

Is the Legitimacy Crisis in the Eye of the Beholder?

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EXECUTIVE SUMMARY

This essay examines the current state of affairs regarding Ecuador's challenge to the legitimacy of the international investment arbitration system following the tension created by the Lago Agrio domestic litigation and the related international arbitration under the US-Ecuador BIT. The essay reflects on Ecuador's precise submissions to the legitimacy debate while providing support for the literature in the defense of the current system of investor-state arbitration. After analyzing the detailed reasons for Ecuador's current critique; and finding them to respond mostly to endogenous factors related to the country's new mandates under the 2008 Constitution, this essay attempts to provide a design for legitimacy through treaty drafting and negotiation for the Country's future participation in the international investment arbitration scenario.

I. INTRODUCTION

Looking back at the history of the international investment regime over the last two decades, its expansion has been nothing short of dramatic. The rise of Bilateral Investment Treaties allowing investors to hold states responsible for violations of international law has created a complex structure in which the individual's rights and regulatory environments are delicately balanced¹ The system's innovation and limitations are currently being tested as its mercurial rise has also given way to a group of states that challenge the legitimacy of the system as a whole. Perceived shortcomings and inconsistent rulings have made way to "calls for replacement or radical redesign of investor-state dispute-settlement mechanisms".²

Ecuador is a particular case in this regard as its recent actions suggest deep discomfort with the current framework of investment state arbitration. During the past decade, Ecuador has been constantly involved in transnational dispute litigation mostly as a result of claims brought through the ICSID system for the settlement of disputes.

As a result of President Rafael Correa's election, compounded with the country's precise situation involving intertwined domestic and international proceedings, the Republic of Ecuador has become a driving force in the critique of the current investment arbitration mechanism. So far, the actual content of the Republic's analysis is visible only through the Government's specific course of action and public declarations made by its officials. The inconsistency of these remarks requires a more definite examination as to the existence of a legitimacy crisis and a possible design to incorporate legitimacy in further international practice.

For this purpose, the present Article purports to address four different issues found in this particular critique of the investor-state arbitration mechanism. In order to examine the legitimacy challenge, this Article will first recount Ecuador's current state of affairs in regards to the international investment system. Second, it will discuss how this critique

¹ Burke-White, "The Argentine Financial Crisis," 1.

² Charles Brower and Stephan Schill, "INTERNATIONAL JUDGES: Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?," 3.

aligns with the existing arguments at the forefront system's critique. Then, this Article will explore Ecuador's particular submissions to the legitimacy debate in light of the country's idiosyncratic link between domestic proceedings and ongoing international arbitration. Finally, the Article will conclude by indicating the particular strategies for a legitimacy design available from the point of view of treaty drafting and negotiation.

II. THE REPUBLIC OF ECUADOR'S CURRENT VIEW ON INVESTOR STATE ARBITRATION

The Republic of Ecuador has gone through drastic changes to its approach at international policy in the last few years. "On July 6, 2009, the World Bank received a written notice of denunciation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention [or ICSID]) from the Republic of Ecuador".³ This radical measure is another one in a series of steps and statements made to challenge the legitimacy of the current state of international investment law.

One of the first steps in this challenge occurred in 2008, when the Republic of Ecuador's Constitutional Assembly enacted a new Constitution within the political agenda set forth by President Rafael Correa. Article 422 of the Constitution contains a prohibition for the State to "enter into treaties or international agreements in which the Ecuadorian State yields sovereign jurisdiction to international arbitration organizations, in contractual disputes or of commercial nature, between the State and individuals or private corporations".⁴ The only exception to the prohibition is for the State to submit to regional Latin-American arbitration; a mechanism that has not yet been created.

This article has prompted a wave of domestic academic discussions as to what actual limitations would be placed on the State's powers to enter into a Bilateral Investment Treaty (BIT) and the concrete meaning of the "yielding of sovereign jurisdiction" phrase. Whatever the definite outcome of the discussions is, the intent set forth by the document

³ ICSID News Release, "Ecuador Submits a Notice Under Article 71 of the ICSID Convention."

