh their shared dispositions, and where competing interests are less malleable, the work of arbitration is more difficult and likely to be an approximation. For example, during the last fifteen years, many Latin American countries have endorsed international commercial arbitration.[71] Many of them have adopted the UNCITRAL Model Law[72] as a symbol of their commitment to the effective future application of the process. The reality of implementation, however, may be less than the impression conveyed by the ad-

67. After its initial success, CIETAC arbitration has "cooled" considerably because of problems with the integrity of arbitrators. The Argentine response to the enforceability of ICSID awards will be critical to the continued recourse to arbitration in Latin American countries. *See* Carlos E. Alfaro & Pedro M. Lorenti, *The Growing Opposition of Argentina to ICSID Arbitral Tribunals: A Conflict Between International and Domestic Law?*, 6 J. WORLD INVESTMENT & TRADE 417 (2005).

68. *See* Carbonneau, *Arbitral Law-Making*, *supra* note 3, at 1187-94.

69. *Id.*

70. *See* CARBONNEAU, *supra* note 2, at 430-31.

71. *See* NIGEL BLACKABY, DAVID M. LINDSEY, & ALESSANDRO SPINILLO, INTERNATIONAL ARBITRATION IN LATIN AMERICA (2003); Jean Kalicki, *ICSID Arbitration in the Americas*, *supra* note 12; Michael T. Sprague, Comment, *A Courageous Course for Latin America: Urging the Ratification of the ICSID*, 5 HOUS. J. INT'L L. 157 (1983) (advocating the ratification of the ICSID Convention by Latin American countries).

72. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW [UNCITRAL] MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985) (amended 2006), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited Apr. 11, 2008). To date, four Latin American countries have enacted new national legislation on arbitration based on the Model Law. Several other Latin American countries have passed new arbitration laws that incorporate the Model Law but with emendations. *See* JAN KLEINHEISTERKAMP, INTERNATIONAL COMMERCIAL ARBITRATION IN LATIN AMERICA (2005); Horacio A. Grigera Naón, *Arbitration and Latin America: Progress and Setbacks*, 21 ARB. INT'L 127 (2005).

hering rhetoric because a system granting full faith and credit to arbitral awards has yet to materialize.[73] The Japanese response to arbitration also illustrates the lukewarm international reception of the process.[74] Despite its significant commercial position and modern legislation on arbitration, Japan is a less-than-enthusiastic proponent of the process. Its history and cultural sentiments point to mediation as the preferred remedy for resolving disputes.[75] In fact, arbitration in Japan sometimes resembles mediation.[76] Though international arbitral awards are fully enforceable in Japan, and Japanese companies do participate in arbitrations, this conduct may well be a pragmatic concession to Western business interests rather than an acceptance of arbitration as an effective method of dispute resolution.[77]

Of the Asian countries, Singapore is the jurisdiction most hospitable to the Western consensus on arbitration.[78] It has established an arbitration center that provides administrating services and promotes business recourse to the Western process. China has its own form of institutional arbitration, CIETAC,[79] which represents a real, albeit modest, concession to the global practice of arbitration. The Chinese government appears unwilling to recognize an external process. It would rather convert its prior trade regulation bureaucracy into a Westernized adjudicatory process, operating on its territory and ultimately subject to its political control. Even communist dictatorships in transformative evolution are unwilling to forgo advantage. The

73. *See* KLEINHEISTERKAMP, *supra* note 72; Naón, *supra* note 72, at 172-76.

74. THOMAS E. CARBONNEAU, CASES AND MATERIALS ON INTERNATIONAL LITIGATION AND ARBITRATION 363 (2005); *see* David A. Livdahl & Asako Yamagami, *Arbitration in Japan*, *in* INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA 137-200 (Philip J. Mcconnaughay & Thomas B. Ginsburg eds., 2d ed. 2006); David J. Przeracki, Note, "*Working it Out": A Japanese Alternative to Fighting It Out*, 37 CLEV. ST. L. REV. 149, 164 (1989).

