INVESTOR STATE ARBITRATION: STRATEGIC AND TACTICAL PERSPECTIVES ON LEGITIMACY

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I. INTRODUCTION

In this Symposium's discussion of investor state arbitration, there may at first blush appear to be two very different points of perspective. On the one hand, a number of the articles view investor state arbitration as a system from afar: The view from "20,000 feet." On the other hand, a number of articles are from the perspective of having been involved in individual arbitrations: The view from "in the trenches." At the level of individual arbitrations, questions often focus on how to win, or how to survive, the arbitration. From the perspective of the system, questions often focus on how the system of investment arbitration might better meet its objectives which in part often involve assessments about the legitimacy of the system as a whole.

Yet although these two perspectives are quite different, they also are quite linked and I congratulate the organizers of the Symposium for bringing them together in one volume. They are linked in that it is the actions of counsel and arbitrators in the individual and separate arbitrations when viewed in the aggregate which set the stage for discussions of whether the system meets its objectives and whether the system possesses the necessary legitimacy. And conversely, it is systemic perceptions of illegitimacy that lead to reform and changes in the terrain in which the individual arbitrations take place.

At the outset, let me emphasize that although this Symposium focuses upon investor state arbitration, the implications of this discussion in my view go beyond investor state arbitration and reach some commercial arbitrations as well. System wide legitimacy critiques often focus on investor state arbitration as though it is a clearly distinguishable category of international

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dispute resolution. I have never agreed that a categorical distinction between investment arbitration and international commercial arbitration in terms of these critiques is so obvious as some assume. This view should not be taken as a suggestion that I necessarily agree with the legitimacy critiques or the reforms those critiques suggest. Rather, it reflects the desire to engage with the complexity of the situation truly presented. Most of the systemic concerns raised with investor state arbitration are not rooted in whether an arbitration arises out of a bilateral investment treaty rather than a contract, but rather are a consequence of the public importance of the issues possibly addressed by the arbitration. But international commercial arbitrations often can involve issues of great public importance. And, conversely, investor state arbitrations may involve matters of not great public significance either in terms of the amount in dispute or the possible policy precedents suggested.

In Part II, I reflect on the systemic critiques offered in this Symposium. As a practical matter, legitimacy critiques should be of concern because they possibly undermine the ability of the system to meet its objectives. As will be seen, in my view, the critiques suggest avenues for improvement in the system but do not fundamentally suggest that the system is illegitimate. Part III considers the articles in this Symposium that speak from the perspective of the practice of investment arbitration and examines the linkage between this perspective and the systemic one. The conclusion reflects on the future evolution of ICSID and of the investment protection regime more generally.

II. THE LEGITIMACY OF THE SYSTEM

The majority of the contributions to this Symposium focus on investor state arbitration as a system and the legitimacy of that system. But it is important at the outset to ask why legitimacy is important and how critiques of legitimacy should be evaluated.

In general, critiques of legitimacy—at least in legal scholarship—often are directed to procedural rather than substantive legitimacy,¹ a tendency that can be seen in this Symposium.

Legitimacy in these critiques is assessed against some often un-stated value such as coherency. The implicit suggestion is that the more the value is satisfied, then the more legitimacy that is possessed by the system. For example, the more coherent the procedure and jurisprudence, then the more legitimate the system. Of course, this overlooks that some of the values involved can be in tension with one another. The classic example is that accuracy in outcome possibly can be gained at the expense of greater cost and a longer process, but those costs run against the values of efficiency and speed. But, there is also the suggestion that if the value is not satisfied than the loss of legitimacy of the system in at least this regard may lead the system to not be used or trusted. In short, for a system to meet its objectives, it must be perceived as being legitimate. I have a quibble with this formulation.