⁴ *Constitution of the Republic of Ecuador*.

seems clear: Ecuador has become part of a group of states that are “throwing a wrench into the investment rules works”⁵ and therefore, vocalizing serious critiques against the international investment law regime as it stands.

The latest chapter of Ecuador’s challenge to the regime comes courtesy of the highly publicized Lago Agrio proceedings. In this 17-year ongoing litigation in Ecuador’s domestic courts, a group of amazon indigenous individuals obtained an \$18 billion dollar judgment against the Chevron Corporation (Chevron) for environmental damages, which the Ecuadorian judiciary attributed to Texaco Petroleum Company’s (Texpet)⁶ as a result of oil exploitation of several Amazonian oil fields during the 1990s.

Chevron has continuously reported multiple irregularities during the course of the litigation ranging from interference by the executive branch and wrongful handling of the evidence and expert testimony;⁷ to criminal proceedings against defendant’s counsel and accusations that the plaintiff’s legal team participated as ghostwriters of the enormous final judgment rendered. The sheer volume of the accusations and evidence obtained supporting Chevron’s claims on this regard has prompted the corporation to declare in its initial notice of arbitration that “the Ecuadorian judiciary lacks the necessary independence and institutional stability to adequately adjudicate highly politicized cases”.⁸

Ecuadorian courts already enjoy an infamous status in respect to their ability to deliver prompt and un-politicized justice. To make matters worse, Chevron’s claims seem bolstered by recent events in another highly publicized case in which President Rafael Correa successfully employed a criminal libel statute to obtain a \$42 million dollar judgment against the newspaper *El Universo* and a three year jail sentence for three of its officers.⁹ With both judgments “product of the same corrupt judiciary and trials marred

⁵ Schneiderman, “Legitimacy and Reflexivity in International Investment Arbitration,” 1.

⁶ Currently a “wholly owned, indirect subsidiary of Chevron” as per *Chevron Corporation and Texaco Petroleum Corporation V. The Republic of Ecuador (UNCITRAL Claimant’s Notice of Arbitration) (US/Ecuador BIT)*, 1 ¶ I.

⁷ Jan Paulsson, *Expert Report of Jan Paulsson in Chevron Corporation V. Steven Donziger Et Al* ¶8.

⁸ *Chevron Corporation and Texaco Petroleum Corporation V. The Republic of Ecuador (UNCITRAL Claimant’s Notice of Arbitration) (US/Ecuador BIT)*, 10 ¶ 42.

⁹ Theodore J. Boutros, Jr, “President Correa’s Libel Suit and the Fraud Against Chevron.”

by remarkably similar violations of the rule of law”,¹⁰ Chevron’s claims seem describe a clear-cut scenario of “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety”.¹¹

Subsequently, Chevron pursued arbitration under the US-Ecuador BIT to protect itself from the execution of the Lago Agrio judgment in what has already been referred to as “‘a willful disregard of due process of law’ which ‘shocks, or at least surprises, a sense of judicial propriety’ [...] in breach of the international due process of law”.¹² On February 16, 2012, the arbitral tribunal, with its seat in the Permanent Court of Arbitration, rendered its Second Interim Award on Interim Measures following the final judgment against Chevron in the Lago Agrio domestic proceeding. The Tribunal’s Award provides for the respondent (The Republic of Ecuador) to take all measures necessary for the suspension of the enforcement of the \$18 billion judgment, to preclude any certification from the respondent that would allow the judgment to be enforced against Chevron and to constantly inform the Tribunal of any developments in the domestic case.¹³

The main outcry from the Government of Ecuador against the international investment framework has come as result of the aforementioned Award. One of the recent statements by President Correa brands the United Nations as an agent in the drafting of a ‘legal barbarity’ in order to aid Chevron and promote the interests of ‘the great capital’.¹⁴ The Government’s official position seems to be that Chevron should be held fully responsible for all the damages found in the Amazon basin¹⁵ and that no other tribunal, has any say in whatever transpires within the Ecuadorian judiciary; even if its acts do not comply with international law.

