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## **KEYNOTE REMARKS:**

### **STATE PARTIES IN CONTRACT-BASED ARBITRATION:**

### **ORIGINS, PROBLEMS AND PROSPECTS OF PRIVATE–PUBLIC ARBITRATION**

by Charles N. Brower

Keynote address delivered at the 16th Annual ITA-ASIL Conference held in Washington, D.C., on March 27, 2019.

The keynote introduces the kinds of contractual disputes involving public actors that are settled through arbitration, discuss the drivers for such arbitrations, and provide a conceptual framework to analyze these arbitrations. It discusses in particular to which extent contract-based private–public arbitrations should be treated in the same manner as private–private commercial arbitration, or whether they should be related closer to the debates we have in the context of investment treaty arbitrations.

#### **I. INTRODUCTION**

It is an honor and privilege to stand before you today to deliver the Keynote Address for the 16th Annual ITA-ASIL Conference. Our topic is the theory and practice of private–public arbitration,<sup>1</sup> with particular attention devoted to the role of state parties in contract-based arbitration. I have been asked to lay down the conceptual groundwork and to provide a status check on such arbitrations and, after some reflection, let me tell you, I am not pleased.

The nature of international investment law is largely premised on a “false trichotomy.” The fallacious view is that somehow there are clean borders separating commercial arbitration, treaty-based investor–state arbitration, and inter–state forms of dispute resolution involving foreign investments. This is an absolute fallacy.

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<sup>1</sup> See Alex Mills, *The Public-Private Dualities of International Investment Law and Arbitration*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 97 (Chester Brown & Kate Miles, eds., 2011); Julie Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 *VA. J. INT'L L.* 367 (2014); Stavros Brekoulakis & Margaret Devaney, *Public-Private Arbitration and the Public Interest under English Law*, 80 *MOD. L. REV.* 22 (2017); Stephan Schill, *Transnational Private-Public Arbitration as Global Regulatory Governance: Charting and Codifying the Lex Mercatoria Publica*, European Research Council, Amsterdam Center for International Law (2013–2018), available at <https://acil.uva.nl/content/research-projects/current-research-projects/lexmercpub-kopie-2.html?1555407083981>.



In truth, international investment law encompasses all three forms of dispute resolution.<sup>2</sup> The key feature of investor-state dispute settlement (ISDS) is that it opposes private economic interests and the exercise of sovereign legislative, executive or judicial powers. What matters is not the stage on which the dispute is played out, but rather the competing private and public interests at stake.

In 2013, I delivered the annual Alexander Lecture at the Chartered Institute of Arbitrators in London titled “Investomercial Arbitration: Whence Cometh It? What Is it? Whither Goeth it?”<sup>3</sup> In that lecture, I coined the term “investomercial arbitration.” I sought by this phrase to reframe how one ought to think about international investment law. “Investomercial” destroys the “false trichotomy” by exposing the true private-public nature of the foreign investment relationship. I propose in three parts to canvass the origin, the current posture and the prospects of contract-based private-public, or, shall we say, “investomercial” arbitration.

## II. ORIGIN

The protection of foreign property traditionally has underpinned the development of public and private international law.<sup>4</sup> As a field of concentration, it gained significant global interest in the post-colonial era, as former empires sought to ensure that the foreign property of their nationals and corresponding business

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<sup>2</sup> For inter-state dispute settlement, primary examples include Mixed Claims Commissions (e.g., Iran-United States Claims Tribunal) and investment-relevant cases before the International Court of Justice (e.g., Case Concerning Elettronica Sicula S.P.A. (ELSI) (U.S. v. Italy), Judgment, Merits, 1989 I.C.J. 15 [hereinafter “ELSI”]). For commercial arbitration, examples include disputes arising out of the breakdown of private and public economic relations (e.g., disputes where one party is a state-owned enterprise). For treaty-based investment arbitration, examples include jurisprudence administered under the arbitration rules that frequently govern investor-state dispute settlement (e.g., UNCITRAL Arbitration Rules). The common theme across these fields of dispute settlement is the private-public dimension.

<sup>3</sup> Charles N. Brower, *Investomercial Arbitration: Whence Cometh It? What is it? Whither Goeth It?*, 8 INT’L J. ARB., MED. & DISP. MGMT. 179 (2014).

<sup>4</sup> Evidence of early privately-financed infrastructure projects date back to the early antiquity era, circa 312 BC. For a brief historical account of early complex long-term contracts, see HERFRIED WÖSS ET AL, DAMAGES IN INTERNATIONAL ARBITRATION UNDER COMPLEX LONG-TERM CONTRACTS 26–31 (2014) [hereinafter WÖSS].



interests in their former colonies enjoyed legal protection.<sup>5</sup> Established means—i.e., local remedies and diplomatic protection—were largely deemed insufficient over time due to the “politicization” of disputes,<sup>6</sup> the threat of or actual use of force,<sup>7</sup> and ultimately delayed and unsatisfactory outcomes if the matter ever reached an international adjudicative body.<sup>8</sup> Since consensus has not been achieved on a multilateral investment agreement,<sup>9</sup> the international community has adopted

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<sup>5</sup> GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW*, 14 et seq. (2008).

<sup>6</sup> See, e.g., Sir Hersch Lauterpacht, *The Subjects of the Law of Nations*, 63 L. Q. REV. 438, 454 (1947).

<sup>7</sup> One example is the 1956 Suez Canal crisis when Egypt nationalized (and seized control of) the Suez Canal and its operating company. A strategically important intersection between the Mediterranean Sea and Indian Ocean that eased commerce, the British and French, who both had stakes in the canal, responded with military force. Thomas T.F. Huang, *Some International and Legal Aspects of the Suez Canal Question*, 51 AM. J. INT’L L. 277 (1957). The term “gunboat diplomacy” is frequently used. See, e.g., Richard B. Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 1, 3 (R. Lillich ed. 1983). Even in modern times, economic (and possibly military) sanctions continue to play a role. For example, Argentina settled outstanding arbitration awards in 2013–2014 owed in part to the United States implementation of certain economic pressures (i.e., certain trade measures, including limiting access to World Bank and Inter-American Development Bank credit and loan facilities or refusing to support the restructuring of Argentina’s US\$7 billion Paris Club debt). See Roger Alford, *Using Trade Remedies to Enforce Arbitration Awards*, KLUWER ARB. BLOG, Mar. 22, 2014, <http://arbitrationblog.kluwerarbitration.com/2014/03/22/using-trade-remedies-to-enforce-arbitration-awards/?print=pdf>; Arturo C. Porzecanski, *The Origins of Argentina’s Litigation and Arbitration Saga, 2002–2014*, AM. U. WORKING PAPER SERIES, Paper No. 2015-6 (May 13, 2015), available at <http://fs2.american.edu/aporzeca/www/Origins%20of%20Argentinass%20Litigation%20&%20Arbitration%20Saga.pdf>.

<sup>8</sup> See, e.g., *ELSI*, *supra* note 2. The *ELSI* case took 21 years before the dispute was settled (six years before the local courts and 15 years of diplomatic exchanges between the United States and Italy).

<sup>9</sup> Examples of multilateral codifications attempts include: Draft Convention on Investments Abroad [1959 Abs-Shawcross Draft] reproduced in UNCTAD, *International Investment Instruments: A Compendium* (Vol. V), p. 301, U.N. Doc. UNTAD/DITE/2 (Vol. V) (2000); Draft Convention on the International Responsibility of States for Injuries to Aliens, reprinted in Louis B. Sohn & R. R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT’L L. 545, 548 (1961); OECD, Draft Convention on the Protection of Foreign Property, 1962, 2 I.L.M. 241 (1963); OECD, *Draft Convention on the Protection of Foreign Property*, 1967, 7 I.L.M. 117 (1968); Multilateral Agreement on Investment: Draft Consolidated Text, DAF/MAI(98)7/Rev1 (Apr. 22, 1998).



treaty-, contract-, and legislation-based arbitration as the mainstream methods to overcome these shortcomings, as collectively they provide foreign investors with procedural and substantive rights that are directly enforceable against host states (and their entities) on the international plane.