A system may always be more legitimate. Simply because a system is not as legitimate as it could be does not mean that the stakeholders in the system will lose confidence in it. Instead, the crucial requirement is that the system possesses some minimal amount of legitimacy; that is, the system can not be perceived as illegitimate.\(^2\) A critique of legitimacy is an argument for reform of an accepted system; a critique of illegitimacy is a plea for reform necessary to ensure the viability of a questioned system. Thus, I find it helpful to approach critiques of legitimacy also as assertions of illegitimacy; that is, I find it valuable that a discussion of legitimacy be framed also in terms of illegitimacy. The value of a focus on illegitimacy follows from the fact that legitimacy implies moving closer and closer to the center of a target where there is not always agreement as to what is the center. Illegitimacy in contrast asks whether the target is missed entirely, a question on which there naturally can be more agreement.

The articles in this Symposium offer at least four critiques of the legitimacy of the investor state arbitration system. Importantly, all four of these critiques fail in my view if phrased as assertions of illegitimacy. Could the system be more legitimate—of course. Is it illegitimate—I do not assess it to be so. Thus, the following sections address the four legitimacy critiques.

but rephrased in terms of illegitimacy: They are (1) the coherency of the system, (2) the integrity of decision-makers, (3) the representation of the public and (4) the curtailment of state public choice.

A. The Assertion That the System Is Incoherent

The first legitimacy critique centers on the coherency of the system. Framed in terms of illegitimacy, this critique would be an assertion that the jurisprudence of the system is incoherent. Given that the current system in my view is obviously not incoherent, this critique is actually an argument that the system is not as coherent as it could be or we would like it to be.

As expressed by Professor Ortino, the current system lacks the ideal level of coherence in several respects. First, there is an inconsistency of reasoning, which results in a loss of guidance and second, there is also poor reasoning that limits guidance even further and erodes confidence. Both of these circumstances are a consequence in part of varying methods of interpretation utilized by panels. The concern about incoherency is often tied to proposals for an appellate mechanism, the fear of inconsistent awards, and the need for consolidation provisions.

Any discussion of coherency in the ICSID system must begin by noting that the root of the problem is embedded very deeply in the structure of arbitration itself. Arbitration generally, and international commercial arbitration in particular, is not in fact a system, but rather is a framework within which discrete and possibly unknown private actions are taken. It is a framework in the same sense that municipal contract law provides a frame within which discrete and possibly unknown private arrangements are concluded. The quandary for ICSID is that it basically, but not entirely, adopts arbitration as the method it utilizes for dispute resolution, and thus the present effort to build a system on top of ICSID’s use of a framework inherently poses great challenges.

An illustrative example of this quandary is found in the role of the arbitrators in international commercial arbitration. In such arbitration, the focus of the arbitrators is on the dispute

Before them. For such arbitrators, there is no system with which they should endeavor to be consistent and—to the degree there is such a known body of relevant jurisprudence—it is not clear why the arbitral panel constituted by the parties has the duty to devote their time to ensure that a consistent body of a jurisprudence, arguably a public good, is developed. The duty of arbitrators, sometimes expressed in an oath or in an institutional rule, focuses on the mandate received from the parties which ordinarily focuses on the particular dispute. In short, much of the debate on consistency is tied to uncertainty as to whether the panel's focus should be on particular disputes or instead, on the 'system' that emerges from these disputes. ICSID can be schizophrenic in this way—on the one hand, imagining ICSID as a framework calls for a concentrated focus on the particular dispute, while at the same time, imagining ICSID as a system represents an attempt to rearrange all of the free standing arbitrations as though they were part of a court system. This situation can lead to great surprise and frustration when the realization hits home that the patterns that sometimes present are more coincidental than planned. The question of whether there is a system present depends on whether the questions shared by the various tribunals are identical, or perhaps nearly so. Certainly ICSID tribunals share the procedural and jurisdictional limitations of the ICSID convention, but they do not necessarily address the same identical substantive questions since usually different concessions or BITs are involved. However, in the case of NAFTA Chapter 11 arbitration, for example, the tribunals are all part of a de facto system in that they all share the substantive text.

