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ARTICLES

INVESTMENT ARBITRATION, LEGITIMACY AND NATIONAL LAW IN LATIN AMERICA: AN ARBITRATOR'S PERSPECTIVE

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I. INTRODUCTION

Anyone with a serious interest in investment arbitration cannot have avoided the long-running discussion regarding its legitimacy. Depending on how the starting date is selected, this debate has now gone on for at least 25 years, with no end in sight. The discussion has, without doubt, produced a number of serious proposals for reform, some of which have already been implemented.[1]

But in speaking with a number of colleagues who have served as arbitrators in investment cases, I find their reactions to the legitimacy discussion (notwithstanding critiques from outstanding scholar in the field) to be basically, that much of the criticism reflects either ideological bias or ignorance of how the process works in practice. For better or for worse, it seems that the discussion, at this point, focuses principally on ways to expand the number and diversity of those serving as arbitrators and various proposals for unifying international investment law through a new appellate body or the creation of one or more permanent investment arbitration courts.[2] Though these proposals are certainly worth serious thought, my impression is that they do not sufficiently credit the

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* Counsel to the Firm of Porter Wright Morris & Arthur, Washington, D.C. In preparing this paper the author has benefited from the encouragement and helpful comments of many colleagues and friends, a number of whom have expertise in the subjects dealt with which far exceeds that of the writer. First among these is Professor Alejandro Garro of Columbia University Law School. I am also most grateful to Andrés Rigo Sureda, Oscar Garibaldi, Hector Mairal, Miguel Gonzalez Marcos, David Halperin, Hernando Otero, Andrés Barreto and Luis Bates Hidalgo, for their generous observations and guidance. Robert Oszakiewski, our resourceful librarian, was also a tremendous help, as was my assistant, Lorraine Eve. Any remaining errors of fact, interpretation or expressions are my personal responsibility. The article is based on a chapter in *the Comparative Constitutional Foundations of Private-Public Arbitration* (Stephen W. Schill ed., forthcoming).

[1] *See* Antonio R. Parra, A*dvancing Reform at ICSID, in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 569 (Jean Kalicki & A. Joubin-Bret eds., 2015).

2 This statement is not intended to comment, either positively or negatively, on an entirely new iteration of the legitimacy discussion which has arisen principally in Europe and has been one of a number of sources that have contributed to an EU proposal to create a permanent European Investment Tribunal. *See, e.g.*, Stephen W. Schill, *Developing a Framework for the Legitimacy of International Arbitration, in* LEGITIMACY: MYTHS, REALITIES, CHALLENGES: ICCA CONGRESS SERIES NO. 18 at 789 (Albert Jan van den Berg ed., 2015).