Chapter 8

ARBITRATION INVOLVING STATES

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I. INTRODUCTION

Even though arbitrations between States and commercial enterprises is a relatively new phenomenon in the history of international arbitration, such arbitrations have taken place for a long time. Generally speaking, arbitrations between States and companies started to become prominent after the Second World War. Since then all aspects of modern life have gone through a remarkable globalization, including the areas of trade, finance and investment. The practical importance of such arbitrations[1] is beyond any doubt today. In many former socialist countries, foreign trade was a State monopoly, thus by definition engaging the State and/or State enterprises in commercial activities. In other countries, developing and developed, the State and State enterprises have to varying degrees been engaged in international trade and finance. Such participation has occasionally led to disputes which are often settled through arbitration.

During the last 5–8 years there has been a dramatic increase in the number of State arbitrations. No official statistics are available to confirm this statement, but this is certainly the general perception of

[1] In this chapter I shall use the term "State arbitrations" for arbitrations between States and/or State enterprises, on the one hand and commercial enterprises, on the other. Needless to say, it is often necessary to make a distinction between the State proper, on the one hand, and State enterprises and other agents/representatives of the sovereign, on the other. For the purposes of this chapter, however, it is not necessary to dwell further on this important issue.

arbitration lawyers in most parts of the world. As I see it, this is the result of two overlapping and interdependent developments, *viz.*, the transformation of the political and economic systems in Eastern Europe, including the former Soviet Union, and the significant increase in so-called investment arbitrations.

As far as *Eastern Europe* is concerned the most dramatic aspect is perhaps the dissolution of the Soviet Union resulting *inter alia* in more than a dozen new States. All the former republics of the Soviet Union have become independent States. All of them are now participants in international trade and finance, albeit to varying degrees. The new States and their State owned entities are actively trying to entice foreign investments in their economies, in particular perhaps in the oil and gas sector and with respect to other natural resources. The opening up of the economies of Eastern Europe has made such markets much more interesting for foreign investors than was the case in the past. Many of the new States have signed bilateral investment protection treaties ("BITS") as well as other treaties addressing other aspects of foreign investment. Such investment treaties often include arbitration provisions which allow investors to initiate arbitration proceedings against the host State.

The other development – *investment arbitration* – is primarily the result of the spectacular growth of foreign investment in general during the past few decades. This has in turn led to a dramatic growth in the number of BITS. It is believed that around 2000 BITS are in force today. Most of them have provisions providing for arbitration as the dispute settlement mechanism with respect to disputes between the investor and the host State. In addition to BITS there are several multilateral agreements dealing with foreign investment and the protection thereof. One of the more important multilateral agreements is the North American Free Trade Agreement (NAFTA) entered into by Canada, Mexico and the United States in 1994. While there are several dispute settlement mechanisms in the NAFTA, it is particularly Chapter 11 which is of interest in the present context. Chapter 11 sets out specific standards for the treatment of foreign investments and lays down detailed arbitration

provisions. Chapter 11 of the NAFTA has generated several arbitrations, many of which have been widely discussed and debated.

Another multilateral treaty of significance is the Energy Charter Treaty signed in 1994 by some 50 States. Part III of the Energy Charter Treaty addresses the promotion and protection of investment. The arbitration provisions are found in Articles 26 and 27, the former dealing with disputes between investors and the host State.

A third important multilateral treaty is the Mercosur (the Common Market of the Southern Cone) which through its Colonia Protocol and the Buenos Aires Protocol provide for arbitration between investors and host States.

The two developments briefly mentioned above have to a certain extent redrawn the map of international arbitration, in the sense that the number of arbitrations involving States and State entities has grown dramatically. This growth has brought about a situation which could fairly be characterized as a new era of State arbitration. It goes without saying that many problems and issues in State arbitrations are similar to those that arise in private commercial arbitration. On the other hand, it is equally clear that arbitrations involving States do present certain distinctive features, primarily as a result of the simple fact that one of the parties is a State, or a State entity, rather than a commercial enterprise. Such distinctive features include the political considerations which usually play an important role, mostly for the State in question, but sometimes also for the commercial enterprise. As far as the State is concerned such considerations may sometimes make it more difficult to reach an amicable settlement of the dispute. Another characteristic feature of State arbitrations is the fact that time periods for submissions are usually longer than in private commercial arbitration. This is often explained by the need of the representatives of the State to observe internal administrative procedures before submissions can be made and positions taken in the dispute in question. A third distinctive feature of State arbitrations is – or at least has been – the importance attached to the question of the applicable substantive law, in particular the interplay between public international law and municipal legislation.

