The Legitimacy of Arbitral Reasoning: On Authority and Authorisation in International Investment Dispute Settlement

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I. Introduction: The Line of Argumentation

A main source of legitimacy in investor-State dispute settlement (ISDS) is associated with the interpretative authority of arbitral tribunals. This authority is substantially based on the reductionist assumption that coherence in treaty interpretations instigates an authoritative body of law by signalling predictability and systemic unity. From a structural perspective, arbitral authorisation can thus be essentially understood as a legitimation practice based on a tribunal's 'correct' performance of legal reasoning. Yet views over what may be the 'correct' path of reasoning are divided. Current scholarship on the topic is generally understood as tending to portray legitimate arbitral authority as either stemming from a rigorous exercise of procedural autonomy with regard to the factual peculiarities of the case at hand[1] or as

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[1] Compare two prominent proponents Jan Paulsson, 'Unlawful Laws and the Authority of International Tribunals' (2008) 23 ICSID R – Foreign Investment LJ 215; and Karl-Heinz Böckstiegel, 'Commercial and Investment Arbitration: How Different are they Today?' (2012) 28 (4) Arb Intl, 577, 588 or, very recently,

residing in the attempt of approximating a *jurisprudence constante*.[2] Assessments of the legitimacy of arbitrators' conduct and performance may therefore be seen to be based upon either internal or external criteria: i.e. on the one hand, the emphasis on arbitral autonomy as adhering to procedural coherence and context dependence (internal) or, on the other hand, the prominence given to investment treaty arbitration's instrumental role in approximating a jurisprudential congruity within the existent body of preceding awards (external).

In the following it will be argued that perceiving these two seemingly conflicting perspectives as correlative and co-original determinants can substantially aid in ongoing endeavours of conceptualising investment treaty arbitration's uniqueness as a dispute settlement mechanism which amalgamates horizontal treaty authorisation with legitimate arbitral authority. Against this background of a shift of perspective this article makes the claim that the authorisation of arbitral tribunals should be understood as an essentially representational rather than causal interrelation between arbitral performance and authoritative ruling, on the one hand, and responsiveness to procedural autonomy and accountability to implications of public concern on the other. Making the case for a balanced view on the autonomous and instrumental aspects of investment treaty arbitration, the article demonstrates the need for incorporating political interests into the reasoning of tribunals, not as causal necessities but as representational determinants.

II. Legitimacy As Arbitration's Ethics

Legitimacy concerns regarding the interpretative authority of arbitral tribunals are of an essentially ethical nature and concerned with internal and external perceptions of legitimacy.[3] The scholarly focus on arbitrators' conduct where legitimacy relies on the 'constant vigilance and active engagement of judges, arbitrators and lawyers alike'[4] and where appointments of arbitrators depend on a 'reputation for impartial and independent judgment'[5] is closely related

Karl-Heinz Böckstiegel, 'The Future of International Investment Law – Substantive Protection and Dispute Settlement' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law* (Nomos 2015) 1863, 1868.

2 See e.g. Andrea K Bjorklund, 'The Promise and Peril of Arbitral Precedents: The Case of Amici Curiae' (2010) 34 Association Suisse de l'Arbitrage 165, 165; Christoph Schreuer, 'The Future of Investment Arbitration' in Mahnoush H Arsanjani, Jacob Katz Cogan, Robert D Sloane and Siegfried Wiessner (eds), *Looking to the Future: Essays in Honor of W. Michael Reisman* (Nijhoff 2011) 787, 802; Charles Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 (2) Chicago J Intl L 471, 474; or, very recently, Marc Bungenberg and Catherine Titi, 'Precedents in International Investment Law' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law* (Nomos 2015) 1505, 1508–10.

3 Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 147.

4 Charles N Brower, 'A Crisis of Legitimacy' (2002) 7 October National LJ 1–3, 3.

5 Brower and Schill (n 2) 491.

to what Charles Brower and Stephan W. Schill have called 'the self-understanding … of those who decide disputes on the international level'.[6] Capturing this dynamic orbiting legitimacy concerns, David D. Caron has proposed to view the distinction between individual arbitration that takes place in a particular setting as opposed to arbitration seen as 'the aggregate result of numerous arbitrations'[7] as a purposeful as well as productive interaction. He has suggested that the evocation of legitimacy concerns in individual arbitrations may be understood as forceful rhetorical 'argument of last resort pointing to possible systemic implications'.[8]

Even though ethical perspectives on arbitration may suggest to be of a mere advisory nature, I claim that neither of the two sides in the relation between the *arbitrating arbitrator* (individual arbitration) and the *arbitrator performing arbitration* (arbitration as an adjudicative system) should be isolated. As both perspectives directly concern legitimacy, individual arbitration and arbitration as a system conceptually rely upon and necessitate each other. This has to do with the distinct structure of ISDS itself, the 'considerable importance', as Stephan W. Schill and Benedict Kingsbury confirm, which the role of legal reasoning carries for the legitimacy of the tribunals,[9] and especially the position which arbitrators find themselves in when deciding matters of jurisdiction. Thomas Wälde, for example and with respect to local remedies, has rightly noted that 'international investment tribunals have a heightened responsibility to deal with risks to the integrity of the arbitral process themselves as they cannot offload such responsibility onto others.'[10] In general, this *heightened responsibility* which sharply distinguishes arbitral tribunals from any litigation procedures[11] stems from a type of arbitral reasoning which structurally prevents the impression of factual context on the tribunal's decision about its own jurisdiction. Such particular burden of the arbitrators' responsibility to oversee their own conduct essentially arises, as Wälde has phrased it *ex negativo*, out of the inherently self-referential process of arbitral review.

[6] Ibid 471. Christoph Schreuer speaks of 'attitudes of arbitrators towards the goal of their performance' (Schreuer (n 2) 802).

[7] David D. Caron, 'Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy' (2008–2009) 32 Suffolk Transnatl LR 513, 521.

[8] Ibid.

[9] Stephan W Schill and Benedict Kingsbury, 'Investor–State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) 6 Intl Law and Justice Working Paper, Global Administrative Law Series, New York, 45.

[10] Thomas Wälde, 'Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State: Asymmetrics and Tribunals' Duty to Ensure, Pro–actively, the Equality of Arms' (2010) 26 (1) Arbitration International 3, 41.

[11] Compare also with Charles T. Kotuby Jr. and Luke A. Sobota, 'Practical Suggestions to Promote the Legitimacy and Vitality of International Investment Arbitration' (2013) 28 (2) ICSID R – Foreign Investment LJ 454, 455.

