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Legitimacy Concerns in Investor- State Dispute Settlement

by

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**A Thesis Submitted in Partial Fulfilment of the Requirements for the
Degree of Doctorate of Philosophy in Law**

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Declaration

I hereby declare that this thesis is my own work, except where acknowledgement is given to outside sources. It is submitted to the University of Warwick in support of my application for the degree of Doctor of Philosophy in Law. It has been composed by myself and has not been submitted for a degree at another university.

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Abstract

The system of Investor-State Dispute Settlement (ISDS) is not based on a formally recognized hierarchical structure amongst tribunals. In fact, tribunals are created on a case by case basis and therefore, exist only to settle the dispute before them. Moreover, there is no unified statement of International Investment Law (IIL) norms, rather investment norms are currently found in investment agreements which are more than 3000 in number.

The fragmented nature of the system of ISDS and IIL give rise to certain concerns of illegitimacy. For instance, the absence of a formally recognized hierarchical structure amongst tribunals has led to inconsistent decisions even when the facts and the applicable rules were similar. Moreover, even though investment disputes involve issues that have an impact beyond the parties, institutional rules and investment agreements do not provide uniform rules on transparency. Lastly, broad interpretations of investment standards by tribunals have led to an imbalance between the interests of investment protection and the right of states to adopt legitimate policy measures. In light of these concerns, states and non-party stakeholders have begun to question the legitimacy of the current system of ISDS.

Solutions that can be adopted to remedy these concerns, without requiring a fundamental reform of the system of ISDS are not be capable of adequately resolving all three concerns that have given rise to a crisis of legitimacy. It is proposed that the most viable solution is to reach consensus on replacing all investment treaties with an Multilateral Investment Agreement (MAI), and to establish a standing two-tiered international court system to interpret it. The adoption of this proposal, it is argued, would go a long way in resolving the legitimacy crisis that the system is currently suffering from.

Abbreviations

AB	Appellate Body
AF	Additional Facility
ASEAN	Association of South East Asian Nations
BIT	Bilateral Investment Treaty
CAFTA	Central American Free Trade Agreement
CISG	Convention on the International Sale of Goods
CISG-AC	Convention on the International Sale of Goods Advisory
COMESA	Common Market for Eastern and Southern Africa Council
CRS	Corporate Social Responsibility
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EAC	East African Community
ECHR	European Convention for the Protection of Human Rights and
EFTA	European Free Trade Association
EPA	Economic Partnership Agreement
EU	European Union
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
FTC	Free Trade Commission
GATT	General Agreement on Tariff and Trade
GATS	General Agreement on Trade in Services
IBA	International Bar Association
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
	Fundamental Freedom

IIA	International Investment Agreement
ILAC	Investment Law Advisory Council
IMF	International Monetary Fund
ISDS	Investor – State Disputes Settlement System
LCIA	London Court of International Arbitration
MAI	Multilateral Investment Agreement
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
IPA	Investment Protection Agreement
NGO	Non-Governmental Organisation
NT	National Treatment
OECD	Organisation for Economic Co - operation and
Development PCA	Permanent Court of Arbitration
RCEP	Regional Comprehensive Economic Partnership
Agreement TNC	Transnational Corporation
TPP	Trans - Pacific Partnership
TRIMS	Trade Related Investment Measure
TRIPS	Trade Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade
Law UNCTAD	United Nations Conference on Trade and
Development	
US	United States of America
USD	United States Dollar
VLCT	Vienna Convention on the Law of Treaties
WB	World Bank
WTO	World Trade Organisation
WWII	World War II

Chapter 1 - Introduction

This chapter aims to provide a brief introduction of this research by defining the research question, the scope of the study and discussing the objectives and the methodology that will be followed.

1.1. Background

Arbitration has become the most common method for the Investor-State Dispute Settlement (ISDS).¹ Under the current system of ISDS disputes are not settled by a single adjudicative body, instead investment arbitration is conducted by a number of tribunals. Most investment disputes, however, are settled under the Rules of International Centre for Settlement of Investment Disputes (ICSID)² and the United Nations Commission on International Trade Law (UNCITRAL).³

Disputes can be initiated under the ICSID rules by the nationals of member states against another member state.⁴ The ICSID Additional Facility Rules on the other hand, apply when one of the parties to a dispute is not a party to the ICSID Convention.⁵ When none of the parties to a dispute are members to the ICSID Convention, generally the UNCITRAL Rules are used to settle disputes on an ad hoc basis.⁶ In such instances, the parties can refer to any arbitration institution such as the London Court of International Arbitration (LCIA)⁷, Permanent court of Arbitration (PCA)⁸, and the Stockholm Chamber of Commerce (SCC)⁹ as an appointing authority for the resolution of their dispute.

¹ UNCTAD World Investment Report (2018): 'Investment and New Industrial Policies', (hereinafter UNCTAD WIR (2018)).

² ICSID Rules of Procedure for Arbitration Proceedings (last amended in 2006) (Hereinafter ICSID Arbitration Rules).

³ UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013).

⁴ The Convention on Settlement of Investment Disputes between States and the Nationals of Other Contracting States, (1965), article 25.

⁵ The Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (2006), Article 2(a).

⁶ The UNCITRAL Arbitration Rules (2010), article 1(1).

⁷ The London Court of International Arbitration Rules (2014), Article 1.

⁸ PCA Arbitration Rules (2012).

⁹ The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, (2010), article 1.

The fragmented nature of the system of ISDS and International Investment Law (IIL) coupled with the lack of a regulatory body give rise to certain concerns of illegitimacy. For instance, the absence of formally recognized hierarchical structure amongst tribunals has led to inconsistent decisions even when the facts and circumstances of disputes, and the applicable rules were similar.¹⁰ Moreover, even though investment disputes involve issues that have an impact beyond the parties, institutional rules and investment agreements do not provide uniform rules on transparency.¹¹ Lastly, inconsistent and broad interpretations of investment principles by multiple tribunals has led to an imbalance between the interests of investment protection and the right of states to adopt legitimate policy measures.¹²

In light of these concerns, states and non-party stakeholders have started to question the legitimacy of the current system of ISDS. Some countries such as Bolivia, Ecuador, and Venezuela have withdrawn consent from the ICSID Convention.¹³ Similarly, certain states such as Indonesia have begun to terminate their investment treaties that include ISDS provisions, while others have stated that ISDS provisions would no longer be included in their future treaties.¹⁴ South Africa for instance has terminated some of its Bilateral Investment Treaties (BITs) with certain European Countries, and has enacted legislation whereby investment disputes with nationals of those countries would be resolved by its domestic courts and arbitration.¹⁵ Moreover, the 2015 South

¹⁰ See for instance *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6.

¹¹ August Reinisch, 'The Issues Raised by Parallel Proceedings and Possible Solutions' in Waibel M et al (eds.) *The Backlash Against Investment Arbitration: Perception and Reality* (2010) 113-126, (Hereinafter, Reinisch, 'Parallel Proceedings'); Charles Brower et al, 'The Coming Crisis in the Global Adjudication System' (2003) 19 *Arbitration International* 415, 417; Gus Van Harten 'Investment Treaty Arbitration, Procedural Fairness and the Rule of Law' in Stephan Schill (ed.) *International Investment Law and Comparative Public Law* (2010) 627-658; Gus Van Harten et al 'Public Statement on the International Investment Regime' (31 August 2010), available at: <https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>. (Last accessed, January 3, 2019). (Hereinafter Van Harten, 'Public Statement')

¹² See for instance, *CMS Gas Transmission Company v The Argentine Republic* ICSID ARB/01/8; *Enron Corporation and Ponderosa Assets L P v Argentine Republic* ICSID ARB/01/3; and *Sempra Energy International v The Argentine Republic* ICSID ARB/02/16; and *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12.

¹³ Bolivia, Ecuador, and Venezuela withdrew from the ICSID Convention in in 2007, 2009, and 2012 respectively. UNCTAD World Investment Report (2017), 145.

¹⁴ Michael Nolan, 'Challenges to the Credibility of the Investor-State Arbitration System', (2016) 5 *American University Business Law Review*, 429.

¹⁵ Speech delivered by the Minister of Trade and Industry Dr Rob Davies at the South African launch of the United Nations Conference on Trade and Development (UNCTAD) Investment Policy Framework for sustainable development at the University of The Witwatersrand (26 Jul 2012), available

African International Arbitration Act (entered into force in 2017) provides that after the exhaustion of local remedies the Government may consent to inter-state arbitration with the investors' home states.¹⁶

This dissatisfaction with the current system of ISDS is not limited to developing states, rather it is shared by developed states as well. Germany and France for instance, have also expressed their dissatisfaction with the current system of ISDS and opposed to its inclusion in the Comprehensive Economic and Trade Agreement (CETA), EU-Vietnam Investment Protection Agreement (IPA) and the EU- Singapore IPA.¹⁷ In fact, EU have introduced the establishment of a Bilateral Investment Court system into these agreements.¹⁸ This dissatisfaction is best captured by the declaration of the EU Commission, that the traditional version of ISDS is dead as far as the EU is concerned.¹⁹

Certain other states however, have taken a more nuanced approach to the concerns of illegitimacy plaguing the current system of ISDS. The US for instance revised its 2004 Model BIT with the view of constraining the ability of tribunals to adopt expansive interpretations of treaty standards in favour of investors, so as to preserve its regulatory autonomy.²⁰ Furthermore, the newer US Model BIT also includes a provision that requires parties to consider the possibility of the establishment of an appellate mechanism, with the view of curtailing inconsistency in interpretation.²¹

Furthermore, other stakeholders have also voiced concerns regarding the legitimacy of the current system of ISDS. For instance, a report issued by The Committee on International Trade of the European Parliament strongly criticised the inconsistent and broad interpretations of investment standards by multiple tribunals, and the imbalance

at: https://unctad.org/meetings/en/Miscellaneous%20Documents/South-Africa-Investment-statement_Rob_Davies.pdf. (Last accessed December 13, 2018).

¹⁶ Protection of Investment Act, (2015), article 13, available at: <https://www.thedti.gov.za/gazettes/39514.pdf>. (Last accessed January 3, 2019).

¹⁷ EU-Vietnam Investment Protection Agreement (IPA) and EU-Singapore IPA both expected to come into force in 2019.

¹⁸ It is worth noting that draft text of the Transatlantic Trade and Investment Partnership (TTIP) also contained the Investment Court System, but since the US has withdrawn from the negotiations and its future now is unknown.

¹⁹ Colin Trehearne, 'Will 2018 Mark a Tipping Point for Binding Investor-State Arbitration?' Kluwer Arbitration Blog, (October 31, 2017).

²⁰ The US Model Bilateral Investment Treaty (2012), article 12.

²¹ *Ibid.*, article 28(10).

such interpretations create between the interests of investors, and the right of states to regulate on legitimate policy concerns.²² Moreover, the report was critical of the fact that most investment agreements in force today focus on the protection of the interests of investors while disregarding the non-investment related concerns of states.²³ On the basis of these concerns the report concluded that the wide discretion tribunals enjoy in the interpretation of investment standards, the lack of transparency provisions in agreements and the absence of an appeal mechanism are extremely problematic.²⁴

Voicing similar concerns, various academics from different parts of the world issued a public statement back in 2010.²⁵ In particular they stated that the current system is neither fair nor balanced, and that arbitrators should take public interest issues into consideration while interpreting the standards of investment protection contained in investment agreements.²⁶ In light of these concerns, they concluded that there is need for the creation of an independent judicial system for the resolution of investment disputes that respects the regulatory autonomy of states to adopt legitimate public policy measures.

1.2. Significance of the Problem

Foreign investment plays a vital role in the global economy. As demonstrated by the UNCTAD World Investment Reports (WIRs), Foreign Direct Investment (FDI) has increased dramatically in the last few decades.²⁷ While FDI stood approximately at \$50 billion (annually) in the early 1980s, it grew manifold to \$1.9 trillion in 2007.²⁸ The 2008 world economic crisis, however, had an adverse effect on these figures and global FDI fell to \$1.2 trillion.²⁹ It has since recovered, and in 2017 it stood at \$1.43 trillion.³⁰

²² European Union Parliament Report on the Future European International Investment Policy, A7-0070/2011, (22 March 2011).

²³ *Ibid.*, ¶ G.

²⁴ *Ibid.*, ¶¶ J(4),(10), 17, 31.

²⁵ Van Harten, 'Public Statement', *supra* note 11.

²⁶ *Ibid.*

²⁷ See UNCTAD WIR (2018), *supra* note

²⁸ UNCTAD WIR (2018), *supra* note 10.

²⁹ *Ibid.*

³⁰ *Ibid.*, In 2018, only a modest recovery is expected.

FDI is essential from the perspective of states, at least to the extent that FDI is an important tool for sustainable development, transfer of technology, innovation, and the creation of jobs.³¹ In light of the importance of FDI, it is essential to have a legitimate and well organized system for the adjudication of investment disputes. Furthermore, as investment dispute frequently involve issues that relate to public interest, it is argued that to be considered legitimate the adjudication system should be reliable, predictable, consistent and transparent.³² The absence of these key features is what creates the legitimacy crisis that the current system is suffering.³³

Therefore, it is extremely important that possible reforms to the system of ISDS are thoroughly and comprehensively studied and discussed - this research fulfils this need by evaluating the concept of legitimacy and the concerns surrounding the system of ISDS in great detail. In particular, this research aims to provide a comprehensive analysis of the issues that have given rise to concerns of illegitimacy and provides practical solutions whereby they can be remedied.

1.3. Research Questions

This research aims to answer the question of whether the existing system of ISDS lacks the level of legitimacy required of an adjudicative system charged with the resolution of investment disputes. Since a thorough analysis is required to answer such a fundamentally complex question, the research starts with answering the question of what the concept of legitimacy entails in context of ISDS. The particular question posed in the relevant chapter is: what are the factors that legitimize a system of international adjudication. Once these factors are identified, subsequent chapters explore the question of whether the current system of ISDS lacks these features. More specifically, it analyses whether the system gives adequate space to states' to regulate on legitimate policy concerns, is adequately transparent, and whether it consistently

³¹ Stefan D. Amarasinha and Juliane Kokott, 'Multilateral Investment Rules Revisited' in Muschlini, P. et al. Oxford Handbook of International Investment Law (Oxford University Press, 2008).

³² Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham Law Rev 1521, 1584; see also Kaufmann-Kohler G 'Arbitral Precedent: Dream, Necessity of Excuse? – The 2006 Freshfield Lecture' (2007) 23(3) Arbitration International 374, (Hereinafter Kaufmann-Kohler, 'Arbitral Precedent'); Thomas Franck, The Power of Legitimacy among Nations (Oxford University Press, 1990), 24.

³³ Ibid. Franck; and Ibid., Franck.

interprets and applies the substantive principles of investment law. After determining these issues, each chapter further poses the question of whether these concerns can be overcome without fundamentally reforming the system. To this end each chapter turns to the identification of the methods by which these concerns can be curtailed. Once these methods have been identified, the question of whether they can adequately remedy the legitimacy crisis is raised. Finally, the question of whether the system can overcome these concerns of illegitimacy through a fundamental reform of the system is raised followed by the question of what the most viable method of reform would be.

1.4. Brief Overview of Literature

The debate on the issue of whether the current system of ISDS is in need of reform has ostensibly given rise to two schools of thought. On the one hand, certain scholars argue that the system is indeed suffering from a legitimacy crisis and its sustainability depends on its ability to overcome these concerns. On the other hand, some scholars, while recognizing that there are certain concerns of illegitimacy, argue that there is no need to interfere with the functioning of the system. This sub-part will provide a brief overview of the arguments advanced by commentators belonging to both schools of thought. In disagreement with commentators who oppose reforming the current system of ISDS however, this research argues that the legitimacy crisis is becoming more acute with time and as a result there is need for reform before it is too late. Indeed as discussed above, various states have lost confidence in the system of ISDS and are actively opting out of it. Considering the importance of this system and the fact that it frequently deals with issues of public interest, concerns of illegitimacy must be addressed and appropriate solutions should be adopted, which this study aims to provide.

Proponents of reform: Scholars who argue that the system of ISDS is suffering from a legitimacy crisis focus on certain legitimacy issues. The most widely discussed legitimacy concern in academic commentary is the issue of inconsistent interpretations of investment standards and inconsistent awards. In this regard a number of solutions

have been advanced. For instance Reinisch³⁴ and Crivellaro³⁵, and Knahr³⁶ argue that the issue of inconsistency can be remedied if related claims are consolidated. They argue that consolidation of claims, apart from curtailing the possibility of inconsistent decisions, would prevent parallel proceedings and would minimize the costs.³⁷

Certain other scholars have advocated the adoption of the doctrine of precedent (also known as *stare decisis*) for the resolution of the issue. Kaufmann-Kohler for instance argue that the way to increase the credibility of the system of ISDS is to provide predictability to the users of the system i.e. the parties.³⁸ They argue that predictability can only be ensured if tribunals consistently interpret investment law obligations and the way to achieve this lies in the adoption of the doctrine of precedent.³⁹ While this proposal is advanced primarily with the view of curtailing inconsistency, it is argued that the adoption of the doctrine would go a long way in remedying concerns surrounding the perception that ISDS tribunals operate to curtail the regulatory autonomy of host states. This is because the two concerns are intrinsically linked. Indeed, inconsistency in the interpretation of the substantive standards of investment protection undermines predictability, from the perspective of host states, *vis-à-vis* the issue of whether a tribunal would find the adoption of a particular regulatory measure to be in derogation of a host state's obligations under the relevant investment agreements. This lack of predictability in turn, causes states to shy away from adopting legitimate regulatory policies and measures. Thus to the extent that the adoption of the doctrine of binding precedent would operate to curtail inconsistency, it would go a long way in remedying the concerns relating to regulatory autonomy.

³⁴ August Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The threat of Fragmentation vs. The promise of more effective system? Some reflections from the perspective of investment arbitration' in Isabelle Buffard et al (eds.) *International Law Between Universalism and Fragmentation* (Brill, 2008), 107-126. (Hereinafter, Reinisch, 'The Proliferations').

³⁵ Antonio Crivellaro, 'Consolidation of Arbitral and Court Proceedings in Investment Disputes' (2005) 4 *Law and Practice of International Courts and Tribunals*, 371.

³⁶ Christina Knahr, 'Consolidation of Proceedings in International Investment Arbitration' in C. Knahr et al (eds.) *Investment and Commercial Arbitration – Similarities and Divergences* (2010) 1-19, 2.

³⁷ Christian Tams, 'An appealing Option? The debate about an ICSID Appellate Structure' (2006) 57 *Essays on Transnational Economic Law* 1-50, 41.

³⁸ Kaufmann-Kohler, 'Arbitral Precedent', *supra* note 32, 378; and August Reinisch, 'The Future of Investment Arbitration' in C. Binder et al (eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009), 915. (Hereinafter, Reinisch, 'The Future of Inv. Arb.')

³⁹ *Ibid.* Kaufmann-Kohler.

Another solution proposed by those who view the system to be suffering from severe concerns of illegitimacy is the establishment of an appeals mechanism.⁴⁰ Advocates of this view argue that in addition to providing consistent interpretations of the standards of investment protection, an appeals mechanism would operate to correct the factual and legal errors made by ISDS tribunals.⁴¹ This proposal, they argue, would address concerns of states by providing them with predictability thereby ensuring the sustainability of the current system of ISDS.⁴² While this thesis agrees that the establishment of an appeals mechanism which can issue binding awards would go a long way in making ISDS more predictable and thus would infuse a degree of reliability into the system, it is argued that there is an absence of consensus on the manner in which such an appeal mechanism should be created.⁴³ The most popular approach to the issue, in academic commentary, is the creation of an appeals facility under the auspices of ICSID.⁴⁴ While at first glance this proposal does seem attractive, especially when one takes into account the fact that a majority of ISDS disputes are adjudicated under ICSID, implementing it would be an extremely difficult task. This is because, the establishment of an appeals facility under the ICSID mechanism would require amending the ICSID Convention which in turn would require the consent of all member states. Obtaining such consent it is argued, would be an extremely difficult task.

In recognition of these concerns certain commentators have suggested that the ICSID Administrative Council should adopt the ICSID Appeals Facility Rules, which would

⁴⁰ Franck, 'Legitimacy Crisis', supra note 32; Reinisch, 'The Future of Inv. Arb.' supra note 38.

⁴¹ Katia Yannaca-Small, (2006), 'Improving the System of Investor-State Dispute Settlement', OECD Working Papers on International Investment, 2006/01, 195; and David Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges' (2009) 39 Vanderbilt Journal of Transnational Law, 39-76, 74.

⁴² Doak Bishop, 'The Case for an Appellate Panel and its Scope for Review' in F. Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (British Institute of International and Comparative Legal Studies 2006).

⁴³ Asif Qureshi, 'An Appellate System in International Investment Arbitration?' in P. Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008), Ilija Mitrev Penusliski, 'A Dispute Systems Design Diagnosis of ICSID' in M Waibel et al (eds), *The Backlash Against Investment Arbitration: perceptions and Reality* (Kluwer 2010).

⁴⁴ Reinisch, 'The Future of Inv. Arb.' supra note 38, 895; Frank S D 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521 at 1586; also see Howard Mann, 'Civil Society Perspective: what Do Key Stakeholders Expect from the International Investment Regime?' in Alvarez J. and Sauvant K. (eds.) *The Evolving International Investment Regime* (Oxford University Press, 2011) 170;

not require the consent of all member states.⁴⁵ Others have suggested that a treaty based appellate body should be established.⁴⁶ It is argued that both of these proposals would not be able to adequately resolve the concerns of illegitimacy as the appeals facilities, so created, would have a very limited mandate. Moreover, the creation of a treaty based appellate body would require amendments to all investment treaties in force and would operate to create further fragmentation in the system of ISDS. This is because, such an approach would simply give rise to another level (appellate) of fragmentation in the system.