75. Przeracki, *supra* note 74, at 156-60, 163-66.

76. *Id*.

77. *See* Livdahl & Yamagami, *supra* note 74; Przeracki, *supra* note 74, at 159-60 (comparing Western law in Japan to an "heirloom sword" which is taken out and shown to outsiders but never actually used).

78. *See* THOMAS E. CARBONNEAU, ARBITRATION IN A NUTSHELL 286 (2007).

79. *See, e.g.*, Cedric C. Chao & James Schurz, *International Arbitration: Selecting the Proper Forum*, MEALEY'S INT'L ARB. REP., Feb. 2007, at 17; Sally A. Harpole, *Factors Affecting the Growth (or Lack Thereof) of Arbitration in the Asia Region*, 20 J. INT'L ARB. 89 (2003); Huang Yanming, *The Ethics of Arbitrators in CIETAC Arbitrations*, 12 J. INT'L ARB. 5 (1995); SELECTED WORKS OF CHINA INTENATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION AWARDS (Priscilla Leung Mei-fun & Wang Sheng-chang, eds., 1998); Pechota, *supra* note 66, at 4315; Wang Sheng-chang, *Practical Aspects of Foreign-Related Arbitration in China*, *in* ARBITRATION IN SWEDEN 45 (1997).

standing of Hong Kong in terms of international commercial arbitration remains to be defined and clarified.[80]

By far, the Arab countries are the least hospitable jurisdictions to international commercial arbitration for a variety of political and religious reasons.[81] Saudi Arabia,[82] despite its ratification of the New York Arbitration Convention and other similar international instruments,[83] is in effect quite hostile to Western transborder arbitration. Iran recently ratified the New York Arbitration Convention,[84] but the current regime possesses a knee-jerk antagonism to anything Western or non-Muslim. Repressive and oppressive governments are unlikely to foster the conduct of global business. Tentative accommodations are often reached for reasons of necessity and with the hope of eventual amelioration or extinction.

ARBITRATION AND POLITICS

Under U.S. law, arbitration has a statutorily-recognized impact upon sovereign status. According to the "arbitration exception"[85] to the Foreign Sovereign Immunities Act of 1976, sovereign status can-

80. *See* Mark Lin, *Enforcement of Mainland China's Arbitral Awards in the Hong Kong Special Administrative Region After 1 July 1997*, 65 ARB.: J. CHARTERED INST. ARB. 56 (1999); Robert Morgan, *The Arbitration Act 1996 and Arbitration Law Reform in Hong Kong and Singapore: A Brave New World?*, 1997 ARB. & DISP. RESOL. L.J. 177, 177 (1997).

81. CARBONNEAU, *supra* note 74, at 365.

82. *Id*.

83. *Id.*

84. The New York Arbitration Convention entered into force on January 13, 2002 in Iran. Status of UNCITRAL Conventions and Model Laws, www.jus.uio.no/lm/un.conventions.membership.status/un.arbitration.recognition.and.enforcement.convention.new.york.1958.html (last visited Apr. 14, 2008).

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or the of the States in any case
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> . . . .
>
> (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitration, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United Sates court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

United States Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(6) (2000).

not block the enforcement of an arbitration agreement or award. Once a State enters into an arbitration agreement, it waives its sovereign immunity from suit and execution and consents, as a matter of law, to the jurisdiction of the court to achieve enforcement.[86] The federal policy on arbitration demands the removal of barriers to arbitration no matter what their basis in law might be. U.S. law provides that the only parties who benefit from immunity in the context of arbitration are the arbitrators and the arbitral service-providers.[87]