However, this very absence of hierarchically structured review mechanisms upon which tribunals could rely also renders the exceptional autonomy of arbitral tribunals a fact. In other words, in deciding upon jurisdictional authority, it is the notion of arbitral autonomy itself that requires clarification, as it crucially informs an understanding of arbitral authority as such.

Furthermore, the manner in which a tribunals conduct legal reasoning is key in determining a legitimating proximity to such an arbitral ideal of autonomous procedure. In addressing matters of interpretation, arbitral reasoning, the composition of tribunals and congruity of arbitral awards the literature has identified problematic conditions for legitimate and legitimating arbitral reasoning not so much in the substantiality of awards issued. What Caron pinpointed as a 'significant error reason requirement'[12] is closely related to the ethical dimension underlying the legitimacy of interpretative authority. It qualifies the structure of self-reference to be an *ex ante* evaluative standard that merely and exclusively associates legitimacy concerns with procedural incoherence in the arbitral awards' coming into existence, i.e. with the performance of arbitrators in relation to adhering to formal rules of procedure and legal reasoning. It will thus be shown in what follows that leaving the evaluation of individual arbitral performances aside has a distinct effect on scholarly attempts to assess a tribunal's interpretative authority against the measure of coherence between treaty provision and arbitral authority itself.

III. Coherence Of Arbitral Interpretation (And Reasoning)

With ISDS legitimacy concerns ultimately pointing towards the systemic whole of investment treaty adjudication, understood as a coherent system of rules to decide consistently upon disputes, the logical point of analytical departure is the jurisprudential formation of rules governing international investment itself. Caron has rightly remarked that the scholarly concern with systemic coherence implies the closet 'assertion that the jurisprudence of the system is incoherent'.[13] Yet, the hidden presupposition behind this assertion, it is argued, is the basic idea that coherent causes will lead to coherent effects. Therefore, any critique of the incoherence of arbitral awards and international investment

[12] Caron (n 7) 517.

[13] Caron (n 7) 516. Compare also with M Sornarajah, *The International Law on Foreign Investment* (CUP 2010), 85.

rules relates intrinsically towards unified standards of interpretation and forms of reasoning during arbitral proceedings and in arbitral awards.[14]

Legitimacy concerns may be grounded in the indeterminacy of standards of a particular investment treaty[15] and due to cultural idiosyncrasies and differing political preferences, international treaties consented to by States posit a variety of standards as well as a different phrasing of similar standards to begin with.[16] Moreover, given that State interests and political ideologies may change with the passing of time, even the international agreements consented to by one and the same State entity can encompass a similar amount of diversity of standards and formulations. If the initial interest in treaty formations changes, the subsequent treaty negotiations and formations change too.[17]

However, the ensuing challenge for ISDS tribunals to interpretively determine standards coherently does not *ipso facto* condition concerns of legitimacy. It would be more than a Herculean task to coherently interpret and thereby unify the manifestations of such perpetually changing State interests. On the contrary, scholars do not tend to identify – as they indeed might – the threat to legitimacy in the inability of arbitrators to unify this treaty web of ephemeral standard provisions. Rather, they see grounds for legitimacy concerns in an interpretative activity of tribunals that produces even more varieties of interpretations and thus adds to the already vast amount of different standards and to what has been rightly identified and discussed as a phenomenon of a 'fragmentation of authority'[18]. A limitation of

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[14] Compare with Federico Ortino, 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures' (2012) 3 (1) J Intl Dispute Settlement 31–52.

[15] Compare e.g. Charles H. Brower II, 'Structure, Legitimacy, and NAFTA's Investment Chapter' (2003) 36 Vand J Transntl L 1536 and Charles N. Brower, Charles H. Brower II, and Jeremy K. Sharpe, 'The Coming Crisis in the Global Adjudication System' (2003) 19 Arb Intl, 415.

[16] As a source of further diversity of substantial treaty obligations, the fair and equitable treatment standard, for example, appears in a variety of shapes, from an unqualified formulation (4 April 2009 China-Switzerland BIT) over attachments to international law and customary international law (Art. 2(3)(a) 1999 Bahrain-US BIT and Art. 1105(1), NAFTA) to additions of substantive content (Art. 4(3), 2009 Mexico-Singapore BIT). Cp. UNCTAD, *Fair and Equitable Treatment* (United Nations 2012).

[17] This firm contextualist approach in understanding even legal relations and principles in international affairs had puzzled even Hersch Lauterpacht, especially in relation to the central principle of international treaty law, i.e. *pacta sunt servanda*, and particularly its exception, the *clausula rebus sic stantibus*. For Lauterpacht, the latter exception to the rule was a perplexing yet merely legal expression of political factors in treaty negotiation and formation (H Lauterpacht, *The Function of Law in the International Community* (Hamden Connecticut: Archion Books 1966), 279). Adding that the latter doctrine certainly violates the *pacta sunt servanda* principle, which is no less than "'one of the bases of the legal relations between the members of any community"' he eventually argued for conceiving the exception as an integral part of international law because such a possible voidability of contracts is "'common to all systems of jurisprudence"'(ibid., 281).

[18] Cp. T Broude, Fragmentation(s) of International Law: On Normative Integration as Authority Integration' (2008), *The Shifting of Allocation of Authority in International Law*, Tomer Broude and Yuval Shany (eds.), Oxford: Hart Publishing, p. 99, and N Matz-Lück, 'Structural Questions of Fragmentation'

the interpretative scope of arbitral reasoning to only submitted facts of the case at hand would at least impede an increase in the uncertainty of textual meaning. However, such a limitation of the interpretative scope of ISDS tribunals is simply absent, and arbitral practice instead shows a tendency of an increasing interpretational latitude towards the applicable law.

It is exactly these growing 'expansionary interpretations' of tribunals, Muthucumaraswamy Sornarajah explains, that pose a threat to the legitimacy of the legal system as a whole because they 'extend the law in a manner not contemplated by the original drafting of the parties'.[19] In this way, expansionary interpretations may be seen to fundamentally undermine the system of consent underlying international investment rules in general. The literature has dealt with this subject matter under the broad heading of legitimate expectations of sovereign entities and investors. What the latter may expect from investment treaty arbitration is the coherence of arbitral reasoning itself. Evoking an international rule of law as a cornerstone of legitimate interpretation as sufficient reason for legitimacy, Susan D. Franck has observed that:

> Without the clarity and consistency of both the rules of law and their application, there is a detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules, which can lead to a crisis of legitimacy. Legitimacy depends in large part upon factors such as determinacy and coherence, which can in turn beget predictability and reliability.[20]

Against the background of the above-introduced perspective on the ethical nature of legitimacy concerns regarding interpretative authority, it is noteworthy that arbitrators' self-understanding is strongly supportive of the idea that arbitral autonomy resides in restrictive procedural self-governance. In his empirical study on the usage of interpretative arguments in 98 decisions in 72 cases under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), Ole Kristian Fauchald considered the question whether tribunals created a 'predictable legal framework' and came to the conclusion that 'the tendency to be "dispute oriented", indicates that ICSID tribunals have significant potential to increase their ability to take into account interests other than those represented to them by investors and host countries.'[21] For Fauchald, the legal reasoning of a tribunal is 'dispute

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(2012), *ASIL Proceedings*, vol. 105, p. 125.