Many of the distinctive features referred to above have been discussed and analyzed in detail by practitioners and scholars alike. In fact there is a wealth of literature addressing the different characteristics of State arbitrations, indeed too voluminous even to mention in a meaningful footnote. The purpose of my chapter is not to discuss – again – these distinctive features. I have rather tried to identify some aspects of State arbitrations which have proved to be particularly problematic and relevant to the new era of State arbitrations. While some of these aspects may be well-known to the experienced arbitration lawyer, it is submitted that there may now be a need to look at them in a different light. The following three aspects will be addressed below:

- State immunity;
- Confidentiality v. Publicity; and
- The growing importance of public international law

I shall discuss these three aspects from the perspective of the international arbitrator. This perspective is by no means irrelevant for the parties to State arbitrations, nor for their representatives. On the contrary, it is highly relevant. For counsel involved in State arbitrations, it is essential to understand the perspective of the international arbitrator. Only then will counsel be able to structure and present their respective cases in the most efficient and convincing way. After all it is the task of counsel to convince the arbitrators of their respective cases.

II. STATE IMMUNITY – OLD WINE IN NEW BOTTLES?

A. Introduction

As mentioned above States and State enterprises are to an ever-growing extent participating in international trade and other commercial and economic transactions. One aspect of practical

importance which continues to create problems is that of State immunity. The question of State immunity and international arbitration is certainly not a new issue, but has rather been addressed by practitioners and scholars alike on many occasions.[2] This notwithstanding, many aspects of this issue remain unresolved. Most of the unresolved issues do not *directly* concern the international arbitrator. Typically, they arise only when the award has been rendered and when the winning side is seeking to enforce the award. While arbitrators generally have the ambition – some commentators would even say that it is a duty – to render valid and enforceable awards, once an award has been rendered, measures taken with respect to the award are typically beyond the control and authority of the arbitrators. On the other hand, there are situations when questions of State immunity arise also for the arbitrators. Given the fact that State immunity is one of the most traditional topics of public international law, and also of private international law, it is perhaps surprising that it still presents problems in State arbitrations. This is probably explained by the fact that many aspects, as mentioned above, of State immunity remain unresolved and also by the fact many of the newly independent States, referred to above, are inexperienced in matters concerning State immunity.

B. Background

State immunity is based on the concept of sovereignty in the sense that a sovereign may not be subjected without its approval to the jurisdiction of another sovereign. In most Western and industrialized countries today the notion of restrictive State immunity is broadly endorsed. In the former Soviet Union, certain other former socialist States and in some developing countries, however, the

[2] For a comprehensive discussion of State immunity, *see e.g.,* Badr, State Immunity: An Analytical and Prognostic View (1984) and Schreuer, State Immunity: Some Recent Developments (1988).

opposite and more traditional view was usually adhered to *viz.*, the doctrine of absolute State immunity.[3]

The theory of *restrictive State immunity* rests on the distinction between commercial activities (*acta jure gestionis*) and sovereign activities (*acta jure imperii*). A State enjoys immunity only for the latter category of acts. In other words, if a State engages in commercial activities it does not enjoy immunity with respect to such activities. Even though the principle of restrictive immunity is easily formulated and generally accepted, there are a number of open questions. One such question is to what extent immunity is, or perhaps should be, restricted when it comes to execution of court judgments and arbitral awards against assets of the State. Also, it is not always without problems to distinguish between commercial and sovereign acts. In fact, much of the debate during the last decades has focused on how to make this distinction.[4]

The theory of *absolute State immunity* is based on the idea that no suit may be brought against a State without its consent. As far as Soviet law was concerned, this theory was based on the assumption that the State, the sovereign, is always one: it is always one single subject, although the manifestations of its legal personality may be manifold. It does not lose its sovereignty by entering into commercial transactions, be they in the form of contracts, or otherwise. The State continues to act as a sovereign, now in the economic field.

An important issue in this context is what exactly constitutes a waiver of State immunity. Of particular interest is the meaning and effect of an arbitration clause in relation to State immunity. The generally held view today is that an arbitration clause constitutes waiver of immunity from the *jurisdiction* of foreign courts exercising

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[3] *See e.g.* Boguslavskij, Mezhdunarodnoe chastnoe pravo (Private International Law) (1989) 148–154, 178–182.

[4] *See e.g.*., Badr, *op. cit.* at 34 *et seq.* and Schreuer, *op.cit.* at 10 *et seq.* – Several attempts have been made in municipal codifications, and otherwise, to define "commercial acts," *see* e.g. Section 3(3) of the British State Immunity Act; Section 1603(d) of the US Foreign Sovereign Immunities Act; Article 2(1)(g) of the International Law Commission Draft Articles on State Immunity, and Article IC of the Draft Convention prepared by the International Law Association.

their ancillary role in international arbitration and that the ancillary role extends to the declaration of enforceability of an arbitral award. In several legal systems it is, however, still an open question whether such waiver should extend also to the execution of an arbitral award. On this issue, French Courts have issued two relatively recent decisions which are of particular interest. In *Creighton v. Qatar*[5] the French Court of Cassation ruled that a State, by signing an ICC arbitration clause – including the undertaking to carry out the award in accordance with the terms of Article 24 of the ICC Rules of Arbitration – has, at least implicitly, waived its immunity from execution. Article 24 of the ICC Rules of Arbitration (then in force) provides in its second paragraph that "by submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made." [6] Generally speaking, it is fair to say that the decision in *Creighton v. Qatar* is well in line with the general trend towards minimizing the impact of state immunity on international commercial arbitration from the very beginning of the proceedings until and including the enforcement of the resulting award.

