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SESSION: **DIVING DEEPER INTO THE NATURE OF AN INVESTMENT COURT – DESIGN ELEMENTS**

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RECALLING THE (PERCEIVED) PROBLEMS WITH THE CURRENT SYSTEM:

- Lack of coherence, fairness, accountability, consistency, predictability, and legitimacy
insufficient process for remedying incorrectness
- Some debate as to whether these are actually problems in current system.
- Nevertheless, working toward coherence, fairness, accountability (but not at the expense of judicial independence), consistency, predictability and legitimacy are in the *long run* valuable
- Overall, beneficial to assess proposals against these criteria

MOVING FORWARD:

- Consider how various proposals do or do not remedy problems.
- My aim is to consider how a permanent investment court provides benefits related to perceived problems of current system:
 1. Permanency as a design feature
 2. Appellate review as a design feature
 3. Negotiated settlement as a design feature
 4. Centralized financing arrangements as a design feature
 5. Voluntary + Compulsory jurisdiction as a design feature

I. PERMANENCY CAN BE DESIGN FEATURE

- Adjudication where judges sit for fixed appointments
 - As opposed to ad hoc appointments made to review a specific dispute
- A standing court would feature permanency for first instance review as well as appellate review (as per EU proposal)
- In contrast to systems like the WTO DSM (where ad hoc panels constitute first instance)

PROS AND CONS OF PERMANENCY

Cons

- Less flexibility: cannot be tailormade to the short term interests of states—may be harder to get states to participate
- Can expand authority over time, for example, through expansive treaty interpretation
 - As correction mechanisms, however, states retain power to revise treaty or may be allowed to issue interpretive statements

Pros

- More predictable in the aggregate
- More coherence and consistency
- Greater legitimacy
- More accountability: both of judges and personnel of court
- More resource efficient
- Greater capacity due to supporting registrar/secretariat

HOW DOES PERMANENCY PROVIDE ADVANTAGES?

Permanency makes clearer who is to be accountable.

- Accountability requires clarity about *who* is accountable—permanency makes this clearer.
- In ad hoc systems, accountability is a one-off only.
 - E.g., states can decide to not have the same appointee or seek annulments.
 - But, who is accountable for the system as a whole or in the long-run? Permanency remedies these challenges.
 - **Permanency remedies these challenges.**
- With a permanent court, accountability holders are foremost member states, and indirectly their domestic constituents

Permanency ensures states have interests in the integrity of the institution.

- The interests of a court's personnel (judges, registrars, staff) are tied up with the integrity of the institution.
- Consequently, they have interests in the legitimacy and the legal coherence and consistency of the court's jurisprudence.
 - Personnel will thus often act to promote legitimacy, coherence and consistency.
- Interests in the system may not be as strong in an ad hoc system (with the exception of active arbitrators).

HOW DOES PERMANENCY PROVIDE ADVANTAGES (CONT'D)?

Permanency reduces *transaction costs* (monetary & human resources, e.g. time, expertise, energy)

- In an ad hoc system, a lot of resources are exhausted on making appointments.
- With fixed-term judges, these costs are minimized because the selection process does not occur for each dispute.

Permanency can ensure that appointments are based on long-term interests of states rather than short-term interests

- Select judges with reputation for (e.g. impartiality, objectivity, integrity, etc.)
 - Not selected based on state vs i interests
- However, in appointing fixed-term judges, states will need to consider possibility of bias from respondent and a host state of an

2. APPELLATE REVIEW CAN BE A DESIGN FEATURE?

MODELS

- A. First instance division + Appellate division (e.g., CJEU, EACJ)
 - Judges appointed to serve on specific division
 - No judge who sat on first instance will hear appeal

- B. Court sits in different formations/chambers (e.g., ECtHR)
 - First instance review = smaller formation/sub-chamber + larger formation/full chamber = appeal
 - Some judges from first instance can also hear appeal (in addition to others)
 - E.g., ECtHR: Chamber is composed of 7 judges, and Grand Chamber is composed of 17 judges (overlap)
 - This model may enable higher consistency due to overlap in judges across levels of review

- A and B can include criteria for appellate review, such as whether first instance decision is of potential inconsistency.
 - E.g., Appeals must meet a set of criteria to be reviewed. Consequently, only a small portion are appealed (approx. 5.2% since 1998).