Arbitration's direct role in the resolution of commercial disputes that arise from, and implicate, sovereign interests and policies is a vocation-in-the-making. Because disputes with a political element tend to be imperturbable, arbitration's resolutory performance (as noted earlier[88]) has been more tentative and less spectacular. The Iran-United States Claims Tribunal[89] was the first contemporary experiment with arbitration in politicized areas. More than a decade later, it was followed by the less-significant Iraqi War Claims Commission.[90] The latter's mission was compromised by a would-be lack of oil revenues. The Iran-United States Tribunal was more remarkable because there were monetary resources for its operation and satisfaction of orders for compensation. The funding came from the worldwide freezing of Iranian assets, one of the crowning achievements of the Carter Administration. The Tribunal was intended to allow private companies and individuals to seek compensation for the commercial losses they suffered as a result of the Iranian revolution.[91] It also allowed the adverse State parties to confront each other on the question of compensation and other matters.[92] It may have been the first

86. *See id*.

87. *See* David J. Branson & Richard E. Wallace, Jr., *Immunity of Arbitrators under United States Law*, *in* THE IMMUNITY OF ARBITRATORS 85 (Julian D.M. Lew ed., 1990); *see also, e.g.*, Martin Domke, *The Arbitrator's Immunity from Liability: A Comparative Survey*, 3 U. TOL. L. REV. 99 (1971); Mark W. Levine, *The Immunity of Arbitrators and the Duty to Disclose*, 6 AM. REV. INT'L ARB. 197 (1995); Richard J. Mattera, *Has the Expansion of Arbitral Immunity Reached Its Limits After* United States v. City of Hayward*?*, 12 OHIO ST. J. ON DISP. RES. 779 (1997); Andrea Mettler, *Immunity v. Liability in Arbitral Adjudication*, 47 ARB. J. 24, 26 (1992); Michael D. Moberly, *Immunizing Arbitrators from Claims for Equitable Relief*, 5 PEPP. DISP. RESOL. L. J. 325 (2005).

88. *See* sources cited *supra* notes 65-67.

89. *See supra* note 67.

90. *See* CARBONNEAU, *supra* note 2, at 464.

91. *See, e.g.*, David P. Stewart & Laura B. Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, *in* THE IRAN-US CLAIMS TRIBUNAL 1981-1983 4-5 (Richard B. Lillich ed., 1984).

92. *Id.* at 5.

time that a victor (who, additionally, had won on its home turf) became accountable for the economic consequences of the political strife it initiated and conducted. The rules of arbitral procedure contained the violence of the political disagreement between the two sovereign countries.[93] In effect, arbitral adjudication, customized to the incidents of sovereignty and adjusted to specific situations, provided the measure of stability and order by which to redress commercial grievances and allocate compensation. The sovereigns, however, would never have been so inclined had assets not been frozen.

States have also used arbitration to address trade regulation and policy. Although the Disputes Settlement Body (DSB) within the World Trade Organization (WTO),[94] formerly the GATT,[95] has been enhanced to achieve expedited coercive results, the NAFTA process[96] is a vehicle of even greater transborder innovation. The WTO procedures apply exclusively between sovereigns and address economic policy disagreements between Member States.[97] Despite the imposition of real procedural restraints on the processing of claims,[98] the prospect of final enforcement of a DSB ruling often dims and eventually disappears in the haze of political temporizing. Sovereign discretion, in any context, is difficult, if not impossible, to mitigate. It cannot be eliminated. The "softwood lumber" saga[99] demonstrates that sovereignty still trumps, even though economic sanctions can (technically) be imposed by the DSB on noncomplying States. The reality of power cannot be ignored and the effectiveness of power relationships overstated.

From a wider systemic perspective, NAFTA complements the WTO system by integrating affected individuals into the dispute reso-

93. *See, e.g.*, STEWART A. BAKER & MARK DAVID DAVIS, THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 3 (1992).

94. *See, e.g.*, THE WTO AND INTERNATIONAL TRADE LAW/DISPUTE SETTLEMENT (Petros C. Mavrodis & Alan O. Sykes eds., 2005).

95. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

96. *See, e.g.*, Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 372-73 (2003).

97. *See* THE WTO AND INTERNATIONAL TRADE LAW/DISPUTE SETTLEMENT, *supra* note 94.