19 M. Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration' (2008), *Appeals Mechanism in International Investment Disputes*, Karl P. Sauvant (ed.), Oxford: OUP, pp. 39–45, 41.

20 Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham LR 1528, 1584.

21 Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals: An Empirical Analysis' (2008) 19

oriented' whenever the tribunal 'restricts its arguments to those presented by the parties to the dispute', as opposed to a tribunal which is 'legislator-oriented' in 'isolat[ing] the interpretive issues and deal[ing] with these independently of the facts of the case'.[22] In the tendency of ICSID to take a restrictive approach to interpretation, Fauchald sees a 'significant potential' for ICSID arbitrations to include submissions from others, such as third parties. Yet, it is precisely this inclusion which, in turn, might encourage an expansionary method of interpretation, as criticised by Sornarajah. Rather, what Fauchald's empirical study illustrates is the effect of legitimacy concerns of an ethical nature on the self-understanding of arbitrators. The conceptual implication of arbitral autonomy must thus be read to stand for an arbitral self-restriction. However, the question then arises of how arbitral autonomy relates to interpretative authority if the latter is evaluated against the level of coherence of its decisions.

The 'interpretative determinacy' of treaty standards called for by Franck is not the result of a coherent arbitral reasoning itself. Providing a 'clarification on the meaning and application of rules' for arbitral tribunals, she insists, 'can rectify textual indeterminacy' of treaty provision, but the success, Franck admits, 'depends upon who does the interpretation, their authority to interpret, and the coherence of the decisions they reach'.[23] Regarding the composition of tribunals, it is important to add that legitimacy concerns not only arise through the varying interpretative methods of different arbitrators but also through different interpretative strategies and argumentative leanings adopted by any one arbitrator when partaking in different proceedings.[24] This might also be seen to exemplify Brower and Schill's legitimating notion of the 'arbitrator's *reputation* for impartial and independent judgment' and to support their insistence that 'arbitrator appointments in investment-treaty cases do not hinge primarily on the arbitrator's position on the substantive issues in dispute in a specific case'.[25] A fundamental critique of this arbitral reputation of neutrality has been formulated by Jan Paulsson in his comment on the 2003 ICSID award of *Loewen v United States of America*.[26] In this case, as it later emerged, the arbitrator of the respondent State was put under severe pressure by officials of the U.S. Department of Justice prior to his appointment.

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(2) Eur J Intl L 301, 359.

22 Ibid 307.

23 Franck (n 20) 1585.

24 For a discussion of legitimacy concerns regarding arbitral personnel and conflicting interests and divergent interpretative methods, see Sornarajah (n 13) 462, footnote 34.

25 Brower and Schill (n 2) 491, emphasis added. This finding was also confirmed in a representative empirical study on the professional background of arbitrators. See T Schultz and R Kovacs, 'The Rise of a Third Generation of Arbitrators? Fifteen Years After Dezalay and Garth' (2012) Arbitration Intl 28 (2), 161.

26 *Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No. ARB(AF)98/3, Award (26 June 2003).

In his commentary on the case, which eventually saw an unexpected outcome in favour of the respondent due to a technicality concerning 'continuous nationality', Paulsson emphatically states:

> [The] practice of unilateral appointments militates against coherently and sincerely motivated awards. Since the requirement of reasons is intended to serve as a check on arbitrariness, it follows that the subversion of this requirement carries the risk that awards fail to fulfil their important legitimating function.[27]

For Paulsson, the problems inherent to the parties' appointment of their respective arbitrators are central to the incoherence of reasoning itself, leading him to the rather pessimistic conclusion that 'only a few arbitral institutions can make credible claims to legitimacy'[28] while the practice of unilateral appointment seems unlikely to change.

Questions of arbitral personnel, their responsiveness to influence and the composition of tribunals remain structurally embedded in the context of interpretational coherence as well as determined by the above mentioned pre-conception of a direct correlation between coherent causes and coherent effects. The centre of attention of concern about legitimacy of scholars seems to oscillate between critiquing arbitrators' autonomous choice of interpretative methods and the self-restrictive approach taken, as indicative in the ICSID review mechanism stipulated by ICSID Convention's Article 52 and its minimalistic 'reason requirement'. However, an ethics perspective on these two aspects reveals that the self-restrictive interpretation essentially stems from arbitral autonomy, and thus might approximate a legitimating coherence of performance through procedural self-governance. In other words, given the autopoietic and self-referential rhetorics of arbitral tribunals with regard to jurisdiction, applicable law and its expansive or non-expansive interpretation, a coherent performative pattern appears more likely because the autonomous as well as treaty-dependent subject of arbitral performance happens to be the one and the same arbitral tribunal. However, the identified elements of arbitrators' reputation and their performative coherence during proceedings are only partly affected by such autonomous arbitral self-understanding. In other words, if interpretational coherence is the effective cause of a legitimate arbitral performance, its final cause, i.e. reliability of performance and predictability of outcomes, points towards the issuing of arbitral awards themselves as the manifestation of arbitral reasoning and interpretation.

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27 Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 (2) ICSID R – Foreign Investment L J, 339, 353.