In order to establish an appeals facility that could review the awards of all ISDS tribunals, certain scholars have proposed the establishment of a standing and independent investment court.⁴⁷ In other words, they argue that instead of creating an appeals facility under specific investment agreements or institutions, an appellate court with the jurisdiction to hear all ISDS appeals should be created.⁴⁸

This brief literature review shows that proponents of reform tend to focus on a particular legitimacy concern and as a result, it is difficult to find a comprehensive research that provides an analysis of each legitimacy concern. The impact of this piecemeal approach to the issue is that academic commentary on the issue of the need for reform proposes solutions to a particular legitimacy concern rather than focusing on how the legitimacy of the system as a whole can be improved.

Advocates of no-reform: As discussed above, certain academics are critical of reform proposals. Karl for instance, argues that as long as there is an increase in the amount of FDI and the number of investment agreements being concluded, there is no need to intervene in the system of ISDS. He argues that an increase in FDI and investment

⁴⁵ Kaufmann-Kohler, 'Arbitral Precedent', supra note 32, 347; Reinisch, 'The Future of Inv. Arb.' supra note 38, 915; and Rainer Gaiger, 'Multilateral Approach to Investment' in Alvarez J. and Sauvant K. P. (eds.) *The Evolving International Investment Regime* (Oxford University Press, 2011), 153-173, 170.

⁴⁶ Gantz, supra note 41, 74-76.

⁴⁷ Franck, 'Legitimacy Crisis', supra note 32, 1617; see also William Knull and Noah Robins, 'Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?' (2000) 11 *The American Review of International Arbitration*, 531-577; 531; Michael Goldhaber, 'Wanted: a World Investment Court' (2004) 3 *Transnational Dispute Management*.

⁴⁸ Van Harten, *Investment Treaty Arbitration and Public Law* (OUP, 2007), 180. (Hereinafter Van Harten, *Public Law*)

agreements goes to show that the parties are happy with the functioning of the current system.⁴⁹

Wälde similarly argues that there is no need for reform. He compares the system of ISDS with other adjudicative systems in the realm of international law, and argues that ISDS is working relatively well.⁵⁰ While he recognizes the fact that tribunals have reached inconsistent interpretations and decisions, he argues that the existence of such inconsistency is not detrimental to the legitimacy of the system. Instead he categorizes inconsistency as a natural consequence of dispute resolution, a feature that cannot be avoided in international law.⁵¹

Brower and Schill also adopt a similar stance. They argue that while there are some concerns of illegitimacy affecting the system of ISDS, their impact has been exaggerated in academic commentary.⁵² They are of the opinion that notwithstanding these concerns, the system of ISDS does possess an adequate level of legitimacy and therefore there is no need for a fundamental reform.⁵³

Certain other commentators oppose reforming the system of ISDS, not on the basis that the system is legitimate but rather, as a result of the limitations of the reforms proposed in academic literature. Tams for instance argues against the creation of an appeals mechanism as he views it would come at expense of the principle of finality, and would increase the costs and length of the proceedings.⁵⁴

To conclude, it is submitted that most of the solutions proposed in academic commentary focus on the resolution of specific concerns of illegitimacy. Therefore, as the author considers that one cannot resolve the issue of illegitimacy by focusing only

⁴⁹ Joachim Karl, 'On the Way to Multilateral Investment Rules - Some Recent Policy Issues' (2002) 17 *ICSID Review: Foreign Investment Law Journal*, 300.

⁵⁰ Thomas W. Wälde, 'Improving the Mechanisms for Treaty Negotiation and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy' (2009) in *Yearbook on International Investment Law & Policy* 505-585, 506.

⁵¹ *Ibid.*

⁵² Charles Brower and Stephan Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 *Chicago Journal of International Law* 471-498, 495-96. See also for similar approaches Tams, *supra* note 37; and Susan Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 *Harvard International Law Journal* 435-489, 440.

⁵³ *Ibid.*

⁵⁴ Tams, *supra* note 37, 12.

on one concern in isolation, and without exploring the relationship between these concerns. Therefore, as will be discussed in later chapters, there is need to examine the issue as a whole and by identifying a method of reform which would remedy all three major concerns of legitimacy.

1.5. Methodology

This study is a product of extensive research in the field of IIL. Specifically it relies on both primary and secondary sources. Primary sources that have been relied on consist of arbitral awards, reports of international organizations and international instruments such as international agreements, conventions, and treaties. Secondary sources that have been used are books, journal articles, and working and conference papers written by academic scholars.

The legal approach that will be adopted to answer the main and the secondary questions, is a combination of positivist and normative approach. Therefore, while the study will evaluate the current state of law and the way it operates (positivist), it will also discuss and make recommendations on what it should be and how it should operate (normative). To this end, the research will use all aforementioned primary and secondary sources with the view of developing a comprehensive guide to the crisis of illegitimacy plaguing the system of ISDS and the manner in which the crisis can be resolved.

1.6. Originality of the Research

As this thesis adopts a thematic approach and each chapter looks at a different aspect of the legitimacy crisis, it makes multiple contributions to the field that can only properly be appreciated by looking at each chapter separately.

Chapter 2 seeks to explore what legitimacy in the realm of ISDS entails. To this end it adopts a novel approach to the issue by taking an inter-disciplinary approach to the identification of legitimacy values. Specifically, this chapter draws from area of sociology to identify these legitimacy inducing values thereby allowing for a

framework of analysis that takes the agent relative nature of legitimacy of the system of ISDS into account. While essential for the purposes of this research, it is hoped that this contribution will also play a role in informing the future literature on the issue.

Chapter 3 focuses on the impact that IIL has had on the right of states to regulate on legitimate policy objectives. The principal contribution of this chapter lies in its approach to the identification of what the ‘right to regulate’ in the context of ISDS entails. Unlike the existing literature on the issue, this thesis identifies the right to regulate as the legal right of states to derogate from their existing investment commitments. This approach allows for the exclusion of the host states’ policy space over areas in which a specific investment has not been assumed and therefore are not entirely relevant for this analysis. In other words, through the identification of what the right to regulate entails, this thesis is able to tailor precise recommendations for the resolution of the issue.

The subject matter of chapter 4 is the tension between the principle of confidentiality and the principle of transparency in ISDS. The originality of this chapter lies in its approach to the resolution of the issue of lack of transparency plaguing the system of ISDS. Instead of taking a blanket either-or approach to the competing interests of confidentiality and transparency as taken in the existing literature on the issue – this chapter provides recommendations whereby the two principles can be balanced during the drafting of the investment agreement and during each stage of the arbitration proceedings. These recommendations are fabricated with the view of maximising the joint interests of the stakeholders thereby allowing for widespread acceptance.

Chapter 5 is concerned with the issue of procedural inconsistency in ISDS, particularly the issue of parallel proceedings. The originality of this chapter lies in its approach to the identification of potentially the most effective remedies to the issue of parallel proceedings without requiring a fundamental reform of the system of ISDS as it exists today. In particular, this chapter drawn from the realm of tax law to allow for piercing of the veil of ownership and borrows from mechanism developed in domestic legal systems in order to tailor recommendations that can lead the system to retain a degree of legitimacy.

After analysing each legitimacy concern in detail, the thesis concludes that while the legitimacy crisis can to an extent be resolved by certain specific amendments to investment agreements and institutional rules, legitimacy concerns will not disappear. The time has come for a fundamental change. It here that the most major contribution of this thesis lies – it is concluded that the legitimacy crisis surrounding ISDS can be overcome, to a large extent, through the creation of a Multilateral Agreement on Investment (MAI) that establishes a standing two-tiered International Investment Court (IIC). While the establishment of a uniform statement of norms and a new centralised court structure will admittedly have certain disadvantages, on a careful weighing of the advantages and the disadvantages, the establishment of an MAI and IIC would be more beneficial than its disadvantages. Moreover, this thesis recognizes that the establishment of an MAI with a two-tiered court system would take considerable time and political effort and will. Therefore, until an MAI is created and it gains widespread approval, it is argued that there is a need for an interim mechanism to combat the legitimacy crisis. To this end, this chapter draws guidance from the field of international sales of goods and recommends the creation of an International Investment Law Advisory Council (ILAC) that publishes opinions on the correct interpretation of investment standards and other issues of IIL.

Chapter 2 - The Legitimacy of the Investor-State Dispute Settlement (ISDS) System

As this thesis is concerned with ascertaining whether the system of ISDS suffers from a legitimacy crisis, a natural starting point is the identification of what the concept of legitimacy entails and the values that legitimise or otherwise delegitimise a system. This inquiry lays the ground for the ascertainment of whether the bare minimum or threshold level of legitimacy inducing values exist in the system of ISDS – which is the reason why the thesis is structured in the manner it is. In particular, this chapter will identify the legitimacy values that will be analysed in subsequent chapters with the view of ascertaining whether the current system of ISDS suffers from a legitimacy crisis and if so, how this crisis may be averted. This approach also gives rise to the originality of this work. While the literature on the subject analyse each concern in isolation, this thesis is able to identify the systemic problems that give rise to concerns of illegitimacy thereby allowing for the fabrication of recommendations that can holistically remedy such concerns.

Introduction

Consent to ISDS was initially justified on the basis of self-interest. In particular, the pervasive perception amongst developing states was that they would be hard-pressed to attract or compete for Foreign Direct Investments (FDI). To attract or compete favourably for FDI, developing states were required to demonstrate that the FDI would be protected by an impartial dispute settlement mechanism.¹ Even if the host state could demonstrate the impartiality of its judicial system, foreign investors were still concerned about unfamiliarity with the system, which proved a powerful deterrent.² Accordingly, most developing states consented to the jurisdiction, and followed the

¹ Susan D. Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2006) 19 Pacific McGeorge Global Business and Development Law Journal, 337-373, (hereinafter "Franck, 'Rule of Law'"); Axel Berger et al. 'Do Trade and Investment Agreements Lead to more FDI? Accounting for Key Provisions Inside the Black Box.' (2013) 10(2) International Economics and Economic Policy, 247-275; Yoram Z. Haftel, 'Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries' (2010) 17(2) Review of International Political Economy, 348-377.

² Ibid. Franck, 'Rule of Law', 337.

rulings, of ISDS tribunals as the costs of doing otherwise seemed to outweigh the benefits.³

This narrative however has been challenged in recent years. In particular, certain developing and developed states have begun to question whether the advantages of consenting to the jurisdiction of ISDS tribunals outweigh its costs. For instance, Ecuador, Bolivia, and Venezuela have withdrawn from the ICSID Convention.⁴ Others such as Argentina,⁵ Russia,⁶ Zimbabwe,⁷ Thailand,⁸ Liberia,⁹ Kyrgyzstan,¹⁰ Senegal,¹¹ and Venezuela¹² have refused to honour ISDS awards rendered against them.¹³ Some states have also taken a piecemeal approach to the issue by terminating only those BITs that are frequently relied on to bring claims.¹⁴

The foregoing are only examples and by no means suggest that states frequently adopt such extreme response following their reevaluation of the comparative advantages of consenting to ISDS jurisdiction in relation to its disadvantages. On the contrary, some states have adopted nuanced solutions to address instances where the operations of ISDS undermined their interests. Australia, for instance, sought to minimise the risk of adverse ISDS awards shrinking its regulatory space and has included certain exceptions in its recent FTA with Korea. Those exceptions preserve the host state's

³ Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33(10) *World Development*, 1567-1585.

⁴ 'Towards a New Generation of Investment Policies', United Nations Conference on Trade and Development (UNCTAD) *World Investment Report* (2012), 88, (hereinafter "UNCTAD, 'World Investment Report, 2012'").

⁵ *Azurix Corp. v. Argentine Republic*, ICSID Case No ARB/01/12, Award, (14 July 2006).

⁶ *Mr. Franz Sedelmayer v. The Russian Federation*, Stockholm Chamber of Commerce ("SCC") (Ad hoc arbitration under SCC Rules), Arbitration award (7 July 1998).

⁷ *Funnekotter v Republic of Zimbabwe*, ICSID Case No ARB/05/6, Award (22 April 2009).

⁸ *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand*, UNCITRAL, Award, (1 July 2009).

⁹ *Liberian Eastern Timber Corp v Republic of Liberia*, ICSID Case No ARB/83/2, Award 2 ICSID Rep. 346 (1994).

¹⁰ *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Arbitral Award, 29 March 2005).

¹¹ *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Award (25 February 1988) ICSID Rep 190 (1994).

¹² *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010).

¹³ UNCTAD, *World Investment Report* (2012), 88.

¹⁴ See *International Investment Agreements Navigator*, BITs signed by Indonesia, available at: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/97>, (Last accessed, 25 April 2018).

domain over its regulatory space on environment, labour, health, human rights, animal and plant life issues.¹⁵

Examples of states withdrawing from or not honouring ISDS awards do however show that, from the perspective of various states, self-interest is no longer sufficient to justify the authority of the ISDS system. In this context, the question of why states should continue to be part of the current arbitration oriented IIL regime and resultantly honour the awards of arbitral bodies becomes increasingly important.¹⁶ This is where the utility of the concept of legitimacy becomes apparent.

The issue of legitimacy has engaged scholars of political theory at least since the seventeenth century.¹⁷ To the extent that humans are considered to be free and rational individuals, to use the words of Rousseau, “*what can justify their chains?*”¹⁸ The concept of legitimacy seeks to provide the answer to this very question. Legitimacy is concerned with the factors that provide an institution the ‘right to rule’. It provides justifications of the right of ISDS tribunals to make binding awards.¹⁹ It is in this regard that legitimacy involves the concept of deference – it provides the basis of why an addressee of a ruling should abide by it even when the same goes against its interests.²⁰

The first part of this chapter will explore the traditional approach to normative legitimacy namely, state consent and procedural fairness. It will conclude that the traditional approach to normative legitimacy suffers from two inter-related limitations

¹⁵ See Simon Lester, ‘Improving Investment Treaties through General Exceptions Provisions: The Australian Example’ (*Investment Treaty News*, May 2014) available at <https://www.iisd.org/itn/2014/05/14/improving-investment-treaties-through-general-exceptions-provisions-the-australian-example/>. (Last accessed 28 April 2018).

¹⁶ Allen Buchanan and Robert O. Keohane, ‘The Legitimacy of Global Governance Institutions’ (2006) 20(4) *Ethics & International Affairs*, 405-437, 408. According to Buchanan and Keohane, the operation of international institutions to the extent that they constrain state sovereignty flies in the face of the right of self-determination. They argue that self-determination is “exercised through the powers of state sovereignty”.

¹⁷ Discussions in the area of political theory on legitimacy was primarily concerned with domestic governments. Stanley Isaac Benn, Authority, in Paul Edwards (eds.), *I Encyclopedia of Philosophy*, (Macmillan Publishing, 1967), 215; Richard E. Flathman, ‘Legitimacy’, in Robert E. Goodin & Philip Pettit (eds), *I A Companion to Contemporary Political Philosophy*, (Blackwell Publishing, 2nd ed., 1993), 678-684.

¹⁸ *Ibid.*, Benn, 216.

¹⁹ Daniel Bodansky, ‘The Concept of Legitimacy in International Law’, in Rudiger Wolfrum and Volker Röben (eds) *Legitimacy in International Law*, (Springer, 2008) 309-317, 310. (hereinafter “Bodansky, ‘The Concept of Legitimacy’”).

²⁰ *Ibid.*

i.e. the framework falsely assumes that international tribunals only operate to resolve disputes brought before them and that their judgments in such disputes affect only the litigants to a case.²¹ These limitations of the traditional approach leads to the conclusion that while the factors that provide the basis for an institution's authority, identified through the study of traditional normative legitimacy, are extremely important; they may well not be enough for sufficient legitimacy. In particular, it is argued that while states and investors play a substantial role in creating an international adjudicative body, continuance of its legitimacy hinges on the perception of other stakeholders as well.

Part 2 of this chapter argues that the limitations of the traditional approach to normative legitimacy can be remedied if one recognises the 'agent relative' nature of legitimacy.²² As is well established in the field of international relations, the preferences of states are shaped by various constituencies.²³ These include citizens and political parties of the host state, domestic and international NGOs, non-party investors, and potential investors. This part of the chapter draws on the works of Weber, Frank, Grossman and Bodansky and, therefore, formulates a non-exhaustive list of factors/values that impact the legitimacy perception of ISDS stakeholders. It will conclude that in addition to the factors identified in part 1, the perception of stakeholders is dependent upon the imbuelement of the following values in ISDS: transparency, impartiality and consistency. In addition, it will be argued that legitimacy of ISDS is being eroded by the perception that it operates to cast a regulatory chill.

²¹ Nienke Grossman, 'The Normative Legitimacy of International Courts' (2013) 86 *Temple Law Review*, 61-106, 68 (hereinafter Grossman, 'The Normative Legitimacy'), 75; Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach', (2012) 106(2) *The American Journal of International Law*, 225-270, 246; Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981), 22,26.

²² Richard H. Fallon, Jr., 'Legitimacy and the Constitution', (2005) 118(6) *Harvard Law Review*, 1787-1853, 1790; and Nienke Grossman, 'Legitimacy and International Adjudicative Bodies' (2009) 41 *George Washington International Law Review*, 107-180, 116 (hereinafter "Grossman, 'International Adjudicative Bodies'"). The term agent relative has been used in this sense by Professor Fallon and Grossman. They argue that legitimacy is agent-relative as different stakeholders may have different perceptions of what constitutes a legitimacy-inducing factor.

²³ Harold Hongju Koh, 'Transnational Legal Process', (1996) 75 *Nebraska Law Review*, 181-207, 192-93.

This thesis recognizes that ISDS is evolving which must warrant dropping a static conception of legitimacy. Certainly, the great deal of disagreement regarding the standards that ISDS should meet to be judged as legitimate signals that these standards are subject to change based on actions and reflections. Therefore, determining what constitutes sufficient conditions for permanent legitimacy is near impossible. As such, this chapter provides only a proposal for assessing legitimacy of such institutions today. Accordingly, whilst not concerned with providing empirical evidence in support of its hypotheses, the chapter aims only at providing a framework for understanding the concept of legitimacy for future debate and analysis.

2.1. Normative Legitimacy

“The concept of legitimacy allows various actors to coordinate their support for institutions by appealing to their common capacity to be moved by what might be called normative reasons, as distinct from purely strategic or exclusively self-interested reasons.”²⁴

Normative legitimacy is based upon the belief that there exist normative reasons that provide an institution with the ‘right to rule’.²⁵ As such, in the normative sense, legitimacy is simply concerned with the normative basis of what gives an institution the right to rule. Since this inquiry is guided by normative reasons, an institution does not need to possess any coercive mechanism to be considered legitimate. Seen through this lens, the ISDS system is normatively legitimate to the extent that there are good objective reasons to support its authority, and will be considered illegitimate if such reasons do not exist.²⁶

Before embarking upon a discussion on normative legitimacy, it is essential to distinguish it from self-interest and justice. While both self-interest and justice are

²⁴ Buchanan and Keohane, *supra* note 16, 30.

²⁵ *Ibid.*

²⁶ Hanna Pitkin, ‘Obligation and Consent-II’, (1966) 60(1) *American Political Science Review*, 39-52.

related to the concept of legitimacy – and they do indeed work in tandem – it would be a mistake to reduce legitimacy to either of the two.²⁷

Legitimacy and Self-interest

As discussed above, self-interest was one of the primary reasons that originally gave rise to the need for the ISDS system.²⁸ It naturally follows that self-interest may amount to one of the reasons that justify the authority of ISDS.²⁹ Indeed, stakeholders would be more inclined to recognize and comply with the authority of an institution if it operates to maximise their interests, for example, by producing sustainable economic growth. However, if the only justification for the right to rule by an institution lay in self-interest, it would add nothing to say that it is legitimate.³⁰ From this standpoint, legitimacy (the basis of compliance) must be something more than self-interest.

Notwithstanding, the point being made is not that the legitimacy of an institution is not at all depended upon the extent to which it achieves mutual benefit. Contrariwise, the notion is to assert that institutions must meet certain standards that are more demanding than mutual benefit to be considered legitimate.³¹ This is partially because it is extremely difficult to achieve coordinated support for an institution solely on the basis of self-interested reasons.³² What self-interest requires is rarely, if ever, uniform amongst the multitude of stakeholders in the ISDS system. For example, even if all are in agreement that an institution for the adjudication of investment disputes is required, there will inevitably be disagreement regarding the scope and functions of the body.

Given the inevitable disagreement on determining the ideal institutional arrangement for resolving investment disputes, instead of the lens of self-interest, what is required is a common evaluative outlook that achieves coordinated support without sacrificing

²⁷ Bodansky, *The Concept of Legitimacy*, supra note 19, 312.

²⁸ Ibid.

²⁹ Andrew Hurrell, 'Legitimacy and the Use of Force: Can the Circle Be Squared?' (2005) 31(S1) *Review of International Studies*, 15-32, 16.

³⁰ Buchanan and Keohane, supra note 16, 32.

³¹ Ibid.

³² Ibid., 31.

shared basic normative commitments.³³ The suggestion is not that normative standards for determining the legitimacy of an institution are well established.³⁴ Rather, it recognizes that “legitimacy is grounded in a complex belief that...[institutions] can be worthy of our support even if they do not maximize our own interest and even if they do not measure up to our highest normative standards.”³⁵

It is noteworthy that while legitimacy and self-interest are distinct reasons for compliance with authority, a consistent tendency of undermining the self-interest of any major group of stakeholders is bound to erode legitimacy, at least from the affected stakeholders’ perspective. Thus, while self-interest alone is not sufficient to legitimise an institution, it cannot be ignored. It is in this sense that legitimacy and self-interest must work in tandem for an institution to have ‘the right to rule’ and be ‘believed’ to have this right.

Justice and Legitimacy

While discussing the legitimacy of ISDS, it is easy to fall into the trap of equating the inquiry with the pursuit of justice. Unlike justice, legitimacy does not denote an ideal standard. Rather, legitimacy simply represents the threshold of standards which provides the justification for an institution’s authority.³⁶ Thus, equating the two would be tantamount to comparing an essentially non-ideal standard with one that is ideal, thereby undermining the function that assessments of legitimacy are intended to serve.³⁷

The first difficulty one encounters while attempting to define the notion of legitimacy through recourse to the concept of justice is the narrowness of the universally accepted definition of the latter.³⁸ It would indeed be an understatement to say that there is

³³ See the following sections.