It is also important to consider that the question of consistency may present a greater concern for academics, than for the parties themselves, both from the perspective of the particular dispute and from the greater system. In terms of a particular dispute, arbitration inherently accepts a significant range of error in the individual dispute. Awards are not annulled for simply being incorrect and they certainly are not annulled for not being consistent with other awards. Rather, they are only annulled if there are significant errors. Similarly, on the systemic level there is little evident desire thus far on behalf of parties and states to build appeal structures which might yield greater consistency.
In terms of the ICSID system and the few areas such as NAFTA Chapter 11 where sufficient arbitrations occur that a shared substantive system may be said to exist, it is my sense that over time there will be a convergence in jurisprudence resulting in some level of consistency. As of yet, it is unclear whether this convergence is taking place, given that some of the areas where there is argued to be inconsistency are still at an early stage of development. As compared to a body like the WTO panels, where there is a more assertive secretariat that influences the decision-making and the reasoning of panels through the preparation of memoranda summarizing relevant earlier decisions, the ICSID secretariat at present leaves such matters more in the hands of the parties and the panels. And in a shared substantive area such as NAFTA Chapter 11, there is no secretariat. These circumstances not only slow convergence but also make it difficult to ascertain whether there is convergence in reasoning and why there might not be convergence.

A final point on consistency is that the move to create a system actually generates its own issues of legitimacy. Paradoxically, transparency, which is the first step to legitimacy, engenders awareness of inconsistency. For example, submissions of amicus briefs and requests to be present at hearings are only possible if the process is transparent. However, it is that very transparency that allows for awareness of inconsistency. Thus, the possibly tremendous variations in interpretation of certain standard clauses in contracts in international commercial arbitrations will not be troublesome to most, simply because they are unaware of this inconsistency.

**B. The Assertion That the System Is Corrupt**

The second broad systemic critique about legitimacy pertains to the integrity of decision-makers. Phrased in terms of illegitimacy, this critique becomes an assertion of corruption. Fortunately, there is little known corruption among decision-makers. Rather, the concern as to the integrity of decision-makers centers on more nuanced, yet also significant, concerns such as the identity, equality, independence and impartiality of arbitrators. Today, all the arbitral systems are confronting the issues that revolve around different disclosure standards, different methods of choosing arbitrators, and functionally different institutions. The institutional regulation of the integrity of arbitra-
tors is currently an area of great ferment and increasing awareness.

Approached as a call for greater legitimacy through reform, one suggestion to solve these issues of arbitrator integrity is to create a permanent panel of arbitrators. But, the implications of such a suggestion are far-reaching. First, it would be necessary to request that such arbitrators refrain from taking on other arbitrations so as to avoid potential conflicts of interest. This, in turn, likely would require that such arbitrators be paid on a full-time basis. Second, such a permanent panel would likely result in a push to strip the States and the parties of the right to choose an arbitrator, as it would most likely fall to the institution to assemble the panel of arbitrators. Finally, as a result of losing the control to choose an arbitrator, there would be greater concern regarding the persons placed on the permanent panel in the first place and the persons placed on the list from which the arbitrators are chosen. The fear that develops from a loss of control in choosing an arbitrator is not to be underestimated—it has been my experience that parties at present will go to great lengths to avoid ICSID making the appointment of the chair from its roster.

Related to the concern about the integrity of the arbitrators is the examination of Reasons and Reasoning In Investment Treaty Arbitration by Tai Heng Cheng and Robert Trisotto in this Symposium. In essence, the requirement for reasons to be stated in awards viewed from systemic level is a device for improving the integrity of the judges. Cheng and Trisotto assert that the reasons requirement should be approached somewhat liberally when examined in the context of a request for annulment and more exactingly when examined in the context of considering the precedential effect to be given an award. The important point to emphasize here is that the requirement to provide reasons is also a discipline in and of itself placed on the arbitral panel. For Martin Shapiro, the reason for requiring reasons is that this is a way for the parties to force the arbitrators to

4. See, e.g., Gabriel Bottini, Should Arbitrators Live On Mars? Challenge of Arbitrators In Investment Arbitration, 32 SUFFOLK TRANSNAT'L L. REV. 341 (2009) (arguing that some structural deficiencies could be resolved by a permanent appellate mechanism with a set membership "receiving basic income.").