28 Ibid 354.

IV. Coherence Of Arbitral Awards

Once an arbitral award is issued, its reasoning and interpretational findings relate to other awards in an affirmative or dissenting manner. It thereby partakes in and (through the uniqueness of the facts and legal issues it accommodates) adds to a dynamic body of arbitral jurisprudence in its distinct way. However, the uniqueness of an arbitral award not only stems from the idiosyncratic composition of its parties, facts, legal ground of claims and other contextual determinants. It also derives from the *form* of its coming into existence – the procedural determinants peculiar to investment treaty arbitration. In analysing the particular and institutionally predetermined function that arbitrators bring to bear, Charles T. Kotuby and Luke A. Sobota have rightly emphasised that '[b]ecause final awards must be accepted as just by a broad constituency of interested parties, the strength of the institution of investor-State arbitration is in many ways measured by the strength of its awards'.[29] This essentially retrospective causal relation between the 'strength of the award', i.e. the reasoning and interpretative methods offered therein, and the performance of crafting an award, not only affirms the above introduced ethical stand on legitimacy concerns regarding interpretative authority but also serves as the underlying justificatory moment for, as Kotuby and Sobota explain, perceiving 'shortcomings in final awards' as 'anterior problems in the arbitration process'.[30]

In this way, incongruities in the composition of awards and possible contradictory relations to other arbitral rulings do not concern the legitimacy of arbitral jurisprudence on international investments *per se*. While the emphasis is put on the performance of arbitrators in general, and particularly on the 'coherent' form in which an award is crafted in terms of interpretative methods and reasoning, the external recognition of an award (approvingly or disapprovingly) also finds its origin in the arbitral proceedings. Legitimacy concerns about incoherent awards can therefore be said to condition the incoherence of arbitral reasoning. The retrospective transformation of problems stemming from contradicting awards into questions of tribunals' interpretative authority is not a mere theoretical concern. In the case of *Lauder/CME v Czech Republic*[31] – which has become the *locus classicus* of legitimacy concerns through the

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29 Kotuby and Sobota (n 11) 456.

30 Kotuby and Sobota (n 11) 456.

31 *Ronald S. Lauder v Czech Republic*, UNCITRAL Arbitration Proceedings, Award (3 September 2001) and *CME Czech Republic B.V. (The Netherlands) v The Czech Republic,* UNCITRAL Arbitration Proceedings, Award (14 March 2003).

respondent winning and losing cases on effectively identical grounds before two different arbitral tribunals – it was the later Stockholm tribunal's manner of emphasising its autonomy against the earlier London tribunal which eventually resulted in what Brower called a 'totally conflicting [arbitral decision]'.[32] The Stockholm tribunal acknowledged that '[b]oth arbitrations deal with [the] same investment in the Czech Republic' but were mindful of refraining from 'judg[ing] whether the facts submitted to the two tribunals for decision are identical.'[33] This rhetorical distinction – bearing the hidden preconception that facts submitted for decision to any two tribunals are never identical – manifestly served the one purpose of autonomously generating arbitral authority, i.e. jurisdiction. In distinguishing between the sameness and identity of submitted facts, the Stockholm tribunal in *CME v Czech Republic* stressed the non-contextuality[34] of its interpretative authority, thereby effectively excluding the reasoning and findings of other tribunals.

In the context of the measures of arbitral coherence and external recognition of arbitral awards as introduced above, the *Lauder/CME* cases thus signal a non-consequentialist attitude written into arbitral reasoning. This attitude finds expression in the *prima facie* prioritisation of procedural performance over the delivery and possible effects of awards.[35] This also applies reciprocally with regard to the moment of external recognition. In awards which are incoherent with the existing body of arbitral decisions, it is generally not the award itself which becomes the focus of illegitimacy concerns but rather the arbitral proceedings themselves.

This predicament between the internal and the external side of investment treaty arbitration, between arbitral performance and arbitral award, is strongly connected to the question of coherence itself because it touches upon the nature of the institution of arbitration itself. If coherence, as Franck writes, 'beget[s] predictability and reliability',[36] the nature of the assumed causal relation generates a twofold perspective towards the receiving end of those legitimate expectations, as the latter apply internally as well as externally. Firstly, legitimate

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32 Brower (n 4) 2.

33 *CME v Czech Republic* (n 30) para 432.

34 For a territorial reading and conception of non-contextuality as delocalisation see Jan Paulsson, 'The extend of independence of international arbitration from the law of the *situs*' in Julian D M Lew, *Contemporary Problems of International Arbitration* (Nijhoff 1987) 141.

35 For a study on the legitimating function of such a non-consequentialism see David D. Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 Am J Intl L 552, 561: '[I]n some instances integrity is promoted by entrusting operation of the organization to persons who can claim to be independent of those governed and to have no interest in a particular outcome.'

36 Franck (n 20) 1584.

expectations can be perceived to determine the (self-governing) interpretative autonomy of arbitrators, i.e. their above-mentioned self-understanding of ethical conduct. Secondly, legitimate expectations promote external acceptance by investors[37] as well as recognition by State entities as the disputing parties and recipients of final awards. What is repeatedly mirrored in this distinction – and to be addressed in the following – is the question of whether the legitimate authority of the institution of arbitration resides in autonomous procedural performances or if a tribunal is 'authorised' to arbitrate on the basis of an arbitration provision contained in the respective investment treaties.

V. Coherence Of Arbitral Authority And Treaty Authorisation

As has been stressed above, the critical focus on arbitral performance in the scholarly literature on legitimacy is based on the assumption of a causal link between coherent arbitral reasoning and the expectation of a predictable and reliable outcome for the parties involved. Arbitral conduct is internally determined through arbitrators' autonomy while party expectations in arbitral proceedings represent an external determinant in playing a crucial role in the recognition of proceedings through the recognition of awards. Serving these two types of expectation, i.e. the self-imposed internal and the retrospective external, is the principal task in which arbitrators engage once the tribunal is formed. The interpretation of the role which arbitrators *perform* (authority) or *ought to performatively represent* disputants' interest (authorisation) falls upon the ethical stand, i.e. upon the concrete understanding that arbitrators have of their sources of authority. The identification of the source of authority, in turn, is not only conditioned by the self-understanding of arbitrators but also conditions the arbitral performance in that it provides as well as restricts the particular tools of legal reasoning. The self-understanding of arbitrators thus critically affects the arbitral award in two ways: firstly, relating arbitral performance to a particular arbitral self-understanding determines the scope of interpretative authority as well as the instruments of legal reasoning; secondly, it relates the arbitral performance to a particular 'legitimate expectation' concerning that very arbitral performance as the cause for a legitimate arbitral award.