¹⁰ Ibid.

¹¹ *Loewen v United States (ICSID)* ¶ 132; Jan Paulsson, *Expert Report of Jan Paulsson in Chevron Corporation V. Steven Donziger Et Al* ¶ 15.

¹² Jan Paulsson, *Expert Report of Jan Paulsson in Chevron Corporation V. Steven Donziger Et Al*, 16 ¶ 48, Referring to [citing]; *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J Reports 1989:15 ¶ 128.

¹³ *Chevron Corporation and Texaco Petroleum Corporation V. The Republic of Ecuador (UNCITRAL Second Interim Award on Interim Measures) (US/Ecuador BIT)* ¶ 3.

¹⁴ Maria Miranda Aguilera, “Correa: Chevron-Texaco Utiliza a La ONU Para No Pagar Sentencia.”

¹⁵ Reuters, “Chevron Caused Environmental ‘Barbarity’ in Ecuador: Correa.”

III. THE REPROACH AGAINST LEGITIMACY IN INTERNATIONAL INVESTMENT ARBITRATION

Ecuador's challenge of legitimacy aligns itself to what Brower and Schill have described as an "hegemonic critique of international investment law that originates from a Marxist analysis of international law and views international investment law as an attempt by developed countries to impose their power on weaker, developing countries".¹⁶ Ecuador's submissions constantly demonize the international investment law framework while resorting to an unassuming analysis that equates the mere fact of facing an international procedure as a fundamental flaw of the system. With almost 18 pending cases (almost two-thirds coming from ICSID arbitration)¹⁷ and many more in Ecuador's prior track record, a proper translation from the aforementioned critiques set forth by the Republic is that "investment treaties and investment-treaty arbitration institutionalize a pro-investor bias that casts the legitimacy of the entire system of international investment law and arbitration into doubt".¹⁸

According to Brower and Schill, three main arguments are advocated by the literature advancing the pro-investor bias scenario. The first argument deals with a perceived inequality between the substantive obligations and rights of investors found in the language of a treaty vis-à-vis the state's regulatory powers. The second argument advances that this perceived inequality is 'exacerbated' by providing an investor with a right to initiate arbitration while denying the host state of the same right. The third argument avers that the appointment of ad-hoc arbitrators is detrimental to the legitimacy of the procedure in contrast to more permanent adjudicators appointed through more neutral processes.¹⁹

The first argument's perception that investors are afforded an unbalanced set of protections in contrast to their obligations and the host state's own rights under the treaty

¹⁶ Charles Brower and Stephan Schill, "INTERNATIONAL JUDGES: Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?," 2.

¹⁷ "Ecuador Publishes List of Arbitral Claims; Many Have Had a Prior Airing in IARporter, but There Are a Couple Surprises - Investment Arbitration Reporter (IARporter)."

¹⁸ Charles Brower and Stephan Schill, "INTERNATIONAL JUDGES: Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?," 3.

¹⁹ Ibid.

fails to take into the account global factors affecting and supporting the international investment framework. One of the cornerstones of the present is the dual benefit found in the object and purpose of the treaty. On one hand, BITs strive to secure a constant influx of capital in a globalized economy by affording foreign investors certain assurances contained in the treaty language.²⁰ It is also usually in the State's interest to protect this set of rights because otherwise, their non-fulfillment would be viewed negatively in future negotiations or before the international community as a whole.²¹ The need for a State to afford this kind of protections comes as no surprise since “[b]oth in the developing as in the developed world, private foreign investment today is regarded as an essential means for economic welfare and development”.²²

In the case of Ecuador, the host state's benefits seem to outweigh the setbacks upon entering into such a system of international law. Through the use of joint large-scale oil projects, Ecuador has been able to access resources previously unavailable to it during a time where the country's largest export has benefited from record prices in the international market. Additionally, the “transfer of technology connected to foreign investment, the creation of employment [and] additional tax revenue”²³ are positive elements that have crystalized through either the entry into force of many BITs or the promise that such negotiations would take place soon, thus allowing investors to trust in the availability of an international recourse should their rights become affected by actions of the host state. In this fashion, there is clear benefit to be found in host country's inclusion in a treaty of the standard rights afforded to the investors in contrast to the view that investors are offered unbalanced rights over the host state.