98. *Id.*

99. *See* DAOWEI ZHANG, THE SOFTWOOD LUMBER WAR: POLITICS, ECONOMICS, AND THE LONG U.S.-CANADIAN TRADE DISPUTE 2-4 (2007); Chi Carmody, *International Decisions – Softwood Lumber Dispute (2001-2006)*, 100 AM. J. INT'L 664 (2006).

lution process and by creating a mechanism for advisory opinions.[100] Individuals can sue an offending State directly under Chapter 11 for alleged violations of the NAFTA Treaty.[101] Moreover, the NAFTA partners have recourse to a type of advisory adjudicatory mechanism in Chapter 20 for resolving trade policy disagreements.[102] In a number of celebrated cases, foreign claimants asserted that state laws and judicial procedures in the United States (in California and Mississippi particularly) violated the NAFTA treaty and gave rise to a right of compensation in the implicated commercial enterprises.[103] The allegations generated a firestorm of protest within the United States.[104] Opponents asserted that international attorneys acting as adjudicators in a distant, elusive, and unaccountable transnational framework could, in effect, impose a commercial tax on the operation of democratic government. In each case, the foreign company's claim and position was both real and credible.[105] State legislative prohibition of a fuel additive, for example, diminished considerably a Canadian company's business and reduced the profitability of the enterprise.[106] Moreover, the recourse to a Mississippi jury to resolve a commercial

100. *See* CARBONNEAU, *supra* note 74, at 385-88; Marcia J. Staff & Christine W. Lewis, *Arbitration Under NAFTA Chapter 11: Past, Present, and Future*, 25 HOUS. J. INT'L L. 301, 304-08 (2003).

101. *See* RALPH FOLSOM ET AL., HANDBOOK OF NAFTA DISPUTE SETTLEMENT 2-18 (1998); LEON E. TRAKMAN, DISPUTE SETTLEMENT UNDER THE NAFTA: MANUAL AND SOURCE BOOK (1997); JOSEPH A. MCKINNEY, CREATED FROM NAFTA 223-24 (2000); Asha Kaushal, *Reconciling the Public Interest: Third Party Participation, Confidentiality and Privacy in NAFTA Chapter 11 Arbitrations*, 9 INT'L ARB. L. REV. 172, 172 (2006).

102. MCKINNEY, *supra* note 101, at 28-30.

103. *See* Loewen Group, Inc. and Loewen v. U.S., (Can. v. U.S.), 7 ICSID Rep. 442, 42 I.L.M. 811, ICSID Case No. ARB(AF)/98/3 (2003); Memorandum Opinion of the U.S. Dist. Ct. Dismissing Loewen's Petition to Vacate Arbitral Award, *In re Arbitration Between Loewen v. U.S.*, No. 04-2151 (D.D.C. Oct. 31, 2005); Methanex Corp. v. U.S. (Can. v. U.S.), IIC 167 (UNCITRAL/NAFTA Ad Hoc Tribunal 2005), *available at* http://www.investmentclaims.com/IIC_167_(2005).pdf (last visited Apr. 14, 2008); Metalclad Corp. v. Mexico (U.S. v. Mex.), IIC 161, ICSID Case No. ARB(AF)/97/1 (2000), *available at* www.investmentclaims.com/IIC_161_(2000).pdf.

104. *See* Public Citizen, *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy* (2001), http://www.citizen.org/documents/ACF186.PDF; New Study Analyzes Seven Years of Corporate Investor Challenges to Democratic Governance under NAFTA, www.organicconsumers.org/Corp/DolanReport.html (last visited Apr. 14, 2008).

105. Some commentators argue that the Chapter 11 cases do not constitute a coherent decisional law with clear and fixed legal rules on the propriety of State regulation of regional commercial conduct. Critics see the Chapter 11 cases as an infringement of State sovereignty, but that assessment is almost undeniably an exaggeration meant to fuel a political agenda. *See* Staff & Lewis, *supra* note 100, at 328-29.