The two interwoven perspectives played out here are those of arbitration as a form of contract-based dispute mechanism, on the one hand, and of arbitration as a form of

[37] Stephan W. Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 (1) Virginia J Intl L 57, 66.

adjudication, on the other. As regards its legitimating self-understanding, it is clear that contract-based arbitration does not *derive its authority* from consent (or emerge on the basis of contract, agreement or treaty) but must rather be understood as being effectively *authorised* by consent. Rather than perceiving investment treaty arbitration as a form of adjudication in which arbitral activity is regarded as performing a function of *delegated authority* in deciding on matters of public importance, contract-based perspectives on arbitration highlight the autonomous nature of tribunals once they are effectively authorised. Analysing the degree of self-imposed restriction on a tribunal's procedural autonomy, Giuditta Cordero Moss has noted that, primarily, '[the only limitation that the tribunal seems to have is … contained in the arbitration agreement'.[38]

However, a perspective on arbitration as a form of adjudication does not deny arbitrators their autonomy but rather favours an expansion of the scope of interpretation. This is because proponents of such a view look upon ISDS as intrinsic to and a driving factor of global administrative law[39] or global governance in general.[40] Referring to the particular role of legitimate expectation towards arbitral authority, Schill and Kingsbury have pointed out that '[t]he effects of public decisions of investment tribunals are not limited to the investment treaty governing the dispute at hand.'[41] As for arbitral tribunals, Schill and Kingsbury emphasise that they serve 'as review agencies to assess balances governments have struck between investor interests and public interests'.[42]

When reading these remarks alongside the Moss quotation above, two observations seem of particular relevance in the context of the current analysis. Firstly, all three authors, in firmly stating their position on the role that arbitrators should perform, refer to at least some limitations of treaty law that affect a tribunal's interpretative scope. Both Moss' as well as Schill and Kingsbury's views thus acknowledge the reciprocal relation between authority and authorisation. The second observation is inherently related to this reciprocity of understandings. For relating the distinction between contract based and delegated authority to

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[38] Giuditta Cordero Moss, 'Tribunal's Powers versus Party Autonomy' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds.) *The Oxford Handbook of International Investment Law* (OUP 2008) 1207.

[39] Gus van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 (1) *Eur J Intl L* 121, and Gus van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007).

[40] Compare with Schill and Kingsbury (n 9) 50.

[41] Ibid 41.

[42] Schill and Kingsbury (n 9) 50.

the literature on the proceedings of appointment of arbitrators[43] reveals that the conflict between internal and external sources of legitimation in investment treaty arbitration is not so much a conflict between internal and external recognition but rather touches upon the problem of procedural representation of disputants' interests itself.

Holding this tension, it is highly instructive to turn to Daniel Markovits' writings on the argumentative structure of enthusiasts and critics of arbitral institutions, as he found that both shared two common assumptions of the idea of arbitration. The first of these, he writes, is that 'arbitration is seen as 'a contractually *created* substitute for adjudication [with the commonly supposed idea] that adjudication pursues the true and just resolution of disputes, whereas contract merely reflects the balance of advantage that is revealed through bargaining among competitors.'[44] On the basis of these two interconnected assumptions, Markovits sees a tendency in arbitration enthusiasts '[to] exploit the analogy to adjudication in order to construct an expansive account of arbitral authority – so that an arbitrator's authority might extend well beyond the range of freedom of contract, for example, to deciding statutory claims and even (when courts affirm the arbitrability of arbitrability) to determining its own scope.'[45] Arbitration critics, on the other hand, Markovits argues, 'exploit the analogy to contract [which] enables them to restrict an arbitrator's authority according to the narrow limits of contractual authority, so that, for example, it cannot extend to claims involving statutory rights in which the [S]tate has an interest that stands apart from the parties.'[46]

Markovits thus exposes not merely rhetorical divergences between enthusiasts and critics of arbitration but also reveals the common beliefs and presuppositions underlying the arbitral institution. These suggest that arbitral authority, due to its contractual and adjudicatory moments, is determined by its social function, that is to say, the particular institutional expectations associated with it. Markovits concludes that 'The legal space occupied by arbitration is spanned, as it were, by contract and adjudication'.[47]

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[43] See especially the writings of Jan Paulsson in which he continuously argues for institutional and moral reasons 'to abandon the practice of unilateral appointments' (Paulsson (n 27) 348). Compare also with Paulsson (n 3) 276-281.

[44] Daniel Markovits, 'Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract' (2009–2010) 59 *DePaul LR* 431, 431–2.

[45] Ibid 434.

[46] Ibid.

[47] Ibid 433.

With respect to investment treaty arbitration and against the suggested ethics perspective on the matter, it thus becomes clear that internal and external legitimate expectations[48] of arbitral performance fall into one. If arbitration enthusiasts and critics merely differ in their interpretative exploitation of one feature of arbitration while agreeing on the structural premises, the difference between contract-based and adjudication-oriented arbitration appears superficial. Following Markovits and translating his findings into international investment terms, legitimacy is not linked with the causal relation between arbitral performance and arbitral award but rather depends on the coherence of expectation between arbitration as arbitral performance (internal) and arbitration as adjudicatory dispute mechanism (external). Furthermore, to isolate the contractual moment in investment treaty arbitration from the adjudicatory moment means to accentuate the limited scope of treaty authorisation (contractual) against tribunal's interpretative authority over inter-State treaty provision (jurisdictional).

For Julio César Betancourt, for example, it is 'something of a misnomer [...] to refer to the primarily *contractual* duty of an international arbitral tribunal as a genuinely *jurisdictional* function'.[49] This is because arbitral awards are 'nothing more than a further manifestation of not only the parties' freedom of contract but also […] the courts' reliance on arbitration as a means of dispute settlement'.[50] In this view, the merely delegated – if not derivative – authority of arbitral tribunals seems to underpin the basic insight that *there is no interpretative authority without authorisation*. In an effort to isolate contractual from jurisdictional authority and distinguishing between jurisdiction and decision-making power, Betancourt is nevertheless compelled to acknowledge that tribunals are not only authorised but also endowed with self-sustained authority.[51] In denying arbitral tribunals' jurisdictional authority whilst also affirming their arbitral autonomy over procedural issues, Betancourt's retreat to arbitrators' 'decision-making powers' is thus exemplary for the commonality in theorists' conceptual pre-assumptions, as highlighted by Markovits.

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48 Internal and external legitimate expectations are also referred to as 'subjective' and 'objective' legitimate expectations. Compare with e.g. Giorgio Sacerdoti, 'The application of BITs in time of economic crisis' in Giorgio Sacerdoti, Pia Acconci, Mara Valenti and Anna de Luca (eds.), *General Interests of Host States in International Investment Law* (CUP 2014) 3, 21.

49 Julio César Betancourt, 'Understanding the 'Authority' of International Tribunals: A Reply to Professor Jan Paulsson' (2013) 4 (2) J Intl Dispute Settlement, 227, 231.