The other French decision is that of the Paris Court of Appeal in *Embassy of the Russian Federation v. Compagnie Noga d'importation et d'exportation*.[7] In this case the Russian Federation had signed not only an arbitration clause – providing for arbitration at the Stockholm Chamber of Commerce – but also an express waiver "of any right of immunity." This notwithstanding, the Paris Court of Appeal ruled that such an explicit waiver did not extend to the immunity from execution guaranteed by the 1961 Vienna Convention on Diplomatic

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[5] The decision was rendered on 6 July 2000. An English translation appears in Mealey's International Arbitration Report, September 2000 at A–I.

[6] A similar provision is found in Article 28 of the revised ICC Rules which took effect on 1 January 1998.

[7] Case No. 2000/14157, Paris Court of Appeal, 1st Chamber, Section A (unpublished). The decision was rendered on 10 August 2000.

Relations and by customary international law on diplomatic immunities. Consequently, the Court of Appeal ordered the lifting of arrest orders obtained by Noga with respect to bank accounts opened in the name of the Russian Embassy and other diplomatic entities of the Russian Federation. Given the ruling in *Creighton v. Qatar*, it will be interesting to see if the Court of Cassation will uphold the distinction carried out by the Paris Court of Appeal.

In the Russian Federation and other former socialist States there is a clear trend away from the theory of absolute immunity towards restrictive immunity. However, in many of the former republics of the Soviet Union, and some former socialist States, as well as in developing countries, the law of State immunity remains shrouded in mystery.

As far as the former Soviet Union is concerned, with the exception of the three Baltic States, it is, generally speaking, fair to say that the former republics closely follow the development of Russian law and often adopt solutions identical, or similar, to those adopted by the Russian legislator. It is therefore of particular interest to monitor the development of Russian law. While there is a clear trend away from the absolute theory of State immunity in Russian law, as will be explained in the following, the Russian legislator has still not adopted any legislative act in this field which confirms that the restrictive theory has been adopted. The situation is similar in most other former republics. This means that the traditional approach – absolute immunity – continues to color the thinking of lawyers and State officials, since it has not been officially repealed, nor officially replaced by the theory of restrictive immunity.

There are two basic provisions in Russian law addressing State immunity, *viz.*, Article 435 of the RSFSR Code of Civil Procedure, of 16 June 1964, which remains in force in the Russian Federation, and Article 213(1) of the Code of Arbitrazh Procedure of 5 May 1995.[8]

[8] It must be noted that the Arbitrazh courts, whose activities are governed by the Code of Arbitrazh Procedure, have nothing to do with arbitration, but are rather specialized State Courts for commercial and economic disputes.

While the wording – and possibly the scope – of both provisions is different, they are both based on the theory of absolute State immunity. Article 124(1) of the Russian Civil Code could be viewed as heralding a new approach in that it stipulates that the Russian Federation "shall act in relations regulated by civil legislation on equal principles with the other participants of these relations – citizens and juridical persons." Article 127 of the Civil Code also provides for a law on State immunity to be adopted. As mentioned above, however, no such law has been adopted. On the other hand, two draft laws on State immunity have been prepared. Both drafts are based on the theory of restrictive immunity.[9] The trend away from absolute immunity was also confirmed by president Yeltsin in May of 1998 in an opinion on a draft law sent to the chairman of the State Duma.[10] The opinion was prepared with respect to a Draft Law On the Administration of State Foreign Financial Assets Inherited by the Russian Federation. While the opinion is not a wonder of clarity, it is clear that the approach taken in it is based on the theory of restrictive State immunity. The most recent confirmation of the aforementioned trend is a so-called information letter issued by the Presidium of the Supreme Arbitrazh Court of the Russian Federation.[11] In the information letter comments are provided with respect to two actual court cases involving embassies in Moscow. In effect the Presidium of the Supreme Arbitrazh Court has accepted the theory of restrictive immunity. This is particularly interesting since the Code of Arbitrazh Procedure, as mentioned above, prescribes absolute immunity.

It follows from the brief account above that Russian law is moving away from the theory of absolute State immunity. In my

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[9] For a discussion of the two drafts, *see* Bykhovskaya, State Immunity in Russian Legislation and Judicial Practice, MS (to be published in) Uppsala Yearbook of East European Law 2003 (2003) 9–16.

[10] *Ibid.,* at 4–9.