The second argument, in a similar manner, fails to take into account that the availability of a recourse to international arbitration allows the investor-state relationship to become more balanced and nuanced. The critique “disregards the fact that the host state already possesses a power that the investor lacks”.²⁴ In its position as a sovereign, the ability of a state to easily change the *status quo* is nothing less than dramatic. As

²⁰ Ripinsky and Williams, *Damages in International Investment Law*, xxxiii.

²¹ C. Schreuer in “Is There a Need for the Necessity Defense for Investment Law - Panel Discussion,” 207.

²² Marboe, *Calculation of Compensation and Damages in International Investment Law*, 5.

²³ Charles Brower and Stephan Schill, “INTERNATIONAL JUDGES: Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?,” 12.

²⁴ *Ibid.*, 6.

Gaillard points out, “[i]t is indeed tempting for a State, or a State-owned entity, to renege on an arbitration agreement to which it freely consented by resorting to its own courts to have another contracting party enjoined from initiating an arbitration against it, or if arbitral proceedings have already been initiated, from pursuing them”.²⁵ The investor’s right to initiate arbitration proceedings cannot therefore be viewed as clear unbalance between their rights and obligations; to the contrary, it becomes the most important aspect necessary to balance the negotiating power between the parties in particular dispute. In this approach, “[d]ispute settlement has a central function in stabilizing the expectations of foreign investors and enables them to counter opportunistic behavior by the host state, such as unreasonable interferences with the investor’s economic rights or even expropriations without compensation”.²⁶

In the case of the Lago Agrio Litigation, such an imbalance of power between the investor and the host state becomes evident. A host state will seldom subject adverse claims to its interests to a proper treatment in its own judiciary; therefore, investors lacking the ability to initiate international arbitration would have to seek relief in a clearly adverse forum. In this precise case, “The explicitly stated purposes of the treaty were to encourage investment by Americans in Ecuador and Ecuadorians in the United States by assuring investors that an independent, neutral tribunal exists to arbitrate claims”²⁷ The absence of such a right or recourse to the investor would clearly deprive the BIT of one of its main objectives and purpose. An independent tribunal *must exist* in order to protect these interest and balance the power relationship between investors and sovereign states.

Finally, the Ecuadorian Government’s proposed argument that an pro-investor bias exists in the current framework is called into question by the recent events of *El Universo* case after final judgment was entered against the defendants. This occurrence prompted the Inter-American Commission of Human Rights to issue precautionary measures for the protection of human rights for the three officers of the corporation involved in the case.²⁸

²⁵ Gaillard, *Legal Theory of International Arbitration*, 71 ¶ 73.

²⁶ Charles Brower and Stephan Schill, “INTERNATIONAL JUDGES: Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?,” 4.

²⁷ Honorable Leonard Sand on *Hearing on Republic of Ecuador V. Chevron Corporation Et Al / Lusitande Yaguaje V. Chevron Et Al*, 16 ¶ 21-25.

²⁸ “MC 406/11 – Emilio Palacio, Carlos Nicolás Pérez Lapentti, Carlos Pérez Barriga y César Pérez Barriga, Ecuador.”

In a peculiar simile with the reaction to the interim order issued by the international tribunal in the Chevron arbitration, the official position of government officials was to reject the issuance of such measures and declare a clear refusal to comply with same.²⁹ This particular incident serves as an example of what the proposed arguments and critiques actually mean for the Government. It would seem that they are directed not towards the existence of pro-investor bias specifically but rather reflect an underlying philosophical stance that equals ‘sovereignty’ to ‘exclusion’ and ‘rejection’ of the international legal order that doesn’t match the Government’s political views.