50 Ibid 234/235.

51 Ibid 235/236.

It has been suggested during the course of this examination that arbitral autonomy and arbitral recognition are, in fact, interdependent. The conceptual force which made the inclusion of a 'decision-making power' in Betancourt's account necessary verifies that an inversion of the above observation also holds true: *There is no authorisation without interpretative authority*. In other words, if treaty authorisation only contains a moment of delegation of power[52] while lacking a 'past-perfect' moment of 'having established authority', tribunals could be regarded as not having decision-making powers at all, let alone interpretative authority. The correlation between internal and external power, and internal and external legitimate expectations, simply denies the isolation and fixation of the institution of arbitration. The concept of 'authority' and the concept of 'authorisation' contain transcending moments of their own negation in the sense that recognised authority is the product of authorisation, and successful authorisation resides in recognised authority. At the same time, authority and authorisation are conceptually intertwined in that recognised authority embodies the 'past perfect' of authorisation while authorisation represents the persistent *conditio sine qua non* of authority.

Against the background of the reciprocal dynamic between authority and authorisation, it becomes clear why scholars engaged with the question of arbitral legitimacy usually lean towards one interpretation of the nature of arbitration while refraining from identifying that interpretation as exclusive. Caron, for example, notes that any 'discussion of coherency in the ICSID [framework] must begin by noting that the root of the problem is embedded very deeply in the structure of arbitration itself.'[53] He continues by comparing this framework to the one provided by municipal contract law in which the actions of a variety of actors are framed with the highest possible inclusion of the interests of participants for the price of coherence.[54] His view on the necessity for a minimum of external constraints put on investment treaty arbitration can be compared to Brower and Schill's stance, who also stress that 'arbitrators in investment-treaty disputes are required to reach their decisions based on their impartial and independent judgments'.[55] However, they remark that it is precisely for this form of independent arbitral performance that 'investment-treaty arbitration has little in common with private-law arbitration where the parties have full sovereignty in determining

[52] See for a strong proponent of arbitral authority as a mandate Böckstiegel (n 1) 1868.
[53] Caron (n 7) 516.
[54] Ibid.
[55] Brower and Schill (n 2) 492.

not only which law arbitrators have to apply, but also whether they should render an impartial and independent decision at all.'[56]

This is because 'investment-treaty arbitration in its decision making process is [essentially] an adjudicatory process'.[57] Brower and Schill thus conclude that ISDS 'is in fact not classic arbitration where the parties have full liberty to set the standards for the decision-making process and can control the way the dispute is resolved.'[58]

The emphasis put on arbitration's autonomy while perpetually relating this to the final cause of investment treaty arbitration, i.e. the decision over State action or administrative measures, perfectly illustrates the dialectical tension between the non-contextuality and contextual embeddedness of arbitral awards. Illustrating this unique, oscillating structure of investor-State arbitration, Kotuby and Sobota see arbitrators 'in a position of privilege' at the same time as facing 'a delicate task' in 'pronounc[ing] judgment on official government acts and award damages that could significantly affect the public fisc'.[59] Consequently, they conclude, the privileged position arbitrators find themselves in 'must be exercised with care'[60] because it *per se* establishes a 'heightened responsibility'.[61]

This essentially ethical stand on coherence and legitimacy of investor-State arbitration manifests itself in the literature in varying contexts. This section has developed a fuller notion of legitimacy as the embodiment of a coherence of expectations between arbitration as arbitral performance (internal authority) and arbitration as adjudicatory dispute mechanism (external authority). Thus legitimacy concerns are essentially not an unease over arbitral performance alone, understood as sufficient ground for legitimate awards, but must also be seen to relate to an assessment of arbitral performance in its systemic role in a legal field in which private and public interests and preferences collide. Two questions necessarily raised by the call for a 'heightened *responsibility*' can thus be identified and will be addressed in the following: Firstly, to whom or what does the institution of arbitration have a responsibility to reconcile internal and external legitimate expectation, if scholars deny binding advocacy in arbitral proceedings (responsibility)? Secondly, if legitimate expectations are constitutive in

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56 Ibid.
57 Ibid.
58 Ibid.
59 Kotuby and Sobota (n 11) 455.
60 Ibid.
61 Wälde (n 10) 41, emphasis added.

internal and external moments of ISDS, what particular legal function does investment treaty arbitration serve (accountability)?

VI. Responsibility And Accountability

The scholarly legitimacy concerns which this article categorises as relating to the 'responsibility' and 'accountability' of investment tribunals are mutually intertwined and based upon the conceptual tensions between arbitral autonomy and award recognition. *Responsibility* denotes the internal ethical stand (responsiveness) arbitrators take towards their activity as one oscillating between private and public dispute settlement conceptions. *Accountability*, on the other hand, signifies the distinct process of how the issued arbitral award 'performs' within a framework of already established public and private expectations. Responsibility in the literature frames legitimacy concerns according to the dual nature of arbitration while relying on the seemingly causal relation between coherent arbitral conduct and coherent awards which was refuted above.[62] But even when contrasting the critical role of arbitration in interpreting and determining treaty standards with its ambiguous nature of being systemically rooted in both commercial arbitration and forms of public adjudication, the referential horizon of scholarly concerns relates, as Caron puts it, to the 'consequence[s] of the public importance of the issues possibly addressed by the arbitration'.[63] Even though this consequentialist emphasis differs sharply from the moment of non-consequentialism which was revealed above as being partly inherent in arbitral autonomy, it also exemplarily embodies the dialectical dynamic of arbitral autonomy according to internal and external legitimate expectations. Indeed, a disconnection between arbitral autonomy and its consequences, including expectations prior to and during arbitral proceedings, represents an insulation of arbitral awards from their external moment altogether. In what may be read as support for this analysis, Franck remarks that 'greater sensitivity to the public interest' equals a minimising of 'the risk of inconsistent decisions'.[64] A lack of responsiveness to issues of a potential public nature, on the other hand, may result in public pressure threatening the interpretative authority of tribunals.[65]

Moreover, the link to external expectations connects arbitral responsibility with the moment of accountability. The latter stands for a democratic aspect of participation, something which

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62 See Schill and Kingsbury (n 9) 41, also Brower II (n 15) 66.
63 Caron (n 7) 514. Compare also with Sornarajah (n 13) 360/361.
64 Franck (n 20) 1625.
65 Ibid.

some scholars conceive as elementary to arbitration.[66] In an abstract form that does not unnecessarily favour a particular political sentiment about the degree of participatory rights as constituted, for example, in democratic societies,[67] accountability demarcates the interests of the party to the dispute that had also given consent to the authorisation of the tribunal. Brower and Schill describe this approach to ISDS as follows:

> Critics argue that arbitration, as compared to dispute resolution in courts, is unsuitable for ... public law disputes because arbitrators are privately contracted by the parties to specific disputes and do not hold, like tenured judges, a public office. For this reason, arbitration is said to institutionalize a pro-investor bias because arbitrators are influenced by their self-interest in being reappointed in future cases.[68]