[11] *Ibid.*,, at 16–19 – Information Letters are regularly issued by the two Supreme Courts of the Russian Federation, i.e. the Russian Supreme Court and the Supreme Arbitrazh Court. Such letters are mainly of an explanatory nature. They include overviews of recent decisions of the Supreme Courts and provide lower courts with instructions on how to interpret and apply statutory provisions.

view, it is reasonable to assume that other former republics will sooner or later follow suit. For the time being, however, the law of State immunity – as so many other matters in the former Soviet Union – is in a transitional stage. This is undoubtedly one reason why issues of State immunity tend to create problems in arbitrations involving States from this part of the world.

C. State Immunity and the International Arbitrator

Surprising as it may sound, it is not unusual that States, and State entities involved in international commercial arbitrations, or counsel representing them, rely on State immunity seeking to avoid the arbitration. The argument is that the arbitrators lack jurisdiction since the State enjoys immunity.

While such arguments and objections may require a certain amount of time to address and resolve, from the perspective of the arbitrators they do not constitute a problem from a legal point of view. It is since long accepted that arbitrators derive their authority from the arbitration agreement entered into by the parties. The arbitrators sit there because the parties have agreed to put them there. Arbitrators do not represent any sovereign, nor the interests of any sovereign. In most legal systems arbitrators do not, and cannot, exercise any State authority, but only the authority given them by the parties. Arbitration is thus an entirely private dispute settlement mechanism and the proceedings before the arbitrators have nothing to do with the exercise of State authority. Consequently, for a sovereign State involved in international arbitration, there is simply nothing to be immune from. Accordingly, if a sovereign State, which has entered into a contract providing for arbitration pleads immunity before an arbitral tribunal, such an objection must be rejected. The resulting award will not be either void or challengeable because of such rejection.

In addition to the simple fact that there is nothing to be immune from, the conclusion mentioned above also follows from the well-known Latin maxim *pacta sunt servanda*. In many, if not most, jurisdictions, an arbitration clause is regarded as an implicit waiver

of immunity from suit. The commitment made by the sovereign State when accepting arbitration is thus binding and irrevocable. To put it in somewhat dramatic terms: a sovereign State must be sovereign enough to make a binding promise. Accepting that a promise to arbitrate requires "confirmation" by the sovereign State before the tribunal would in fact be to undermine the sovereignty.

As mentioned above, it is generally accepted that there is no room for pleas of immunity before arbitral tribunals. There is widespread support for this in many arbitral awards and scholarly writings. This also follows from the ICSID Arbitration Rules. In the 1965 Washington Convention itself, Article 25(1) provides that consent to ICSCD arbitration, once given, cannot be unilaterally revoked. Consent to ICSID arbitration therefore constitutes an irrevocable waiver of immunity from the jurisdiction of the arbitral tribunal.

An issue which is sometimes mentioned in connection with State immunity is the Act of State doctrine. Surprisingly often the argument is still made that since a particular transaction, or measure, is "sovereign" in nature, or is within the exclusive authority of the State, it cannot be tried by an arbitral tribunal. This is not the place to discuss the details of, or the philosophy underlying, the Act of State doctrine. Suffice it to say that, for the same reasons as mentioned above, there is nothing in this doctrine which would prevent an arbitral tribunal from trying matters purportedly covered by the doctrine. In fact, it is hard to see that the Act of State doctrine has anything to do with State immunity. The latter concept is strictly speaking of a procedural nature, whereas the Act of State doctrine is focused on the substantive aspects of a dispute. If anything, the Act of State doctrine would seem to go to the arbitrability of a dispute, or certain aspects of a dispute. Generally speaking, however, when a State has consented to arbitration, it is difficult to see that particular aspects of the State's activities would be non-arbitrable, and thus beyond the jurisdiction of the arbitrators, simply because the State is involved, on the assumption, of course, that the activities in question are covered by the arbitration clause.

There is yet another situation where the issue of State immunity may become relevant for the arbitrators. The situation is the following: Let us assume that the State has made an objection as regards the validity of the arbitration agreement before the arbitral tribunal. The other party may then wish to have the validity issue determined by a court of law, either before or after the tribunal has ruled on the issue. Under many systems of law any party to an arbitration agreement may at any time submit the issue of the validity of an arbitration to a court of law, even while the arbitration proceedings are going on. Such a court action often does not *automatically* mean that the arbitration proceedings must be stayed, awaiting the decision of the court. This is a decision to be taken by the arbitrators. *If* the arbitrators decide to continue with the arbitration proceedings they do, of course, take a risk in the sense that time and money may have been spent in vain, if the court were to conclude that the arbitration agreement is invalid. It is quite possible that the State in question will raise the defense of State immunity in such *court proceedings*, arguing that it is immune from suit. In such a situation the arbitrators must evaluate the possibility of the State being successful in raising the question of State immunity before the court. *If* the State is indeed successful, it means that the court of law in question will not be able to try the objection, which in most cases means that it will be for the arbitrators to try it. On the other hand, if the State is not successful, the court of law will proceed with the case, in which case the arbitrators must assess the likelihood of the claimant being successful on the merits of the claim. As far the immunity aspect is concerned, it follows from what has been said above that an arbitration agreement will in most legal systems be viewed as a waiver of immunity from suit. It is thus unlikely that a plea of immunity will be accepted by a court of law in the situation described above.