106. *See Methanex*, IIC 167 at 1, 26.

claim against another Canadian corporation violated, in all likelihood, due process of law and treaty obligations in light of the jury's track record in favor of plaintiffs.[107]

Especially in the fuel additive case, by considering whether the company was entitled to compensation,[108] NAFTA tribunals recognized—perhaps for the first time in an adjudicatory context—that States could be held responsible for the commercial consequences of their regulatory decisions. Political authority could be exercised for the public, but not without private accountability. The economic impact of regulatory law could be effectively determined and measured. The cases provoked a vehement outcry among ideological groups. The protests "encouraged" reconsideration of preliminary determinations and even the allegiance to the transborder investment regime.[109] The criticisms threatened to undermine the independence and legitimacy of NAFTA arbitration. In fact, some commentators suggested that NAFTA arbitrators should have less of a commercial vintage and be more "politically experienced" so that more "suitable" results could be reached.[110] In politics, ornamentation is everything; the ability to obfuscate and make grandiose but vacuous statements is a veritable art form. Succinctly stated, NAFTA is not a concession by political actors to commercial interests. It is effective only when its procedures and results fit the political convenience of the circumstances. The opportunity to encircle political will with the rule of law appears to have been lost.

The reference in NAFTA and in Bilateral Investment Treaties (BITs)[111] to ICSID arbitration revitalized World Bank arbitration and

107. *See Loewens*, IIC 254. *See also* William S. Dodge, *Loewen Group, Inc. v. United States and Mondev International Ltd. v. United States*, 98 AM. J. INT'L L. 155, 156-57 (2004); Emmanuel Gaillard, 'Loewen v. U.S.A.': *New Ground in NAFTA/ICSID Arbitration*, N.Y. L.J. Apr. 5, 2001, at 3.

108. *See Methanex*, IIC 167. In Metalclad v. Mexico (U.S. v. Mex.), IIC 161, ICSID Case No. ARB(AF)/97/1 (2000), for example, the U.S. investor brought a Chapter 11 action against Mexico because the government of a Mexican state refused to issue a construction permit to allow it to reopen a waste disposal facility. The tribunal ordered Mexico to compensate Metaclad for its investment loss (the purchase of a Mexican company which owned the site). Critics saw the determination as a violation of State sovereignty over environmental regulations. *See* Staff & Lewis, *supra* note 100, at 322.

109. *See supra* note 105 and accompanying text.

110. Interview with Armand de Mestral, NAFTA arbitrator, in McGill Law Faculty, Montreal, Quebec, Canada (Summer 2005).

111. *See* Antonio R. Parra, *ICSID and Bilateral Investment Treaties*, NEWS FROM ICSID (ICSID, Washington D.C.), Spring 2000, at 11; Eduardo Savarese, *Investment Treaties and the Investor's Right to Arbitration between Broadening and Limiting ICSID Jurisdiction*, 7 J. WORLD INVESTMENT & TRADE 407, 410 (2006); Margrete Stevens, *Experience in Arbitrations*

gave it a chance at a new day.[112] In fact, ICSID arbitration is currently the primary mechanism for adjudicating foreign investment claims involving Latin American countries.[113] The arbitrations involve volatile political claims arising out of commercial contracts and transactions. Foreign investors seek to develop and commercialize the natural resources of the host State; the natural resources can range from water and oil to minerals and lumber.[114] While a private contracting party is not entitled to modify a contract unilaterally without liability, the circumstances of conducting a commercial transaction between a Western party and a developing State agency or government involving would-be patrimonial interests may alter or eliminate that settled principle of contract law. Although ICSID tribunals may apply standard legal rules in reaching their determinations, it remains to be seen whether their rulings will be "accepted" by the foreign State against which they are rendered.[115]

The systematic use of arbitral adjudication to address politicized commercial disputes in the world community is novel and proffers hope for establishing the stability necessary for future global prosperity. As noted at the outset of the discussion, the utility of arbitration in this area is far removed from its accomplishments in international commercial litigation among private parties. Political actors believe in the cultivation of advantage (through alliances, disinformation, or

under ICSID Rules Pursuant to Bilateral Investment Treaties, 29 INT'L BUS. LAW. 377, 377 (2001); Jeswald Salacuse, *Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES 51, 69 (Norbert Horn ed., 2004).