While treaty-based arbitration is the darling of ISDS today, contract-based arbitration is its kissing cousin. The International Centre for Settlement of Investment Disputes' (ICSID) 2019 first quarter statistics reveal that treaty-based arbitrations constitute 75% of its registered cases. Contract-based arbitration holds second place at 16%. At 9%, arbitrations permitted by a host state's national legislation round out the total.<sup>10</sup> Historically, state contracts were the safest way to protect foreign investment.<sup>11</sup> Many historical landmarks would not have been built but for private financing. For example, many of London's bridges, the Gotthard railway tunnel under the Alps in Switzerland, the Suez Canal in Egypt, and the "Chunnel" linking England to the Continent were all privately financed projects.<sup>12</sup> Accordingly, "state contracts"<sup>13</sup> have evolved from one-sided agreements into true partnerships covering a wide array of projects and engaging multiple legal fora.

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<sup>10</sup> ICSID reports 706 total cases, which is not a full accounting of all known ISDS cases but largely representative of the whole. The ICSID Caseload-Statistics, Issue 2019-1, at 10, available [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf) [hereinafter ICSID Statistics].

<sup>11</sup> For an overview of contractual protection through diplomacy (early 1800s-early 1900s), see JEAN HO, STATE RESPONSIBILITY FOR BREACHES OF INVESTMENT CONTRACTS 11-19 (2018). And, for an overview of the early contractual protection through international adjudication vis-à-vis mixed claims commissions (early 1900s-1920s), see *id.* at 19-36. ICSID originally was created to address dispute resolution of concession contracts. *Consultative Meeting of Legal Experts, Bangkok, Thailand, 27 April-1 May 1964*, in HISTORY OF THE ICSID CONVENTION (1968). See also J. Christopher Thomas & Harpreet K. Dhillon, *The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards*, 32 ICSID REV. 459, 473 (2017). Rudolf Dolzer and Christoph Schreuer further describe such contracts as building blocks for the legal regime of oil and gas projects by multinational companies. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 79 (2d ed. 2012) [hereinafter DOLZER & SCHREUER].

<sup>12</sup> WÖSS, *supra* note 4, 27.

<sup>13</sup> There may be subtle legal and political connotations attached to the various terms used to describe private-public contractual arrangements. For convenience, and without prejudice



Over time, there have been ebbs and flows in the use of investment contracts. The first portion of the twentieth century included the First and Second World Wars, a period that featured an international trend of political and economic instability as well as the advancement of nationalistic ideologies. In response, the later opening up of investment contracts with states became a primary legal means for establishing large infrastructure projects such as highways, bridges, airports and power plants, as well as the set-up and maintenance of natural resource extraction and essential

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to the various interpretations, “investment contract,” “foreign investment contract” and “state contract” are used interchangeably throughout this written contribution. Accordingly, there are many ways to describe these arrangements. Traditional state contracts were known as concession contracts, which generally were long-term contracts providing exclusive rights to develop and harvest natural resources whereby the state received royalties based on the resources extracted. Modern state contracts may include modern concession agreements (which are largely the same as traditional concession contracts, but the state retains a greater degree of control of and return on the extraction of resources); production-sharing agreements; skill-specific (management/technical/service) contracts; turnkey contracts; joint venture agreements; licensing and transfer of technology agreements; and build, operate and own (BOO) and build, operate and transfer (BOT) agreements. For a general overview, see JAN OLE VOSS, *THE IMPACT OF INVESTMENT TREATIES ON CONTRACTS BETWEEN HOST STATES AND FOREIGN INVESTORS* 17–24 (2010) [hereinafter VOSS]. In some jurisdictions (particularly civil law countries under the Code Napoleon tradition), a distinction is made between a concession (i.e., private party provides service to public and takes an end-user risk) and a private-public partnership (i.e., private party provides service to public and undertakes risk in the existing market). A Public-Private Partnership (“PPP”) may be defined as “a long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance.” World Bank, *PPP Knowledge Lab: PPP Reference Guide*, (2017), available at <https://pppknowledgelab.org/>. In addition to country-specific PPP laws, available are international guidelines relevant to PPPs: UNCITRAL, *Legislative Guide on Privately Funded Infrastructure Projects*, UN Doc. A/CN.9/SER.B/4 (2001), available at <http://www.uncitral.org/pdf/english/texts/procurem/pfip/guide/pfip-e.pdf>; UNCITRAL, *Model Legislative Provisions on Privately Financed Infrastructure Projects*, (2004), available at [http://www.uncitral.org/pdf/english/texts/procurem/pfip/model/03-90621\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/procurem/pfip/model/03-90621_Ebook.pdf); OECD, *EBRD Core Principles for a Modern Concession Law* (2006), available at [https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Core%20Principles%20for%20Modern%20Concession%20Law\\_EN.pdf](https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Core%20Principles%20for%20Modern%20Concession%20Law_EN.pdf); OECD, *Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships*, (2012), available at <https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf>. See also, World Bank, *Public-Private Partnerships*, <http://www.worldbank.org/en/topic/publicprivatepartnerships/overview>. Another commonly used term to describe private-public contracts is the “economic development agreement.”



services (e.g., hospitals, schools, transportation, waste management and telecommunications).<sup>14</sup>

In addition to recording each contracting party's rights and responsibilities, at the heart of these contracts is the allocation of risk. A future return is expected based on up-front provision of capital, technology, skill or service. When the investment is made in a foreign jurisdiction and is intended to be long-lasting, the risks that already are inherent in the foreign economy and its regulatory climate are further heightened if the state contract calls for the private foreign investor to build and maintain facilities essential to the local populace, such as, for example, the local water supply. But the foreign investor is usually at a disadvantage because the host state is not just a contracting party; it has a second, paramount role as a sovereign legislator. Thus, whereas the foreign investor is totally bound by the "sanctity of a contract" (i.e., *pacta sunt servanda*), the host state's second role as sovereign power may incite it to abandon its contractual obligations in response to a changing government agenda due to demands of its citizenry. In order to mitigate, if not eliminate, the risks arising from this imbalance, the foreign investor may, or may not, be successful in bargaining for inclusion in the state contract of one or another, or a combination, of the following: (1) a favorable applicable governing law, possibly international law or a combination thereof with a national law; (2) a favorable dispute resolution clause, e.g., neutral international arbitration;<sup>15</sup> or (3) a stabilization clause.<sup>16</sup>

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<sup>14</sup> EU public authorities (over 250,000), for example, spend around 14% of GDP on the purchase of services, works and supplies. European Commission, *Public Procurement*, [https://ec.europa.eu/growth/single-market/public-procurement\\_en](https://ec.europa.eu/growth/single-market/public-procurement_en).

<sup>15</sup> One recalls the governing law provisions in the 1970's Libyan oil concession agreements: "This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals." See *LIAMCO v. Libya*, Award of 12 April 1977, 62 Int'l L. Rep. 140 (1982); *BP Exploration Co. (Libya) Ltd. v. Libya*, Awards of 10 October 1973 and 1 August 1974, 53 Int'l L. Rep. 297, 302-303 (1973).