While this critique is formulated as if the central issue was the composition of the tribunals,[69] the fundamental stumbling block is, in fact, the relation between investment treaty arbitration and public concerns. Charles H. Brower II has noted that it is not arbitral autonomy as such which is seen as a threat to legitimacy but rather the disconnection between the tribunal's 'creative lawmaking' and its 'unpedigreed outcomes'.[70] The latter are isolated from the public realm and thus seem illegitimate to the community affected because such insulated arbitral practice does not, as Brower II continues, 'conform to historical practice, and incorporate fundamental values shared by the governed community'.[71]

The interdependent relation underlying responsibility and accountability concerns of investment treaty arbitration is embedded in the dialectics of authorisation and authority in the following way: Concerns of arbitral responsibility are scholars' concerns *over* or (arbitral autonomy's) concerns *from* the perspective of an established 'authority'. Concerns of arbitral accountability are essentially scholars' concerns *over* or (public) concerns *from* the perspective of 'authorisation'. It is proposed that the term mediating the two perspectives is *representation*, because it relates two expectations which represent intrinsic signifiers to one another.

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[66] Caron (n 35) 561. Compare also with Sornarajah (n 13) 360/361 and Franck (n 20) 1584.

[67] It is noteworthy that the external accountability of investor-State tribunals is instantly associated with democratic legitimacy. The argument given usually asserts that democratic societies are simply accustomed to a form of legitimacy and legitimate authority that arises out of and is measured against the degree of democratic participation. Compare with Schill and Kingsbury (n 9) 41, Schill (n 37) 67.

[68] Brower and Schill (n 2) 489.

[69] Compare also with Franck (n 20) 1585.

[70] Brower II (n 15) 66.

[71] Ibid 51.

VII. Representation And Perceptions Of Legitimacy

It has been submitted above that the conflict between internal and external sources of legitimacy in investment treaty arbitration touches upon *the* problem of the representation of disputants' interests itself. The problem emerges from a distinct social function ascribed to arbitration and, as a consequence, from conflicting institutional expectations associated with it. Hence the mediation of internal and external legitimate expectation is understood to approximate a desired coherence of internal and external moments of arbitral performance, leading eventually to a perception of legitimacy. With regard to the marked democratic inclinations of a majority of scholars, 'unrepresentative tribunals'[72] pose a problem in their own right. If contextualised as a matter of participation of the initial and affected parties to the dispute, it becomes evident that a more inclusive engagement might soften the concerns of a democratically habituated community.[73] However, a participatory broadening of the arbitral process is not without detriments, as expanding participatory elements also expose investor-State arbitration to an increased influence of political interests. This collides with one of the central ideas behind the private and excluding nature of arbitration, which was the depoliticisation of investment disputes.[74] The apparent dilemma of reconciling internal and external expectations, if portrayed on a conceptual level, also imparts an *ideal* by which ISDS appears to be measured and of which it falls short. This ideal is exposed *ex negativo* in that investment treaty arbitration denies the conclusive reconciliation of these two expectations.

It has been suggested by Schill and others that at the heart of the criticism of international investment law is a 'public law challenge',[75] denoting the review of policy measures by non-political and non-politically legitimated arbitrators. This stance is rooted in an ideal of arbitration as not the advocacy of particular interests but of notions concerning public values that the affected political community holds dear. Legitimate expectations, when associated with more general notions of legitimacy, do not take the shape of participatory interests but rather manifest as perceptions of the form of arbitral performance. In the literature, predictability and reliability are therefore related to 'perceptions of legitimacy'. Franck, for example, sees the 'consistency of interpretation and application of rules' as instrumental in promoting '*perceptions* of fairness and justice', which strongly links to jurisprudential

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[72] Ibid 66.

[73] See e.g. Samantha Besson, 'Theorizing the Sources of International Law' in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (OUP 2009) 163, 176.

[74] See e.g. Brower II (n 15) 65.

[75] Schill (n 37) 67.

coherence as a 'key element of legitimacy'.[76] Furthermore, Brower II affirms 'that international legal regimes depend for their survival on perceptions of legitimacy', and also emphasises that '[t]o generate perceptions of legitimacy, legal regimes must operate predictably'.[77]

The notion that legitimacy concerns are subject to a dialectical dynamic means that these concerns culminate in an idealisation of the *representational form* investor-State arbitration should take in order to be *perceived* as legitimate. That the crisis of the legitimacy of arbitral authority is not a crisis concerning actual arbitral reasoning, nor actual interpretations or awards was demonstrated in the analytical development of the concept of interpretative authority as simultaneously adhering to internal and external *perceptions* of coherent conduct. Moreover, the ethical stand on legitimacy concerns regarding interpretative authority of arbitral bodies has proven fruitful in the conceptualisation of a mediated *formal* standard of arbitral performance. In his analysis of the self-referential mechanisms that an international institution adheres to in order to establish or confirm external perceptions of authority and legitimacy, Caron has affirmatively pointed out that the 'perception of illegitimacy may spring as easily from not acting as from acting' [78].

In summary, critical scholarly references to perceptions of legitimacy are essentially references to perceptions of coherence of arbitral performance in its internal (procedural) and external (award-related) aspects. While the core institutional purpose of generating coherence and responsiveness to a general adjudicative system is strongly linked to legitimacy itself,[79] the arbitral representation of a coherent international system of rules on foreign investment forms the measure in the literature concerned with legitimacy against which problematic conditions of arbitral performance are evaluated.

VIII. Conclusion: Legitimacy And The Crisis Of Arbitral Reasoning

Paying tribute to the etymological root of the term, the 'crisis' internal to the representation of the treaty system signifies a separation of two correlative moments. Investor-State arbitration, as representing a coherent legal system, is perceived to oscillate between contractual (private) and treaty-based (public) traits. This distinction translates into two perspectives on arbitral performance. Firstly, ISDS responds to internal legitimate

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[76] Franck (n 20) 1585, emphasis added.
[77] Brower II (n 15) 51.
[78] Caron (n 35) 560/561.
[79] Caron (n 7) 518.

expectations and secondly, investment treaty arbitration attempts to address external legitimate expectations. These perspectives on arbitration either stress the *autonomous nature of arbitration* or the *arbitral responsibility* to represent the moment of 'public concern' within public treaty law. Therefore, the two distinct attitudes anticipate two distinct but, in the unity of internal and external moments, related representations of legitimacy. First, complying with the idea of arbitration as a private dispute settlement mechanism, some arbitrators, Schreuer has remarked, 'see it as their duty to decide the particular case without regard to a *jurisprudence constante*' while, second, '[o]thers see it as their duty to contribute to the development of a coherent body of law'.[80] To decide either regardless of or with regard to the formation of consistent jurisprudential referents[81] was demonstrated above to be pivotal to the generation of predictability and reliability and to form, in turn, the basis of perceptions of legitimacy.