112. *See* David R. Sedlak, *ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?* 23 PENN ST. INT'L L. REV 147, 149 (2004).

113. *See, e.g.*, Gonzalo Biggs, *The Latin American Treatment of International Arbitration and Foreign Investments and the Chile-U.S. Free Trade Agreement*, 19 ICSID REV. – FOREIGN INVESTMENT L.J. 61, 69 (2004); Charles Chatterjee, *Investment-Related Promissory Notes Are Investments under the ICSID Convention:* Fedax N.V. v. The Republic of Venezula, 3 J. WORLD INVESTMENT 147 (2002); Alejandro Escobar, *Bolivia Exposes 'Critical Date Ambiguity'*, GLOBAL ARB. REV., June/July 2007, at 17; Francisco Gonzalez de Cossio, *The International Centre for Settlement of Investment Disputes: The Mexican Experience*, 19 J. INT'L ARB. 227 (2002).

114. *See* sources cited *supra* note 112; *see also* Alexia Brunet & Juan Agustin Lentini, *Arbitration of International Oil, Gas, and Energy Disputes in Latin America*, 27 NW. J. INT'L L. & BUS. 591, 591-92 (2007).

115. *See, e.g.*, Alfaro & Lorenti, *supra* note 67; Enron Corporation v. Argentine Republic (U.S. v. Arg.), IIC 292, ICSID Case No. ARB/01/3 (May 22, 2007); Compania De Aguas Del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Fr. v. Arg.), IIC 307, ICSID Case No. ARB/97/3 (Aug. 20, 2007). *See also* Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT'L & COMP. L. Q. 371, 392 (2007).

aggression). For them, arbitration provides initially a framework for conducting discussions and, later, a possible endpoint. By contrast, commercial parties espouse the process as a means of eliminating the problems that impede the doing of business. Merchants see intractable positions and the generation of irremediable conflict as costly and counterproductive. In the end, the pursuit can yield an absolute loss for all parties. Politicians seem to thrive on conflict; it provides them with an opportunity to defeat the other side. Political leaders take advantage of circumstances rather than benefiting from the advantages of the arbitral process. In these circumstances, arbitration can only work if attachable assets exist or if the parties are willing or are constrained to accept its adjudicatory discipline. A mutual self-interest and the political will to achieve a workable result must undergird arbitration as a mechanism for resolving trade policy or other political disputes. The possibility of manipulating the process for advantage (by altering the composition of the tribunal, for example) and the right to veto or unilaterally renegotiate the results increases arbitration's appeal to political parties, but reduces its credibility and effectiveness as a functional process of adjudication that can achieve results.

CONCLUSION: ARBITRATION'S LIKELY POTENTIAL

Despite forays into the political realm, arbitration's bedrock achievements have been in its area of origin, namely, the adjudication of commercial claims between parties who belong to similar regional, political, and economic systems. Arbitration establishes the legal foundation for the conduct of business at this transborder level. Through private arbitral trials, international business parties avoid the competition between national courts, their conflicting perceptions of jurisdiction, and the independence of the legal traditions they represent.[116] As the pursuit of commerce gives rise to the miracle of tolerance, the use of arbitration allows for the accommodation of dissimilar legal practices.[117] The essentials of the trial can be entrusted to

116. *See* CARBONNEAU, *supra* note 74, at 353-54.