- C. Alternative model for a two-tier system: Commission + Court
 - Commissions are quasi-judicial, first instance review organs that issue non-binding decisions
 - They can refer disputes to a permanent court, so long as state accepts jurisdiction
 - Potential to become a two-track system: only some states recognize court

PROS AND CONS OF AN INTEGRATED APPELLATE REVIEW

Pros

- *Centralized* appellate review can help to identify and resolve inconsistencies and incorrectness
 - Conflicting interpretations have potential to arise when appellate review is decentralized (i.e., available for some but not all)
- Accountability over first instance for either party

Cons

- Dispute prolongation

3. NEGOTIATED SETTLEMENT AS A DESIGN FEATURE

- A standing court can include a court-facilitated settlement procedure including requirements, forum and/or procedures for negotiated settlement (such as conciliation at ICSID)
 - E.g., ECtHR = Friendly settlements
 - E.g., WTO DSM = Consultations

ASSESSING ADVANTAGES OF NEGOTIATED SETTLEMENT AS DESIGN FEATURE OF A COURT

- ICSID conciliation = 2% of cases through 2014 went to conciliation (von Kries, Lack, & Leathes 2014)
- Where permanent court facilitates or mandates attempt to negotiate a settlement
- ECtHR = 4025 judgments, 851 friendly settlements (1998-2008) (Keller, Frowd, & Engi et al. 2010)
- WTO = between 1995-2010, 20% of all disputes settled without going to panel (Pauwelyn and Zhang 2018)
- Possibility that if negotiated system is integrated into a permanent court there may be a greater level of negotiated settlement
 - This can make litigation less expensive and timely for parties

4. CENTRALIZED FINANCING ARRANGEMENT CAN BE A DE FEATURE

Four Main Models

1. Financed by IO

- Part of ordinary budget for larger IO, which is funded primarily by assessed member contributions
- E.g., ECtHR

2. Financed directly by states

- Primarily based on equal or assessed member contributions
- EU's proposal

3. Other financing

- E.g., Caribbean Court of Justice: Funded entirely by a Trust Fund which all members states invested in

4. Voluntary contribution schemes

- Member states and third party (non-member states, IGOs, and NGO) funders
- E.g., Rome Statute of ICC, Article 116: "...the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with the rules adopted by the Assembly of States Parties."
- Ear-marking or not

COMPARING OPERATING COSTS

- Under current ISDS system: ICSID only
 - Average ICSID tribunal costs = \$900,000 per dispute
 - Average of 42 ICSID disputes per year (in 2010s)
 - Based on average = 37.8 million in tribunal costs per year (ICSID only)
 - + 12.5 million ICSID administrative costs (2018)
 - \$USD 50.3 million per year
- Operating and programming costs at permanent international courts
 - ICJ in 2018/2019 = \$USD 49 million
 - ITLOS 2019/2020 = EUR 20, 521, 200 (approx. \$USD 22.8million)
 - ECtHR 2019 = 69,997,500 euros (approx. \$USD 77.8 million)
 - keep in mind the ECtHR's workload is massive (43,000 applications and 2,700 judgments in 2018)
 - ICC 2019 = \$USD 148million (maybe not the best comparison because it includes prosecutors office- litigation costs and victims assistance)
- Very possible that permanent investment court could be less expensive as a whole in terms of

PROS AND CONS OF CENTRALIZED FINANCING ARRANGEMENTS

Pros

- Financing responsibilities can be distributed based on relative wealth of states (as per ICJs, ICs, and the EU proposal)
- Financial contributions can be attached to rights/privileges, such as voting on judges or arbitrators, access to proceedings, etc.
 - These are currently not available to states that are nonparties to a dispute

Cons

- Assessing state contributions can become quite political: how often will financial responsibilities be reassessed?
- Noncompliance with fulfillment of financial obligations—what to do?
- States may be paying for the court at times when they are not using it

5. OPTIONAL + COMPULSORY JURISDICTION AS A DESIGN

- Jurisdiction can be voluntary or compulsory
 - Voluntary jurisdiction may come in different ways:
 - Treaty-based jurisdiction: an IIA confers jurisdiction to adjudicate disputes arising from (need not be exclusive)
 - E.g., ITLOS and ICJ both have this form of optional jurisdiction
 - This model could give states a choice of whether to confer original and/or appellate jurisdiction
 - By special agreement: jurisdiction conferred by agreement of parties to a specific dispute only
 - E.g., ITLOS and ICJ both have this form of optional jurisdiction
 - Compulsory jurisdiction: all disputes arising for member states who are state Court (and accept jurisdiction, sometimes automatic upon membership)
 - E.g., ICJ: states accept jurisdiction and court then has jurisdiction over any dispute between accepting jurisdiction
 - E.g., ITLOS: compulsory jurisdiction on certain types of disputes (seabed, prompt release)
- Can also add advisory jurisdiction

PROS AND CONS OF OPTIONAL+COMPULSORY JURISDICTION

Pros

- Optional jurisdiction helps to accommodate existing treaties (per EU proposal)
- Compulsory jurisdiction for member states limits potential for growth in fragmentation, inconsistency, and future forum-shopping
- Can help to improve sense of fairness in overall treatment of states—states have access to same institution, procedures, etc.

Cons

- States lose flexibility of choice
- Potential difficulty with managing transition, given the current decentralized system where ISDS is established by thousands of treaties.
- Need to decide if compulsory jurisdiction is automatic on membership or if additional declaration required

IN SUM

- Many of the perceived problems of the current ISDS system could be alleviated (in part) by a permanent court
- However, this does not resolve all design questions and some models of design may better alleviate some problems than others
- Other important design aspects to consider: third party state access, non-party access (e.g., amicus), exhaustion of local remedies, among others