³⁴ Part 3 of this chapter attempts to provide a principled proposal of what normative values should be used to judge the legitimacy of the ISDS system (for the time being).

³⁵ Buchanan and Keohane, *supra* note 16, 32.

³⁶ Bondasky, *supra* note 19, 311. See also Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law*, (Cambridge University Press, 2010); Tullio Treves, 'Aspects of Legitimacy of Decisions of International Courts and Tribunals' in Wolfrum and Roeben, *supra* note 19, 169-188; and Anthony D'Amato, 'On the Legitimacy of International Institutions' in Wolfrum and Roeben, *supra* note 19, 83-92.

³⁷ Buchanan and Keohane, *supra* note 16, 34, and Bondasky, *supra* note 19, 311.

³⁸ *Ibid.*, Buchanan and Keohane.

disagreement on what the concept of justice requires. Moreover, the constant evolution of the law in the international arena poses a further issue in this regard, i.e. such norms, if they exist at all, would change over the course of time.³⁹ As such, there is little hope for a standard of legitimacy based upon the concept of justice to achieve coordinated support for the ISDS system on normative grounds. This fact is attributed by various commentators as the primary reason why “*many scholars have shied away from justice in assessing the legitimacy of international courts*”.⁴⁰

Moreover, it must be noted that normative legitimacy is concerned with content independent reasons for compliance. Thus, legitimacy is not concerned with whether a particular award of a tribunal is substantively correct or just. Rather, legitimacy assessment is concerned with ascertaining whether more general support for the regime exists (or otherwise) i.e. whether sufficient support exists for subjects to substitute their own evaluation of a situation with the decisions of the institution.⁴¹ Thus, unlike justice, legitimacy is concerned with the systems of governance of institutions that render binding awards and the processes by which they operate rather than the ‘justness’ of any particular award.⁴²

Thus, even in instances where the legitimacy of specific awards of an institution is under scrutiny, the enquiry must be framed in a manner that questions the decision’s authority as opposed to its particular content. Indeed a group of stakeholders may well believe that a particular decision is unjust, but may still accept it as legitimate, for instance, because the tribunal was acting within the realm of its jurisdiction.

2.1.1. Traditional Approaches to Normative Legitimacy

This chapter has discussed the general concept of legitimacy and differentiated it from other reasons for compliance such as self-interest and justice. An understanding of the function of the legitimacy assessment however is incomplete unless one analyses particular conceptions or values of legitimacy. To this end, the next part of this chapter

³⁹ Bondasky, *supra* note 19, 311.

⁴⁰ Grossman, ‘The Normative Legitimacy’, *supra* note 21.

⁴¹ *Ibid.*

⁴² *Ibid.*

shall provide an analysis of legitimacy values under the traditional approach to normative legitimacy. These values can be grouped into two premises namely: state consent and procedural fairness.

2.1.1.1. Source: State Consent

Historically, the notion of Westphalian sovereignty was deeply entrenched in international law.⁴³ Per the notion, international agreements would only be recognized to the extent that they complied with the ‘consensus principle’.⁴⁴ This principle was based upon the assumption that states had a monopoly over their domestic affairs.⁴⁵ From this standpoint, the system of investor-state arbitration was merely a device of the state lacking any autonomous authority i.e. authority other than that delegated by the state.⁴⁶ Therefore, the legitimacy of the system was traditionally considered to be a matter of ‘source of authority’.⁴⁷

It is however hard to see how legitimacy can be delegated in cases of nondemocratic states that systematically violate the inalienable rights of their citizens and are therefore illegitimate themselves. In such instances, the state in question cannot be said to possess legitimacy that it is capable of transferring. To hold otherwise would be tantamount to regressing to a conception of an international order that is incapable of or not even concerned with the abidance of the most minimal normative requirements by states.⁴⁸

⁴³ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, (Oxford University Press, 2nd ed., 2012) 12; for an opposing view see Andreas Osiander, ‘Sovereignty, International Relations, and the Westphalian Myth’ (2001) 55(2) *International Organization*, 251-287.

⁴⁴ Charles N. Brower and Stephan W. Schill, ‘Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law’ (2009) 9(2) *Chicago Journal of International Law*, 471-498; and Stephan Schill, ‘Conceptions of Legitimacy of International Arbitration’ in David D. Caron, et al. (eds) *Practising Virtue: Inside International Arbitration* (Oxford: Oxford University Press, 2015), 106-124.

⁴⁵ *Ibid.* Brower and Schill.

⁴⁶ According to the voluntarist theory of international law, it is the consent of states that provides authority to the rules of international law. Michael Zürn and Matthew Stephen, ‘The View of Old and New Powers on the Legitimacy of International Institutions’ (2010) 10(1) *Political Studies Associations*, 91-92; A. Claire Cutler, ‘Critical Reflections on Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy’ (2001) 27 *Review of International Studies*, 133.

⁴⁷ Such consent is judged on the basis of the tribunal’s powers as contained in its founding statute (which the state has consented to) or in the underlying arbitration agreement/ treaty.

⁴⁸ Buchanan and Keohane, *supra* note 16, 35.

This should not, however, be taken to mean that in the case of democratic states consent is capable of being the sole factor that legitimizes authority. This limitation becomes apparent when one considers the fact that consent, even on the part of democratic states, is not always without pressure. For instance, from the perspective of economically weak democratic states, not consenting to the framework of ISDS could lead to potentially serious costs in the form of limiting the inflow of FDI.⁴⁹ As such, the mere existence of the vulnerability of weak democratic states is sufficient to undermine the view that state consent – on its own- is capable of being an adequate source of legitimacy.⁵⁰

This thesis, however, recognizes that while state consent may not form a sufficient source of legitimacy on its own – it is necessary. This is because, ignoring state consent in its entirety would at its extreme amount to denying the right of self-determination of the citizens of the relevant state, even if they may not be able to exercise that right.⁵¹

In any case, the lens of state consent as a source of legitimacy does not explain why a state gives jurisdictional consent to an international tribunal to begin with or why it continues to do so. Rather it narrows legitimacy concerns to the issue of whether a tribunal is acting within the scope of the jurisdiction that the host state has generally consented to. Such general ex-ante consent to arbitration actually operates to raise serious concerns in particular because a state cannot foresee the constraints it might be subjected to in the future. Thus, more than ex-ante consent is needed to justify the ongoing authority of ISDS. Legitimacy in this regard needs to be based upon the extent to which tribunals are “responsive to the ideas and the demands of the governed”.⁵²

This is where the second limitation of state consent comes in. It does not view private entities or non-litigant states as having any role to play in the determination of the legitimacy of ISDS. Thus, from this perspective, the ‘governed’ are limited to states – a fact that undermines the possibility of achieving coordinated support from the various non-state stakeholders of ISDS. It was this fact that led Partridge to assert that

⁴⁹ Haftel, *supra* note 1, 348.

⁵⁰ *Ibid.*

⁵¹ For instance, in states with an autocratic form of government.

⁵² Percy Herbert Partridge, *Consent and Consensus*, (Macmillan Press Ltd., 1971), 29.

*"any concept of consent is unlikely to have any significant application... unless we conceive it as a process, as a relationship... that must be constantly renewed and maintained."*⁵³

2.1.1.2. Procedure: Fairness of Process

A second approach to normative legitimacy evaluates the authority of a tribunal based on the processes it uses in reaching its decision. In a nutshell, this perspective argues that the authority of any tribunal is directly related to the extent to which the judges/arbitrators are impartial and the rules of procedure adopted thereunder are 'fair'.⁵⁴ Professor Fuller, for instance, argues that the integrity of any dispute resolution framework should be judged on the basis of the extent to which "the affected party's participation in the decision by proofs and reasoned arguments" is "adversely affected".⁵⁵ Drawing on the work of Professor Fuller, Professor Shapiro constructs a triad to illuminate the requirements of fairness and argues that the further a tribunal moves away from the triad, the greater the impact on its legitimacy.⁵⁶ The elements identified by him are:

- a) Both sides to the dispute must have the right of hearing;
- b) Both sides to the dispute must be provided with the opportunity to respond to the assertions and submissions of the other; and
- c) An unbiased adjudicator should make a judgment on the basis of the arguments put before him/her.⁵⁷

While this triad takes into account the most important aspects of procedural fairness, analysis is limited to the provision of such processes to the parties only. In other words, the fairness of process approach to normative legitimacy has traditionally been thought to only require that due process be afforded to the litigants before the tribunals, as opposed to third party stakeholders who may be affected by the ruling.

⁵³ Ibid., 29-30.

⁵⁴ Lon L. Fuller and Kenneth I. Winston, 'The Forms and Limits of Adjudication', (1978) 92 Harvard Law Review 353-409, 382.

⁵⁵ Ibid.

⁵⁶ Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981) 1-2.

⁵⁷ Ibid.

2.1.2. Limitations of the Traditional Normative Approach

The traditional approaches to normative legitimacy suffer from two inter-related limitations. First, the framework falsely assumes that international courts and tribunals only operate to resolve the disputes brought before them and, second, that their judgments in such disputes affect only the litigants to a particular case. Empirical evidence however demonstrates that neither of the two assumptions are correct.⁵⁸

2.1.2.1. Debunking Myths: Resolution of Disputes under Examination and Impact of Decisions Limited to the Litigating Parties

Historically, the theory of state consent did not raise many difficulties to the extent that international law focused solely on the behaviour of states i.e. regulated the relations between states. In such situations, the executive branch of the consenting state was merely binding itself to the relevant international norms.⁵⁹ But, increasingly, interpretations of the standards of IIL by ISDS tribunals has significant repercussions for non-state stakeholders as well.

Consequently, even in situations in which a tribunal is simply adjudicating upon a certain set of facts, it must interpret the law thereby affecting the evolution of the normative regime of IIL. While the principle of binding precedent does not apply to ISDS, tribunal rulings do create a body of international jurisprudence that is relied upon in future disputes by tribunals in support of their arguments and judgments.⁶⁰ ISDS awards therefore have an indirect influence on non-litigant states and investors who may become parties to a similar dispute in the future. In other words, given that interpretation of investment standards by tribunals borders upon ‘law-making’, it is bound to impact non-litigant parties. Thus, it cannot be stated that ISDS tribunals

⁵⁸ Grossman, ‘The Normative Legitimacy’, supra note 21, 75; Shany, supra note 21, 246; Shapiro, supra note 21, 22,26.

⁵⁹ Daniel Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’ (1999) 93(3) American Journal of International Law, 596-624, 611 (hereinafter “Bodansky, ‘Legitimacy of International Governance’”).

⁶⁰ Garry Sturgess and Philip Chubb, ‘Judging the World: Law and Politics in the World’s Leading Courts’, (Butterworth, 1988) 458.

operate simply to resolve the disputes brought before them and have no bearing on a state that is not party to the dispute.⁶¹

Moreover, specific interpretations of norms by tribunals can (and most certainly are) used by both international and domestic actors to pressurise non-party states into conforming to the norm.⁶² This is most evident in instances where a tribunal, through a novel interpretation of investment standards, changes the scope of international legal obligations that non-party states have consented to in their investment agreements.⁶³ Furthermore, in various instances, the awards of ISDS tribunals have an impact on stakeholders who will never be litigants under the ISDS framework. Such an impact is most noticeable when one considers the impact of ISDS on issues of human rights and environment protection.⁶⁴

An instructive case in point is *Chevron Corp. & Texaco Petroleum Co. v. Ecuador* heard before the Permanent Court of Arbitration (PCA).⁶⁵ This case concerned the question of whether Texaco Petroleum's activities had caused and were responsible for environmental degradation and injuries to thousands of nationals of Ecuador.⁶⁶ In particular, Texaco and Chevron asked the court to declare that they had "*no liability or responsibility for environmental impact, including but not limited to... human health, the ecosystem, indigenous cultures, [and] the infrastructure.*"⁶⁷ Since the ISDS framework recognises only investors and host states as parties, the nationals of Ecuador were not allowed to directly participate in the proceedings which would inevitably affect them. Consequently, affected non-party stakeholders were placed in a position where they had to rely on the government of Ecuador to represent their

⁶¹ In instances where such norm creation promotes human rights, it (the decision) would be legitimacy enhancing.

⁶² Grossman, 'The Normative Legitimacy', supra note 21, 77. Professor Grossman argues that, through the interpretation of the normative regime "*courts routinely change the international legal obligations of non-litigating states even if those states did not consent to jurisdiction*".

⁶³ Ibid.

⁶⁴ David Caron, 'ICSID in the Twenty-First Century: An Interview with Meg Kinnear', (2010) 104 *American Society of International Law*, 413-424, 424; and Noemi Gal-Or, 'The Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in the Legitimacy Debate', (2009) 32(2) *Suffolk Transnational Law Review*, 271-301, 282.

⁶⁵ UNCITRAL, PCA Case No. 2009-23. See generally Claimants' Notice of Arbitration, (23 September 2013), ¶ 25.

⁶⁶ Interestingly, a group of thirty-thousand Ecuadorian nationals had filed a suit in the Federal court in Southern District of New York against Texaco's alleged activities, but it was dismissed on the grounds of forum non-conveniens.

⁶⁷ Chevron, supra note 65, ¶ 76.

concerns. However, such representation by the Ecuadorian government seemed quite impossible given the history of Ecuador's Amazon policy of 'internal colonisation'.⁶⁸ It is therefore hard to see how state consent or the provision of procedural fairness to the parties would operate to provide legitimacy to ISDS from the perspective of such stakeholders, who are undeniably affected by its operation.

Thus, the traditional approach to normative legitimacy which asserts that absent consent, ISDS awards cannot be applied to and have no bearing on a non-disputing stakeholder is out of touch with reality.⁶⁹ Similarly, while the provision of procedural fairness to the parties operates as a legitimising factor from their perspective, it fails to take into account the perception of various other stakeholders.

2.1.3. Concluding Remarks for Normative Legitimacy

So far, this chapter has been concerned with answering the fundamental question of what normative standards have traditionally been used to assess the legitimacy of the ISDS framework. It has been argued that state consent and procedural fairness are presumptively necessary for legitimacy, but not sufficient enough.⁷⁰ This is because the traditional approach to normative legitimacy does not take the "agent-relative" nature of legitimacy into account. It is now well established that the preferences of states are shaped by various stakeholders. It may therefore be stated that the decision by a state to recognize the legitimacy of any international tribunal and its interpretations is based upon the preferences/ perceptions of these constituencies.⁷¹

As the legitimacy of ISDS is bound to the beliefs of those who are affected by its operation, the belief in legitimacy of the current framework of ISDS is dependent upon the degree to which justifications of its authority resonate with all stakeholders. Indeed

⁶⁸ See Judith Kimberling, 'Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and *Aguinda v. Texaco*' (2006) 38 *NYUJ Int'l. L. & Pol.*, 413-664, 426-33.

⁶⁹ In instances where such norm creation promotes human rights, it (the decision) would be legitimacy enhancing.

⁷⁰ The result-oriented approach under normative legitimacy simply requires that tribunals do not display a trend of committing serious injustices. Thus, it provides little clarity on the factors that would lead various stakeholders to consider the ISDS framework as legitimate when it does not commit serious injustices. In other words, committing serious injustices attracts the badge of illegitimacy, but not doing so does not attract the badge of legitimacy.

⁷¹ At least to the extent that they may have an impact on state preference.

the more favourable the attitude of stakeholders regarding an institution's right to govern, the greater its popular legitimacy.⁷² An account of legitimacy must therefore include a sociological component which illuminates the grounds upon which the relevant actors believe that the institution has the right to rule.⁷³ In other words, the question of 'why does an institution have the right to rule' captures only part of the picture and must be supplemented with the question of 'what factors lead stakeholders to consider that an institution has the right to rule'.⁷⁴ From this lens, legitimacy in the case of ISDS is the right to make binding awards, understood to mean both that institutional agents have the legal right to make these awards and that people affected by those awards have content-independent reasons to follow them.⁷⁵

Thus, an account of legitimacy must incorporate a two prong approach. The first prong should focus on the traditional normative component of legitimacy so as to provide insights into the issue of what gives an institution the right to rule. The second prong on the other hand, should include a sociological meaning to shift the focus to 'perceptions' of its agent relative.

Since the second prong is concerned with the attitudes/perceptions of people and institutions- it moves away from the assumptions that international courts only operate to resolve the disputes brought before them or that their judgments in such disputes affect only the litigants to a particular case. Thus the second prong remedies the limitations of the traditional approach to normative legitimacy.⁷⁶

This raises the question regarding what factors/values have an impact on the legitimacy assessment of international adjudicative institutions from the perspective of various

⁷² Bodansky, 'Legitimacy of International Governance', supra note 59, 601.

⁷³ Bondasky, 'The Concept of Legitimacy', supra note 19, 314.

⁷⁴ According to Weber, legitimacy is a sense of duty, obligation, or oughtness towards rules, principles, or commands. Max Weber, *Economy and Society: An Outline of Interpretative Sociology*, Volume 1, (University of California Press, 1978). See also Inis L. Claude, Jr., 'Collective Legitimation as a Political Function of the United Nations', (1966) 20(3) *International Organization*, 367- 379, 369; Martin E. Spencer, 'Weber on Legitimate Norms and Authority', (1970) 21(2) *The British Journal of Sociology* 123-134, 126; Jerome Slater, 'The Limits of Legitimation in International Organizations: The Organization of American States and the Dominican Crisis', (1969), 23(1) *International Organization*, 48-72, 52; and Martin Wight, 'International Legitimacy', in Hadley Bull and Martin Wight (eds) *Systems of States*, (Leicester University Press (for) the London School of Economics and Political Science, 1977), 153.

⁷⁵ Buchanan and Keohane, supra note 73, 33.

⁷⁶ Bondasky, 'The Concept of Legitimacy', supra note 19, 314.

stakeholders (government officials, NGOs, civil society, investors, etc.). To answer this question, the next part of this chapter shall draw on the works of Max Weber, Thomas Franck, Nienke Grossman and Daniel Bodansky.⁷⁷

While all four authors identify ostensibly the same values that influence the perception of legitimacy on the part of stakeholders, they label these indicators of legitimacy differently. Moreover, while the latter two take a broader approach to the issue and resultantly identify a larger set of values, they do include the values identified by the former two. For structural clarity, the next section provides a general overview of the views of these authors before utilising the values identified by them to create an account for the manner in which the legitimacy of ISDS can be assessed.

2.2. Belief in Legitimacy

“An international tribunal is legitimate if it has a certain quality that leads people to accept [its] authority because of a general sense that the authority is justified.”⁷⁸

While the issue of the legitimacy of international adjudicative bodies was barely discussed before the 1990s, the importance of the role that such institutions play has brought the issue to the forefront of academic debate.⁷⁹ As a result, there now exists a large amount of academic commentary that focuses upon the specific values that an international adjudicative body must be imbued with in order to attract the perception of legitimacy. Unfortunately, however, most of the commentary simply limits analysis to the traditional normative criteria of legitimacy discussed above.⁸⁰ This is because, while legitimacy is concerned with the justifications of the imposition of the will of an institution over those affected by its operations, the authority of international

⁷⁷ Although Weber and Franck focused on the legitimacy of law (domestic and international), this research’s focus will be legitimacy of international courts and tribunals and specifically legitimacy of ISDS Tribunals. Ibid.; Weber, supra note 74; Thomas M. Franck, *The Power of Legitimacy among Nations*, (Oxford University Press, 1990).

⁷⁸ Bodansky, ‘Legitimacy of International Governance’, supra note 59, 600.

⁷⁹ Ibid.

⁸⁰ For exceptions to this see, *ibid.*, Bodansky; Grossman, ‘International Adjudicative Bodies’, supra note 22, 107; Franck, supra note 77; David D. Caron, ‘The Legitimacy of the Collective Authority of the Security Council’, (1993) 87 *American Journal of International Law* 552-588 (hereinafter “Caron, ‘Collective Authority’”).

adjudicative bodies has traditionally been thought to be self-imposed through state consent thereby pre-empting any issues of domination.⁸¹

Thus, there is a dearth of analysis on the question of: what factors lead non-party stakeholders to perceive an international adjudicative body as legitimate? The few exceptions to this are the works of Nienke Grossman and Daniel Bodansky.⁸² The source of inspiration for both lies in the area of sociological legitimacy, namely Weber's work on domestic legitimacy which seeks to ascertain 'why people or states obey rules?'⁸³

Brief Introduction to the Existing Literature

Weber, in his book titled 'Economy and Society' argues that the uniformity and stability of social action is, in part, a product of the belief in the existence of a legitimate order.⁸⁴ This belief operates to provide a badge of normative validity to certain patterns of behaviour by attaching a sense of duty to their maintenance.⁸⁵ Thus, for Weber, legitimacy hinges upon the belief of the participants. He argues that there are four different factors that affect the legitimacy of an order, which may be described as belief in legality, emotional faith, value rational faith and traditional legality.⁸⁶

⁸¹ Pitkin, supra note 26, 991; Leslie Green, *The Authority of the State* (Clarendon Press, 1988).

⁸² Bodansky, 'The Concept of Legitimacy', supra note 19; Bodansky, 'Legitimacy of International Governance', supra note 59; Grossman, 'International Adjudicative Bodies', supra note 22; Grossman, 'The Normative Legitimacy', supra note 21, 61; Nienke Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts' (2011) 12(2) *Chicago Journal of International Law*, 647-684, (hereinafter "Grossman, 'Sex on the Bench'"); Daniel Bodansky, 'Legitimacy' in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law*, (Oxford University Press, 2012), (hereinafter, "Bodansky, 'Legitimacy'"); Daniel Bodansky, 'What's in a Concept? Global Public Goods, International Law, and Legitimacy' (2012) 23(3) *European Journal of International Law*, 651-668, (hereinafter "Bodansky, 'What's in a Concept?'); Daniel Bodansky, 'Legitimacy in International Law and International Relations' in Jeffrey L. Dunoff, and Mark A. Pollack (eds) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, (Cambridge University Press, 2013), 321-41, (hereinafter "Bodansky, 'Legitimacy in International Law'").