117. *See* THE COMMERCIAL WAY TO JUSTICE (Geoffery M. Beresford-Hartwell ed., 1997) (containing the proceedings of the the 1996 International Conference of the Chartered Institute of Arbitrators); Christian Borris, *Common Law and Civil Law: Fundamental Differences and Their Impact on Arbitration*, 60 ARB.: J. CHARTERED INST. ARBS. 78 (1994); Bernardo M. Cremades, *Arbitration and Business*, *in* ICCA, SIXTH INT'L ARB. CONGRESS PROCEEDINGS 77 (1978); Lucy Reed & Jonathan Sutcliffe, *The "Americanization" of International Arbitration?*, MEALEY'S INT'L ARB. REP., Apr. 2001, at 11; Lara M. Pair, *Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Har-*

appointed arbitrators who will make adjustments as the proceeding develops. To scholars or practitioners familiar with mixed legal jurisdictions (Louisiana, Québec, Puerto Rico, Scotland, and South Africa), achieving a procedural and substantive consensus among these national traditions is no less impressive than a military armistice.[118] The substantial disparity in the trial paradigm as to the role of the decider, the collection and evaluation of information, the use of experts and other witnesses, and the character and form of the determination can be reconciled through the "comparative" experience of the appointed arbitrators or through the exercise of party choice implied in freedom of contract or by the joint action of both factors.[119]

In the North American-European context, the form of arbitration that emerged in the wake of World War II was based primarily on continental and civilian trial models.[120] It was practiced largely by ex-patriate firms and lawyers, along with the local foreign bar. U.S. attorneys generally favored recourse to federal courts for resolving international commercial claims.[121] In the mid- to late 1980s, roughly coinciding with political triumph of capitalism and the disintegration of the Soviet Union, American international lawyers acquiesced to the use of arbitration as the basic mechanism for the conduct of international commercial litigation.[122] U.S. participation in the European trend, however, brought baggage—the use of American-styled trial techniques, creating a battle for establishing the central structure of the transborder arbitral trial.[123] The essential question focused upon whether legal counsel or the arbitrators would control the conduct of the proceedings. The American adversarial tradition attributed this procedural power to the litigating attorneys whereas judges performed the function in the continental civilian process.[124]

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monization?, 9 ILSA J. INT'L & COMP.L. 57 (2002); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1317 (2003); Serge Lazareff, *International Arbitration: Towards a Common Procedural Approach*, *in* CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 31 (Stefan N. Frommel & Barry A.K. Rider eds., 1999).

118. *See, e.g.*, H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (3d ed. 2007).

119. The principle of *pacta sunt servanda* is instrumental both to international litigation and the law of arbitration. *See* CARBONNEAU, *supra* note 78, at 299-300.

120. *See generally* Carbonneau, *The Ballad of Transborder Arbitration*, *supra* note 3, at 781-82.

121. *See id.* at 778.

122. *See id.* at 778, 782.

123. *See id.* at 782.

124. *See* GLENN, *supra* note 118, at 230-31.

As it has in all jurisdictions with a hybrid legal heritage, the quest to predominate and prevail over the other legal tradition remained active in North American-European international commercial arbitration. For attorneys, the real concern was to engage in a trial format that was familiar in order to maximize the client's position and advantages. It was also a matter in which profound cultural assumptions clashed[125]—roughly equivalent to writing a brief in the other side's language. The battle was tempered to a considerable extent in light of the unquestioned status of English as the language of international business and the substantial popularity of American legal education among foreign commercial litigators. The competition between major trial traditions also softened because of the intercession and cultural bridging work of institutional service-providers, like the ICC, LCIA, AAA, and Stockholm Chamber of Commerce.[126] The institutions supplied arbitrators with the support necessary to reach considered determinations and accommodations on this issue. Finally, as noted earlier,[127] parties could arrive at their own solutions when they negotiated the arbitral clause.

As Newman and Zaslowsky have argued,[128] arbitral institutions should provide multinational parties with a choice of trial options at the early stage of the process. This practice would avoid surprise and would also allow parties to delegate the task of determination to the arbitrators. It might be useful to provide parties who disagree or are likely to disagree with a trial model that integrates the basic features of both the adversarial and inquisitorial trial systems. For example, given the absence of a jury and the arbitrators' experience and expertise, the rules for gathering and weighing evidence could be relaxed and arbitrators given a greater role in ordering and conducting discovery. Expert witnesses, as is now the case,[129] could be required to

125. *See id.*

126. *Id.* at 368-69.