actually think through the issue rather than having supposedly thought it through their conclusion.6

C. The Assertion That the System Denies Representation of the Public Interest

The third legitimacy critique is one of representation. Again, phrasing this in terms of illegitimacy, this critique asserts that the process is illegitimate because the party at interest is not present in the arbitration and is not represented. In essence, this is a critique of the State because the State is present as a respondent, yet the argument is that the State in fact does not represent the interests of the affected community, a portion of the state respondent. This line of thought can be in the observation of Professor Gal-Or regarding the difference in procedural capacity between the investor and the investment-impacted community, and her idea that the investment-impacted community should be reconceptualized in terms of global citizenship and afforded more procedures.7

The concern this line of critique raises, for me, is that in some cases, the respondent state clearly does a very good job of representing the interests of the investment-impacted community. Thus, the question of whether the state adequately represents the investor-impacted community in a particular proceeding is ultimately a contextual question and depends on the state and community in question. Elevating the community past the state respondent creates a number of obvious political tensions. The best solution to this issue would be context sensitive, allowing for international procedures to act as a supplement where the state’s representation is inadequate. In some measure, this is what occurs with the recent practice authorizing amicus filings because such filings can bring to the tribunal’s attention any argument that the State does not wish to raise.

D. Protection of the Public Interest

The fourth and final critique is that there is an unjust curtailment of state public choice because the protection of private

interests is placed above other public interests. However, this critique is one that focuses primarily on regulatory takings where the issue is the protection to be afforded property (the investment) where regulations adopted for public purposes arguably affect a taking of that property.

This is an important question, but also one where there is a sense that states are converging. The possibility of convergence is, for example, implicit in Jie Wang's discussion of investment arbitration in China.\(^8\) Countries that once were thought to be capital importers are now finding that their situation is much more nuanced and complicated as they find their nationals investing abroad. Likewise, the reverse is occurring in countries that traditionally recognized themselves as capital exporters and now see themselves as also an importer of capital. The old dichotomy has ceased to exist for some and we now find ourselves in a much more nuanced situation. In other terms, we could say that there once were upstream states and downstream states. But now there is only a lake where there is a convergence of interests of the states bordering the lake.

III. The Realities of Individual Arbitrations

Upon shifting the focus away from the systemic perspective and toward the individual arbitrations, I have four principal points.

First, it is interesting to note that questions of legitimacy arise less frequently when the point of perspective is that of practice and the individual arbitration. Legitimacy is a concern about the system, about the aggregate result of numerous arbitrations. Legitimacy is invoked in individual arbitrations, but almost as an argument of last resort pointing to possible systemic implications: 'If the tribunal were to do what the other party requests, such a decision would call into question the legitimacy of the regime.' Instead, the rhetoric of the individual arbitration

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\(^8\) Jie Wang, *Investor-State Arbitration: Where Does China Stand?*, 32 Suffolk Transnat'l L. Rev. 493 (2009). Although there are signs of convergence of interests and much has changed around the world in terms of countries accepting the requirements of investment protection, it should not be assumed that this process is not reversible. See Wenhua Shan, *Is Calvo Dead?*, 55 Am. J. Comp. L. 123, 163 (2007) (arguing that although the Calvo doctrine in Latin American countries has been largely “deactivated,” it could “resurge” in the right political and economic circumstances).
is about efficiency, cost, and competency. And all of these are values, which in the aggregate, can add up to a concern with legitimacy.

Second, it is evident from the contributions to this symposium that the questions present in individual arbitrations can be marvelously complicated: Veijo Heiskanen’s discussion of dépeçage in arbitration⁹ and Timothy Nelson’s discussion of individual nationality¹⁰ are but two examples. The perspective these articles offer on the range of topics that can arise in individual arbitrations is a reminder of the enormity of expertise that not only is required to win particular arbitrations but is required in both counsel and arbitrators to maintain a system that inspires confidence in its users.