⁸³ Fallon, supra note 22, 1795; Weber, supra note 74; Franck, supra note 77; Jose E. Alvarez, 'The Quest for Legitimacy: An Examination of the Power of the Legitimacy among Nations by Thomas M. Franck', (1991) 24 *New York University Journal of International Law and Politics*, 199; and Alan Hyde, 'The Concept of Legitimation in the Sociology of Law', (1983) *Wisconsin Law Review*, 379-426, 380-382.

⁸⁴ *Ibid.*, Weber, 1978.

⁸⁵ *Ibid.*

⁸⁶ According to Franck also there are four different factors that affect the legitimacy of rules i.e. determinacy, symbolic validation, coherence and adherence.

Drawing on Weber's arguments, Franck examines the effective authority of individual legal norms and defines legitimacy as "*a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed consider that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.*"⁸⁷ Of the four commentators, Franck adopts the narrowest definition of legitimacy. He argues that the perception of legitimacy hinges primarily upon the extent to which rules are themselves clear, and are applied consistently.⁸⁸ He asserts that inconsistent application of rules or the absence of clear rules altogether would render an institution illegitimate, leading the participants to withdraw from its use.⁸⁹ He argues that this would at its extreme lead to the collapse of the system as a whole.

Citing both Weber and Franck, Grossman agrees that state consent is not sufficient to guarantee the perception on the part of various stakeholders that the authority of an international adjudicative body is justified. In comparison with Franck, however, Grossman adopts a broader approach to the issue and argues that apart from a commitment to interpret and apply the law consistently, the perception of stakeholder is dependent upon the extent to which the adjudicative body is considered to be impartial and transparent from the perspectives of both party and non-party stakeholders.⁹⁰

Bodansky similarly attempts to identify the factors that affect the perception of legitimacy from the perspective of various stakeholders.⁹¹ His approach is very similar to Grossman's, arguing that legitimacy is based on a two prong assessment of: (1) the rationality of rules and (2) performance of the institution.⁹² According to him, the factors that justify belief in authority are: impartiality, democracy, rationality, tradition, predictability and legality.⁹³

⁸⁷ Franck, *supra* note 77, 24.

⁸⁸ *Ibid.* Franck states that legitimacy has four indicators namely determinacy, symbolic validation, coherence, and adherence.

⁸⁹ *Ibid.*

⁹⁰ Grossman, 'International Adjudicative Bodies', *supra* note 22, 124.

⁹¹ Bodansky, 'Legitimacy of International Governance', *supra* note 59, 601.

⁹² *Ibid.*

⁹³ *Ibid.*, 602.

While the foregoing authors use different terms, they all agree that the legitimacy of an institution hinges upon the existence or embodiment of certain values/factors that impact the legitimacy perception of various stakeholders. Nevertheless, these authors did not ignore the perspectives of the parties, rather their view recognises that they do not consider state consent and procedural fairness (in traditional terms) to be sufficient to ‘justify’ the exercise authority. The following section of this chapter builds on the values identified by these commentators with a view to creating a single comprehensive account of the values that must be present and embodied for the ISDS system to be considered legitimate at this point in time.

2.2.1. Factors Affecting Belief in Legitimacy

2.2.1.1. Transparency

According to Weber, the most important and common form of belief in legality occurs as a result of the norm being created through the agreement of everyone who will be affected by its operation. As such, legitimacy is directly linked with the requirement/observance of democratic procedures.⁹⁴ In the ISDS realm, transparency denotes the extent to which non-party stakeholders are given access to the process and awards of ISDS tribunals.⁹⁵ Access to process simply requires that non-party stakeholders be provided with information regarding initiation of a dispute and participation rights. In essence, such transparency allows non-party stakeholders to scrutinise the functioning of the tribunal and individual arbitrators thereby displacing the perception that the tribunals operations are insulated from those who are affected by it.

It should be noted that transparency in no way implies that non-party stakeholders should have the right to actively participate in the proceeding i.e. have the same rights as the parties. Rather, as shall be discussed in detail in the chapter on confidentiality and transparency, it simply requires that non-parties be provided with passive rights of participation, such as access to documents, right to observe hearings, etc. The only

⁹⁴ Weber, *supra* note 74.

⁹⁵ Grossman, ‘International Adjudicative Bodies’, *supra* note 22, 152.

right of ‘active’ participation that transparency calls for, is the right of interested stakeholders to submit amicus briefs, if they fulfil certain conditions. Moreover, such rights (passive and active) have to be balanced with reasonable confidentiality-related concerns of the parties. Understandably, while the adoption of transparency procedures would positively impact the legitimacy perception of non-party stakeholders, it could potentially have a negative impact on legitimacy perception from the perspective of the parties. For instance, parties would wish to keep documents that involve sensitive information such as trade secrets confidential. A blanket rule allowing non-party stakeholders access to all documents presented to the tribunal would operate to disincentive the use of the system from the perspective of states and investors alike.

2.2.1.2. Regulatory Space

According to Franck one of the most important indicators of legitimacy is adherence. Adherence simply requires fidelity to the establishing instrument. Seen through this lens, the awards of a tribunal are likely to be considered as illegitimate if the tribunal is acting outside the scope of its legal authority. In the ISDS realm, however, one of the greatest legitimacy concerns lies in the perception that by limiting themselves to the specific content of the establishing instrument, tribunals fail to take into account the non-investment related obligations of states.⁹⁶

Indeed, while interpreting an investment agreement, ISDS tribunals have rarely entered into the exercise of balancing the rights and obligations of the investor against those of the host state to regulate in ‘public interest’. Such ignorance of the host state’s right to regulate is also thought to have contributed to investment standards being

⁹⁶ Suzanne A. Spears, ‘The Quest for Policy Space in a New Generation of International Investment Agreements’, (2010) 13(4) *Journal of International Economic Law*, 1037–1075, 1046. See also Markus Wagner, ‘Regulatory Space in International Trade Law and International Investment Law’, (2014) 36 *University of Pennsylvania Journal of International Law*; Charles N. Brower, Michael Ottolenghi and Peter Prows, ‘The Saga of CMS: Res Judicata, Precedent, and Legitimacy of ICSID Arbitration’, in Christina Binder et al. (eds), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009), 356–364; Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, (Oxford University Press, 2nd ed., 2017), 22–23, (hereinafter McLachlan et al.); Alec Stone Sweet, ‘Investor-State Arbitration: Proportionality’s New Frontier’, (2010) 4 *Law and Ethics of Human Rights*, 47–76, 63–64; José E Alvarez and Kathryn Khamsi, ‘The Argentine Crisis and Foreign Investors’ (2009) *Yearbook on International Investment Law and Policy*, 379–478, 447–49.

interpreted extremely broadly in the favour of investors. As a result, the operation of ISDS has caused a “regulatory chill”, in that host states have begun to feel constrained in their ability to achieve legitimate policy objectives through the exercise of their sovereign right to take regulatory and administrative actions.⁹⁷ In other words, the threat that an investor may initiate arbitration in response to a regulatory or administrative action of the host state has limited the ability of states that have provided ex-ante consent to ISDS to regulate in public interest.⁹⁸

Indeed, the proliferation of BITs and MAIs has led to increasing number of claims against domestic regulations and administrative measures that historically fell squarely within the domain of sovereign states. Thus, with time, the tension between the IIL regime and the right/duty of a state to regulate on legitimate public policy objectives has become ever more acute.⁹⁹ This has resulted in a significant backlash to the perceived legitimacy of ISDS – particularly from NGOs, academics and various states.

2.2.1.3. Consistency

According to Weber, what people ‘traditionally’ see as legitimate is likely to always be considered as such.¹⁰⁰ Seen through this lens, the legitimacy of authority is based on sanctity of tradition.¹⁰¹ This can be linked to the concept of ‘coherence’ which Franck identifies as one of the four factors that impact legitimacy. While Franck uses the label ‘coherence’ to define this factor, Grossman adopts the more obvious label ‘consistency’.¹⁰² Coherence/consistency as defined by the two authors requires rules to be applied consistently in similar situations. In the realm of ISDS, this translates into the requirement that tribunals should interpret investment standards such as fair and equitable treatment and national treatment consistently to ensure that conflicting interpretations do not exist.

⁹⁷ *Ibid.*, Spears;

⁹⁸ Report of the SRSG, Business and Human Rights: Towards Operationalizing the ‘Protect, Respect and Remedy’ Framework, A/HRC/11/13, 30 (2009). See also, Report of the SRSG, Business and Human Rights: Further Steps Towards the Operationalization of the ‘Protect, Respect and Remedy’ Framework, A/HRC/14/27, ¶¶ 20–23 (2010).

⁹⁹ Spears, *supra* note 96, 1038.

¹⁰⁰ Weber, *supra* note 74.

¹⁰¹ Peter M. Blau, ‘Critical Remarks on Weber’s Theory of Authority’, (1963) 57(2) *The American Political Science Review*, 305-316.

¹⁰² Grossman, ‘International Adjudicative Bodies’, *supra* note 22, 150.

A considerable amount of ink has been spilled in academic commentary on why people value coherence/consistency in legal interpretation by adjudicative bodies. Professor Dworkin, for instance, argues that the law should be viewed as the coherent voice of the ‘community of principles’.¹⁰³ The community of principles in turn is simply a group whose individual members consider that they are linked to one another given that the same set of rules define their rights and obligations. According to Dworkin, by enabling the understanding of the law as the voice of the community of principle, the law itself is legitimised.¹⁰⁴ Inconsistent interpretations however act as a barrier to understanding the law in such a manner as they lead the community to perceive the system to be arbitrary (lacking certainty and predictability). This consequently operates to undermine their confidence in the system, leading to the loss of justifiable authority (legitimacy).¹⁰⁵ The law must therefore be interpreted consistently i.e. have one voice.¹⁰⁶

Consistency is also closely related with the concepts of determinacy¹⁰⁷ and predictability¹⁰⁸ which according to Franck and Bodansky respectively are essential values for building legitimacy. Determinacy as defined by Franck denotes a rule’s clarity of meaning and the extent of its own pull toward compliance.¹⁰⁹ This is where legitimacy is linked with reliability. In the context of ISDS, determinacy simply translates into the requirement that the rights of the investors and obligations of the states, as interpreted by the tribunal, should be clear.¹¹⁰ Such clarity would in turn allow investors, states and non-party stakeholders to determine their exact rights and obligations ex-ante (predictability), thereby enabling them to assess how to best comply with the law.¹¹¹ In this regard, consistency is a component of determinacy i.e. inconsistent interpretations and applications of rules undermines both clarity and

¹⁰³ Ronald Dworkin, *Law's Empire*, (Harvard University Press, 1986), 195.

¹⁰⁴ *Ibid.*

¹⁰⁵ Grossman, ‘International Adjudicative Bodies’, *supra* note 22, 144.

¹⁰⁶ Dworkin, *supra* note 103, 219.

¹⁰⁷ Determinacy according to Franck denotes a rule’s clarity of meaning and the extent of its own pull toward compliance. Franck, *supra* note 77, 91-110.

¹⁰⁸ Bodansky, ‘Legitimacy of International Governance’, *supra* note 59, 601.

¹⁰⁹ Franck, *supra* note 77, 91-110.

¹¹⁰ *Ibid.* and Susan D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’, (2005) 73 *Fordham Law Review* 1521-1625, 1584, (hereinafter “Franck, ‘The Legitimacy Crisis’”).

¹¹¹ Franck, *supra* note 77, 84; Bodansky, ‘Legitimacy of International Governance’, *supra* note 59, 601.

predictability.¹¹²

2.2.1.4. Expertise

It was argued above that while legitimacy and self-interest are distinct basis for compliance, they often work in tandem. This is primarily because, as a matter of human psychology, we judge institutions on the basis of their fruits.¹¹³ Different stakeholders, however, tend to have different conceptions of what amounts to the correct out-put (decision) in any given dispute. Minimizing the inquiry of legitimacy to the question whether an institution achieves the desired out-put therefore adds nothing to the legitimacy assessment.¹¹⁴

This does not mean that the outputs of an adjudicative framework are of absolutely no relevance. Rather it recognizes that the inquiry itself needs to be remodelled in a manner that allows co-ordinated support on the basis of the perception that the body has the capabilities to reach the correct out-put regardless of whether the correct decision is reached or otherwise. This shifts the focus from specific decisions of an adjudicative body to the issue of whether the body is structured in a manner that allows it to achieve the correct output. As this inquiry is simply concerned with particular attributes of the adjudicative system, question of what is the correct out-put in any given case is pre-empted.

Various scholars argue that the primary basis that may allow for the achievement of coordinated support for an institutional framework on the basis of its ability to reach the correct output lies in the expertise of the arbitrators.¹¹⁵ As far back as Plato, scholars have emphasised the correlation between expertise and legitimacy.¹¹⁶ Indeed, people tend to consider that technical or complex issues are best resolved by those who have expert knowledge in the field, rather than through a democratic decision

¹¹² Ibid., Franck; and Ibid., Bodansky.

¹¹³ Bodansky, 'Legitimacy of International Governance', supra note 59, 619.

¹¹⁴ Arguably it takes a lot away as under this lens the result will inevitably be that the adjudicative framework does not produce the best result from the perspective of a number of stakeholders even if the decision is viewed as correct from the perspective of various, even a majority, of stakeholders.

¹¹⁵ Bodansky, 'Legitimacy of International Governance', supra note 59, Grossman, 'International Adjudicative Bodies', supra note 22, 152.

¹¹⁶ The Collected Dialogues of Plato, (Edith Hamilton & Huntington Cairns eds., Princeton Univ. Press 1961), 317.

making.¹¹⁷ It is in this sense that expertise contradicts with an element of another source of legitimacy: public participation under the legitimacy-inducing factor of transparency.¹¹⁸ This contradiction however does not mean that one must trump the other, but simply highlights the fact that the stakeholders of an institution wish for it to be both subject to public control and effective in resolving issues that fall in its realm of operation.¹¹⁹

Expertise as a source of legitimacy for an adjudicative system is based on three assumptions: (1) investment disputes have various answers but not all are equally correct; (2) there exist expert adjudicators that know what those answers are; and (3) such experts can be identified. Of these assumptions, the last is the most problematic; for there is no unanimously accepted checklist that can be used to judge whether any particular person is an expert adjudicator of investment disputes or otherwise.¹²⁰ This is because, while a particular group of stakeholders might consider particular attributes of an adjudicator to warrant the label of ‘expert’, others may consider such attributes to be irrelevant. For instance, investors may value training and experience in international commercial arbitration as an indicator of expertise to resolve international investment disputes, while various NGOs may consider such training and experience to be unconnected and thus inappropriate for investment arbitration which has significant ‘public law’ characteristics.

Even if this difficulty is overcome, the relationship between expertise and correct decision making is difficult to see. For instance, one expert arbitrator (say a public international law specialist) may identify a different answer to be the ‘correct’ one than that be identified by another expert arbitrator (for instance a specialist in commercial arbitration). In such an instance, the issue does not lie in the determination of which one of the two is the real expert. Rather the issue becomes: what value judgments should be considered relevant for the resolution of such investment disputes? This is because, in instances where questions have correct and incorrect answers, the

¹¹⁷ William C. Clark and Giandomenico Majone, ‘The Critical Appraisal of Scientific Inquiries with Policy Implications’, 1985 10(3) *Science, Technology, and Human Values*, 6-19, 15.

¹¹⁸ *Ibid.* and see Charles Edward Lindblom, *The Policy-Making Process*, (Prentice Hall, 3rd ed., 1992), 12.

¹¹⁹ *Ibid.*, Clark and Majone, 15.

¹²⁰ Experience as an ISDS arbitrator does not equate to the possession of specialised skill.

identification of the correct answer does not translate into the identification of the correct decision. For instance, the questions whether broad interpretations of investor rights can operate to cast a regulatory chill and, if so, whether this will delegitimise the system of ISDS, are now questions with objective answers. The ability of experts to identify the correct answer however sheds little, if any, light on what the correct response should be while interpreting an investment agreement. This is not to say that experts will not be able to provide useful information about the effectiveness or feasibility of any one response, but rather that the choice between the responses will, more likely than not, turn on an expert's policy preferences as opposed to an objective assessment based on expert knowledge. As Bodansky aptly states, "*Assessing risks is a scientific task, but determining what to do in response requires value judgments about what levels of risk are acceptable. Such decisions require inferences, choices, and assumptions that themselves reflect policy preference*".¹²¹ Given these limitations of expertise as an indicator of legitimacy and the fact that there is no dearth of international investment arbitrators with training and expertise in a number of relevant areas of the law, this thesis will not discuss it in further detail.

Conclusion

This thesis does not view states as the sole or unitary actors within the realm of international law, and recognizes the fact that the preferences of states are shaped by various actors such as: political parties, NGO's (both domestic and international), other private parties and voters.¹²² It further recognizes that not all constituencies would always uniformly perceive the legitimacy of any international adjudicative body i.e. while some considers it to be legitimate, others might not. Indeed, the values of legitimacy are not universal as they vary among actors on various lines, and as such a standard that perfectly captures the multitude of differing views of all actors on the issue of legitimacy cannot be created. That said, what is required to legitimise an institution is not the same inquiry as what is the most optimal institution. As has been

¹²¹ Bodansky, 'Legitimacy of International Governance', supra note 59, 621. See also David A. Wirth, 'The Role of Science in the Uruguay Round and NAFTA Trade Disciplines', (1994) 27(3) Cornell International Law Journal 817-859, 834.

¹²² Koh, supra note 23, 192-93.

maintained throughout this chapter, an institution may be worthy of support even if it does not measure up to our highest normative standards. Thus what is required is a shared perspective of evaluation that allows for the achievement of coordinated support for an institution without having to compromise the most elementary normative commitments. In essence, those content independent reasons need to be identified that provide reasons for compliance to those addressed by the decisions and, reasons for support to those who are affected by the operations of the system.

This chapter argues that a two prong process is required to determine the legitimacy of ISDS. The first step focuses primarily on the existence of state consent. This is because, as discussed in the section on the traditional approach to normative legitimacy, state consent is necessary to justify the authority from the perspective of sovereign states. Moreover, state consent provides legal justification for the exercise of authority on the part of arbitrators. It should however be noted that while the absence of legal legitimacy signals illegitimacy, its existence does not provide the badge of legitimacy. This is because legal legitimacy takes an internal perspective and is simply concerned with whether an institution is complying with the regime's rules on "who can exercise authority, according to what procedures, and subject to what restrictions."¹²³ Thus, the lens of legal legitimacy does not provide insights into whether a regime's ongoing governance arrangements are themselves justified. For example, the fact that investment treaties provide that in instances of their breach ISDS tribunals should award monetary compensation to injured investors does not answer the seminal issue of whether the composition and decision making mechanisms of tribunals are themselves legitimate.

The second prong remedies these concerns by focusing on legitimacy-inducing values that allow various stakeholders to accept ISDS rulings as binding, independently of a positive assessment of the content of each particular ruling. Based on the beliefs of various stakeholders, this prong is performance-centred in the sense that the stakeholders scrutinize the performance of the institution to judge its legitimacy. To the extent that the institution operates in line with the minimum agreed normative values, it should not be considered illegitimate. Drawing on the works of Weber,

¹²³ Bodansky, 'Legitimacy of International Governance', *supra* note 59, 608.

Franck, Bodansky and Grossman, this thesis argues that the legitimacy of ISDS hinges in part upon the extent to which it is consistent, transparent, impartial and operates in line with the expectation of stakeholders (the issue of regulatory space). The next few chapters will evaluate the existence of each of these legitimacy values in ISDS with an aim to evaluating its legitimacy. Where these legitimacy values are found to be lacking, possible solutions will be identified.

Chapter 3 - The Issue of Regulatory Space in International Investment Law

Chapter 2 identified the legitimacy values that need to exist, to a certain degree, for the system of ISDS to be considered legitimate. This chapter will analyse one of these legitimacy values namely regulatory space in IIL with the view of providing an in-depth analysis of whether the system of ISDS suffers from this particular legitimacy concern and if so, the identification of the underlying reasons that give rise to the concern. This identification will in turn allow for the creation of recommendations that are tailored to adequately avert a legitimacy crisis. The reason for analysing the retention of sufficient regulatory space before other legitimacy values lies in the fact that it is able to best capture how each legitimacy concern begets the other. Specifically, it will highlight how the issue of inconsistency directly gives rise to and perpetuates the issue of regulatory chill. Similarly it highlights how transparency concerns, relating in particular to the processes of drafting and interpreting of investment treaties, have acted as a catalyst to the rise of the perception the state has given away too much policy space by entering into them. The originality of this chapter lies in its approach to the identification of what the ‘right to regulate’ in the context of ISDS entails. Specifically, through the identification of what the right to regulate entails, this thesis is able to tailor precise recommendations for the resolution of the issue.

Introduction

“No legal regime can maintain legitimacy while ignoring the fundamental needs and values of affected populations.”¹

¹ Charles H. Brower, 'Structure, Legitimacy, and NAFTA's Investment Chapter' (2003) 36 Vanderbilt Journal of Transnational Law, 56.

Majority of international investment agreements signed before the 21st century² are based upon a version of neo-liberal economic theory. This theory perceives the regulatory role of states to be limited to the protection of property rights.³ The predominance of this version of neo-liberalism underlying the first generation of investment agreements is attributable, in part, to the imbalance of bargaining power which existed between the capital exporting north and the capital importing south when these agreements were drafted.⁴ As the capital exporting north was primarily concerned with achieving the most far-reaching protections for its citizens who were investing abroad,⁵ the capital importing south was pushed to adopting the provision of such protections by competition in attracting FDI.⁶ It cannot be gainsaid that the capital importing south was equally concerned with preserving its sovereign right to regulate investment. Yet, the competition in attracting FDI forced developing states to ostensibly place restrictions on their regulatory autonomy *vis-à-vis* foreign investments.

With time, host states saw that the requirements of the first generation of investment agreements in terms of investment standards, as interpreted by tribunals, contradicted with their obligations to protect the environment and society under domestic and international laws.⁷ In this context, various commentators, NGOs and international

² The first generation of investment agreements. The terms ‘first generation’ and ‘second generation’ of investment treaties have been adopted from the works of Suzanne Spears. Suzanne A. Spears, ‘The Quest for Policy Space in a New Generation of International Investment Agreements’ (2010) 13(4) *Journal of International Economic Law*, 1037-1075, 1041.