It would seem that in the new era of State arbitrations, the issue of State immunity is being raised more often than one would have expected. For the international arbitrator, however, the current status of the law of State immunity is sufficient to resolve such issues. Thus,

while there seems to be a fair number of new bottles, the wine is still of old vintage.

III. CONFIDENTIALITY V. PUBLICITY

A. Introduction

Confidentiality and secrecy are traditional hallmarks of international commercial arbitration. They are often mentioned among the advantages of arbitration over litigation. Even though there have been some recent cases and discussions which could lead one to question the extent of confidentiality in international arbitration, most commentators would still agree that arbitration is confidential in nature. Under most systems this certainly applies to the proceedings as such, in the sense that no third party has the right to participate in them, unless the parties so agree.

When a State, or State institution, or State enterprise is a party to the arbitration the situation is often different. The fact that a State is involved often means that the issues in dispute are of a public nature and also of public interest. The issues under dispute are usually different, or at least broader, than in traditional commercial arbitration; there is always an element of State activity involved. On the other hand, while the dispute will raise issues of a commercial, regulatory, political and sometimes even of a cultural nature, the arbitrators will usually be asked to resolve only the commercial issues which are the disputed ones. Given the public nature of, and the public interest in, State arbitrations, it is perhaps not surprising that there have been demands from politicians, public interest groups and NGOs for greater openness and transparency in such arbitrations. This does, of course, militate against the traditional view that arbitration is confidential and secret.

Demands for openness and transparency have been made in particular with respect to arbitrations under NAFTA Chapter 11. Subsequent to its entry into force on 1 January 1994, claims for unfair treatment have been filed, *inter alia*, against the United States. Soon after the first cases were filed, voices were raised to the effect

that NAFTA arbitration undermines national prerogatives. In one article in the New York Times – much quoted in arbitration circles – NAFTA arbitration was described in the following manner:

> "Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged."[12]

As far as NAFTA arbitrations are concerned, it would seem that environmental activists and groups have been particularly active in voicing criticism. Such arbitrations have been described as "one-sided," "lacking transparency" and as "shockingly unsuited to the taste of balancing private rights against public rights."[13]

It is clear from the foregoing that there is a tension between the traditional principle of confidentiality in commercial arbitration and some form of transparency when States are involved in arbitration. This chapter is not the place to discuss whether or not international arbitration involving States – in particular perhaps in investment arbitrations – needs to be reformed such as to allow for some degree of publicity. I will rather focus on three aspects which in my view may be of particular importance for the international arbitrator. In so doing, I concentrate on aspects which are relevant against the background of the recent growth of State arbitrations. Below I shall discuss the following three aspects:

(i) The confidentiality of the arbitral procedure;
(ii) Involvement of third parties in State arbitrations; and
(iii) Arbitral awards as precedents.

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[12] New York Times, 11 March 2001, Section 3, at 1; similar views were expressed in an advertisement placed in the Washington Post with headings like "Secret Courts for Corporations" and "Taxpayer Dollars for Foreign Polluters," Washington Post, 5 December 2001, Section A, at 5.

[13] Mann, Private rights, public goods (2001) 46.

B. The Confidentiality of the Arbitral Procedure

As mentioned above, during the last couple of years there has been much discussion about confidentiality and international arbitration. While it has been debated to what extent arbitration is in fact, and in law, confidential, most commentators would seem to agree that the actual *proceedings* are confidential in the sense that only the parties – and other actors approved by them such as witnesses, experts and party representatives – have the right to participate in the proceedings. Most arbitration rules today stipulate that the hearings are to be *in camera*. As a matter of general principle it is up to the arbitrators – in particular the chairman – with the assistance of the parties to make sure that no "unauthorized" persons are present during the hearings. In practice this seldom seems to be a problem. If the parties agree, however, it is of course possible for non-parties to be present during the hearings. Needless to say, this requires the agreement of both, or all, parties. If there is no such agreement, the arbitration rules originally agreed by the parties will apply, which usually means that the hearings are to be held *in camera*.

When it comes to the representatives of the State party in the arbitration in question, an issue sometimes arises with respect to who the proper representatives are. The background is usually that the other party is concerned that "unauthorized" persons participate in the hearings. Objections of this nature may be raised for practical reasons, i.e. that such persons may increase the number of participants in the hearing so as to make the proper conduct of the hearing more difficult. Another, and more important, concern is the fear that the larger the number of participants in the hearing is, the greater the risk is of undermining the confidentiality of the hearings.