Third, given the stakes involved and the complexities often present, there is a desire on the part of the parties to control the environment of the arbitration. In this vein, there is a great deal of effort and anxiety about controlling arbitrators that certainly includes, but also goes beyond, concerns with the ethical conduct of the arbitrators. Apart from the challenging of arbitrators, there is a desire that the arbitrators perform their tasks with which they are charged by the parties. Thus, there are control devices such as requiring arbitrators to provide reasons for their opinions and proposals for further control devices such as setting a mandatory time frame for the issuance of awards.

Fourth, it is interesting to observe how new areas of possible claims open up and how other areas of claim are closed. Some examples of new areas mentioned at the conference underlying this symposium included advice to potential claimants on whether the acts of non-state actors are possibly covered by bilateral investment treaties (BIT), or whether an expansive view of a particular BIT includes claims as to intellectual property. States, on the other hand, likely will make a push in the future to close off certain areas of claim by carving out certain claims from the jurisdiction of tribunals, a possibility foreshadowed in Abba Kolo’s article on the place of claims regarding

The pattern emerging (which is likely to continue) is that the respondent states aim to close down areas of claim at the time of negotiation (or renegotiation) of the BIT, while the claimant investor attempts to create new areas of claim in particular arbitrations, with such creativity being present often subsequent to the dispute itself arising. An inherent danger in this pattern is that counsel collectively, actively, and creatively, in their particular arbitrations, push the system in unpredictable ways calling into question once again the legitimacy of the system itself.

IV. Conclusion

Where is the investment protection regime going? The question posed includes not only the specifics of how the investment arbitration system should evolve, but also the means by which it will evolve. Reform of the system will be difficult. Many BITs have already been concluded and investments have been made in reliance on the present form of those BITs. Yet, legal innovation is not to be underestimated and there are areas where evolution is entirely possible. One example of a potential area of innovation is that agreements as to the content of the requirement of fair and equitable could be concluded, or a body such as the International Law Commission could attempt to restate the content of the fair and equitable treatment requirement. In other words, there are ways such as this to influence custom and to fill the gaps.

Moreover, it must be borne in mind that it still is early in the history of investment protection treaties. There has not yet been sufficient time for a round of state renegotiation actions to respond to the arbitral decisions of the last two decades. The future of investment arbitration is still unclear. But to say it unclear does not mean we have no sense of the directions and choices ahead.

First, a global multilateral treaty will have some role to play, although such a treaty would embody a general consensus as the basic protections of investment protection thus supplementing, not replacing, the BITs. Such a multilateral system

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would supply a basic set of protections and avoid many of the gaps in coverage of the present bilateral array, would by its very nature moot much of the nationality requirements present in the bilateral system and provide an opportunity for the coordination of overlapping coverage in the bilateral system. Second, although there are several possibilities as to how the ICSID system might evolve, one basic choice would be to choose to reinforce the system, moving away from the current framework model. However, if this effort is undertaken, a challenge will be the possibility that parties, particularly the claimants, would in establishing their particular tribunal, defect by their choice from the ICSID system to, for example, the UNICTRAL framework for arbitration. Clearly, if both parties choose to defect, this would not be a problem. But most BITs give the choice of ICSID or UNCITRAL to the claimant alone. In this sense, it is arguable that the real issue is whether it is preferable to have a clause in the BIT to the effect that "a claimant may initiate proceedings either before ICSID or under the UNCITRAL Arbitration Rules," or a clause that provides that "a claim may be brought before ICSID by the claimant, or if both parties agree, under the UNCITRAL Arbitration Rules." The second alternative would make defection from ICSID a matter of joint agreement and arguably less likely.

Regardless of the specific mechanisms that are used to further develop the ICSID system, it is clear that the view from afar and from up close should be viewed simultaneously as the effort at reform forward. As States begin to formulate their reactions, and as the international legal community seeks to enhance the system of investment arbitration, critiques of legitimacy and the reforms suggested by those critiques must be seriously considered, always keeping in mind the interests of those whose focus will be on the individual arbitration proceeding.