³ *Ibid.*

⁴ On the economic theory underlying the first generation of investment agreements, see Kenneth J. Vandewelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, 2010), 75–115; Peter T. Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press, 2007) 89.

⁵ Spears, *supra* note 2, 1040. According to Spears, the first generation of investment agreements were drafted by industrialized capital exporting states that “*subscribed to a market fundamentalist or ‘neo-liberal’ version of economic liberalism at the time*”.

⁶ Jeswald W. Salacuse and Nicholas P. Sullivan, ‘Do BITs Really Work?: An Evaluation of BITs and their Grand Bargain’, (2005) 46 *Harvard International Law Journal* 67-130, 77.

⁷ See e.g. *Occidental v Ecuador*, LCIA Case No. UN 3467, Award, (1 July 2004); *Vattenfall et al v Federal Republic of Germany*, ICSID Case No. ARB/09/6, Registered (17 April 2009); *Aguas del Tunari S.A. v Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, (21 October 2005); *Azurix Corp. v Argentina*, ICSID Case No. ARB/1/12, Award, (14 July 2006) (measures to protect water services); *Piero Foresti, Laura de Carli and Others v Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Registered (8 January 2007). See also Markus Wagner, ‘Regulatory Space in International Trade Law and International Investment Law’ (2014) 36 *University of Pennsylvania Journal of International Law*, 1-87, 1.

institutions have argued that the threat of ISDS and the concurrent risk of large adverse awards operate to cast a ‘regulatory chill’.⁸

The ‘right to regulate’ concern became prominent further with the changes in the geopolitics of IIL in the last two decades. The developed north no longer remains the predominant source of FDI.⁹ In fact, the inflow of FDI into the developed and developing world have reached similar levels in recent years.¹⁰ For instance, the US and the EU, traditionally seen as the exporters of FDI, have become the largest destinations of FDI.¹¹ This shifting landscape has challenged the traditional perception of the role of investment treaties i.e. the ostensible one-sided protection of investors from developed states in developing states.¹² That the view is no longer tenable is visible in the impact that the convergence between capital exporters and importers has had on the doctrinal positions adopted by them in the past. Specifically, while the developed capital exporting states supported the ‘acquired rights’¹³ and the Hull

⁸ On regulatory chill, see Lars Markert, ‘The Crucial Question of Future Investment Treaties: Balancing Investors’ Rights and Regulatory Interests of Host States’ (2011) *European Yearbook of International Economic Law: International Investment Law and EU Law*, (Springer, 2011), 145-171; Kyla Tienhaara, ‘Regulatory Chill and the Threat of Arbitration: A View from Political Science’ (2010) in Chester Brown and Kate Miles (eds.), *Evolution on Investment Treaty Law and Arbitration*, (Cambridge University Press, 2011), 606-628.

⁹ See William S. Dodge, ‘Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement’, (2006) 39 *Vanderbilt Journal Transnational Law*, 1-37, 3.

¹⁰ UNCTAD, *World Investment Report 2018* available at: https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf (last accessed March 1, 2018).

¹¹ *Ibid.*

¹² Muthucumaraswamy Sornarajah, ‘Starting Anew in International Investment Law’, (2012) *Columbia FDI Perspectives*, No:74.

¹³ Doctrine of acquired rights simply requires that fixed or immediate rights of individuals cannot be adversely affected by the later laws or regulations.

doctrine¹⁴; developing states advocated the Calvo doctrine¹⁵ and the New International Economic Order¹⁶, however, such a distinction has become difficult to draw.¹⁷

Thus, both developed and developing states now share common concern of whether they have signed away too much ‘policy space’ by entering into international investment agreements.¹⁸ The experience of both Canada and the US in the claims filed by investors challenging environmental and social regulation under the NAFTA exemplifies the point.¹⁹

Moreover, two factors, widely accepted as characteristics of the current ISDS framework, exacerbated states’ concerns regarding the shrinking of policy space. First, the unpredictability of ISDS places states in a precarious position as past awards do not provide concrete guidance on what forms of regulatory actions are permissible, or at least do not fall foul of treaty commitments. Second, as argued by Professor Waincymer, there is a growing fear amongst states that the private international law background of a majority of investment arbitrators predisposes them to interpret investment law obligations broadly.²⁰ While a review of ISDS awards reveals that host

¹⁴ Hull formula suggests that investors should be treated according to the minimum standards of treatment under international law which requires host states to pay ‘prompt, adequate and effective compensation’ to investors in case of an expropriation. Surya Subedi, *International Investment Law: Reconciling Policy and Principle*, (Hart Publishing, 2016), 18, (Hereinafter Subedi, *Reconciling Policy and Principle*).

¹⁵ Calvo Doctrine requires that foreign and national investors should be treated in the same manner, and all local remedies should be resorted before going to the international arbitration, and it also rejects any interference from other states especially home countries in case of a dispute regarding the investors and his/her property. Andrew Paul Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009), 13.

¹⁶ The Declaration on the Establishment of a New International Economic Order (NIEO) was proposed by a group of developing countries through UCNTAD in 1970s, to revise the Bretton Wood regime which was considered that it favours the developed countries. This proposal was adopted by the UN in 1974. ‘UN Declaration on the Establishment of a New International Economic Order 1974’, established by UN General Assembly Resolution 3201, UN Doc. A/RES/S-6/3201 (1 May 1974).

¹⁷ Catharine Titi, *The Right to Regulate in International Investment Law* (Bloomsbury Publishing, vol. 10, 2014), 21.

¹⁸ Examples of instances where investors challenged regulatory measures based on public policy concerns include Aguas del Tunari, supra note 7; Occidental, supra note 7; Azurix, supra note 7; Piero Foresti, supra note 7; and Biwater Gauff (Tanzania) Ltd. v Tanzania, ICSID Case No. ARB/05/22, Award (24 July 2008).

¹⁹ See, e.g., Methanex Corporation v. United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, (3 August 2005); Ethyl Corporation v. The Government of Canada, UNCITRAL, Award on Jurisdiction, (24 June 1998); S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, (13 November 2000); Glamis Gold v United States, UNCITRAL, Award, (8 June 2009).

²⁰ Jeff Waincymer, ‘Balancing Property Rights and Human Rights in Expropriation’, in Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009), 275-309, 306–7.

states have more often than not been on winning side of disputes,²¹ the uncertainty caused by inconsistent awards and the suspicion that arbitrators will adopt expansive interpretations of investment standards have in practise operated to cast a ‘regulatory chill’ thereby fuelling the legitimacy crisis ISDS has come to suffer.²²

These challenges to the perceived legitimacy of the ISDS system have led to calls for withdrawal from investment agreements, or, in the case of certain states, a complete opt-out from the system.²³ Certain other states have responded, however, on the recognition that arbitration does not operate in a legal vacuum, rather its very existence and viability is dependent on the terms of investment agreements.²⁴ These states have incorporated a range of analytical devices in their newer investment agreements that allow arbitrators to show greater degree of deference to the right of states to regulate, while applying treaty provisions to disputes that involve competing policy objectives.²⁵ These analytical devices include the incorporation of: (a) interpretative statements refining investment standards, (b) general exception clauses and (c) positive language on a state’s right to regulate. Agreements that incorporate this approach have moved away from this fundamental version of neo-liberal theory that underlay the first generation of investment agreements discussed above, and have been termed as ‘the second generation’ of international investment agreements.²⁶

The second generation of international investment agreements are in line with a more moderate form of economic liberalism.²⁷ While this moderate form of economic

²¹ UNCTAD, World Investment Report 2018, 94.

²² See, e.g., *ibid.*, Waincymer; and Wagner, *supra* note 7, 1.

²³ Some countries have also refused to honour arbitral awards that were rendered against them. See e.g. Edward Baldwin, ‘Limits to Enforcement of ICSID Awards’ (2006) 23 *Journal of International Arbitration*; Eric Peterson and Jarrod Hepburn, ‘Payment Round Up New Reporting on ICSID Award Debts of Kazakhstan, Kyrgyzstan and Bangladesh’, (Dec 31, 2011) *Investment Arbitration Reporter*; Eric Peterson, ‘Zimbabwe not Paying ICSID Awards’ (2010) *Investment Arbitration Reporter*. See also M. Sornarajah, ‘A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration’ (Hereinafter Sornarajah, ‘A Coming Crisis’) in Karl P. Sauvant (ed), *Appeals Mechanism in International Disputes* (Oxford University Press, 2008), 39, 51, 73–74, (hereinafter Sauvant, ‘*Appeals Mechanism*’); and Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(c) of the Vienna Convention’, (2005) 54 *International & Comparative Law Quarterly*, 279-319.

²⁴ Spears, *supra* note 3, 1044, and Titi, *supra* note 17, 17.

²⁵ See generally, Stephen M. Schwebel, ‘The United States 2004 Model Bilateral Investment Treaty and Denial of Justice’, in Christina Binder et al. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, 519-525; Peter Muchlinski, ‘Trends in International Investment Agreements: Balancing Investor Rights and the Right to Regulate: The Issue of National Security’, (hereinafter, Muchlinski, ‘Trends in IIAs’) in Sauvant, ‘*Appeals Mechanism*’, *supra* note 23, 37–45.

²⁶ Spears, *supra* note 3, 1044.

²⁷ Titi, *supra* note 17, 17.

liberalism continues to stress the importance of recognising and protecting property rights, it does not link economic development and the perceived growth of FDI to the existence of such protections.²⁸ Interestingly, it argues that the success of markets in this regard is dependent upon an array of factors including the rule of law, the strength of institutions and socio-economic stability.²⁹ Given the active role states play in achieving and promoting such stability and strengthening institutions, this economic theory recognizes that the ability of investment agreements in attracting FDI is dependent upon the state retaining sufficient space to regulate on non-investment policy objectives.

This chapter argues that by incorporating new devices to combat the issue of regulatory chill the second generation of investment agreements may well be capable of addressing the legitimacy concerns relating to the perceived imbalance between the right of states to regulate on the one hand and investment protection on the other. To this end, the first part of this chapter will define a states' 'right to regulate'. In particular, the right to regulate will be distinguished from other related concepts, which while operating to preserve the policy space of a state do not attempt to provide a balance between the competing interests of investment protection and non-investment policy objectives.

Against the back-cloth of understanding the right to regulate, part 2 will analyse the manner in which the standards of investment protection have been refined in the second generation of investment agreements. Particular emphasis will be made upon the degree to which these refinements push tribunals to adopt a more balanced approach in their interpretation than they have tended to adopt while interpreting investment agreements belonging to the first generation.

Part 3 will evaluate the manner in which the second generation of investment agreements have attempted to incorporate an express right to regulate through the inclusion of general exception clauses which introduce exceptions applicable to the treaty.

²⁸ Ibid.

²⁹ Ibid; see also Spears, *supra* note 3.

Part 4 will then turn to analyse the impact of the inclusion of positive language regarding regulatory interests in the second generation of investment agreements. In particular, this part will discuss the inclusion of: (a) articles on the declaratory right to regulate and (b) new language in the preamble that aims to place non-investment policy objectives on the same normative plane as investment ones.

In conclusion, it will be argued that by incorporating these analytical devices in their second generation investment agreements states have equipped arbitrators with the tools to show a greater degree of deference to states' right to regulate while applying treaty provisions to disputes that concern a tension between the duty/right of states to regulate upon legitimate non-investment policy objectives on the one hand and the objective of investment protection on the other.

3.1. Defining the Right to Regulate

3.1.1 What is Included in the Scope of the Right to Regulate?

This chapter defines a states' 'right to regulate' in the field of IIL as the power to adopt regulatory measures in derogation of its commitments under investment agreements without incurring the duty to compensate.³⁰ The 'right to regulate' in this context is a legal right i.e. it has a concrete legal basis. It should however be noted that while the legal right to regulate may well be independent of its express incorporation in investment agreements, as it is indeed partially based on certain concepts of general international law, this chapter is solely concerned with the right to regulate as safeguarded by the black letter of investment agreements.³¹

It is essential to note that the non-incurrence of the duty to compensate is a seminal component in the definition of the right to regulate. This is because, even in the absence of the right to regulate, a state may act in the derogation of its commitments under investment agreements as long as it is willing to compensate the investor.³² Thus, a

³⁰ For a similar definition of the '*right to regulate*' see Titi, *supra* note 17, 19-52.

³¹ This limitation is a result of restricted space/word count.

³² See generally Markert, *supra* note 8, 145-171.

right to regulate is made superfluous if its invocation would still attract the duty to compensate. In contrast then to certain commentators who argue that the right to regulate as contained in an investment treaty merely furnishes a state with an excuse to derogate from its treaty commitments “without prescribing the legal consequences of that excuse”,³³ this chapter interprets the non-incurrence of the duty to compensate as a natural corollary of the successful invocation of a state’s right to regulate.³⁴

Moreover, whilst interpretative statements and clarifications in the preamble and text of investment agreements do not provide a state with an independent legal right to regulate, they are very important for the determination of the scope of the right to regulate. They allow substantive provisions of investment agreements to be formulated in a manner that ensures that the “legitimate regulatory concerns of states are balanced against investment protection rights.”³⁵ In other words, interpretative statements and clarifications operate to limit the interpretative discretion enjoyed by ISDS tribunals and act as a fail-safe to interpretations that contradict the intention of the parties to an investment agreement. This form of interpretative guidance operates to provide a degree of predictability and certainty to states on the issue of whether they can adopt regulatory measures in derogation of their obligations under an investment agreement.³⁶ Thus, this chapter analyses certain manifestations of interpretative statements and clarifications in second generation investment agreements while discussing the right of host states to regulate in IIL.

3.1.2 What the Right to Regulate Does not Encompass

The vast majority of literature on the right to regulate assumes that limiting the scope of protections afforded by investment agreements, by delimiting what constitutes an investor/investment and making compliance with the laws of the host state a

³³ José Alvarez and Kathryn Khamisi. ‘The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime’, *The Yearbook on International Investment Law and Policy 2008/2009* (2009), 457.

³⁴ For example it was held in *Marvin Feldman v Mexico* dispute that legitimate governmental regulation in public interest cannot be carried out if investments affected by such regulation have the right to seek compensation. *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 (also known as *Marvin Feldman v. Mexico*), Award, (16 December 2002), ¶ 103.

³⁵ Muchlinski, ‘Trends in IIAs’, *supra* note 25, 42.

³⁶ Titi, *supra* note 17, 43; Markert, *supra* note 8, 143.

prerequisite for the operation of treaty protections, are a part of a states right to regulate.³⁷ In contrast to this approach, it is argued that while these methods operate to protect the policy space enjoyed by sovereign states, they do not grant a state a right to regulate.

As discussed above, the right to regulate is the right of host states to regulate on areas in which specific commitments, by entering into investment agreements, have already been assumed. Accordingly, it is the right of host states to regulate on areas which are covered by an investment agreement. Limiting investment protection, on the other hand, has the impact of cancelling the commitments a state has entered into through investments agreements, thereby precluding discussion on a states right to regulate.

For example, the difference in the approaches adopted in the French and Canadian treaty practice on the issue of cultural exceptions clarifies this reasoning. The French approach to cultural exceptions is one where investors engaging in cultural industries are protected by the provisions of the treaty, while the state has the right to adopt measures “designed to preserve and promote cultural and linguistic diversity.”³⁸ The Canadian approach, on the other hand, is one whereby treaty protections do not apply to investments in cultural industries; rather such investments are explicitly excluded from the scope of the treaty.³⁹ Thus while the French Model BIT provides a state with the right to regulate i.e. adopt governmental measures in an area which is covered by the investment treaty, the Canadian cancels any “underlying commitments with reference to which only there can be talk of a right to regulate.”⁴⁰ Accordingly, while the Canadian Model BIT approach does indeed preserve a state’s policy space, it does not equip it with the right to regulate as defined by this chapter.⁴¹

This distinction between a state’s right to regulate and the preservation of a state’s policy space in the absence of a right to regulate is essential for one seminal reason. In practise, the provision of the right to regulate means that the state would have to prove

³⁷ See for example *ibid.* Markert; Newcombe and Paradell, *supra* note 15; Peter Muchlinski, ‘The Framework of Investment Protection: The Content of BITs’ in Karl P. Sauvant and Lisa E. Sachs (eds) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, (Oxford University Press, 2009), 37-71.

³⁸ French Model BIT (2006), Article 1(5).

³⁹ Canadian Model BIT (2004, later revised), Article 18(7).

⁴⁰ Titi, *supra* note 17, 37

⁴¹ The right to regulate is one of the components of the policy space enjoyed by states.

that a challenged measure falls within the scope of its right to regulate as contained in the investment agreement.⁴² Limiting the scope of the treaty, on the other hand, translates to the denial of *locus standi* to an investor or depriving a tribunal jurisdiction on the issue. Thus, while the former approach operates to protect investment and provide a state the right to regulate, the latter does not allow for the balancing of investment protection with legitimate policy concerns of the state. Given that FDI contributes to the economic development of states⁴³ and there is ample evidence that suggests that investment protection greatly attracts FDI,⁴⁴ preservation of policy space without providing a right to regulate is counter-productive to the goal that gave rise to the investment law regime in the first place.⁴⁵

Other examples of limiting the scope of treaty protections that do not equip states with the right to regulate include: the provision of certain standards of treatment and the exclusion of others;⁴⁶ the limitation of the application of treaty protections to those investments already established in the state entering into the agreement;⁴⁷ or the inclusion of a “denial of benefits clause” whereby the host state can limit the application of treaty protections under certain circumstances, such as where the investor indirectly controlling the investment belongs to a country with which the host state does not have diplomatic relations.⁴⁸

Following the discussion on what amounts to the right to regulate, the remainder of this chapter argues that in response to concerns of regulatory chill, certain states have

⁴² Stephan W. Schill, ‘International Investment Law and the Host State’s Power to Handle Economic Crises – Comment on the ICSID Decision LG&E v. Argentina’ (2007) 24 *Journal of International Arbitration*, 265-286.

⁴³ Andrew Newcombe, ‘Sustainable Development and Investment Treaty Law’, (2007) 8 *Journal of World Investment and Trade*, 357-407, 357 (hereinafter Newcombe, ‘Sustainable Development’).

⁴⁴ UNCTAD, ‘The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries’ (2009) UNCTAD Series on International Investment Policies for Development, 23 (hereinafter UNCTAD, ‘The Role of IIAs’).

⁴⁵ On the goals which gave rise to the IIL regime, see Wagner, *supra* note 7, 34.

⁴⁶ For example, MFN treatment, protection against expropriation, and full protection and security do not exist in EFTA-Hong Kong FTA. Moreover, the national treatment has been confined to the post-establishment phase under the China-Peru FTA (2009), Article 129(1) and (2), even though MFN treatment has been granted for the same under Article 131(1) and (2).

⁴⁷ Under the European treaty practice, this has been the norm. For instance, Austrian Model BIT (2011), articles 2 and 3; French Model BIT (2006), article 3; German Model BIT, article 2; Belgium-Luxembourg Economic Union Model BIT (2002), articles 2 4; Swedish Model BIT (2003), articles 2(1),(3) and (4); UK Model BIT (2008), article 2(1).

⁴⁸ For an overview of denial of benefits clause, see Organisation for Economic Co-operation and Development, *International Investment Law: Understanding Concepts and Tracking Innovations – A Companion Volume to International Investment Perspectives*. Organisation for Economic Co-operation and Development, (OECD, 2008), 28-33.

incorporated certain analytical devices in their relatively newer investment agreements, belonging to the second generation, that aim to remedy the perceived imbalance between the right of states to regulate on the one hand and investment protection on the other. In particular, this chapter evaluates the impact that: (a) refinement of investment standards, (b) inclusion of general exception clauses and (c) incorporation of positive language, has had on the ability of ISDS tribunals to take the legitimate noninvestment policy concerns into account, while adjudicating disputes that challenge valid governmental measures adopted by host states. With a view of contextualising such incorporations, reference shall be made to the deficiencies in the first generation of investment agreements which operated to cast a regulatory chill from the perspective of states and their agent relatives.

3.2. Refinement of Investment Standards

Tribunals interpreting investment standards under the first generation of investment treaties seldom considered a balancing exercise between the legitimate public policy concerns of states and investment protection.⁴⁹ A number of reasons have been advanced for such omission on the part of arbitrators, ranging from the neo-liberal bias of these agreements⁵⁰ to arbitrators' concern that their award would be annulled for exceeding the scope of the relevant agreements.⁵¹ It is clear that the absence of a balancing exercise in arbitral awards led to investment standards being interpreted extremely broadly in favour of investors.⁵² The propensity of such wide interpretations

⁴⁹ See Alvarez and Khamsi, *supra* note 33, 447–49; Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier', (2010) 4 *Law & Ethics of Human Rights*, 47-76, 63–64; Charles H. Brower, 'Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes', (2009) in Karl P. Sauvant (ed), *Yearbook on International Investment Law and Policy 2008– 2009* (Oxford University Press, 2009), 347-379, 356–64.

⁵⁰ See e.g., Jose E. Alvarez, 'Book Review of Gus Van Harten, *Investment Treaty Arbitration and Public Law*', (2008) 102 *American Journal of International Law*, 909.

⁵¹ See e.g., Brower, *supra* note 49, 375.

⁵² Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration', (2012) 15(1) *Journal of International Economic Law*, 223-255; L. Yves Fortier and Stephen L. Drymer, 'Indirect Expropriation in the Law of International Investment: I Know it When I See it, or Caveat Investor' (2004) 19(2) *ICSID Review*, 293-327.

to cast a regulatory chill has caused a significant backlash to the perceived legitimacy of investment arbitration.⁵³

To remedy this certain states have refined investment law standards in a manner that incorporates a state's right to regulate while still protecting investment. In particular, investment law standards have been refined in certain second generation investment treaties in a manner that allows ISDS tribunals to show a degree of deference to the right of states to adopt legitimate policy measures without falling foul of their obligations relating to investment protection. This part highlights the refinement of the standards of indirect expropriation, fair and equitable treatment and non-discrimination.