Yet generating a perception of investment treaty proceedings as being performed 'without regard to external expectations' does not indicate arbitrariness in arbitral conduct. On the contrary, this ideal-type[82] of autonomous arbitral performance *rigorously* follows the (self-given) procedural template agreed upon and found to be appropriate prior to the tribunal's commencement of proceedings. In this sense, the internal perception of investment treaty arbitration as an autonomous mechanism of dispute resolution is *formal* because the exclusively *procedural formality* guarantees perceptions of legitimacy within a process that is *autopoietic* and *self-referential* with regard to the ordering procedural setting.[83]

In this framework of rigorous arbitral autonomy, the form of the arbitral performance is critical in generating legitimacy. Being originally designed for and applied to disputes of a commercial nature, the very *form* of arbitration, of the arbitral rules that require meticulous observance from all parties to the dispute, and of the ethical stand arbitrators take towards the nature of arbitral performance, may be seen to *imprint itself onto the outcome of the dispute* unfavourably to the public authority involved, that is to the respondent State.[84]

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80 Schreuer (n 2) 802.

81 See also Brower and Schill (n 2) 474.

82 See also Loukas A. Mistelis, 'Award as an Investment: The Value of an Arbitral Award or the Cost of Non–Enforcement' (2013) 28 (1) ICSID R – Foreign Investment L J 64, 69.

83 Compare also with Jan Paulsson's vision of the ideal of arbitration. He writes: "'Arbitration is a form of self-governance"' (Paulsson (n 3) 259) with which he too points towards the self-referential and auto-legislative constitutive elements intrinsic to arbitration.

84 Cp. with Tania Voon, Andrew Mitchell and James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29 (2) ICSID R – Foreign Investment L J, 451, 473.

Perceiving arbitration as instrumental rather than rigorously autonomous means, on the other hand, to firstly regard arbitration not under the heading of a depoliticised dispute settlement mechanism that ensures an 'equality of arms' between both parties[85] but to rather take the initial and constant public purpose of investment protection seriously into account. The public interest in arbitration is 'initial' because States as representatives of public interest authorise this dispute settlement through international treaty provisions while also expressing public interest in the protection of foreign direct investments. The 'constant' public interest inherent to investor-State arbitration, furthermore, naturally arises out of the participation of State sovereignties during proceedings as respondents who represent the interest of the political community affected and who, within the framework of the New York Convention, warrant the recognition and enforcement of arbitral awards. Hence, if, as Paulsson suggests, the 'idea of arbitration is liberty',[86] understood as rigorous autonomy, the ideal-type of the contextual aspect of arbitration essentially negates self-reference, formalistic autonomy and operational exclusion of external content. The contextual side of investment treaty arbitration displays a veritable connection to the community involved, through both the recognition and the enforcement of awards. In this way, investor-State arbitration's contextual moment transcends the formal procedural aspects, overcomes the isolation of focusing solely on settling the dispute at hand regardless of the impact an award might have, and thus becomes *instrumental*.

For the contextual side of arbitration, being *instrumental* means that it has its quintessence outside of itself because content-dependence indicates that the procedural performance is there to answer or to fulfil external contextual requirements. Unlike the formalistic content-independent side which generates perceptions of legitimacy in performing arbitration purely *self-sufficiently*, the instrumental element of ISDS is a procedural anticipation of external legitimate expectations and public authority itself. Capturing eloquently the spirit of this moment of contextual embeddedness, which is particularly pivotal to investment treaty arbitration, Paulsson has described the idea of an instrumental kernel within arbitration as the 'great paradox of arbitration [which] seeks the cooperation of the very public authorities from which it wants to free itself.'[87]

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85 Van Harten and Loughlin (n 39) 149.

86 Paulsson (n 3) 256.

87 Jan Paulsson, 'Arbitration in Three Dimensions' (2010) LSE Law, Society and Economy Working Papers, 2.

The external legitimate expectation projected onto the arbitral performance, the ‘scope of legal protection granted to investors’, as Anna de Luca has put it, is thus strictly correlative with the community affected and their evaluations of ‘what is deemed to deserve legal protection’.[88] However, this link between external perceptions of legitimacy and the resultant standards of public interest projected onto arbitral conduct produces a similar concern regarding the neutrality and suitability of the dispute mechanism installed. If the private format of arbitral procedural rules imprints itself onto the award in an investor-biased or State-favouring manner, arbitration as an instrument anticipating public interest and reflecting State power[89] seems to be as much influenced by content-determination as by formal rules.

Both moments of investment arbitration are inherent in the instrumental as well as the autonomous nature of investor-State arbitration, and both are legitimating factors in that they determine standards of arbitral performance which meet external or internal legitimate expectations. Yet both, based on indeterminate notions of ‘public interest’[90] and ‘autonomy’, only signify *abstract place holders* in a dialectical concept of legitimacy, incorporating external as well as internal legitimate expectations.

Accordingly and based on the findings of this analysis, a crisis of legitimate interpretative authority stems from a perspective which interprets the above-developed different perspectives on investment treaty arbitration as standing in an oppositional or dichotomous relation. Instead of being appreciated as conceptually interdependent, investment treaty arbitration is perceived to be bound either by internal and external expectations, compelled to formal and contextual determinants, autonomous and instrumental procedural objectives, or, as the most popular narrative tells it, torn between private and public interests. Performatively transforming oppositional perceptions into differentiating perspectives is thus the first and foremost source of arbitral authority and legitimacy, and relates hortatively to the ‘arbitrating arbitrator’ as well as the ‘arbitrator performing arbitration.’

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[88] Anna de Luca, ‘Indirect expropriations and regulatory takings’ in Giorgio Sacerdoti, Pia Acconci, Mara Valenti and Anna de Luca (eds.), *General Interests of Host States in International Investment Law* (CUP 2014) 58, 73.

[89] See Caron (n 35) 588.

[90] See the famous 1824 case in the English Court of the Exchequer in which it was said that ‘public policy’ ‘is a very unruly horse, and when once you get astride it you never know where it will carry you’ (*Richardson vs. Melish* [1824-34] ALL ER 258, para. 266). Also cited in Paulsson (n 3) 130.