On regards to the third argument, Brower and Schill propose that the legitimacy of arbitration as a tool to solve investor-state disputes is in fact growing in acceptance.³⁰ The perceived pro-investor bias would actually be diminished through the process in which a state participates in the appointment of the arbitrators; hence providing the state a degree of control as to the direction and content of the arbitration to be held.³¹ Ecuador’s contentions on this matter are limited. It would appear that the inclusion of the provision of “Regional Arbitration” in article 422 of the Constitution does not challenge the system of appointed arbitrators as much as it challenges the actual forum where the arbitration is to be held. Professor Gaillard opines that “[c]onsidering the widespread trend in favor of the international arbitration as the normal means of settling international disputes, the legitimacy of arbitrators performing this function cannot be disputed”.³² This seems to be the case in regards to The Republic of Ecuador given the steps already taken to develop a regional arbitration center as an alternative to ICSID via an adjunct organism to the newly founded Union of South American Nations (UNASUR).³³

²⁹ “Authorities Will Not Comply With IACHR Precautionary Measures And Will Not Grant Safe-Conduct To El Universo Director.”

³⁰ Charles Brower and Stephan Schill, “INTERNATIONAL JUDGES: Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?,” 10.

³¹ *Ibid.*, 11.

³² Gaillard, *Legal Theory of International Arbitration*, 35 ¶ 40.

³³ EFE Quito, “Ecuador Nombra Representante Para Negociar Centro De Arbitraje De Unasur.”

IV. ECUADOR'S ARGUED LEGITIMACY CRISIS IS IN THE "EYE OF THE BEHOLDER"

The submissions presented by Ecuador align with the critiques mentioned by Brower and Schill insofar as they reflect the general concerns of a host state having faced, and currently facing, multiple investor-state arbitration proceedings. The three aforementioned arguments, particularly in the case of Ecuador, fail to account for the reasoning and core concept behind the creation of the system as well as the possible benefits that it can provide to the host state. By exposing the flaws of the critiques, a state like Ecuador should agree that "investment treaties and investor-state arbitration constitute a legitimate vehicle for structuring and stabilizing foreign investment activities".³⁴ However, the decision to withdraw from ICSID and further denouncing of several BITs seems to suggest a deeper discomfort derived from the current outlook of the international investor-state arbitration framework.

While it is true that there are aspects of this system that require a critical view and evaluation³⁵, I believe the challenge propounded by the Republic of Ecuador responds to a more nuanced concern found upon further analysis of the country's internal development to the postulates of international law. In this manner, Ecuador, as the "beholder", finds that a fundamental legitimacy crisis is to be found within the investor-state arbitration framework through the inclusion of its own limited view of international arbitration. By imposing the current Government's particular set of interests in international disputes, Ecuador will continue to find that the legitimacy of the system is in crisis. The origin of these issues involving seems to be rooted in both a domestic procedural inefficiency to implement international law and the lack of exposure from the judiciary (and other branches of government) to its concepts and postulates. Therefore, a theoretical design for legitimacy in regards to Ecuador would have to into account these factors in the process of treaty making and negotiation.

³⁵ For example, see Charles Brower and Stephan Schill, "INTERNATIONAL JUDGES: Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?," 12.

The lack of clear domestic legislation within Ecuador to facilitate the implementation of orders and judgments issued by international arbitration tribunals generates several problems when the State is faced with the duty to comply with a certain order or from an arbitration tribunal. It is clear that a State is precluded from invoking internal law as justification for its failure to perform a treaty through the operation of article 27 of the Vienna Convention on the Law of Treaties. Additionally, treaty language such as Article 54 of ICSID Convention may also equal the award rendered to a final judgment of a court in that State; however, if a State reaches an impasse as to implementation of a certain international order, the resulting ‘clash’ will most likely lead the State’s officials to believe that the system is fundamentally flawed.