3.2.1. Indirect Expropriation

Expropriation was the first IIL standard, the interpretations of which raised issues of regulatory chill.⁵⁴ Investment disputes of the 1970s-1980s, for instance, were predominantly concerned with the issue of 'direct' expropriation as a result of the nationalisation of markets.⁵⁵ These instances were marked by the transfer of title from the investor to the host state.⁵⁶ In the last two decades, however, disputes concerning expropriation have largely been based upon claims of indirect expropriation, which do not entail a transfer of title.⁵⁷ Rather, indirect expropriation is concerned with instances where state measures have the impact of substantially depriving investors of the value of their investment.⁵⁸

The central question raised by claims of indirect expropriation is: to what extent can governmental actions made in the pursuance of legitimate public purposes, whether in the form of general regulation or a specific action in pursuance of a general regulation, affect the value of the investment without requiring compensation (i.e. amounting to

⁵³ Ibid. Henckels; and Ibid., Fortier and Drymer.

⁵⁴ Ibid. The rule that the property of aliens cannot be expropriated without adequate compensation has been recognized in IIL for decades.

⁵⁵ Katia Yannaca-Small, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law' (2004) OECD Working Papers on International Investment 2004/04, 2.

⁵⁶ Fortier and Drymer, supra note 52, 293-327.

⁵⁷ Henckels, supra note 52, 223-255.

⁵⁸ Ibid.

indirect expropriation).⁵⁹ Framed in another way, when do governmental actions of such a nature cross the line of the legitimate exercise of sovereign rights which do not require compensation, and step into the domain of regulatory ‘taking’?⁶⁰

Unfortunately, ISDS awards have followed inconsistent approaches to the issue. On the one hand, various tribunals have rejected the proposition that valid regulatory actions of host states can amount to indirect expropriation.⁶¹ While on the other, various arbitral decisions have held that the simple fact that investment was affected by legitimate regulatory action is not sufficient to automatically remove such instances from the preview of expropriation.⁶²

Compare for instance the awards in *Metalclad v Mexico*⁶³ and *Methanex v United States*.⁶⁴ In the former dispute, the tribunal held that it “*need not decide or consider the motivation or intent of the adoption of the Ecological Decree*”, rather it was only concerned with the question of whether the decree deprived the investor “*of the use or reasonably-to-be-expected economic benefit of property*”.⁶⁵ In essence, the tribunal was of the view that the validity of the ‘purpose’ behind the regulation had no bearing on whether it operated to amount to an indirect expropriation or otherwise. On the other hand, the *Methanex v United States* tribunal asserted that the issue hinged primarily on the ascertainment of whether the measure served a valid public purpose and was legitimate.⁶⁶ In its words, “*as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with*

⁵⁹ Customary international law allows expropriation of the investment of aliens as long as: (a) the ‘taking’ is for a public purpose, (b) it is not discriminatory and (c) adequate compensation is paid. See Wagner, supra note 7, 35.

⁶⁰ The term ‘taking’ has been used in arbitral awards and academic commentary to mean expropriation/privatisation/deprivation. Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, (Martinus Nijhoff Publishers, 1995), 98.

⁶¹ As stated by Schwarz when he was acting as an arbitrator in the SD Myers dispute, “*in the vast run of cases, regulatory conduct by public authorities is not remotely the subject of legitimate complaints*”. S.D. Myers, supra note 19, Separate Opinion by Dr. Bryan Schwartz (on the Partial Award) (12 November 2000); see also *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.

⁶² See for example *Occidental*, supra note 7, ¶¶ 85, 92.

⁶³ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, (30 August 2000) ¶¶ 103, 111.

⁶⁴ *Methanex*, supra note 19.

⁶⁵ *Metalclad* supra note 63, ¶ 103.

⁶⁶ *Methanex*, supra note 19.

*due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable”.*⁶⁷

Whilst only a handful of recent awards have found regulatory measures to amount to indirect expropriation,⁶⁸ the lack of clarity on factors that determine the issue has caused a significant backlash to the legitimacy of ISDS. In other words, the legitimacy of ISDS is dependent, in part, on the extent that such factors can be identified. This is not to ignore that decisions turn on facts and thus case-by-case consideration remains necessary, but it rather a recognition of the fact that the provision of a degree of certainty *vis-à-vis* the rights of states and investors is essential to overcome the legitimacy crisis which is, in part, a product of uncertainty surrounding the parameters of a state’s right to regulate. In the words of Dolzer and Stevens: “[T]o the investor, the line of demarcation between measures for which no compensation is due and actions qualifying as indirect expropriations (that require compensation) may well make the difference between the burden to operate (or abandon) a non-profitable enterprise and the right to receive full compensation (either from the host state or from an insurance contract). For the host state, the definition determines the scope of the state’s power to enact legislation that regulates the rights and obligations of owners in instances where compensation may fall due. It is arguable that the state is prevented from taking any such measures where these cannot be covered by public financial resources.”⁶⁹

To distinguish actions that amount to a breach of the standard from a legitimate regulatory measure that does not require compensation, certain investment agreements belonging to the second generation, such as the Canadian and US Model BITs, have introduced a specification whereby: “[e]xcept in rare circumstances, non-discriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”⁷⁰ A number of second generation treaties concluded by developing states have also incorporated very similar

⁶⁷ Muthucumaraswamy Sornarajah, ‘The Retreat of Neo-Liberalism in Investment Treaty Arbitration’, in Catherine A. Rogers and Roger P. Alford (eds), *The Future of Investment Arbitration* (Oxford University Press, 2009), 273-297, 278.

⁶⁸ *Ibid.*, 287.

⁶⁹ Dolzer and Stevens, *supra* note 60, 99.

⁷⁰ US Model BIT (2012), Annex B, Para 4(b).

language. Examples include the 2005 Singapore-India FTA⁷¹ and the 2006 China-India BIT.⁷² While such a provision seems to resemble an interpretive statement, it in fact amounts to an exception to the standard of indirect expropriation thereby providing a state with the right to regulate without the fear of breaching its obligations under the investment agreement.⁷³

Certain investment agreements have gone even further by omitting the “except in rare circumstances” proviso. The 2007 COMESA Investment Agreement for instance states:

*“Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.”*⁷⁴

While a few second generation treaties, like the ones mentioned above, have attempted to resolve the controversy surrounding the identification of the line that demarcates indirect expropriation from legitimate regulatory action, the majority of investment agreements do not contain any such interpretative language. Absent concrete guidance to tribunals, it is uncertain which approach any given tribunal would adopt in a future dispute. What is certain however is that there are a number of alternatives the tribunal would have a pick from – ranging from the extremes of Metalclad and Methanex or the more intricate approach adopted by the US and Canadian Model BITs. The specific incorporation of articles such as those in the US and Canadian Model BIT (amongst others) in future BITs would carry great advantages in the protection of states from adverse awards based on the breach of the standard, especially in instances where

⁷¹ See Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore, (2005) Annex 3.

⁷² See China-India BIT (2006).

⁷³ Titi, *supra* note 17, 151.

⁷⁴ COMESA Common Investment Area Agreement (COMESA Investment Agreement) (2007), Article 20(8).

health and environmental regulation such as those challenged in the Philip Morris⁷⁵ and Vattenfall⁷⁶ disputes respectively is called into question.

3.2.2. Fair and Equitable Treatment

The Fair and Equitable Treatment (FET) standard is contained in almost every investment agreement concluded to date.⁷⁷ Moreover, in recent years it has become the most frequently invoked standard in disputes involving a tension between a state's legitimate public policy concerns and the protection of investor's rights.⁷⁸ Unfortunately, however, exceptions to the standard that provide a state with the right to regulate, even in investment agreements belonging to the second generation, are difficult to find.⁷⁹ The reason for this lies partially in the fact that the FET standard is a non-contingent/absolute standard in that it reflects "an important part of the minimum standard of treatment of aliens dictated by customary international law".⁸⁰ In other words, while exceptions providing a right to regulate to contingent standards are easy to encounter in the newer generation of investment agreements as protections accorded by them are exclusively treaty based; exceptions to non-contingent standards such as the FET are extremely scarce as they represent an irreducible minimum from which derogation is not permitted.⁸¹

Yannaca-Small argues that there is no need for the inclusion of exceptions to the FET standard in the text of the treaty, as it inherently contains a balancing test that forces tribunals to take the legitimate interests of states into account, while ascertaining whether the standard has been breached.⁸² Similarly, Titi argues that "the emergence of particular arbitral *topoi* in the interpretation of the FET standard, notably the

⁷⁵ Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12.

⁷⁶ Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12; see generally Wagner, *supra* note 7.

⁷⁷ Newcombe and Paradell, *supra* note 15.

⁷⁸ *Ibid.*; Titi, *supra* note 17, 144.

⁷⁹ *Ibid.*, Titi, 143; see also Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, (Oxford University Press, 2017), 1.26.

⁸⁰ *Ibid.*, McLachlan.

⁸¹ This is particularly true as the FET standard is at its barest minimum considered to be reflective of MST under customary international law. Titi, *supra* note 17, 144.

⁸² Katia Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments' in August Reinisch, *Standards of investment protection*, (Oxford University Press, 2008), 111-130, 126-127.

protection of the investor's legitimate expectations, fair procedure and proportionality introduce the idea of a balancing test that renders the need for an exception redundant."⁸³

If tribunals had consistently and uniformly adopted a balanced and proportionate position in the ascertainment of whether the standard had been breached, there would be little concern surrounding the possibility of the inclusion of the standard casting a regulatory chill, even in the absence of the express provision of the right to regulate in this regard. Tribunals have adopted inconsistent interpretations of the content and scope of the standard, thereby precluding the possibility of the uniform adoption of a balancing test. This is attributable to two seminal issues surrounding what the standard entails, namely: (1) whether the content of the standard can be ascertained by recourse to the general principles of international law and (2) whether FET is simply a reflection of the minimum standard of treatment (MST) under customary international law or does it go beyond it.⁸⁴ Each of these are discussed in turn below, with specific focus on the manner in which certain investment treaties belonging to the second generation have attempted to resolve the issue of regulatory chill raised by these questions through the incorporation of specific language.

3.2.1.1. Defining FET by Recourse to General Principles of International Law

Given the lack of guidance on the content of the standard in various first generation investment agreements, tribunals have attempted to define it through reference to certain general principles of international law such as transparency, good faith and consistency of governmental conduct.⁸⁵ As a result of no real agreement on the content of these general principles, defining the FET standard by recourse to them does not provide any concrete guidance. In other words, tribunals adopting such an approach fall into the trap of attempting to overcome vagueness by reference to terms that are themselves indeterminate.

⁸³ Titi, *supra* note 17, 145.

⁸⁴ Spears, *supra* note 3, 1045.

⁸⁵ *Ibid.*, 1054.

It is therefore unsurprising then that this approach to the determination of the content of the FET standard has yielded inconsistent definitions. On the one hand, various tribunals adopting this approach have interpreted the standard extremely broadly thereby imperilling any public policy-based regulation that a state may wish to adopt.⁸⁶ For instance, *Tecmed v Mexico* award where the tribunal held that “[T]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”⁸⁷

At the other end of the spectrum, tribunals that adopt this approach to the ascertainment of the content of the standard have concluded that it operates to allow host states to regulate as long as they do not act inequitably, unreasonably and unfairly in the exercise of their legislative power.⁸⁸ The *Parkerings v Lithuania* tribunal, for instance, referred to the general principles of international law and concluded that under the FET standard “there is nothing objectionable about [an] amendment brought to the regulatory framework existing at the time an investor made its investment.”⁸⁹ According to the tribunal, only those expectations of investors that are ‘reasonable’ in light of the circumstances are protected by the standard.⁹⁰

The upshot of the discussion above is that while certain tribunals adopting this approach have expanded the content of the standard thereby lending no support to the legitimate policy objectives of states, others have been more willing to do so through a more restrictive interpretation of the scope of the standard. Thus rather than supporting, the adoption of this approach to the ascertainment of the content of the standard hinders the possibility of the uniform adoption of a balanced and proportionate position in the ascertainment of whether the standard has been breached.

⁸⁶ Ibid., 1053; see also Kate Miles, ‘International Investment Law and Climate Change’, (2008) Society of International Economic Law, Working Paper No. 27/08, 21-22.

⁸⁷ *Tecmed*, supra note 61, ¶ 154. See also, *Occidental*, supra note 7; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Award (22 May 2007).

⁸⁸ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, (11 September 2007), ¶ 332.

⁸⁹ Ibid.

⁹⁰ Ibid.

In response to these concerns, various states have attempted to include language in their investment agreements, belonging to the second generation. The essence is to give content to the FET standard by recourse to something more specific than general principles of international law. In particular, certain states have included express language in their investment agreements whereby they have tied the standard to the requirement that states do not ‘deny justice’ to investors. Article 5 of the US Model BIT for instance states that FET “includes the obligation not to deny justice...in accordance with the principle of due process embodied in the principal legal systems of the world”.⁹¹ While such an addition is commendable, to the extent that it provides a degree of clarity to what the FET entails, it does not completely settle the uncertainty surrounding the scope of the standard. For example, a lot of ink has been spilled in academic commentary on whether the obligation of not denying justice to the investor as contained in the Model BIT is the sole obligation flowing from the standard or whether it is just one example of the plethora of obligations the standard imposes.⁹²

A more concrete approach is adopted in Article 11 of the 2009 ASEAN Comprehensive Investment Agreement which provides that “for greater certainty . . . fair and equitable treatment requires each Member State not to deny justice”.⁹³ The ASEAN-China Investment Agreement (2009) incorporates similar language linking FET with the sole obligation of not denying justice.⁹⁴ By linking the standard solely to the obligation of not denying justice, these agreements provide for a degree of protection to investors while indirectly providing a state with the right to regulate.

3.2.1.2. An Autonomous Standard or a Reflection of MST

The first generation of international investment agreements rarely contain guidance regarding whether FET is an autonomous standard or whether it is simply a reflection of the MST under customary international law.⁹⁵ Concerns of regulatory chill arise,

⁹¹ US Model BIT (2012), Article 5.

⁹² See for instance José E. Alvarez, ‘The Evolving BIT’, (2010) 7(1) Transnational Dispute Management (30 April 2009), 1-19, 10.

⁹³ ASEAN Comprehensive Investment Agreement (ASEAN-CIA, 2009), Article 11.

⁹⁴ UNCTAD World Investment Report 2010, 87.

⁹⁵ *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, (10 April 2001) ¶ 110. See also *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004); *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, (17 March 2006).

in particular, in light of the tendency of tribunals interpreting the standard as an autonomous one to give it a very expansive definition.⁹⁶ In other words, fear on the part of states that tribunals will interpret the standard as an autonomous one and adopt an expansive definition leads to the casting of regulator chill.⁹⁷

In response to these concerns various states have added language in their more recent BITs whereby the FET standard is placed squarely within the confines of the MST. Spain and Mexico for instance adopted this approach in the 2006 revision of their BIT.⁹⁸ Interestingly, the incorporation of such language followed the very expansive interpretation of the FET standard in the 1995 Spain-Mexico BIT⁹⁹ by the *Tecmed* tribunal.¹⁰⁰ That tribunal justified the expansive interpretation of the FET by holding that the FET standard is autonomous to the MST.¹⁰¹ Mexico has since continued to argue for the inclusion of language that limits the parameters of the FET standard to the MST in treaties it has concluded with other states. Mexico's 2008 BIT with China¹⁰² and 2009 BIT with Singapore,¹⁰³ for instance, include such limiting language.

Mexico is not the only country that has limited the FET standard to the MST. The NAFTA Free Trade Commission (FTC) for example issued an interpretive note¹⁰⁴ to this effect in response to the 2001 award in *Pope and Talbot v Canada*.¹⁰⁵ Various African countries have also added similar language to their investment agreements as well. For instance, Article 14(2) of the COMESA Agreement states that the level of treatment guaranteed under the FET standard is equivalent to that provided under the MST.¹⁰⁶

These developments are a step in the right direction, at least to the extent that they provide host states (and their agent relatives) with a degree of certainty *vis-à-vis* the parameters of their regulatory space *ex-ante*. Given that the MST simply represents

⁹⁶ See *Glamis Gold*, *supra* note 19.

⁹⁷ Muchlinski, 'Trends in IIAs', *supra* note 25, 42.

⁹⁸ Spain-Mexico BIT (2006), Article IV(1).

⁹⁹ Spain-Mexico BIT (1995), Article IV(1).

¹⁰⁰ *Tecmed*, *supra* note 61, ¶ 154 (29 May 2003).

¹⁰¹ *Ibid.*

¹⁰² Spears, *supra* note 3, 1037-1075 (citing Mexico-PRC BIT 2008).

¹⁰³ *Ibid.*, UNCTAD, World Investment Report 2010, 87.

¹⁰⁴ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), (hereinafter FTC Interpretative Note on Transparency).

¹⁰⁵ *Pope & Talbot*, *supra* note 95.

¹⁰⁶ COMESA Investment Agreement, Article, 14(2).

the floor i.e. “an absolute bottom below which conduct is not accepted by the international community,”¹⁰⁷ limiting the content of FET to the MST serves to provide states with a degree of clarity of their obligations towards investment protection. Coincidentally, it also provides states with clarity regarding the confines of their regulatory space.

3.2.3 Non-discrimination

Inherent in the non-discrimination standard is a comparative test between ‘similarly situated’ investments and investors.¹⁰⁸ According to the Total Tribunal “*in order to determine whether treatment is discriminatory, it is necessary to compare the treatment challenged with the treatment of persons or things in a comparable situation.*”¹⁰⁹

While this comparative test does not provide a state with the right to regulate as defined by this chapter, it does operate to define the scope of a state’s policy space. This is because ISDS tribunals applying the standard have adopted one of two approaches. On the one hand, tribunals have construed the comparative test to invite the balancing of the legitimate policy concerns of the state with the interests of investor thereby indirectly importing policy space.¹¹⁰ Take for instance the approach adopted by the *S.D. Myers* tribunal when it stated: “[L]ikeness...may set the stage for an inquiry into whether the different treatment of situations found to be ‘like’ is justified by legitimate public policy measures that are pursued in a reasonable manner.”¹¹¹ On the other hand, tribunals identifying categories of like investments have completely ignored the legitimate policy concerns of states thereby indirectly imposing restrictions on their regulatory discretion.¹¹²

Thus, inconsistent approaches adopted by tribunals in determining ‘similarly situated’ or ‘like’ investors/investments have an impact on the degree of certainty states have

¹⁰⁷ Titi, supra note 17, 146.

¹⁰⁸ Newcombe and Paradell, , supra note 15.

¹⁰⁹ Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, (27 December 2010), ¶ 210; Wagner, supra note 7, 43.

¹¹⁰ Titi, supra note 12, 140.

¹¹¹ S.D. Myers, supra note 19, ¶ 246.

¹¹² Newcombe and Paradell for instance argue that this comparative test provides states with more policy space than general exception clauses. Newcombe and Paradell, , supra note 15, 503, 505.

regarding the scope of their regulatory space.¹¹³ Compare for instance the manner in which the term ‘like investments’ was defined in *Occidental v Ecuador*¹¹⁴ and *Parkerings v Lithuania*.¹¹⁵ In the former dispute, while interpreting and applying the term, the tribunal compared the treatment afforded to an oil company with that afforded to exporters in general.¹¹⁶ The tribunal unfortunately did not provide detailed guidance on why it chose to compare the two, instead of opting to compare the treatment afforded to the foreign oil company with that afforded to domestic oil companies.¹¹⁷ In any case, it is clear that such a wide interpretation of the term could cast a regulatory chill in instances where a state may wish to take legitimate regulatory action in sensitive areas.¹¹⁸ This stems from the fact that a state can never be sure of whether tribunals will give due regard to its public policy objectives while determining what constitutes like investments.

The tribunal in *Parkerings v Lithuania* on the other hand adopted a more contextual approach to ‘like investments’.¹¹⁹ Here, the tribunal held that the difference in treatment afforded to the foreign investor’s parking project relative to that afforded to a domestic investors car parking project did not amount to discrimination as the project of the foreign investor was situated in an area which had been designated as a World Cultural Heritage site by UNESCO.¹²⁰ While such interpretations of the standard provide a degree of comfort to states *vis-à-vis* the fact that their regulatory concerns will be taken into account when tribunals identify categories of like investments, inconsistency in arbitral awards on the issue is itself sufficient to cast a regulatory chill.¹²¹

In response to these concerns, certain states have incorporated provisions in their investment agreements belonging to the second generation that aim to resolve the controversy surrounding what constitutes ‘like investments’. The COMESA

¹¹³ Spears, *supra* note 3, 1057.

¹¹⁴ *Occidental*, *supra* note 7.

¹¹⁵ *Parkerings-Compagniet*, *supra* note 88.

¹¹⁶ *Occidental*, *supra* note 7.

¹¹⁷ *Ibid.*, ¶¶ 173–76.

¹¹⁸ Spears, *supra* note 3, 1057; Muchlinski, ‘Trends in IIAs’, *supra* note 25, 43; Sornarajah, ‘A Coming Crisis’, *supra* note 23, 62–3.

¹¹⁹ *Parkerings-Compagniet*, *supra* note 88.

¹²⁰ *Ibid.*, Section 8.3. See also *Methanex*, *supra* note 19.

¹²¹ See Muchlinski, ‘Trends in IIAs’, *supra* note 25, 43; Sornarajah, ‘A Coming Crisis’, *supra* note 23, 62–3.

Investment Agreement for instance incorporates a non-exhaustive list of factors that tribunals may consider when identifying ‘like circumstances’. Article 17 (2) of the agreement states:

“For greater certainty, references to ‘like circumstances’...requires an overall examination on a case by case basis of all the circumstances of an investment including, inter alia:

- (a) Its effects on third persons and the local community;
- (b) Its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
- (c) The sector the investor is in;
- (d) The aim of the measure concerned;
- (e) The regulatory process generally applied in relation to the measure concerned; and
- (f) Other factors directly relating to the investment or investor in relation to the measure concerned;

And the examination shall not be limited to or be biased towards any one factor.”¹²²

Unfortunately, not many investment agreements belonging to the second generation have clarified the non-discrimination standard. Consequently, the issue of the regulatory chill cast by uncertainty in what amounts to ‘like investments’ continues to be a major source of concern.