<sup>16</sup> See, e.g., Energy Charter Treaty Secretariat, *Model Host Government Agreement*, in *MODEL INTERGOVERNMENTAL AND HOST GOVERNMENT AGREEMENTS FOR CROSS-BORDER PIPELINES*, Art. 37.2 [Option 2] 93 (2d ed., 2008), available at <https://energycharter.org/fileadmin/DocumentsMedia/Legal/ma2-en.pdf> ("The Host



### III. PROBLEM

The main problem, as I see it, is the misguided belief—the myth, if you will—that commercial arbitration, treaty-based investor-state arbitration, and inter-state dispute settlement processes operate in water-tight compartments (i.e., the “false trichotomy”). The relationships among these three processes is much more fluid. It should be obvious that contract-based disputes, when involving private and public actors, inevitably will deal with issues of concern to both private and public spheres of economic regulatory life. Perpetuation of the mythical trichotomy leads to fragmentation, artificially walling off each of the three types of investment dispute resolution processes from one another.<sup>17</sup> My solution to this misconception is, as I already have stated, the all-embracing concept of “investomercial” dispute settlement, which offers a normative and pluralistic perspective that bridges the divide heretofore separating the trio of private-public foreign investment dispute settlement processes from one another.<sup>18</sup>

Next, I discuss two types of investment disputes, i.e., (1) contractual and (2) inter-state, in relation to treaty-based and legislation-based investor-state disputes, in an effort to dispel the “false trichotomy” by demonstrating just how, despite their differing legal fora, they are all private-public disputes.

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Government shall take all actions available to it to restore the Economic Equilibrium established under this Agreement and any other Project Agreements if and to the extent the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of any change (whether the change is specific to the Project or of general application) in [insert name of the State] law (including any laws regarding Taxes, health, safety and the environment) occurring after the Effective Date...”).

<sup>17</sup> For more on fragmentation of international law, see International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006), available at [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf).

<sup>18</sup> “Normative pluralism” is “the idea that behavior can be evaluated from the perspectives of a variety of normative orders or normative control systems and thus, importantly, can also be justified from a variety of such perspectives.” Jan Klabbers & Touko Piiparinen, *Normative Pluralism: An Exploration*, in *NORMATIVE PLURALISM AND INTERNATIONAL LAW: EXPLORING GLOBAL GOVERNANCE* 13, 14 (Jan Klabbers & Touko Piiparinen eds., 2013).



### A. *Treaty-Based and Legislation-Based Arbitration*

By their nature, investment arbitrations arising under treaties or pursuant to legislation necessarily involve private-public arbitration, as the invitation to arbitrate is extended by a host state to foreign investors.<sup>19</sup>

The situation is less clear for contract-based investment arbitrations. At this point, it may be helpful to clarify that when I refer to contract-based investment arbitration, I mean that the contract and not, for example, the subject matter of the dispute (*i.e.*, the investment), operates as the basis for arbitration. In treaty-based and legislation-based investor-state dispute settlement, there are many examples, however, of the investment itself being the basis of the arbitration.<sup>20</sup> Unfortunately, contract-based arbitration disturbingly often is characterized as a form of international commercial arbitration despite the clear private-public relationship that exists between the parties, a point to which I will return shortly.

There also are instances, at least in treaty-based investor-state arbitrations, in which a host state may act as the claimant and the foreign investor as the respondent. The drafters of the ICSID Convention in fact expressly contemplated equal access for the host state,<sup>21</sup> but despite this formal equality, there have been few such cases. Notably, the handful of known such cases are all contract-based arbitrations.<sup>22</sup>

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<sup>19</sup> See, *e.g.*, U.S. Model BIT, 2012, Art. 24(1)(a)-(b), available at <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>; Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232 (1995).

<sup>20</sup> See, *e.g.*, ATA Const., *Indus. & Trading Co. v. Jordan*, ICSID Case No. ARB/08/2, Award (May 18, 2010).

<sup>21</sup> “[T]he Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.” ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Art. III(13), at 41, available at [https://icsid.worldbank.org/en/Documents/resources/ICSID\\_Conv%20Reg%20Rules\\_EN\\_2003.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID_Conv%20Reg%20Rules_EN_2003.pdf).

<sup>22</sup> See, *e.g.*, *Gabon v. Société Serete S.A.*, ICSID Case No ARB/76/1 (settled); *Gov. of the Province of E. Kalimantan v. PT Kaltim Prima Coal & Others*, ICSID Case No ARB/07/3, Award on Jurisdiction (Dec. 28, 2009), available at [https://www.italaw.com/sites/default/files/case-documents/italaw8031\\_4.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw8031_4.pdf); *Peru v. Caraveli Cotaruse Transmisora de Energia S.A.C.*, ICSID



## B. *Private–Public Arbitration*

International commercial arbitration is generally regarded as the preferred method of settling contract disputes in international commerce. It frequently involves private–private disputes relating to purely commercial matters. I am not concerned with these types of disputes except where at least one of the parties is a state. As mentioned, investment contracts frequently are formed as a joint arrangement with state-owned companies, and with increasing frequency, private–public arbitrations are being camouflaged as private–private disputes. For example, from 2017 to 2018, 15% of the caseload of the International Court of Arbitration of the International Chamber of Commerce (ICC) consisted of state-owned or parastatal entities as a party to the arbitral proceeding, up from 11% in 2016.<sup>23</sup> A significant majority of these cases were contract-based arbitrations.<sup>24</sup> I refer next to three disputes, as Exhibits A, B, and C, that demonstrate the private–public nature of contracts concluded by foreign investors with state-owned entities.

Exhibit A is *Dow Chemical Co. v. Petrochemical Industries Co.* Petrochemical Industries Company (“PIC”) is a subsidiary of the state-owned Kuwait Petroleum Corporation. The roots of this contract-based arbitration date back to a US\$17.4 billion joint venture agreement between Dow Chemical and PIC called “K-Dow.” The terms of the agreement included a promise by PIC to pay US\$7.5 billion for a 50% interest in certain petrochemical assets of Dow Chemical.<sup>25</sup> For its part, Dow Chemical agreed to hand over chemical plants and other assets to K-Dow in exchange

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Case No ARB/13/24, Resolution to suspend proceedings (Dec. 26, 2013), available at <https://www.italaw.com/sites/default/files/case-documents/italaw9043.pdf>.

<sup>23</sup> In 2017, 810 cases were registered with the ICC, which involved 150 state or parastatal entities. In 2018, 842 cases were registered with the ICC, 143 involved state or parastatal entities. International Chamber of Commerce Court of Arbitration, *ICC Dispute Resolution 2018 Statistics* (2019) at 8–9, available at <https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/>.

<sup>24</sup> Only four treaty-based investment cases were registered with the ICC in 2017. Since 1996, the ICC has administered 40 treaty-based investment arbitrations. *Id.* at 56.

<sup>25</sup> *Petrochemical Indus. Co. (KSC) v. The Dow Chem. Co.* [2012] E.W.H.C. 2739 (Comm) at ¶ 2 (Oct. 11, 2012), available at <http://www.bailii.org/ew/cases/EWHC/Comm/2012/2739.html>.



for approximately US\$9 billion in cash that it planned to use to fund a US\$15 billion acquisition of Rohm & Haas, a specialty chemicals company.<sup>26</sup> The relationship soured when PIC jumped ship in December 2008 as a result of parliamentary pressure and concern about declining oil prices in light of the fast-approaching global recession.<sup>27</sup> Dow Chemical responded by initiating arbitration, arguing that the deal's collapse nearly ruined its deal with Rohm & Haas and forced it to divest assets to obtain short-term financing.<sup>28</sup> The ICC tribunal held in 2012 that PIC was liable for the botched merger and awarded damages to Dow Chemical in excess of US\$2 billion.<sup>29</sup>

Exhibit B is *Esso Exploration & Production Nigeria Ltd. & Shell Nigeria Exploration & Production Co. Ltd. v. Nigerian National Petroleum Corp.* This case involved a dispute over crude oil allocation and related tax matters under a 30-year production-sharing contract for extracting oil from the Erha Deepwater oil field, which is along

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<sup>26</sup> Ed Crooks, *Dow Chemical Wins \$2.2bn in Kuwait Damages*, FINANCIAL TIMES (May 24, 2012), available at <https://www.ft.com/content/cc79eaca-a5a8-11e1-a3b4-00144feabdc0>.