While such concerns may be wholly legitimate as a matter of general principle, it is generally accepted that in arbitrations involving States, the representative of the State will often have to report back to administrative and political bodies of the State. This is often the result of national legislation or internal administrative procedures. The representative of the State is simply under an obligation to do so. Even if the representative of the State is not under an obligation to

do so, it will often be necessary for him to inform his superiors with a view to obtaining instructions with respect to the conduct of the arbitration. It is thus clear that a wider group of people will usually be involved on behalf of the State, which typically threatens to undermine confidentiality. Indeed, most, if not all, arbitrations involving States are, in fact, semi-public. In my experience it is very little that the arbitrators can do about this. It is difficult to see that it is – as a general rule – part of the arbitrator's duties to make sure that the parties observe confidentiality outside the arbitration proceedings proper.

While it is a distinctive feature of State arbitrations that they are more or less semi-public, this fact is seldom of any direct consequence to the arbitrators. They must, however, be aware of this aspect since it may lead to complications in the arbitration, one such potential complication is the attempt by third parties, e.g. lobbyists, environmental activists and other public interest groups, to become involved in the arbitration.

C. Third Party Involvement in the Arbitration

It is clear – as a matter of fundamental principle of international arbitration – that only the disputing parties can be involved in the arbitration. No "outsider" can participate unless the parties agree. The quest for more openness and transparency may lead, and has in fact led, to demands from various interest groups to be allowed to participate in arbitrations. Some such groups would seem to seek standing as parties to the dispute; others seem to be content with a role as observers, but with the right and/or possibility to submit briefs and/or comments.

To allow such third-party involvement in arbitrations – without the consent of the disputing parties – would run counter to many of the basic principles and generally recognized advantages of arbitration. From the perspective of the arbitrators, to allow such intervention would not be wise, since under most systems of law it would make any resulting award challengeable, *inter alia*, on the

basis that the arbitrators have gone beyond the mandate given to them by the parties.

On the other hand, in some investment arbitrations it is perhaps not unreasonable to envision some form of third party involvement given the public interest in and public nature of such arbitrations. Such considerations may have guided two arbitral tribunals under NAFTA Chapter 11 to accept, at least in principle, that *amicus curiae* briefs may be submitted under Article 15 of the UNCITRAL Arbitration Rules.[14] It is doubtful if a traditional interpretation of this article really allows for this possibility. Both the language of the provision and its *travaux preparatoires* indicate that Article 15 deals with the *conduct* of the arbitration, as between the disputing parties. There may indeed be a need *de lege ferenda* for some form of third party participation in investment arbitrations, and perhaps in other State arbitrations; *de lege lata*, however, no such rules exist today, unless the parties so agree.

As far as investment arbitration is concerned it has been said that given the legitimate public interest in such arbitrations it is a *sine qua non* for the survival of this form of arbitration that some mechanism for third party involvement be found. On the other hand, from the investor's perspective such participation may significantly change the rules of the game in that, in addition to the State, the investor must also take on third parties whose primary interest may well be to *create publicity* around the dispute, rather than to resolve it. The parameters of the arbitration may thus change dramatically, which will in all likelihood increase the cost of the arbitration. In the end there may be a risk that third party participation in State arbitrations can serve as a disincentive to foreign direct investment. A consequence which typically would run counter to the aspirations of most host States.

[14] The two cases are *Methanex v. the United States*, and *UPS v. Canada, see* www.naftaclaims.com.

D. Arbitral Awards as Precedents

Another aspect of the confidentiality of international arbitration is the fact that, as a rule, few arbitral awards are made available to the public. Generally speaking, it is fair to say that one reason why parties choose arbitration is its private and confidential character. Unless the parties agree otherwise, an arbitral award is usually treated as confidential. As a result of this, few arbitral awards are in practice published, or otherwise made public, without the consent of the parties. This has always been the traditional ball-and-chain of scholarly research concerning international arbitration.[15] During the last two decades, however, the situation seems to have changed, with several arbitration institutions – including the International Chamber of Commerce and the Stockholm Chamber of Commerce – allowing publication of arbitral awards rendered under their auspices. ICSID is also encouraging parties to consent to publication of awards in the Foreign Investment Law Journal. Such endeavours notwithstanding, many, if not most, arbitral awards still remain confidential.

The public interest involved in State arbitrations have lead to increased demands for the publication of arbitral awards such that they may be used as precedents and/or guidelines for future disputes, or with respect to activities with a view to avoiding future disputes. Such demands have to a certain extent been reinforced by the fact that at least investment arbitration is a relatively new area of law where, it is said, there is a particular need for guidance.

From the arbitrator's perspective this State of affairs raises primarily two issues, *viz.*, (i) will the award he is about to render be used/treated as a precedent? and (ii) the use of previously rendered awards as precedents.