3.2.4. Concluding remarks

This part of the chapter highlights the methods by which certain states have refined three principal investment standards in their second generation investment agreements, in response to concerns that ISDS tribunals have interpreted them expansively in the past. In particular, states have added language in their investment agreements that aims at encouraging future tribunals to adopt a balancing exercise in the determination of whether the rights of investors have been breached by governmental actions that are based on legitimate regulatory concerns of the host state. By doing so, these

¹²² COMESA Investment Agreement, Article 17(2).

agreements encourage tribunals to show a degree of deference to the policy concerns of the host state.

Unfortunately, however, agreements incorporating this approach do not provide guidance on how much deference a tribunal should show. A number of approaches to the issue have been suggested in academic commentary, including the adoption of the ‘least restrictive alternative’ approach developed in the context of trade law,¹²³ the doctrine of ‘margin of appreciation’ developed in the context of international human rights,¹²⁴ the three levels of scrutiny developed in US constitutional law,¹²⁵ and the standard of ‘reasonable nexus to rational governmental policies’ developed in ISDS jurisprudence in the context of the non-discrimination standard.¹²⁶ It is however unclear which of these approaches, if any, ISDS tribunals will consistently follow while interpreting the second generation of investment agreements discussed in this part.

3.3. General Exception Clauses

The first generation of BITs usually did not include exceptions to investment treaty liability for regulatory measures taken in the pursuance of legitimate policy concerns of host states.¹²⁷ In instances where exceptions existed, they were tailored to exclude a very limited range of regulatory measures or specific sectors from the scope of the treaty.¹²⁸ The narrow scope of such exceptions in turn limited the regulatory space that the host state enjoyed.

Certain second generation investment agreements have adopted a more comprehensive approach to the issue by incorporating general exception clauses.¹²⁹ Aimed at ensuring that the regulatory space of the host state is sufficiently preserved, these clauses require

¹²³ Developed by the WTO Appellate Body. See Muchlinski, ‘Trends in IIAs’, *supra* note 25, 75.

¹²⁴ *Ibid.*

¹²⁵ Spears, *supra* note 3, 1048.

¹²⁶ Nicholas DiMascio and Joost Pauwelyn, ‘Non-discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’, (2008) 102(1) *American Journal of International Law*, 48-89, 77.

¹²⁷ Spears, *supra* note 3, 1059.

¹²⁸ Titi, *supra* note 17, 169.

¹²⁹ Markert, *supra* note 8, 145-171.

tribunals to balance specifically enumerated policy objectives in order to ascertain whether a breach of the requirements of investment protection is excused.¹³⁰

General exception clauses as they are found in certain second generation investment agreements are of three types. This part will discuss these types in turn, followed by an analysis on the manner in which they may be interpreted by tribunals.

3.3.1 Types of General Exception Clauses

3.3.1.1. GATT Article XX or GATS Article XIV

Certain investment agreements incorporate general exception clauses which are based upon Article XX of GATT¹³¹ or Article XIV of GATS.¹³² Occasionally, investment agreements adopt a tailored mixture of the two articles.¹³³ Exception clauses of this type generally set a number of preconditions for their application.¹³⁴ In particular, they require that regulatory actions are not applied in an arbitrary or discriminatory manner and exclude covert restrictions on investment from their scope of application.¹³⁵ Moreover, they require the host state to prove the connection between the regulatory measure and the policy objective specifically enumerated in the exception clause. The last of these requirements is framed in varying language in different investment agreements thereby producing a divergence in the application of exception clauses belonging to this type. In other words, the divergence in the manner the last requirement is framed in different agreement leads to a difference in the requirements the fulfilment of which invokes the exception. For instance, certain investment treaties take a relatively low threshold and require the host state to prove that the regulatory measure was “designed and applied” or was “relating to” the achievement of a

¹³⁰ See United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, (20 April 2005), ¶ 291.

¹³¹ See e.g., Singapore-Jordan BIT (2004), Article 18; Singapore-Australia FTA (2003), Article 19; Singapore-India FTA (2005), Article 6.11; Japan-Malaysia FTA (2005), Article 10; ASEAN FTA (2009), Article 17; China-ASEAN FTA (2009), Article 16; Singapore-Japan FTA(2007), Article 83.

¹³² Taiwan-Panama FTA (2003), Article 20.02; Singapore-Korea FTA (2005), Article 21.2; ASEAN-Australia-New Zealand FTA (2009), Chapter 15, Articles 1-5.

¹³³ China-New Zealand FTA (2008), Article 200; Japan-Malaysia FTA (2005), Article 10.

¹³⁴ Titi, *supra* note 12, 173

¹³⁵ *Ibid.*

specified objective expressly included in the clause.¹³⁶ Others require a more stringent prerequisite for application, namely the host state must prove that the measure was “necessary” to achieve the policy objective.

3.3.1.2. Exception Clauses Preconditioned on the Fulfilment of Procedural Requirements

The second type of exception clauses found in a few second generation investment agreements are preconditioned on the fulfilment of certain procedural requirements.¹³⁷ In particular, in order for the host state to avail itself of the exception, they obligate it to inform the home state of the non-conforming regulatory measure without delay. Substantively, the host state must prove that the non-conforming regulatory measure was ‘necessary’ to achieve the specified policy objective. Take for example the exception clause contained in the 2002 BIT between the Republic of Korea and Japan which states:

“(1) Notwithstanding any other provisions in this Agreement . . . each Contracting Party may . . . take any measure necessary to protect human, animal or plant life or health.

(2) In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement . . . that Contracting Party shall not use such measure as a means of avoiding its obligations.

(3) In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement . . . that Contracting Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Contracting Party of the following elements of the measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of which the measure is taken; (c) legal source or authority of the measure; (d) succinct description of the measure; and (e) motivation or purpose of the measure.”¹³⁸

¹³⁶ COMESA Investment Agreement, Article 22.

¹³⁷ See for example Japan-Korea BIT (2002), Article 16.1 (c).

¹³⁸ *Ibid.*

3.3.1.3. Exception Clauses with a Low Threshold for Application

The last type of exception clauses seek to preserve the regulatory space of states by adopting a relatively low threshold for their application.¹³⁹ Unlike type 1, they do not explicitly prohibit arbitrary or discriminatory application, though arguably this is implicitly required. Moreover, unlike type 2, they do not contain stringent procedural preconditions for their application. Take for instance the exception clause contained in the Mauritius-Switzerland BIT which states “*nothing in this Agreement shall be construed to prevent a Contracting Party from taking any action necessary [. . .] for reasons of public health or the prevention of diseases in animals and plants.*”¹⁴⁰

Interestingly, various exception clauses falling in this type take an even more flexible approach by moving away from framing the nexus requirement between the non-conforming measure and the specified policy objective in terms of ‘necessity’. Article 8 of the 2002 Colombian Model BIT frames the nexus requirement in terms of proportionality i.e. the non-conforming measure must be shown by the state to be proportional to the objective the measure is meant to achieve.¹⁴¹ Similarly, certain other investment treaties incorporating exception clauses of this type require the state to have in good faith reached an ex-ante determination that the measure was appropriate in light of its objective.¹⁴²

3.3.2 General Exception Clauses in Practise and Concluding Remarks

Given that general exception clauses are a relatively recent creation, not many instances of their interpretation by arbitral tribunals exist. It is therefore uncertain how arbitral tribunals will interpret them in the future. It is however clear that interpretations of more specific exception clauses, like the national security exception found in certain BITs, do not provide a meaningful comparator to predict the interpretation of general exception clauses by ISDS tribunals.¹⁴³ The preambles of

¹³⁹ See for example Mauritius-Switzerland BIT (1998), Article 11; Colombian Model BIT (2002), Article 8; COMESA Investment Agreement.

¹⁴⁰ Mauritius-Switzerland BIT (1998), Article 11.

¹⁴¹ See e.g., Colombian Model BIT (2002), Article 8, Text on file with WCPHD.

¹⁴² See e.g., COMESA Investment Agreement, Article 22.

¹⁴³ Spears, *supra* note 3, 1062.

general exception clauses based on Article XX of the GATT or Article XIV of the GATS implicitly require a balancing test, as does the “lengthy laundry list of exceptions... (which presumably extend beyond the usual customary law defences)”.¹⁴⁴ Specific exception clauses on the other hand do not require such a balancing exercise. This is made apparent by the degree of criticism the award of the *Continental Casualty Co. v The Argentine Republic* tribunal generated on the grounds that it imported a balancing approach akin to that contained in GATT Article XX, while interpreting a national security exception.¹⁴⁵

Certain commentators have however asserted that since the majority of general exception clauses in existence today require the measure to be ‘necessary’ to achieve the policy objectives listed in the clause, the practise of the WTO Appellate body in the interpretation of general exception clauses can provide meaningful guidance.¹⁴⁶ The practise of the WTO Appellate Body suggests that the term is to be viewed as lying somewhere in the spectrum ranging between absolutely required at one extreme and ‘making a contribution to’ at the other.¹⁴⁷ Take for instance the statement of the Appellate Body in the *Korea Beef* dispute where it stated:

*“[D]etermination of whether a measure, which is not ‘indispensable,’ may nevertheless be ‘necessary’ within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.”*¹⁴⁸

Thus, according to this approach, a tribunal called upon to determine whether a measure falls in the scope of a general exception clause will have to enter into a

¹⁴⁴ Alvarez and Khamsi, supra note 33, 441.

¹⁴⁵ The Tribunal in *Continental Casualty Co. v The Argentine Republic*, ICSID Case No. ARB/03/09 Award, para 196 (5 September 2009) See e.g. Alvarez and Khamsi, supra note 33, 441; Kalderimis, Daniel R. "Investment Treaties and Public Goods." *Multilateralism and Regionalism in Global Economic Governance: Trade, Investment and Finance* 92 (2012): 139., at page 152-153.

¹⁴⁶ Given that most general exception clauses in the new generation of investment agreements are based on the GATT Article XX or GATS article XIV, the manner in which the WTO Appellate Body has interpreted general exception clauses provides a relevant comparator.

¹⁴⁷ WTO Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161,169/AB/R, adopted 10 January 2001.

¹⁴⁸ *Ibid.*, ¶ 164.

balancing exercise between the importance of the interests protected by the measure and the harm inflicted by it on the interests protected by the investment agreement.¹⁴⁹

Despite the uncertainty surrounding the manner in which general exception clauses will be interpreted by tribunals in the future, their inclusion in investment agreements operates to provide states with a legal right to regulate.¹⁵⁰ This is based upon the fact that general exception clauses operate to permit derogation from any obligations a state is subject to under the investment agreement i.e. they introduce exceptions that apply to all articles of a treaty. There are however concerns regarding the manner in which such clauses should be drafted in future investment agreements. In particular, as general exception clauses can be drafted in a manner whereby they only cover certain types of regulatory interests or list examples of public interest covered by them, issues are raised in the choice between “*drafting the clause in too general terms, thereby risking the loss of its effectiveness*” on the one hand, or “*drafting it too explicitly, enumerating its specific domains, in which case the risk consists in the possible incompleteness of the enumeration*”.¹⁵¹

3.4. Insertion of Positive Language Regarding Regulatory Interests in International Investment Agreements

To strike a balance between the right of states to regulate and investor protection, certain states have incorporated ‘positive language’ on regulatory interests in their second generation investment agreements. The first section of this part provides an overview of general positive language on regulatory interests as incorporated in certain second generation investment agreements. The remaining two sections will then discuss specific manifestations of such positive language namely, the ‘declaratory

¹⁴⁹ See e.g., WTO Appellate Body Report, US-Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, adopted 20 April 2005, ¶¶ 306–8; and WTO Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, ¶ 178.

¹⁵⁰ Titi, Catharine, *supra note 17*, 172; International Law Commission, ‘Draft Articles on Most-Favoured Nation Clauses, with commentaries’ (1978) 2 Yearbook of the ILC, 16-73, 29.

¹⁵¹ *Ibid* at page 172; International Law Commission. "Draft Articles on Most-favoured-nation Clauses, with Commentaries." *Yearbook of the ILC* 2 (1978): 16-73 at page 29.

right to regulate’ and the inclusion of non-economic policy objectives in the preambles of certain second generation investment agreements.

3.4.1. An Overview of General Positive Language on Regulatory Interests

Positive language incorporating regulatory interests, in certain second generation investment agreements, does not give states an independent right to regulate. In other words, such language does not give rise to legally enforceable rights and obligations.¹⁵² It does, however, provide a legitimate method of balancing public and private interest in the absence of an express right to regulate. Even where an express right to regulate is incorporated in an investment agreement, such positive language can perform a supplementary function in identifying the importance to be attributed to specific regulatory interests.¹⁵³ In either case, however, positive language does not ‘create’ policy space for the host state nor does it guarantee the deterrence of regulatory chill.¹⁵⁴ Rather, the inclusion of positive language in investment agreements has the impact of establishing ‘best efforts’ commitments¹⁵⁵ or ‘soft obligations’¹⁵⁶ which seek to provide states with an interpretative presumption that their interests are more likely to be taken into account by tribunals interpreting the agreement.

To explain this point, this section will analyse the main methods in which positive language is formulated namely: (1) positive language recording a host states obligation to preserve its right to regulate¹⁵⁷ and (2) positive language creating an (indirect) investor obligation, particularly through the incorporation of the requirements of Corporate Social Responsibility (CSR).

¹⁵² E.g. see how the term has been employed in UCTAD Trade and Development Report, (2007), 92, 142.

¹⁵³ Ibid.

¹⁵⁴ Titi, *supra* note 17, 1104

¹⁵⁵ Muchlinski, ‘Trends in IIAs’, *supra* note 25, 48.

¹⁵⁶ Newcombe and Paradell, , *supra* note 15, 509.

¹⁵⁷ Note: positive language recording a host states right to regulate is discussed in the next subsection titled the ‘declaratory’ right to regulate.

3.4.1.1. Positive Language Recording the Obligation of Host States

Recognising that competition in attracting FDI had sparked a “*regulatory race to the bottom*”,¹⁵⁸ certain states have specifically incorporated language in their newer agreements which obligates states to avoid relaxing specific policy standards.¹⁵⁹ Take for instance Article 74 of the Mexcio-Japan FTA which contains a list of assurances and commitments *vis-à-vis* the avoidance of lowering of policy standards on health, safety and environmental measures. It states:

*“The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its Area of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the Parties shall consult with a view to avoiding any such encouragement.”*¹⁶⁰

Various other second generation investment treaties including those concluded between the United States and Morocco¹⁶¹, Indonesia and Japan,¹⁶² Spain and Libya,¹⁶³ Japan and Peru¹⁶⁴ have incorporated this article *ad verbatim*.

It should be noted that under these articles, if a party considers that the other party has lowered policy standards in a specifically enumerated area it may begin consultations rather than institute a legal claim.¹⁶⁵ This approach enhances the perception that incorporating such positive language operates to merely impose soft obligations on

¹⁵⁸ Newcombe and Paradell, , supra note 15, 509.

¹⁵⁹ Ibid.

¹⁶⁰ Mexico-Japan FTA, Article 74.

¹⁶¹ The United States and Morocco FTA, (signed in 2004, entered into force in 2006).

¹⁶² Indonesia-Japan Economic Partnership Agreement (EPA) (signed in 2007, entered into force in 2008).

¹⁶³ Spain-Libya BIT, Article 8(5).

¹⁶⁴ Japan-Peru BIT, Article 26.

¹⁶⁵ Titi, supra note 17, 106.

host states. This perception is further supported by the exclusion of these articles, where they exist, from the treaties arbitration clause.¹⁶⁶

As a result of its ‘soft’ nature, positive language formulated as an obligation of the host state does not enhance regulatory freedom. Regulatory freedom would be enhanced if states could in reliance on such positive language, adopt measures to protect those public interests that are specifically enumerated in the provision. It is however hard to see how the inclusion of such language can justify the adoption of measures which derogate from substantive investment treaty obligations.

3.4.1.2. Positive Language Establishing Indirect Investor Obligations

Certain investment agreements incorporate positive language that imposes (indirect) obligations on the investor – most famously through the incorporation of the CSR standard.¹⁶⁷ While a number of investment agreements have adopted such an approach, its popularity amongst Model Investment Treaties is extremely interesting as it seems that an increasing number of states are signalling the importance of the inclusion of CSR to potential treaty partners.¹⁶⁸ Article 31 of Norway’s 2015 Model BIT titled Corporate Social Responsibility for instance reads: “*The Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact.*”¹⁶⁹

Interestingly, articles incorporating this approach merely obligate states to encourage investors to act in accordance with internationally recognized standards of CSR, rather than placing a direct obligation on investors. As a result, positive language of this type merely has an indirect impact on investors by obligating states and not investors. Article 16 of Canada’s Model BIT, which incorporates such positive language, clarifies the point. The article states that:

¹⁶⁶ See for example Canadian New Model FIPA (2004) , Article 21; US Model BIT (2012), Article 24(1).

¹⁶⁷ On the incorporation of CSR in IIL, see generally Peter Muchlinski, ‘Corporate Social Responsibility’ in Peter Muchlinski, Federico Ortino, and Christoph Schreuer, *The Oxford Handbook of International Investment Law*, (Oxford University Press, 2008), 637-691.

¹⁶⁸ Markert, *supra* note 8, 145-171.

¹⁶⁹ Norway Model BIT (2015), Article 31.

*“Each party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption ”.*¹⁷⁰

The manner in which the article is formulated leaves little doubt that compliance by investors of the CSR standard is voluntary in nature.¹⁷¹ This is indeed true for every investment agreement that has incorporated such positive language.¹⁷² As a result, the standard of CSR does not have legally binding force in that it is not an ‘arbitrable’ investor obligation. While it may make sense for states to incorporate the standard in a manner that it does impose a legally binding obligation, it is difficult to see how a state would enforce it in the current framework of ISDS which does not allow states to initiate claims against investors.

The discussion above leads to the question of which of the two approaches to the formulation of positive language has a larger impact on the regulatory freedom of states. In other words, does formulating positive language in terms of an indirect obligation on investors provide states with greater regulatory space or does formulating it in a manner as to impose obligations on host states create the necessary regulatory space? The discussion has highlighted that absent legal force backing the CSR standard, there do not seem to be many advantages associated with the inclusion of positive language imposing an indirect obligation on the investor, at least regarding the preservation of the host state’s policy space. Similarly, the imposition of the requirement that certain policy standards cannot be relaxed does not operate to excuse a state if it adopts a measure, for the protection of a specially enumerated policy standard, in derogation of substantive treaty obligations. The second approach does however protect policy space to the extent that states recognize that they are not willing to cede any further policy space in the interest of attracting investment.

¹⁷⁰ Canadian New Model FIPA (2004), Article 16.

¹⁷¹ Titi, *supra* note 17, 109.

¹⁷² *Ibid.*

Thus, it is clear that positive language on regulatory interest does not offer concrete policy space to host states and as a result cannot act as a substitute for an express right to regulate. In the presence of an express right to regulate, however, as discussed above, the inclusion of such positive language does function as a complementary element.

3.4.2. Declaratory Right to Regulate

A handful of second generation investment agreements contain an article expressly titled ‘right to regulate’.¹⁷³ Unfortunately, however, the title of these articles is misleading as they do not in reality provide states with regulatory freedom.¹⁷⁴ Consequently, various commentators labelled such articles as a ‘mere declaratory right to regulate’.¹⁷⁵

Articles of this type take one of two forms when they appear in investment agreements – one embodied in Article 12 of the Norway Model BIT and the other exemplified by article 4.6 of the 2011 EFTA-Hong Kong FTA.¹⁷⁶ This section will analyse each in turn.

3.4.2.1. The Norway Model BIT Formulation

Article 12 of Norway Model BIT, which is expressly entitled ‘right to regulate’, states:

*“Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety, human rights, labour rights, resource management or environmental concerns”.*¹⁷⁷

¹⁷³ See for instance, US Model BIT, Article 12(5); NAFTA, Article 1114(1); Australia-US Free Trade Agreement (AUSFTA), Article 11.11; UNCTAD (2001b), Environment, UNCTAD/ITE/IIT/23, UNCTAD Series, (New York and Geneva, 2001), 22-23. Available at: <https://unctad.org/en/docs/psiteiitd23.en.pdf>.

¹⁷⁴ Markert, supra note 8, 149-150.

¹⁷⁵ Ibid.; Newcombe and Paradell, supra note 15, 509.

¹⁷⁶ Titi, supra note 17, 113.

¹⁷⁷ Norway Model BIT (2015), Article 12.

At first glance, this article appears to be extremely broad in its scope. It allows states to adopt “any measure” they consider appropriate to ensure that investment activity is undertaken in line with certain non-investment policy concerns. If such an interpretation were true, a Pandora’s box of questions relating to the self-judging nature of the provision would be opened. Despite this concern, however, such a superficial interpretation of the article would undoubtedly imbue states with a great degree of regulatory freedom.

A thorough reading of the article however reveals that it does not in reality imbue states with more regulatory freedom than that enjoyed by them in the absence of such an article.¹⁷⁸ This is because the article limits the measures a state can adopt to those that are “*otherwise consistent with*” the investment agreement.¹⁷⁹ In light of this limitation, certain commentators argue that the article has no inherent utility.¹⁸⁰

This chapter argues that the utility of the article is that it allows states to inform the world at large that it is cognizant of its non-investment policy concerns. Thus, rather than expressly providing states with the right to regulate, such an article merely imposes a soft obligation on investors. It indirectly incorporates the CSR standard into the treaty thereby assisting “*states in making recalcitrant investors toe the line of health, safety and environmental regulation.*”¹⁸¹ Thus, although the article, when it appears in investment agreements,¹⁸² is titled ‘right to regulate’, it merely concerns those governmental measures that are adopted to ensure that investment activity is undertaken in a particular manner. It does not however allow states to adopt regulatory measures in derogation of their commitments under investment agreements without incurring the duty to compensate. Accordingly, it is argued that the inclusion of such an article in investment agreements does not have a positive impact on states’ ‘right to regulate’.

¹⁷⁸ Titi, *supra* note 17, 150; see also Newcombe and Paradell, , *supra* note 15, 509.