<sup>27</sup> Sebastian Perry, *Dow wins US\$2bn Over Cancelled Kuwaiti Venture*, GLOBAL ARBITRATION REVIEW (May 24, 2012), [https://globalarbitrationreview.com/print\\_article/gar/article/1031361/dow-wins-ususd2-billion-over-cancelled-kuwaiti-venture?print=true](https://globalarbitrationreview.com/print_article/gar/article/1031361/dow-wins-ususd2-billion-over-cancelled-kuwaiti-venture?print=true).

<sup>28</sup> Sebastian Perry, *Dow Sees Bump to Kuwait Award*, GLOBAL ARBITRATION REVIEW (Mar. 04, 2013), [https://globalarbitrationreview.com/print\\_article/gar/article/1032147/dow-sees-bump-to-kuwait-award?print=true](https://globalarbitrationreview.com/print_article/gar/article/1032147/dow-sees-bump-to-kuwait-award?print=true).

<sup>29</sup> Kyriaki Karadelis, *UK Court Keeps US\$2 Billion Dow Award Intact*, GLOBAL ARBITRATION REVIEW (Oct. 22, 2012), [https://globalarbitrationreview.com/print\\_article/gar/article/1031700/uk-court-keeps-ususd2-billion-dow-award-intact?print=true](https://globalarbitrationreview.com/print_article/gar/article/1031700/uk-court-keeps-ususd2-billion-dow-award-intact?print=true). See also Abdelghani Henni, *Analysis: Kuwait's Costly K-Dow Misadventure*, REVIEW REFINING & PETROCHEMICALS MIDDLE EAST (June 27, 2012), available at <https://www.refiningandpetrochemicalsme.com/article-10412-analysis-kuwaits-costly-k-dow-misadventure>.



the Nigerian coast.<sup>30</sup> Under the contract,<sup>31</sup> Esso Exploration and Production Nigeria Limited (“Esso”) and Shell Nigeria Exploration and Production Company Limited (“Shell”) were responsible for exploration and extraction of the oil, which latter was to be split according to the contractual formula. After the project was launched, a dispute arose over the right to allocate oil quantities and the accuracy of the tax returns. The investors brought this case to arbitration when the Nigerian National Petroleum Corporation (“NNPC”), the state-owned oil company, began unilaterally to lift oil based on its own estimates. A majority tribunal issued a final award in 2011 against NNPC for US\$2.7 billion, finding among other things that NNPC had breached the contract by over-lifting crude oil and that Esso and Shell had the exclusive right to estimate the tax payable on the oil lifted.<sup>32</sup>

Exhibit C is *Crescent Petroleum v. National Iranian Oil Company*. This case concerned a breach of contract claim brought by a United Arab Emirates-based private company, Crescent Petroleum Company International Ltd. and its subsidiary (“Crescent Petroleum”) against Iran’s state-owned oil company, National Iranian Oil Company (“NIOC”). In April 2001, the two entities entered into a long-term gas supply

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<sup>30</sup> Charles N. Brower & Michael P. Daly, *A Study of Foreign Investment Law in Africa: Opportunity Awaits*, in *INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY*, ICCA Congress Series No. 19 (Andrea Menaker ed., 2017). See also *Production Sharing Contract Between Nigerian National Petroleum Corporation & ESSO Exploration & Production Nigeria Ltd.*, May 21, 1993, available at [https://lbrcdn.net/cdn/files/gar/articles/Esso\\_NNPC\\_PSC.pdf](https://lbrcdn.net/cdn/files/gar/articles/Esso_NNPC_PSC.pdf); Sebastian Perry *Nigerian Oil Fight Heads to US*, *GLOBAL ARBITRATION REVIEW* (Nov. 13, 2014), [https://globalarbitrationreview.com/print\\_article/gar/article/1033869/nigerian-oil-fight-heads-to-us?print=true](https://globalarbitrationreview.com/print_article/gar/article/1033869/nigerian-oil-fight-heads-to-us?print=true).

<sup>31</sup> *Production Sharing Contract Between Nigerian National Petroleum Corporation & Esso Exploration & Production Nigeria Ltd.*, May 21, 1993, available at [https://lbrcdn.net/cdn/files/gar/articles/Esso\\_NNPC\\_PSC.pdf](https://lbrcdn.net/cdn/files/gar/articles/Esso_NNPC_PSC.pdf).

<sup>32</sup> Caroline Simpson, *Oil Cos. Spar Over Dismissal Of \$2.7B Nigerian Award Row*, *LAW360* (Feb. 4, 2019), <https://www.law360.com/articles/954679/print?section=banking> [hereinafter Simpson]; Damien Charlotin, *Analysis: \$2.7 billion Award by Fortier and Brower Surfaces as a Result of Nigerian Efforts to Block Enforcement; Ruling in Favour of Shell and Exxon Entities Touched on Constitutional Questions, as well as Tax Stabilization*, *IAREPORTER* (Feb. 15, 2019), <https://www.iareporter.com/articles/analysis-2-7-billion-award-by-fortier-and-brower-surfaces-as-a-result-of-nigerian-efforts-to-block-enforcement-ruling-in-favor-of-shell-and-exxon-entities-touched-on-constitutional-questions-as-we/> [hereinafter Charlotin].



and purchase contract, which was governed by Iranian law and referred all disputes, including those relating to the validity of the contract, to arbitration.<sup>33</sup> In July 2009, Crescent Petroleum commenced arbitration against NIOC, claiming that it had failed to deliver any gas since 2005 in breach of the multi-billion dollar contract.<sup>34</sup> In a majority award, the tribunal found that the contract was valid and binding upon the parties and that NIOC remained in breach of its obligation since 2005.<sup>35</sup>

All three of these disputes involved so-called private-private actors, but the effect that these multibillion-dollar awards have had (or will have) in Kuwait, Nigeria, and Iran cannot be ignored.

For *Dow Chemical v. PIC*, the ICC arbitration award created friction in the country's corridors of power. Questions were raised about who should shoulder the blame, which fragmented and polarized its parliament.<sup>36</sup> The *Dow Chemical* dispute also has been kindling for critical analysts, who suggest that the failure of the K-Dow plan due to political pressure remains one of the reasons why international companies are wary of making investments in Kuwait.<sup>37</sup>

For *Esso & Shell v. NNPC*, the award was nearly immediately set aside by the Federal High Court in Abuja, Nigeria, which held that tax matters were not arbitrable under Nigerian law and that the arbitrators had exceeded their jurisdiction.<sup>38</sup> The

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<sup>33</sup> Nat'l Iranian Oil Co. v. Crescent Petroleum Co. Int'l Ltd. & Anor. [2016] E.W.H.C. 510 (Comm), ¶ 1 (Mar. 4, 2016) [hereinafter *NIOC v. Crescent Petroleum*].

<sup>34</sup> Alison Ross, *Crescent Petroleum Files Against Iran's Oil Company*, GLOBAL ARBITRATION REVIEW (July 22, 2009), <https://globalarbitrationreview.com/article/1028490/crescent-petroleum-files-against-irans-oil-company>.

<sup>35</sup> *NIOC v. Crescent Petroleum*, *supra* note 33 at ¶¶ 3, 34–36.

<sup>36</sup> Camilla Hall, *Kuwaiti Oil Minister Quits Over Dow Chemical's Compensation*, FINANCIAL TIMES (May 27, 2013), available at <https://www.ft.com/content/1d6d5cee-c6e3-11e2-a861-00144feab7de>.

<sup>37</sup> Dalal Al Houti, *Arbitration in Kuwait: Time for Reform?*, KLUWER ARBITRATION BLOG (Feb. 20, 2015), <http://arbitrationblog.kluwerarbitration.com/2015/02/20/arbitration-in-kuwait-time-for-reform/>.