It should be noted at the outset that in international arbitration there is no principle of *stare decisis*, i.e. arbitral awards rendered by one tribunal are not binding on any other tribunal. This does not prevent arbitrators from reviewing and seeking guidance from awards dealing

[15] For a general discussion of this issue, *see* e.g. Hobér, Extinctive Prescription and Applicable Law in Interstate Arbitration (2001) 28 *et seq.*, with references.

with identical or similar issues. This seems to be the case to a larger extent with respect to State arbitrations, than in arbitrations between private commercial enterprises.

As to the *first issue*, mentioned above, the real question for the arbitrator, I submit, is: does it matter? Put differently: why should he draft the award in any other manner than in an arbitration between two private entities? As mentioned above, arbitration is consensual in nature, based, as it is, on the agreement of the parties. The arbitrators derive their authority from this agreement, and only therefrom. The task given to them by the parties is to decide the dispute presented to them. The duty of the arbitrator is not to find out the truth, but to decide the dispute on the basis of the facts and arguments presented by the parties. In other words: the arbitrators decide the dispute before them and nothing more.

It is not incumbent on arbitrators to ensure the uniform development of international law, unless the arbitrators have been so instructed by the parties, which of course, is highly unlikely. The arbitrators must take independent decisions in the individual case, based on the facts and arguments presented by the parties. In practice, the experienced and prudent arbitrator will make sure that the parties address issues and aspects which may have a bearing on avoiding inconsistencies in international law and arbitral practice, thereby making such issues and aspects part of the case before them.[16]

[16] As recent practice has shown there is a risk that different arbitral tribunals deciding cases which are based on the same fact pattern reach different conclusions. In the so-called *Lauder* cases two arbitral tribunals sitting on the basis of two different bilateral investment protection treaties reached different – and indeed inconsistent – conclusions with respect to the question of expropriation. The facts in the two cases were identical. The risk of inconsistent and even contradictory awards exists also when a government takes radical measures of a general nature affecting large groups of investors covered by different bilateral investment protection treaties. This was the case with the financial crisis in Russia in August of 1998 as well as with the current crisis in the Argentine. Both crises have resulted in investment arbitrations.

The *second issue* mentioned above, concerns the use by arbitrators of arbitral awards as precedents. One question of a preliminary nature which may arise for the arbitrators is whether they are entitled to take account of other awards and/or decisions than those relied on by the parties. The fundamental problem is this: since international arbitration is consensual in nature it must be up to the parties to determine the scope of the dispute both as to facts and law. It is thus far from self-evident that arbitrators have the right to decide a dispute on the basis of legal principles not raised – and consequently not argued – by the parties. There are different views among arbitration lawyers if – and to what extent – the principle of *iura novit curia* is applicable in international arbitrations. In my view it is very doubtful that the principle should be applied. If arbitrators apply this principle it results in the unfortunate situation that the award may come as a surprise to *both* parties – it is of course not unusual that it comes as a surprise to one of the parties – in the sense that the award is based on rules and/or principles which none of the parties has had an opportunity to address.

Let us assume, however, that the parties have indeed relied on and referred to arbitral awards as precedents. How should the prudent arbitrator treat such awards?

First of all it is important to take proper account of the facts and circumstances of the individual case relied on as a precedent. As mentioned above, most arbitrators see it as their duty to determine the dispute presented to them and nothing else. Unless the facts and circumstances of the case relied on as a precedent are identical, or at least substantially similar, the precedent value is typically doubtful.

Another important factor is the experience and prominence of the arbitrators. An award rendered by arbitrators having particular experience and knowledge of the issues resolved in the award would typically have greater weight than an award rendered by arbitrators who have no such experience and knowledge.

The existence of dissenting opinions should also be taken into account. Generally speaking, it would seem that a unanimous award should be given greater weight than an award with one or several dissenting opinions.

A further obvious factor to take into account is the date of the award. Older cases should typically be treated with greater caution than recent cases. In particular, it is important to ascertain whether older cases have been "overruled" and replaced by subsequent awards and/or whether the facts and circumstances have been overtaken by subsequent events and developments.

Yet another factor of importance is the extent to which the award has been accepted both by the parties and by scholars and commentators. An arbitral award which stands out as a peculiarity, either because the parties have refused to accept it, or because it has been heavily criticized by commentators, or both, is typically less important than an award which has been complied with by the parties and which has been widely accepted by commentators.

IV. THE GROWING IMPORTANCE OF PUBLIC INTERNATIONAL LAW

It is perhaps to restate the obvious to say that public international law plays an important role in State arbitrations. When States and State entities are involved in arbitrations, public international law, by definition, plays a role. The importance of it will of course vary depending on the facts of the individual case. When, for example, expropriation and/or expropriatory measures are the focus of a dispute, the rules and principles of international law relating to the protection of foreign investment will automatically play a central role. Likewise, in arbitrations based on treaties – e.g. BITS or other investment treaties – the rules and principles of international law relating to the interpretation of treaties will often be decisive. In this context the Vienna Convention On the Law of Treaties is of primary importance. Needless to say, it is essential that the international arbitrator is familiar with these areas of public international law.