One instance of this issue was evidenced in the *Chevron v. Ecuador* international arbitration. During the parties’ submissions on the Claimant’s Request for an Interim Award on the Prior Interim Measures Order, a demand was raised in regards to the posting of a bond, which would enable Claimant’s appeal in the domestic Court. The Claimant suggested that Ecuador post a bond on Chevron’s behalf to allow it to procure the appeal or grant a waiver of same. Ecuador’s counsel position was that of being cornered by opposing rules. On one side, the interim Order purported for the respondent to take all necessary steps to cause to be suspended the enforcement or recognition of the Award.³⁶ On the other hand, having the Attorney General use public funds to provide a bond on behalf of Chevron or a waiver of such requirement would profoundly contravene domestic law and potentially expose the Attorney General to administrative, civil, and criminal penalties.³⁷ The Tribunal solved this ‘discrepancy’ by ordering the Republic to take “all measures at its disposal” to comply with the interim Award,³⁸ However, the potential impact on the state responsibility of Ecuador’s failure to act in accordance with the BIT may be enormous and is yet to be addressed by the Tribunal.

The absence of clear legislation existing to facilitate the tasks of implementing international law generates a problem of familiarity with the system’s postulates and

³⁶ *Chevron Corporation and Texaco Petroleum Corporation V. The Republic of Ecuador (UNCITRAL Order for Interim Measures) (US/Ecuador BIT)* ¶ A.

³⁷ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) V. The Republic of Ecuador, Ecuador’s Application to Set Aside Interim and Partial Awards (UNCITRAL - US/Ecuador BIT)*, 6.

³⁸ *Chevron Corporation and Texaco Petroleum Corporation V. The Republic of Ecuador (UNCITRAL First Interim Award on Interim Measures) (US/Ecuador BIT)*.

goals and can further the view that the framework is illegitimate. Ecuador's obligations derived from international law may be clear-cut in the language of the treaty but if the implementation of international law ultimately fails within its borders; be it by the failure to execute an order or an award, the entire purpose and object of the treaty may be called into question.

In dealing with the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), the United Nations Commission on International Trade Law found that “[b]y ratifying a convention, a State undertakes the legal obligations under the convention at the international level and should give effect to the convention domestically by enacting any legislation necessary to that effect”.³⁹ Indeed, this has not been the case in the development of investor-state legislation for Ecuador. The few available paragraphs in Ecuador's Arbitration Statute are riddled with inconsistencies as to its application to a particular proceed derived from a BIT and may result in further judicial review of an award in contravention with international law.⁴⁰ The negotiation of an investment treaty, which provides international arbitration, must therefore include the undertaking of the states to satisfy a minimum requirement of enabling legislation in order to familiarize the state's branches with international law and bolster its effectiveness.

V. A DESIGN FOR LEGITIMACY APPLICABLE TO ECUADOR

The inclusion of domestic legislation in negotiating a treaty has dynamic effects on its operation. In order to avoid the legitimacy issues mentioned *supra*, the future designs of a investment treaty that involves the Republic of Ecuador or a “beholder” state with its characteristics should strive for the introduction of domestic legislation as part of the treaty agenda in two dimensions: (1) as a positive an actual obligation contained within

³⁹ United Nations Commission on International Trade Law, *Report on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* ¶ 13.

⁴⁰ Ley de Arbitraje y Mediacion, Article 42.

text of the treaty, and (2) as a matter of negotiation policy between the states parties to the treaty.

While the language of many model BITs currently provide for provisions to the intent of creating proper conditions for investments⁴¹, the inclusion of a positive and actionable obligation to enact domestic legislation promotes the international rule of law by bolstering the promises made by the parties through the presence of a cause of action in the failure to do so. The inclusion of the obligation to enact legislation to further the purpose and object of a treaty is already found in other areas such as Article 2 of the Interamerican Convention of Human Rights. Although this particular convention extends the cause of action towards the individuals⁴², two issues are avoided by reserving this language only for inter-state disputes. First, legitimacy challenges are avoided because a host state such as Ecuador can no longer have the view that only "private" interests are at play. An undertaking of this magnitude towards another state does not seem directly connected to an investor but to another character of equal international standing. Second, the overlapping of investors' rights (such as the right to a fair and equitable treatment) under the treaty is circumvented by allowing only the state parties to raise this issue through a cause of action in the treaty.