<sup>38</sup> Ruling from The Federal High Court in Abuja, Suit No. FHC/ABJ/CS/923/11 (May 2012), available at [https://lbrcdn.net/cdn/files/gar/articles/Esso\\_and\\_Shell\\_v\\_NNPC\\_-\\_Federal\\_Court\\_of\\_Abuja\\_set\\_aside\\_decision\\_May\\_2012.pdf](https://lbrcdn.net/cdn/files/gar/articles/Esso_and_Shell_v_NNPC_-_Federal_Court_of_Abuja_set_aside_decision_May_2012.pdf).



Nigerian Court of Appeal confirmed the Federal High Court decision in part, determining that the contractual dispute under a Production Sharing Contract which resulted in the over-lifting of available crude oil to satisfy royalty and tax obligations under the Petroleum Profit Tax Act was in essence a tax dispute and was therefore not arbitrable.<sup>39</sup> The two oil companies have recently brought enforcement proceedings before the U.S. District Court for the Southern District of New York, in which they have claimed that the “Nigerian judicial system was rigged against them” and that the Nigerian courts would not order “NNPC, a key generator of state revenues, to pay compensation under an arbitral award.”<sup>40</sup> The *Esso & Shell v. NNPC* dispute is one of five Nigeria-seated arbitrations brought against the NNPC under the same 1993 model production sharing contract, which have resulted in substantial awards against NNPC and reported interference from Nigerian courts.<sup>41</sup>

The *Crescent Petroleum v. NIOC* dispute was inflamed due to allegations by NIOC that the contract was not enforceable because it was procured by a bribe. NIOC alleged a conspiracy between a UK national, an alleged “fixer” on behalf of Crescent, and an individual related to the former Iranian president<sup>42</sup> to influence the finalizing

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<sup>39</sup> The High Court also held that the disputes as to the contractual right to prepare petroleum profits tax returns and to determine the allocation of oil-lifting between the national oil company and the Contractor in the Production Sharing Contract were contractual claims and upheld the arbitration award in that respect. Olufunke A. Adekoya & Ibifubara Berenibara, *Nigeria: Case Review: Esso Petroleum and Production Nigeria Limited & SNEPCO v. NNPC*, MONDAQ (June 4, 2018), <http://www.mondaq.com/Nigeria/x/707222/Arbitration+Dispute+Resolution/Esso+Petroleum+And+Production+Nigeria+Limited+SNEPCO+v+NNPC>.

<sup>40</sup> Charlotin, *supra* note 32. On February 4, 2019, a hearing was held in New York by a federal judge to determine whether the award should be confirmed in light of its set-aside in Nigeria. Simpson, *supra* note 32.

<sup>41</sup> Sebastian Perry, *Shell Takes Nigerian Oil Award to New York*, GLOBAL ARBITRATION REVIEW (May 27, 2016), [https://globalarbitrationreview.com/print\\_article/gar/article/1036367/shell-takes-nigerian-oil-award-to-new-york](https://globalarbitrationreview.com/print_article/gar/article/1036367/shell-takes-nigerian-oil-award-to-new-york).

<sup>42</sup> Anthony McAuley, *Iran’s Gas Dispute with Sharjah’s Crescent Petroleum Enmeshed in Politics*, THE NATIONAL (Apr. 13, 2015), available at <https://www.thenational.ae/business/iran-s-gas-dispute-with-sharjah-s-crescent-petroleum-enmeshed-in-politics-1.86124> [hereinafter McAuley].



of the contract.<sup>43</sup> The tribunal found that although there had been discussions about a corrupt payment, it was never put into effect and that there was no evidence of imbalance in the parties' agreement.<sup>44</sup> At the time of the proceeding, Iran, a country with the world's largest natural gas reserves, was attempting to re-establish its relationships with international oil companies in anticipation of sanctions being lifted in connection with a deal on its nuclear program with the international community.<sup>45</sup> The case naturally gained a lot of international attention, not just because it involves billions of dollars, but also because it has been closely enmeshed in Iranian politics and an alleged corruption scandal, important factors companies consider when making foreign investment decisions. Indeed, when the case was initiated, another oil company publicly vowed to do no more business in Iran "given the . . . circumstances."<sup>46</sup> Moreover, although a direct connection has not been established, the case was also linked to the kidnapping and murder of a British-Iranian businessman, Abaas Yazdi, who provided video evidence during the arbitration.<sup>47</sup>

Exhibits A, B, and C serve as instructive examples. When a state is party to a private contract-based arbitration, there is immediate tension between private and public interests. While there are notable differences in the approaches taken by the parties, and in the processes involved, in contract-based arbitration versus treaty-based and legislation-based arbitrations,<sup>48</sup> there is no avoiding the serious economic and political consequences involved. Thus, careful analysis must be given to

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<sup>43</sup> *Id.*

<sup>44</sup> NIOC v. Crescent Petroleum, *supra* note 33 at ¶ 37. Sebastian Perry, *Crescent Sees Award in Iran Gas Case*, GLOBAL ARBITRATION REVIEW (Aug. 11, 2014), [https://globalarbitrationreview.com/print\\_article/gar/article/1033617/crescent-sees-award-in-iran-gas-case?print=true](https://globalarbitrationreview.com/print_article/gar/article/1033617/crescent-sees-award-in-iran-gas-case?print=true).

<sup>45</sup> McAuley, *supra* note 42.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> For example, the parties normally flip-flop their individual positions on whether the government conduct in question constitutes an act *jure imperii* (dominion act) or act *jure gestionis* (commercial act) depending on the legal fora and applicability of international law to the dispute. See VOSS, *supra* note 13, at 177-78.



seemingly private-private contract-based arbitration involving state parties because of the potentially negative effects felt by the taxpayer, the political finger-pointing, the potentially tarnished reputation of the state, and the resulting deterrent effect on future foreign direct investment.

### C. *Public-Public Arbitration*

Touted as an important precursor to modern investment treaty arbitration, mixed claims commissions remain a means of inter-state dispute settlement available to address private-public contractual disputes.<sup>49</sup> History demonstrates that such international tribunals frequently have exercised jurisdiction over contractual claims.<sup>50</sup> The Iran-United States Claims Tribunal, which was established in the wake of the 1979 Iran-United States hostage crisis to handle the mass of disputes and claims arising from the Islamic revolution in Iran, is a modern-day success story. Article II of the Claims Settlement Declaration provides jurisdiction, in part, as follows:

An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of [either State] against [the other State] ... if such claims are outstanding ... and arise out of debts, contracts, ... expropriations or other measures affecting property rights...<sup>51</sup>

Importantly, the hybrid private-public nature of this Tribunal was further confirmed by the choice of law provision:

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines

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<sup>49</sup> David Bederman, *The Glorious Past and Uncertain Future of International Claims Tribunals*, in *INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* 161 (Mark W. Janis ed., 1992).

<sup>50</sup> See, e.g., *Il. Cent. R.R. Co. (USA) v. Mexico*, Mexico-US General Claims Commission, 4 REP. INT'L ARB. AWARDS 21, 22, 24 (Mar. 31, 1926), available at [http://legal.un.org/riaa/cases/vol\\_IV/21-25.pdf](http://legal.un.org/riaa/cases/vol_IV/21-25.pdf).

