State Parties in Contract-Based Arbitration: A Report from the 16th Annual ITA-ASIL Conference

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On March 27, 2019, Washington, D.C. hosted the 16th annual ITA-ASIL Conference discussing the impact of State parties in contract-based arbitrations. Also known as private-public and "investomercial" arbitration, this genre of arbitration has recently grown due to, among other things, privatization processes, concession agreements, as well as conditions imposed by lenders and insurance companies.

Providing insight on the differences and similarities between treaty-based investment arbitrations and contract-based arbitrations involving State parties, speakers highlighted seminal cases that illustrate the particularities of a State's involvement in commercial disputes and provided recommendations vis-à-vis investment protections. Conference co-chairs Mélida N. Hodgson (Jenner & Block) and Prof. Dr. Stephan W. Schill (University of Amsterdam) led the event, which featured as speakers the Honorable Charles N. Brower (Judge *ad hoc*, International Court of Justice), Abby Cohen Smutny (White & Case), Catherine M. Amirfar (Debevoise & Plimpton), Professor Julian Arato (Brooklyn Law School), D. Brian King (arbitrator), Nathalie Bernasconi-Osterwalder (IISD), Professor Laurence Boisson de Chazournes (University of Geneva), Bart Legum (Dentons), Hugo Perezcano (CIGI), and Martina Polasek (ICSID).

The ICC reports that in 2017 the number of States and State entities that were parties to ICC arbitral proceedings rose to over 15 percent (from 11 percent in 2016).[fn] 2017 ICC Dispute Resolution Statistics, ICC Dispute Resolution Bulletin 2008 – Issue 4, at 9.[/fn] Martina Polasek of ICSID noted that, while the number of contract-based arbitrations before ICSID has remained steady over the years, at 16 percent of its cases, ICSID has witnessed an increase in the number of arbitrations commenced under multiple sources of jurisdiction. An increase in contract-based arbitrations may be on the horizon for ICSID, particularly if the new rules providing for expedited procedures are adopted.

While these statistics show the growth of private-public arbitration, they do not shed much light on the procedural and substantive implications resulting from the presence of States and State entities in contract-based arbitrations. As Judge Brower argued, contract-based disputes involving States or State-owned entities are closer in kind to investment treaty arbitrations than those only involving private parties. Judge Brower suggested we should refer to these proceedings as "investomercial arbitration" because "commercial arbitration" is not an adequate term to define them. At the crux of this distinction, in Judge Brower's opinion, are the political sensitivities involved in these proceedings, as well as the State's exercise of public authority.

Many of the speakers addressed these substantive and procedural implications caused by a State's involvement in a commercial arbitration. Abby Cohen Smutny, for instance, explained that Judge Brower's position is a reminder that foreign investors are not only looking for a neutral forum, but also may want to incorporate international law to resolve potential disputes against sovereigns. Relatedly, Professor Laurence Boisson de Chazournes emphasized that there is a "blurring of the lines" with respect to the applicable law in private-public arbitration. In this regard, Professor Boisson de Chazournes referred to how certain domestic legal systems, such as France, directly incorporate international law obligations within the limits of their national constitutions.

From a practical perspective, the panel discussions evidenced the need for the arbitration community to reach a consensus, or at least to provide additional insight into the scope of the application of international law to private-public arbitration. Professor Julian Arato, for example, inquired whether "applying international law" merely leads to the application of general principles of international law such as *pacta sunt servanda*, or whether it would entail that "the

entire iceberg" of international law would be brought into the dispute. In Professor Arato's view, since reasonable minds can disagree on this question, decisions on this issue are likely to diverge and create uncertainties to contracting parties.

Counsel and arbitrators might also encounter complexities in this genre of arbitration even when they apply the domestic law of a contract to resolve a dispute. Indeed, as stated by Bart Legum, private-public arbitrations might raise complex public law issues in situations where the law of the underlying contract is that of a civil law jurisdiction. Specifically, he questioned whether in that scenario, parties may be entitled to argue sophisticated jurisprudence developed by other civil law jurisdictions, *i.e.*, France, to support their position under the law of the contract, even when the courts of such State do not regularly follow such jurisprudence.

Of course, parties may resort to the principle of party autonomy to resolve uncertainties. In this regard, D. Brian King called for "smart contractual drafting" to protect contracting parties. Specifically, he recommended including stabilization clauses, as well as indemnification and *force majeure* provisions to investment contracts to minimize risks. With regard to stabilization clauses, Nathalie Bernasconi-Osterwalder referred to John Ruggie's commentary to argue that stabilization clauses are typically broader in contracts signed by non-OECD countries. She also left open questions with regard to an arbitrator's role vis-à-vis long-duration stabilization clauses and the need for environmental protection, as well as the dismantlement of laws enacted by non-democratic governments.

The particularities of private-public arbitration may also have procedural implications. In this regard, Catherine M. Amirfar explained that the presence of a sovereign affects the proceedings from start to finish. Among other things, she observed that a sovereign's presence in a proceeding might make settlements more cumbersome because of the commitment of public funds and conflicting internal political interests. Moreover, she noted that it could create difficulties vis-à-vis the recognition and enforcement of an award, including due to divergent interpretation of the public policy exception under the New York Convention.

One speaker took a contrary view regarding the complexities of public-private arbitration and argued that this debate is not necessary and there is no such thing as "investomercial arbitration". Hugo Perezcano voiced his disagreement with most of the points raised during the day, including on any similarities between

treaty-based arbitrations and private-public arbitrations. In his view, these types of arbitrations arise from different causes of actions and applicable law. He further recommended any parties concerned with certain domestic laws to choose a different applicable law for their contracts.

In the author's view, some investors – particularly sophisticated ones with large bargaining power – may increasingly seek to enter into contractual agreements with States to protect their investments. This will be particularly true if: (i) the investor's alternative is a dispute settlement mechanism where claimants will be afforded less autonomy *i.e.*, as with a permanent investment court; and/or (ii) States are more amenable to negotiate investor protections on a case-by-case basis, as opposed to relying on blanket protections provided under investment treaties. Such facts will likely cause an increase in the number of private-public arbitrations before the ICC, ICSID, and other arbitral institutions.

We might, therefore, be witnessing only the beginning stages of this debate. It is the author's view that this debate must be careful not to generalize all disputes involving sovereigns or their state entities as being identical. Moreover, it is necessary to acknowledge that States face specific social, political, and economic circumstances when they decide to attract and protect investments and are free to decide, for example, that certain state-owned entities should be independent and enter into purely commercial transactions. In addition, the author considers that this debate should further provide greater innovations to protect smaller foreign and national investments where the investors may lack the bargaining power to do so. This is critical since the availability of greater protections for these kinds of investors might facilitate additional capital flows into developing countries. "Investomercial" or not, these disputes are likely to increase and create new challenges for both counsel and arbitrators.