127. *See supra* note 119 and accompanying text.

128. *See* Lawrence W. Newman & David Zaslowsky, *Cultural Predictability in International Arbitration*, N.Y. L.J., May 25, 2004, at 3, *reprinted in* CARBONONNEAU, *supra* note 74, at 493.

129. *See* PROTOCOL FOR THE USE OF PARTY-APPOINTED EXPERT WITNESSES IN INTERNATIONAL ARBITRATION (Chartered Institute of Arbitrators), *available at* http://www.lcia.org/CONF_folder/documents/PeterReesProtocolfortheUseofExpertWitnessesinInternationalArbitration.DOC (last visited Apr. 16, 2008).; David Howell, *Use of Experts In International Arbitration*, ASIAN DISP. REV., Apr. 2005, *available at* http://www.fulbright.com/iages/publications/use%20of%20experts%20in%20international%20arbitrationdjh%20_2_.pdf; THE EXPERT IN LITIGATION AND ARBITRATION (D. Mark Cato ed., 1999); Doug Jones, *Use of Experts in Arbitration; Independent Experts- The Common Law Approach*, TRANSNAT'L DISP. MANAG., Nov. 2005, at 2, 17.

testify together and engage in a colloquy with the arbitrators under the supervision of counsel. Live testimony should not be discouraged or presumptively displaced by written evidence. Cross-examination of witnesses should be an accepted feature of the arbitral trial, along with a verbatim record of the proceedings if only to act as a means of supplying the tribunal with accurate information.[130]

After many years of formative churning, the development of arbitration in the North American–European sector has reached a plateau of uniformity and consensus demanded by its application in a region with an integrated sense of history, culture, and values.[131] Uncertainty, however, resides in transplanting the process into other regional areas of the global economy and having it apply in politicized circumstances that involve sovereign parties and mixed conflicts. Emerging and reemerging countries in Eastern Europe, the former Soviet Union, and Latin America rightly see their future in global commerce and understand that transborder arbitration is the "supporting beam" of the world marketplace. Even the remaining staunchly communist regimes, like China and Vietnam (with the possible exception of Cuba), recognize the necessity of global commerce and how vital arbitration is to its existence.[132] Whether antagonisms and political and religious diversity can be corralled to achieve commercial prosperity and override the antipathies and bloodlust of yore remains to be seen. The voice of arbitration has a different resonance outside the tolerant confines of the North American-European trading city, but it is whispering the tune of a more rational and tolerant destiny for humankind.

130. *See* Paul D. Friedland, *Combining Civil Law and Common Law Elements in the Presentation of Evidence in International Commercial Arbitration*, MEALEY'S INT'L ARB. REP., Sept. 1997, at 25, 28; *see also* Peter R. Griffin, *Recent Trends in the Conduct of International Arbitration: Discovery Procedures and Witness Hearings*, J. INT'L ARB., March 2000, at 28-29.

131. *See* CARBONNEAU, *supra* note 74, at 362.

132. *See* Lucy V. Katz, *How International Arbitration Bridges Global Markets in Transition Economies*, ALTERNATIVES TO THE HIGH COSTS OF LITIG. (CPR Inst. for Dispute Resolution, New York, N.Y.), Oct. 2004, at 145 *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/109609872/PDFSTART; Magnus Andrén, *Enforcement of an Arbitral Award in the People's Republic of China*, STOCKHOLM ARB. REP., 2000, at 73; John Mo, *Probing the Uniformity of the Arbitration System in the PRC*, J. INT'L ARB., May 2000, at 1; Pip Nicholson & Nguyen Thi Minh, *Commercial Disputes and Arbitration in Vietnam*, J. INT'L ARB., Sept. 2000, at 1.