<sup>51</sup> Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Article II (Jan. 19, 1981), 75 AM. J. INT'L L. 418, 423 (1981) available at <http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf> [hereinafter *Iran-US Claims Settlement Declaration*]. See also David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 130 (1990).



to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.<sup>52</sup>

And, indeed, the vast majority of the cases before the Tribunal have involved such private-public contract claims.<sup>53</sup>

The investment treaty regime also contemplates inter-state arbitrations as a means to address private-public disputes involving contracts.<sup>54</sup> Almost all BITs include state-to-state arbitration as an option and despite the public-public aspect of that arena, private interests are in fact the underbelly of the known inter-state case examples.<sup>55</sup>

In *Italy v. Cuba*,<sup>56</sup> Italy brought a claim on behalf of itself and several Italian investors alleging violations of the Cuba-Italy BIT. While both claims ultimately failed (Italy's direct claim failed because its diplomatic claims failed), the tribunal regarded a three-year contract to train staff and hire equipment for the operation of a beauty salon in the premises of a state-owned hotel as an investment. The closure of the salon without notice by the state-owned hotel on the ground that it had been providing a tattoo service that was not included in the list of services authorized by the Ministry of Internal Commerce was viewed by the majority of the tribunal as a

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<sup>52</sup> Iran-US Claims Settlement Declaration, *supra* note 51, Art. V.

<sup>53</sup> See, e.g., *Amoco Int'l Fin. Corp v. Iran*, 15 IRAN-U.S. CL. TRIB. REP. 189 (1987); *Philips Petroleum Co. Iran v. Iran*, 21 IRAN-U.S. CL. TRIB. REP. 79 (1989).

<sup>54</sup> See generally Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT'L L.J. 1 (2014); Clovis Trevino, *State-to-State Investment Treaty Arbitration and the Interplay with Investor-State Arbitration Under the Same Treaty*, 5 OXFORD J. INT'L DISP. SETTLEMENT 199 (2014); Michele Potestà, *State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?*, in INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF TULLIO TREVES 753 (Nerine Boschiero et al. eds., 2013).

<sup>55</sup> As a point of clarity, while neither of the examples described in the text arose from a contract-based arbitration, that procedural pathway remains available.

<sup>56</sup> *Republic of Italy v. Republic of Cuba*, Sentence préliminaire, [Interim Award] (Ad Hoc Arb. Trib. Mar. 15, 2005), available at [http://italaw.com/sites/default/files/case-documents/ita0434\\_0.pdf](http://italaw.com/sites/default/files/case-documents/ita0434_0.pdf); *Republic of Italy v. Republic of Cuba*, Sentence finale [Final Award] (Ad Hoc Arb. Trib. Jan. 15, 2008), available at [http://italaw.com/sites/default/files/case-documents/ita0435\\_0.pdf](http://italaw.com/sites/default/files/case-documents/ita0435_0.pdf) [hereinafter *Italy v. Cuba*, Final Award].



commercial activity of hotel management not involving an exercise of governmental authority.<sup>57</sup>

Host and home states of investors also may engage in arbitration to overcome disagreeable treaty interpretations. There are two cases of this nature: *Peru v. Chile* and *Ecuador v. United States*.<sup>58</sup> In the first case, Peru, in response to a disagreeable interpretation of the Peru-Chile BIT by the tribunal hearing the *Lucchetti v. Peru*<sup>59</sup> case, commenced a state-to-state arbitration seeking to suspend the ongoing *Lucchetti* investor-state arbitration on the ground that the concurrent inter-state arbitration had interpretive authority.<sup>60</sup> The *Lucchetti* tribunal itself refused to suspend its proceedings, whereupon Peru ceased pressing its case against Chile.

The second case began after Ecuador disagreed with the tribunal's interpretation of the U.S.-Ecuador BIT's "effective means" clause in *Chevron v. Ecuador*.<sup>61</sup> The *Ecuador v. United States* tribunal declined jurisdiction, finding that in fact there was no dispute between the two states as to the correct interpretation of the "effective means" provision of their BIT.<sup>62</sup>

A further example of private and public interests intertwining at a public-public level is when state-owned enterprises ("SOEs") act as claimants.<sup>63</sup> SOEs increasingly are active in foreign direct investment flows, with 550 state-owned cross-border

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<sup>57</sup> *Italy v. Cuba*, Final Award, *supra* note 56 at ¶¶ 144–69.

<sup>58</sup> *Ecuador v. United States*, UNCITRAL, Permanent Court of Arbitration, Case No. 2012-5, Award, (Sept. 29, 2012), available at <https://www.italaw.com/sites/default/files/case-documents/italaw7940.pdf>.

<sup>59</sup> *Empresas Lucchetti, S.A. & Lucchetti Peru, S.A. v. Peru*, ICSID Case No. ARB/03/4, Award (Feb. 7, 2005), available at <https://www.italaw.com/sites/default/files/case-documents/ita0275.pdf>.

<sup>60</sup> *Id.* ¶¶ 7, 19.

<sup>61</sup> *Chevron v. Ecuador*, UNCITRAL, Permanent Court of Arbitration, Final Award (Aug. 31, 2011), available at <https://www.italaw.com/sites/default/files/case-documents/ita0154.pdf>.

<sup>62</sup> *Ecuador v. United States*, *supra* note 58, at ¶¶ 207, 227–28.

<sup>63</sup> See generally, Albert Badia, PIERCING THE VEIL OF STATE ENTERPRISES IN INTERNATIONAL ARBITRATION 157–60 (2014); Mark Feldman, *State-Owned Enterprises as Claimants in International Investment Arbitrations*, 31 ICSID REV. 24, 24–25 (2016).



entities in possession of more than US\$2 trillion in assets.<sup>64</sup> Despite the outward appearance of public-public dispute—i.e., SOE v. host state—ISDS tribunals have adopted and applied the test outlined by ICSID’s chief architect, Aron Broches, which seeks to determine jurisdiction based on whether the activity in question was commercial or sovereign in nature. For example, in assessing whether a state-owned claimant had standing under Article 25(1) of the ICSID Convention, the *Ceskoslovenska Obchodni Banka, A.S. (“CSOB”) v. Slovakia* tribunal wrote:

[I]t cannot be denied that for much of its existence, CSOB acted on behalf of the State in facilitating or executing the international banking transactions and foreign commercial operations the State wished to support and that the State’s control of CSOB required it to do the State’s bidding in that regard. *But in determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on the nature of these activities and not their purpose.* While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental policies or purposes of the State, *the activities themselves were essentially commercial rather than governmental in nature.*<sup>65</sup>

More recently, in *Beijing Urban Construction Group v. Yemen*,<sup>66</sup> the tribunal upheld the application of the Broches test, hence in line with CSOB, and found that state-owned Beijing Urban Construction Group (“BUCG”)’s participation in an airport project was that of a commercial contractor and not as an agent of the Chinese government. Notably, the tribunal also found that the Chinese government’s role as the ultimate decision-maker was irrelevant.<sup>67</sup>

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<sup>64</sup> UNCTAD, *World Investment Report 2014, Investing in the SDGs: An Action Plan*, 20 (2014), available at [https://unctad.org/en/PublicationsLibrary/wir2014\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2014_en.pdf).

<sup>65</sup> *Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 20 (May 24, 1999) [hereinafter CSOB], available at <https://www.italaw.com/sites/default/files/case-documents/ita0144.pdf> (emphasis added).

<sup>66</sup> *Beijing Urban Const. Group Co. Ltd. v. Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction (May 31, 2017), available at <https://www.italaw.com/sites/default/files/case-documents/italaw8968.pdf>.

<sup>67</sup> *Id.* ¶ 43.



Similarly, in *Masdar Solar & Wind Cooperatief v. Spain*,<sup>68</sup> the tribunal adopted the CSOB reasoning and was unprepared to accept the respondent's submission that the dispute was between two states, finding that Masdar did not exercise a public function prerogative, nor that the United Arab Emirates exercised control over the claimant and its investment decisions.<sup>69</sup> Accordingly, the upfront sovereign versus commercial distinction as a jurisdictional requirement for disputes involving SOEs as claimants ensures that the dispute is treated as a private-public one.