There is yet another aspect of public international law which is increasingly becoming crucially important in State arbitrations, *viz.*, State responsibility in international law. It is generally accepted that the rules on State responsibility form part of customary international law. The law of State responsibility is in large part reflected in the

work of the International Law Commission (ILC) of the United Nations. At its fifty-third session in 2001, the ILC adopted its final version of the Draft Articles On Responsibility of States For Internationally Wrongful Acts. Commentators seem to agree that this is the most authoritative document on the law of State responsibility and therefore of particular importance to arbitrators involved in State arbitrations. The Draft Articles intend to cover all aspects of State responsibility under international law. Not all aspects thereof are, however, of immediate importance to the international arbitrator involved in State arbitrations.

In the new era of State arbitration – including investment treaty arbitrations, but also other arbitrations involving States – there is particularly one aspect of the law of State responsibility which has become of increasing importance, *viz.*, the attribution of conduct to States. The rules and principles pertaining to attribution of conduct to States have come to play an important role, partly because they are, generally speaking, quite far-reaching and partly because States, and their representatives, oftentimes seem to be unaware of them, and are consequently surprised when the opposing party is seeking to hold the State liable for certain conduct on the basis of such rules.

State responsibility plays a fundamental role in public international law. This topic in general, and the different versions of the ILC Draft Articles in particular, have generated a truly overwhelming amount of literature. In previous drafts, for example, the concept of "international crimes" played a central role, but also gave rise to conceptual difficulties as well as to much scholarly controversy, but eventually leading to its deletion from the Draft Articles. Within the framework of this chapter it is not possible to discuss all relevant aspects of the law of State responsibility. My ambition is a limited one, that is, to highlight one important aspect of the newly adopted final version of the ILC Draft Articles, *viz.*, the rules of attribution of conduct to States. Proceeding from the ILC Draft Articles, the law of State responsibility in this respect can be summarized as follows.

The starting point is that the State must be under an international obligation, for example, as a result of a treaty. Further, the Draft

Articles define a breach of an international obligation as an act of the State in question not being in conformity with what is required of it by that obligation.

Another key concept in the ILC Draft Articles is that of an internationally wrongful act. Article 2 of the Draft Articles defines such an act as conduct – both action and omission – which is attributable to the State under international law *and* constitutes a breach of an international obligation of the State.

Before discussing the rules of attribution, it is important to emphasize that the characterization of an act as internationally wrongful is made on the basis of *international law*, irrespective of how such act is characterized by municipal law. One obvious – but to some States apparently very surprising – consequence of this fundamental rule is that even though a particular act is lawful under municipal legislation, it may nevertheless constitute a violation of an international obligation of the State in question.[17]

The basic rule of attribution is set forth in Article 4 of the Draft Articles. It addresses *conduct of organs of a State*. This provision stipulates that the conduct of any State organ, whether exercising legislative, executive, judicial or any other function shall be considered an act of that State under international law, irrespective of the position the organ in question holds in the organization of the State and whatever its character as an organ of the central government, or of a territorial unit of the State.

The Draft Articles also regulate the *conduct of persons or entities* which are not an organ of the State, but which are empowered by municipal legislation to exercise elements of governmental authority. Also such acts are considered acts of the State – and thus attributable to it – under international law, provided the person, or entity, is acting in such capacity in the particular situation. Similar rules are laid down with respect to *persons*, or *groups of persons* which *de facto* act on the instructions of, or under the direction or control of, the State in question in carrying out the conduct in question.

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[17] Article 3 of the ILC Draft Articles.

Already this very brief overview of the basic rules on attribution laid down in the Draft Articles, gives a clear idea of the extent to which a State may be held responsible under international law for the conduct of State organs and others who exercise governmental authority. As mentioned above, this state of affairs frequently seems to come as a surprise to States, and to counsel representing States in State arbitrations. Admittedly, the rules are far-reaching; as the Romans said, however: *lex dura, sed lex*.

In summary, all conduct of State organs, as well as persons, or groups of persons, acting on behalf of the State or exercising State powers are attributed to the State and may thus give rise to State responsibility under international law. Against this background, the *de facto* or *de iure* autonomy of the organ, person or group of persons under municipal law is irrelevant.

A final, but very important, element of State responsibility must be pointed out in this context. Even if a State organ, a person, or entity, authorized to exercise governmental authority, exceeds its authority or contravenes instructions, the conduct of such organs, persons and entities will be considered an act of the State in question under international law.[18] This fundamental rule of State responsibility is of great practical significance, since *ultra vires* objections are frequently raised by the State party in State arbitrations.

[18] Article 7 of the ILC Draft Articles.