The inclusion of domestic legislation as a matter of negotiation policy is also a way to diminish the risk of a legitimacy crisis argument from being raised by a "beholder" state. The necessity to make international law; and hence, the object and purpose of the treaty fully operational through enabling language in domestic legislation serves several purposes in this framework.

The enactment of domestic legislation aids to solidify the rights of investors as a matter of state governance. This familiarizes the judiciary and other branches of government with the international undertakings of the State as a whole; the process bolsters the legitimacy of the system as dynamic international law and not only as an empty obligation backed by a treaty. The inclusion of domestic legislation in the agenda also serves the purpose of allowing the host state to perform the procedure of "house

⁴¹ See, for example *United States 2004 Model BIT*.

⁴² See, for example *Case of Suárez-Rosero V. Ecuador. Merits.* ¶ 110(5).

cleaning” (including the enactment or elimination of contradicting legislation) in preparation for an international undertaking such as a BIT.

Of course, the inclusion of domestic legislation in the negotiation agenda can also prove complex. For instance, in the matter of the implementation of the New York Convention previously discussed, the report found that “[w]here States adopted legislation implementing the New York Convention, the text of that legislation was reported in certain instances to differ from the text of the Convention. Those differences were changes of substance, additions, or omissions”.⁴³ These changes can prove harmful and even wrongful if examined in regards to state responsibility. However, their effects can be effectively reduced by using ‘direct applicability’ clauses of international law or by reserving the enactment of legislation purely to facilitate the procedural aspects of international investment arbitration, such as obtaining evidence for use in an international proceeding; an example of which can be found in the United States of America national law, specifically, in the United States Code, Title 28 § 172.⁴⁴

⁴³ United Nations Commission on International Trade Law, *Report on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* ¶ 18.

⁴⁴ Full Text 28 USC § 1782 - ASSISTANCE TO FOREIGN AND INTERNATIONAL TRIBUNALS AND TO LITIGANTS BEFORE SUCH TRIBUNALS - The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation

VI. CONCLUSION

Ecuador's extreme reactions to the problem surrounding legitimacy should not be regarded as casting doubt on the entire system as a whole.⁴⁵ These extreme measures are still reserved to a minority of states in the increasingly evolving scenario of international investment arbitration.

An identifiable problem is the growing amount of critique literature in contrast with argumentative works in support of the current of investor-state arbitration. However, a recounted and systematic review of the core postulates and treaty language that made this field a global phenomena can effectively demonstrate that many of these critiques are incomplete examinations of the more nuanced and complex framework that is investor-state arbitration. "Overall, states seem to accept that international investment treaties and investment treaty arbitration are legitimate, even if they occasionally disagree with the decisions arbitral tribunals reach on some of the finer points of international investment law".⁴⁶ Nevertheless, the complex reality of some states like Ecuador reveals that the explanation for the existence of a legitimacy crisis may be in the manner that such state addresses its own issues. This places the existence of the crisis "in the eye of the beholder" state, rooted in a more idiosyncratic view of international investment law and passing political agendas.

The additional scenarios that such states present evoke the need to provide a particular design of treaty making that involves national legislation in order to allow the "beholder" state to become a dynamic character in its own international undertakings. Although some states may continue to undertake measures with the view that the system is fundamentally flawed, investment treaties and investment arbitration remain as a legitimate framework to balance investor-state relations with the absence of a pro-investor bias and provide a continued dual benefit relationship of capital flow between host states and potential investors.

⁴⁵ Charles Brower and Stephan Schill, "INTERNATIONAL JUDGES: Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?," 11.

⁴⁶ Ibid.

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