#### IV. THE PROSPECTS FOR "INVESTOMERCIAL" ARBITRATION

Taking stock of the ISDS landscape, it is clear that we are experiencing the winds of change. Reform efforts are being discussed and debated before UNCITRAL's Working Group III.<sup>70</sup> Some changes are organic. ICSID, exercising leadership as an ISDS institution, is undergoing its fourth Arbitration Rules amendment process.<sup>71</sup> Other leading arbitral institutions also have revised their arbitration rules.<sup>72</sup> Investment agreements, such as Chapter 14 of the new Canada-United States-Mexico Agreement ("CUSMA"), are continuing to be negotiated and concluded.<sup>73</sup>

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<sup>68</sup> *Masdar Solar & Wind Cooperatief U.A. v. Spain*, ICSID Case No. ARB/14/1, Award (May 16, 2018), available at <https://www.italaw.com/sites/default/files/case-documents/italaw9710.pdf>.

<sup>69</sup> *Id.* ¶¶ 170–72.

<sup>70</sup> See, e.g., UNCITRAL, Working Group III: Investor-State Dispute Settlement Reform, 37<sup>th</sup> Session 1–5 April 2019, New York, available at [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state).

<sup>71</sup> The first two amendment processes were in 1984 and 2003, which resulted in relatively modest changes. The third amendment process took place from 2004–2006. On October 7, 2016, ICSID began its fourth process and, in December 2018, ICSID closed a second round of public consultations. ICSID, *The ICSID Rules Amendment Process*, available at <https://icsid.worldbank.org/en/documents/about/icsid%20rules%20amendment%20process-eng.pdf>.

<sup>72</sup> See, e.g., ICC Rules of Arbitration in 2012 and 2017, SCC Arbitration Rules in 2010 and 2017, CIETAC Arbitration Rules in 2012 and 2015, ICDR International Dispute Resolution Procedures in 2014.

<sup>73</sup> Canada-United States-Mexico Agreement ("CUSMA"), signed Nov. 30, 2018, Chapter 14: "Investment," available at <https://international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-14.pdf>.



Other suggested changes, however, are more disruptive to the *status quo*. South Africa, India, Indonesia, Venezuela, Bolivia, and Ecuador have decided to either terminate, re-negotiate, or not renew BITs.<sup>74</sup> In 2017, more international investment agreements were terminated (22) than were concluded (18).<sup>75</sup> More recently, to facilitate conclusion of the 11-member Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”),<sup>76</sup> New Zealand signed five side letters with Australia, Brunei Darussalam, Malaysia, Peru, and Vietnam excluding compulsory ISDS.<sup>77</sup> It is a well-known fact that the European Union (EU) is seeking to establish a permanent Investment Court System.<sup>78</sup> Recently, on January 15 and 16, 2019, representatives of the EU took a small step towards ending the BIT regime as we know it. Three political declarations were issued which addressed consequences of the European Court of Justice’s *Slovak Republic v. Achmea* decision in relation to intra-EU BITs. The core declaration, signed by 22 members, pledged to “terminate all [intra-EU] bilateral investment treaties” and put the international community on notice that

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<sup>74</sup> Charles N. Brower & Jawad Ahmad, *Why the “Demolition Derby” that Seeks to Destroy Investor-State Arbitration?*, 91 S. CAL. L. REV. 1139, 1144–53 (2018) [hereinafter Brower & Ahmad].

<sup>75</sup> UNCTAD IIA Issues Note, *Recent Developments in the International Investment Regime* (May 2018) at 2 available at [https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf).

<sup>76</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”), Dec. 30, 2018, Chapter 9, available at <https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Pages/official-documents.aspx>.

<sup>77</sup> Two versions exist: (1) full exclusion (Australia and Peru (no former BIT, so ISDS practice remains the same) and (2) escalation approach (Brunei Darussalam, Malaysia, Viet Nam). See generally Brenda Horrigan & Vanessa Naish, *New Zealand Signs Side Letters with Five CPTPP Members to Exclude Compulsory Investor-State Dispute Settlement*, Herbert Smith Freehills Arbitration Notes (May 9, 2018), available at <https://hsfnotes.com/arbitration/2018/05/09/new-zealand-signs-side-letters-with-five-cptpp-members-to-exclude-compulsory-investor-state-dispute-settlement/>.

<sup>78</sup> See also, European Economic and Social Committee, *Opinion of the European Economic and Social Committee on ‘Recommendation for a Council Decision authorizing the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes’*, OFFICIAL JOURNAL OF THE EUROPEAN UNION (Mar. 22, 2019), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017AE6154&from=EN>.



“no new intra-EU investment arbitration proceedings should be initiated,”<sup>79</sup> a stance shared in varying degrees by six more members in subsequent declarations.<sup>80</sup> Though some debate concerning the operability of the intra-EU BIT survival of sunset clauses remains,<sup>81</sup> a wholesale reset by the EU seems to be in the works. A point furthered by the EU and its Member States, who, on January 18, 2019, in advance of the UNCITRAL Working Group III meeting in April 2019, prepared a submission on “establishing a standing mechanism for the settlement of international investment disputes”<sup>82</sup> along with a “possible work plan” for Working Group III.<sup>83</sup> And even more recently, on January 29, 2019, Advocate General Bot of the European Court of Justice, upon a request from the Kingdom of Belgium, issued an opinion that the Investment Court System proposed in the Comprehensive Economic and Trade Agreement (“CETA”) is compatible with EU law.<sup>84</sup>

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<sup>79</sup> Declaration of the Member States of 15 January 2019 on the Legal Consequences of the *Achmea* Judgment and on Investment Protection, European Commission (Jan. 17, 2019) available at [https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties\\_en](https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en) [hereinafter 22 EU Member Declaration].

<sup>80</sup> Declaration of the Representatives of the Governments of the Member States of 16 January 2019 on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, Euro. Commission (Jan. 17, 2019) available at <https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf> [hereinafter 5 EU Member Declaration]; Declaration of the Representative of the Government of Hungary of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (Jan. 17, 2019), available at <https://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf> [hereinafter Hungary Declaration].

<sup>81</sup> Damien Charlotin & Luke E. Peterson, *Analysis: Four Additional Takeaways from Achmea-Related Declarations by EU Member States*, IA REPORTER (Jan. 17, 2019), <https://www.iareporter.com/articles/four-additional-takeaways-from-todays-achmea-related-declarations-by-eu-member-states/>.

<sup>82</sup> Submission of the European Union and its Member States to UNCITRAL Working Group III: Establishing a Standing Mechanism for the Settlement of International Investment Disputes (Jan. 18, 2019), available at [http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc\\_157631.pdf](http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf).

<sup>83</sup> Submission of the European Union and its Member States to UNCITRAL Working Group III: Possible Work Plan for Working Group III (Jan. 18, 2019), available at [http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc\\_157632.pdf](http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157632.pdf).

<sup>84</sup> Opinion of Advocate General Bot, ECLI:EU:C:2019:72 (Jan. 29, 2019), available at



Despite these changes, none of them take away from the fact that contract-based arbitration will persist as a favorable dispute resolution mechanism for certain cross-border matters.<sup>85</sup> In fact, the advent, if it occurs, of the EU investment court system, which excludes investors from any role in the appointment of its judges, who are to be appointed solely by states or international organizations composed exclusively of states, I predict will lead to greater resort to state contracts. Two of my respected peers in the field, Rudolf Dolzer and Christoph Schreuer, explain:

Large-scale investments may last for decades. They involve interests of the investor, as well as the public interests of the host state. General legislation of the host country may not sufficiently address the nature of the project and the kind of interests concerned. The legal setting of an investment may need to be adjusted to its specifics and complexities by way of an investment contract. The investment contract will also reflect the bargaining power of both sides under the circumstances of the individual project. Therefore, investors and host states often negotiate investment agreements. Not surprisingly, no general pattern applicable to all situations has emerged in practice.<sup>86</sup>

Moreover, and despite a pattern of uniformity, an empirical study from 2013 reveals that contract-based arbitrations are settled more frequently than treaty-based arbitrations.<sup>87</sup> The authors suspected the difference is owed to greater certainty in outcome when compared to investment treaty-based arbitrations.<sup>88</sup>

As we progress through these tumultuous times of reflection and reform, I fall back on the thesis of this Keynote, which is to implore you to view all investor-state dispute fora as “investomercial” arbitrations. One must see through the “false

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<http://curia.europa.eu/juris/document/document.jsf?docid=210244&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=9637024>.

<sup>85</sup> See, e.g., Brower & Ahmad, *supra* note 74; Charles N. Brower & Jawad Ahmad, *From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court*, 41 *FORDHAM INT’L L.J.* 791 (2018).

<sup>86</sup> DOLZER & SCHREUER, *supra* note 11 at 79.

<sup>87</sup> Roberto Echandi & Priyanka Kher, *Can International Investor-State Disputes be Prevented? Empirical Evidence from Settlements in ICSID Arbitration*, 29 *ICSID REV.* 41, 52 (2014).

<sup>88</sup> *Id.* at 52–53.



trichotomy” and better analyze our reform efforts. For example, plural-hatting, which refers to the practice of simultaneously combining the roles of arbitrator, counsel, expert, or secretary in different cases, is a topic of heated debate within the international arbitration field.<sup>89</sup> Without weighing in on the various merits or demerits of the practice, if rules are to develop, they ought to be purposeful, principled and inclusive. One way to achieve that end is to view the alleged conflicting relationships through the “investomercial” lens in order most effectively to evaluate whether the individual’s roles relate to all forms of private-public dispute settlement.<sup>90</sup> To accept otherwise would mean we are fooling ourselves and turning a blind eye to the problem that is the “false trichotomy.”

## V. CONCLUSION

The hybrid nature of private-public arbitration means it is not wholly divorced from private-private or public-public “investomercial” disputes because, while superficially they may appear to be different, underneath they are the same.

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<sup>89</sup> Malcolm Langford et al., *The Revolving Door in International Investment Arbitration*, 20 J. INT’L ECO. L. 301 (2017).

<sup>90</sup> On October 25, 2018, in the annual address the President of the International Court of Justice (ICJ) to the General Assembly, President Yusuf announced that the Court has adopted new restrictions on its sitting Members acting as arbitrators in inter-state and mixed arbitration. Particularly, he said “they will not participate in investor-state arbitration or in commercial arbitration.” Abdulqawi A. Yusuf, Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly, Oct. 25, 2018, at 12, available at <https://www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf> [hereinafter Yusuf]. The ICJ’s change of direction follows a report released by the International Institute for Sustainable Development in November 2017 highlighting that sitting ICJ judges had acted as arbitrators in 90 investor-state disputes. Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, *Is “Moonlighting” a Problem? The Role of ICJ Judges in ISDS*, International Institute for Sustainable Development Commentary (Nov. 2017), available at <https://www.iisd.org/sites/default/files/publications/icj-judges-isds-commentary.pdf>. President Yusuf explained the reason for the new restriction is to address the increasing workload at the ICJ, but the effect removes the possibility of “double-hatting.” Yusuf, at 11-12. Notably, sitting ICJ judges are still permitted to sit on non-ICJ inter-state arbitrations. Since traditional forms of dispute resolution (i.e., diplomatic protection of foreigners; mixed-claims commissions) and certain international investment agreements contemplate state-to-state dispute settlement, the newly implemented restrictions do not preclude the possibility that “investomercial” disputes will be arbitrated by sitting Members of the ICJ.



Contract-based arbitration is a seasoned, effective, decentralized, *ad hoc* means of resolving disputes. The current growing pains faced in the investment arbitration world raise serious questions regarding the consistency and legitimacy of investment protection in light of a state's right to regulate, which contribute to greater uncertainty in global economic governance. ICSID was established in 1966. It took six years before the first dispute was registered with ICSID. Within its first 34 years of existence, ICSID awards were issued in only 31 cases.<sup>91</sup> In short, it took a long time before ICSID was accepted as a leading institution to resolve investment disputes. Presently, however, there are 154 States Parties to the ICSID Convention.<sup>92</sup> All 28 members of the EU recently declared inapplicable all intra-EU treaties that include ICSID arbitration clauses as means to resolve foreign investment disputes despite long-time ICSID membership and co-existence of the intra-EU treaties and Union law.<sup>93</sup> Now, it is safe to say we are experiencing that the "fix" is in. The EU-proposed investment court system, should it not die, as incidentally I hope it will, is not a panacea for investomercial disputes. Rather, it is an idea, in my view a very bad one, certainly an idea that has an unclear future. Ironically, that investment court system is advertised to enhance certainty and predictability, yet it would create uncertainty by its very existence. Will this lead to a global "FDI chill?" My answer is "Yes." Investors, not wishing for their disputes to be decided by a "kangaroo court" composed only of judges appointed by putative respondents, rather than, as now, tribunals to the constitution of which they contribute equally with their state respondents, will do one of three things: (1) they may decline to invest, to the disadvantage of states in need of foreign investment; (2) if they can, they will negotiate a contract with the state, but to the extent the terms they are able to negotiate do not give them the desired substantive and procedural protections, especially an

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<sup>91</sup> ICSID Statistics, *supra* note 10, at 7.

<sup>92</sup> ICSID, *List of Contracting States and Other Signatories of the Convention*, available at <https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx>.

<sup>93</sup> 22 EU Member Declaration, *supra* note 79; 5 EU Member Declaration, *supra* note 80; Hungary Declaration, *supra* note 78. Of the 28 signatories, only Poland is not a Member to the ICISD Convention.



acceptable arbitration clause, the consequently higher risk element built into the price they charge the state will mean that the state will spend that much more for the investment than it otherwise would have had to pay, again to the disadvantage of states in need of foreign investment; or (3), in the absence of the ability to negotiate a contract with the state that grants it any protection at all, *i.e.*, if forced to rely on the investment court system, here, too, the consequently higher risk element built into the price they charge the state, in the event they do decide to invest, will mean that the state will spend far more for the investment than it otherwise would have had to pay, once more to the disadvantage of states in need of foreign investment. So, the bottom line is that the EU's dream of a permanent investment court system is inherently anti-foreign investment, as it will, at worst, prevent it, and, at best, make it much more expensive, hence the poor will pay more to get less, because host states wish to insulate their treasuries from potentially valid legal claims.



**THE HONORABLE CHARLES N BROWER** has been a Judge of the Iran-United States Claims Tribunal in The Hague since 1983 and has served as Judge *Ad Hoc* of the Inter-American Court of Human Rights. He has been Acting Legal Adviser for the US Department of State, Deputy Special Counsellor to the President of the US, and a member of the US Secretary of State's Advisory Committee on Public International Law, of the Register of Experts of the United Nations Compensation Commission and the Panels of Arbitrators and Conciliators of the International Centre for Settlement of Investment Disputes. He is a past President of the ASIL and Chair of the Advisory Board of the ITA. He is a former partner and Special Counsel at White & Case LLP in both New York City and Washington, D.C., where he handled litigation in federal and state courts throughout the U.S., including jury trials, bench trials, and appeals, in a wide range of civil, administrative, and criminal proceedings, while specializing during the last 30 years in the handling of disputes involving States or State entities before international courts, tribunals and commissions. He is also a member of 20 Essex Street Chambers in London. In 2009 Judge Brower was awarded the American Society of International Law's Manley O. Hudson Medal for "pre-eminent scholarship and achievement in international law ... without regard to nationality," and in 2010 received the Stefan A. Riesenfeld Award of the University of California Berkeley School of Law (Boalt Hall) in recognition of "outstanding achievements and contributions in the field of international law." He is a past President of the American Society of International Law (1996-1998), and a past Chairman of the Institute for Transnational Arbitration (1994-2000), which bestowed on him its "Pat Murphy Award" in 2013. In 2015, he became the fourth recipient of the Global Arbitration Review's Lifetime Achievement Award.



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