¹⁷⁹ Norway Model BIT (2015), Article 12.

¹⁸⁰ Newcombe and Paradell, *supra* note 15, 509.

¹⁸¹ Titi, *supra* note 17, 113.

¹⁸² See for example Colombian Model BIT, Article viii; UK-Colombia BIT, Article viii.

3.4.2.2. *The EFTA-Hong Kong FTA Formulation*

A few investment agreements that contain an article titled ‘right to regulate’ use a different formulation than the one discussed above.¹⁸³ Unlike the Norway Model BIT formulation, these articles seem to resemble a broad exception clause and are not solely concerned with the manner in which investment activity is carried out in the host state. They do however retain the requirement that any governmental measure taken in pursuance of them must be consistent with other articles of the investment agreement.¹⁸⁴ Article 4.6 (1) of the EFTA-Hong Kong FTA which exemplifies this ‘type’ states:

*“Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure consistent with this Chapter that is in the public interest, such as measures to meet health, safety or environmental concerns and reasonable measures for prudential purposes.”*¹⁸⁵

While such a formulation, in comparison to the one exemplified by Article 12 of Norway’s Model BIT, focuses more on the host states right to regulate- the requirement that the governmental measure be ‘consistent’ with the treaty greatly narrows the scope of the regulatory right it equips a state with. In fact, the inclusion of such an article may well have the impact of limiting a host state’s right to regulate rather than enhancing it. This is simply a result of the fact that according to this formulation, any governmental measure that is not compatible with the investment protection as required by the investment agreement is not allowed. It is therefore concluded that the ‘declaratory right to regulate’ as contained in certain investment agreements do not operate to introduce a true ‘right’ to regulate.

¹⁸³ See for example India-Korea CEPA (2009), Article 10.16 (1); EFTA-Singapore FTA (2002), Article 43; EFTA-Ukraine FTA (2010), Article 4.8.

¹⁸⁴ This requirement differentiates such articles from a general exception clause.

¹⁸⁵ EFTA-Hong Kong FTA (entered into force 2012), Article 4.6 (1).

3.4.3 The Inclusion of Non-economic Policy Objectives in the Preamble

In line with the neo-liberal economic theory prevalent in western developed states at the time, the first generation of investment agreements were solely concerned with the protection and promotion of investment interests.¹⁸⁶ This fact was most evident in the preambles of first generation investment treaties which largely saw the economic development of the host state to be a product of these protections. Take for instance the preamble of the 1990 UK-Argentina BIT which stated that the conclusion of the treaty was based on the recognition “*that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity*”.¹⁸⁷

Even in the rare instances that the preambles of first generation investment treaties mentioned non-economic policy objectives, such as the promotion of labour wellbeing, they were couched in a manner whereby they would be a natural corollary of the goals of investment protection.¹⁸⁸ This is hardly surprising when one considers that the conception of development under the fundamentalist version of neo-liberalism was measured exclusively on the basis of economic metrics such as GDP growth.¹⁸⁹ Thus, non-investment policy objectives were not viewed as goals of the treaties in their own right, capable of influencing the interpretation of specific clauses.¹⁹⁰

In practise, not mentioning non-investment policy objectives in the preambles of the first generation of investment treaties operated to motivate tribunals to interpret clauses on investor protection expansively. This is partially attributable to Article 31 (1) Vienna Convention on the Law of Treaties (VCLT) which requires treaties to be interpreted in light of their object and purpose, and preambles are commonly used by tribunals in the identification of a treaty’s object and purpose.¹⁹¹ Thus, preambles that do not mention non-investment objectives operate to encourage tribunals to ignore the same while interpreting specific treaty articles. Take for instance the approach adopted

¹⁸⁶ Spears, *supra* note 3, 1065.

¹⁸⁷ UK-Argentina BIT (1990), preamble. See also e.g. The Netherlands-Ukraine BIT (1994), preamble.

¹⁸⁸ Alvarez and Khamisi, *supra* note 33, 470.

¹⁸⁹ Michael J. Trebilcock and Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar, 2008), 4.

¹⁹⁰ Vienna Convention on the Law of Treaties (1980), Article 31(1). According to article 31(1), treaties are to be interpreted in light of their overall object and purpose.

¹⁹¹ Markert, *supra* note 8, 145-171.

by the tribunal in *SGS v Philippines* where it relied on the narrow scope of the preamble of the Swiss-Philippines BIT (which focused exclusively on economic objectives) to argue that it was “legitimate to resolve uncertainties in interpretation so as to favour the protection of covered investments.”¹⁹²

Since the decline of the neo-liberal economic theory, and the rise of the more moderate form of liberalism, calls have been made on the investment law regime to find ways in which tribunals can be motivated to give the same level of importance to certain non-economic policy objectives as that given to economic ones.¹⁹³ This makes contextual sense when one considers that the new economic theory¹⁹⁴ underling second generation of investment agreements is partially based on the goal of sustainable development which encompasses environmental and social aspects as much as economic ones.¹⁹⁵

In light of these recommendations, certain second generation investment agreements have placed economic and non-economic policy objectives on the same normative plane in their preambles.¹⁹⁶ The preamble of the 2009 Australia-Chile FTA, for instance, state that the parties “[d]esir[e] to achieve [investor protection] objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labour rights.”¹⁹⁷ Similarly, the preambles of other investment agreements such as the ones in the 2004 US-Australia FTA and the 2005 India-Singapore FTA, expressly require that the goals of investment protection must be compatible with the objectives of sustainable development.¹⁹⁸ By doing so, these treaties have made clear that they do not view investment protection as

¹⁹² *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, (29 January 2004), ¶ 116.

¹⁹³ See e.g., Wagner, *supra* note 7, 42; Howard Mann, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investment Rights* 46 (Winnipeg: International Institute for Sustainable Development, 2001);

¹⁹⁴ See generally Spears, *supra* note 3, 1037-1075.

¹⁹⁵ See e.g., UN Report of the World Summit on Sustainable Development, (Johannesburg, South Africa, 26 August–4 September 2002).

¹⁹⁶ See for example, preambles to the US-Uruguay BIT (2005); Norwegian Model BIT (2015); Singapore-India FTA (2005); Canada-Peru FTA (2009); Canada-Colombia FTA (2008); and Australia-Chile FTA (2009).

¹⁹⁷ Australia-Chile FTA (2009), preamble.

¹⁹⁸ See for example preambles to China-ASEAN FTA (2009); Panama-Taiwan FTA (2003); India-Singapore CECA (2005); US-Australia FTA (2004).

their primary aim, but rather view it as one of the many factors that contribute to the achievement of the overarching goal of development.¹⁹⁹

In practise, the new preambular language has operated to encourage tribunals to balance the interests of investment protection with the regulatory interests of the host state while interpreting treaty provisions. Take for instance the approach adopted by the NAFTA tribunal in *SD Myers v Canada*, where it interpreted the preamble of the NAFTA which requires investment obligations to be undertaken in a “*manner consistent with environmental protection*”²⁰⁰ to have the impact of necessitating interpretations of the NAFTA to be undertaken in light of the right of the state parties to protect the environment.²⁰¹ Moreover, relying on this preambular language the tribunal unequivocally stated that the NAFTA should be interpreted in a manner whereby the pursuit of environmental protection and economic development are mutually supportive.²⁰²

Incorporating this type of preambular language therefore has the advantage of granting “*regulatory interests an interpretative scope that extends to the entire treaty.*”²⁰³ As such, it has a great impact on a host states’ policy space, at least to the extent that preambles encapsulate the object and purpose of the treaty by virtue of article 31 of the VCLT. It should however be noted that since preambles do not give rise to legally enforceable rights and obligations, the incorporation of such preambular language does not give rise to a right to regulate as defined in this chapter.

3.4.4. Concluding Remarks

Part 4 highlighted the incorporation of positive language in the second generation of investment agreements. It argued that the incorporation of such positive language operates to impose ‘soft obligations’ aimed at encouraging the interpretations of

¹⁹⁹ Singapore-India FTA (2005), preamble. See also, preambles to the Panama-Taiwan FTA (2003); US-Peru TPA (2006); Canada-Colombia FTA (2008); China-New Zealand FTA (2008); Canada-Peru FTA (2009); China-ASEAN Investment Agreement (2009).

²⁰⁰ S.D. Myers, *supra* note 19, ¶ 221.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ Titi, *supra* note 17, 122.

investment agreements in a manner that take the non-economic policy objectives of states into account. Thus, the incorporation of positive language serves as an ancillary means of safeguarding the regulatory space enjoyed by states. This however is not always the case as was demonstrated by the impact of the inclusion of the declaratory right of states to regulate in certain investment agreements. This particular expression of positive language may well limit rather than enhance the regulatory space of states as a result of the incorporation of the restriction whereby regulatory measures must be ‘otherwise consistent’ with the provisions on investment protection contained in the agreement.

In contrast with the declaratory right to regulate, the second specific expression of positive language i.e. the new preambular language, comes close to actually providing states with the right to regulate. This is striking as *de jure* there is not much distinction between positive language in the preamble as compared with general occurrences of positive language in the body of an investment agreement. Under article 31(1) and 31(2) of the VCLT, both need to be taken into account while determining the context of the treaty. However, ISDS tribunals seldom take the interpretative rules of the VCLT into account as a result of which the object and purpose of the treaty as contained in the preamble is given more weight in practise than the content of the treaty.²⁰⁴ Thus even though preambular language does not create independent legal rights and obligations, in practise, preambular language is “*de facto qualitatively different from positive language in other treaty provisions.*”²⁰⁵ Therefore, by placing economic and non-economic policy objectives on the same normative plane through the inclusion of positive language in preambles, certain second generation investment agreements operate to motivate tribunals to interpret treaty provisions in a manner whereby the pursuit of investment protection is compatible with the legitimate non-investment policy concerns of states.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

Conclusion

Historically, the principle of sovereignty operated to place the regulation of economic activities solely within the regulatory power of the state in whose geographic boundaries the economic activities occurred.²⁰⁶ This was simply an attribute of the principle of sovereignty as recognized under customary international law.²⁰⁷ With the rise of globalisation, however, states began to enter into international investment agreements that called for the protection of foreign investment – generally requiring states to treat foreign investors in line with the standards of fair and equitable treatment, non-discrimination and to provide them with compensation in instances of expropriation of their property.²⁰⁸ Thus, by entering into investment treaties states ostensibly placed restrictions on their regulatory freedoms, an act which itself is a manifestation of a state’s regulatory capacity.²⁰⁹

As the investment law regime was initially crafted with the primary view of attracting FDI through the creation of a stable environment for the protection of investment, states limited their regulatory capacity for the purpose of attracting FDI. This singular objective of the system, however, generated legitimacy concerns based on the perception that host states had given up too much policy space. In particular, there were clarion calls to either withdraw from the system or overhaul it completely. Such calls however undermined not only the objectives of the supporters of the regime but also its greatest critics – i.e. those who aim to promote sustainable development. This is because FDI arguably contributes to sustainable development²¹⁰ and as argued by various commentators, there is evidence that suggests that participation in the investment law regime greatly attracts FDI.²¹¹

This chapter argues that the answer to the legitimacy crisis in this regard may well, in part, lie in providing flexibility to arbitral tribunals to consider legitimate public policy concerns of states while interpreting investment agreements. This may be achieved

²⁰⁶ Wagner, *supra* note 7, 4.

²⁰⁷ Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, (Cambridge University Press, 2008).

²⁰⁸ See generally Newcombe and Paradell, , *supra* note 15.

²⁰⁹ In other words, circumscribing the unhindered regulatory capacity a state enjoys in the absence on investment agreements is simply an exercise of a states sovereign right.

²¹⁰ Newcombe, ‘Sustainable Development’, 357.

²¹¹ UNCTAD, ‘The Role of IIAs’, 23.

through the inclusion of general exception clauses, new preambular language and interpretative statements, of the type seen in certain investment agreements belonging to the second generation.²¹² In particular, while interpretative statements and general exception clauses can operate to motivate arbitrators to balance non-investment policy objectives with the goals of investment protection, new preambular language which places non-investment policy objectives on the same normative plane as the goal of investment protection can go a long way in ensuring that such a balancing exercise is genuine. This is the case to the extent that the new preambular language motivates arbitrators not to view non-investment policy objectives as secondary concerns limited by the primary concern of investment protection, as was the case under the first generation of investment treaties.

The incorporation of the three methods of promoting a balance between investment and non-investment policy objectives discussed above are a step in the right direction, but they have not settled the legitimacy crisis that arise from concerns about the shrinking of regulatory space. This is because reference to non-investment policy objectives in general exception clauses and preambular language continues to be couched in very vague terms. Similarly, interpretative statements have not overcome the tendency of expressing substantive standards in vague terms as they appear in investment agreements. As a result, while these three methods do ensure that non-investment related concerns are taken into account by ISDS tribunals, they do not prescribe a concrete outcome to disputes involving competing policy objectives. Thus, tribunals will continue to make value judgements on a case by case basis on whether non-investment policy measures adopted by states are in breach of their obligations under investment treaties.²¹³

Delegating the responsibility of balancing a state's non-investment obligations with its investment obligations to ISDS tribunals touches upon other legitimacy concerns discussed in this thesis. To the extent that ISDS is plagued by a crisis of inconsistency and is viewed as a private dispute settlement mechanism where arbitrators are drawn from private international law backgrounds who are not sensitive to non-investment concerns, the legitimacy crisis based upon the perception of regulatory chill will

²¹² Wagner, *supra* note 7, 37.

²¹³ Spears, *supra* note 3, 1071-1072.

subsist. Thus, the existence of other legitimacy concerns fuel the legitimacy crisis caused by perceived regulatory chill. If however these concerns (consistency, transparency and bias) are adequately addressed, it is asserted that including the three methods discussed in this chapter in investment agreements will go a long way towards reaching a compromise between “the forces of multilateralism or globalization, represented at one extreme by those who would prefer to see the regime remain as it was constructed during the 1990s, and the forces of social and environmental protection—represented at the other extreme by those who would prefer to see the regime dismantled.”²¹⁴ Such a compromise it is argued will resolve the legitimacy crisis faced by the investment law regime while continuing to protect the interests of investors.

²¹⁴ Ibid., 1075.

Chapter 4 - The Principle of Transparency and Confidentiality in Investor-State Dispute Settlement

Chapter 2 lay the ground for this chapter by identifying the specific legitimacy values that must, to a degree, exist for the system of ISDS to be considered legitimate. As this thesis is primarily concerned with the identification of whether the system of ISDS suffers from a legitimacy crisis and if so how the legitimacy crisis can be averted – this chapter follows the structure set by the previous chapter by focusing on one of the values namely transparency. In particular this chapter analyses whether a sufficient degree of transparency exists for the current system of ISDS to be considered legitimate and if not, how the issue may be resolved. It should be noted, that like chapter 3 this chapter highlights how each legitimacy concern is linked to the others, in that they play a part in giving rise to and perpetuating one another. This link creates a natural flow between chapters.

The originality of this chapter lies in its approach to the resolution of the issue of lack of transparency plaguing the system of ISDS. Instead of taking a blanket either-or approach to the competing interests of confidentiality and transparency as taken in the existing literature on the issue – this provides recommendations whereby the two principles can be balanced during the drafting of the investment agreement and during each stage of the arbitration proceedings. These recommendations are fabricated with the view of maximising the joint interests of the stakeholders.

Introduction

International Commercial Arbitration (ICA) had a strong influence on the system of ISDS during the latter's development, and the principle of confidentiality has long been considered by various commentators as an essential feature of both systems.¹

¹ Gus Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State', (2007) 56 *International and Comparative Law Quarterly*, 371-394, 372-373, 378 (hereinafter Van Harten, 'The Public Private Distinction'; Nigel Blackaby, 'Public Interest and Investment Treaty Arbitration', (2004) 1(1) *Transnational Dispute Management*; Daniel Barstow Magraw, Sofia Plagakis, and Jessica Schifano, 'Ways and Means of Citizens' Participation in Trade and Investment Dispute Settlement Procedures' (2008) *Society of International Economic Law (SIEL) Working Paper No: 53/8*, 9 (Hereinafter Magraw and et al.); Loukas Mistelis, 'Confidentiality and

Unlike ICA, however, the principle of confidentiality cannot be accepted as an inherent rule of ISDS.² This is because first, while ICA involves private parties that wish to keep sensitive information about themselves and their businesses secret, ISDS involves a private party and a state, and second, investor-state disputes concern public policy matters. As the citizens of the host state, through taxes or changes in domestic law and practice, ultimately bear the brunt in paying any liability ordered in awards, they have an interest in the proceedings.³ As a result, the perception of the legitimacy of the system of ISDS has a stronger 'public' dimension than in ICA. ISDS must, therefore, emphasise the requirement of transparency to maintain, restore, or develop the legitimacy of the system.⁴

Indeed, the foothold of the principle of confidentiality is one of the main criticisms of ISDS. It is argued that the principle of confidentiality causes a legitimacy crisis in ISDS by aggravating other legitimacy concerns such as inconsistency, uncertainty,

Third-Party Participation: UPS v. Canada and Methanex Corp. v. USA' (2005) 21(2) *Arbitration International* 211–232, 212; and Christian Schliemann, 'Requirements for Amicus Curiae Participation in International Investment Arbitration: A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15,' (2013) 12 *Law and Practice of International Courts and Tribunals* 365-390, 368.

² The Metalclad v. Mexico tribunal was one of the first tribunals that stated that there is no general duty of confidentiality indicated neither in NAFTA nor ICSID. *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, (hereinafter *Metalclad*). Furthermore, while it is stated that confidentiality is a very significant principle of ICA, based on Article 22(3) of ICC Rules, confidentiality is also not a general rule or a general assumption. This provision states that "[U]pon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information' *Ibid.*; Jan Paulsson and Nigel Rawding, 'The Trouble with Confidentiality' (1995) 11 *Arbitration International* 303-320; 305.

³ *Ibid.*; Schliemann, *supra* note 1, 368; Cindy G. Buys, 'The Tension between Transparency and Confidentiality in International Arbitration' (2003) 14 *Am. Rev. Int'l Arb.* 121-138, 134; Mabel I. Egonu, 'Investor-State Arbitration under ICSID: A Case for Presumption against Confidentiality?' (2007) 24(5) *Journal of International Arbitration* 479-489, 482; Kaj Hober, 'Arbitration Involving States' in Lawrence Newman and Richard Hill (eds), *Leading Arbitrators' Guide to International Arbitration* (Juris Publishing, 2003), 139; Olivia Bennaim-Selvi, 'Third Parties in International Investment Arbitrations: A Trend in Motion' (2005) 6(5) *Journal of World Investment & Trade*, 773-808, 77.

⁴ Joachim Delaney and Daniel Barstow Magraw, 'Procedural Transparency' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer eds., *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), 759; Santiago Dussan Laverde, 'Analysis of the Principle of Transparency with Special Reference to its Implications for the Procedure of International Investment Arbitration' (2011) 11(1) *Revista Jurídica / Pontificia Universidad Javeriana Cali*, 105-134, 107; Christina Knahr and August Reinisch, 'Transparency versus Confidentiality in International Investment Arbitration - The Biwater Gauff Compromis' (2007) 6 *The Law and Practice of International Courts and Tribunals* 97-118, 97; Andrea J. Menaker, 'Piercing the Veil of Confidentiality: The Recent Trend towards Greater Public Participation and Transparency in Investor-State Arbitration' in Katia Yannaca-Small eds., *Arbitration under International Investment Agreements: A Guide to the Key Issues*, (Oxford University Press, 2010) 129-160, 129.

inaccuracy, unfairness, and by undermining the public's confidence in the system.⁵ It is therefore unsurprising that in the last few decades, the significance of the principle of transparency in ISDS has increased dramatically.

A tension between the principles of confidentiality and transparency in the realm of the ISDS occurs since both these principles are inherently contradicting but equally important concepts. Therefore, striking a balance between these principles has become one of the hot topics in international law.⁶

To strike such balance, defining them and evaluating their influence on the system is crucial. However, a unanimously accepted definition of these principles does not exist,⁷ as Pauwelyn states the international legal arena is a “*universe of inter-connected islands*”⁸ where harmony appears to be predominated by disintegration. Given the difficulty in framing a unanimously acceptable definition, this thesis defines the principles based on their perceived aims. Following the work of Federico Ortino,⁹ this thesis argues that these principles have two dimensions – external and internal. The external dimension of the concept of confidentiality simply requires that the arbitral proceedings, associated documents, and awards should remain undisclosed to the public.¹⁰ External transparency, on the other hand, requires information regarding

⁵ ISDS mechanisms have started to give more place for transparency, and investment treaties have been amended with this intention. Traditionally, investment treaties did not include transparency provisions. However, this trend changed after the beginning of the 2000s. Gabriele Ruscilla, ‘Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?’ (2015) 3(1) *Groningen Journal of International Law*, 1-26, 2; Gu Weixia, ‘Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?’ (2004) 15 *Am. Rev. Int’l Arb.* 607-637; Gabrielle Kaufmann-Kohler, ‘Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?’ in Laurence Boisson de Chazournes, et al., *Diplomatic and Judicial Means of Dispute Settlement*, (BRILL, 2012), 307-326, (hereinafter Kaufmann-Kohler, ‘Non-Disputing State Submissions’) 311.

⁶ *Ibid.*; Joachim Delaney and Magraw, *supra* note 4, 759; Laverde, *supra* note 4, 107; Stephan W. Schill, ‘Editorial: Five Times Transparency in International Investment Law’ (hereinafter Schill, ‘Five Times Transparency’) (2014) 15 *The Journal of World Investment & Trade* 363-374; Stephan W. Schill and Wiladislav Djanic, ‘Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law’ (2018) 33(1) *ICSID Review - Foreign Investment Law Journal*, 29–55.

⁷ Michael Hwang and Katie Chung, ‘Defining the Indefinable: Practical Problems of Michael Dominique Confidentiality in Arbitration’ (2009) 26(5) *Journal of International Arbitration Law*, 609-645, 610.

⁸ Joost Pauwelyn, ‘Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands’ (2004) 25 *Michigan Journal of International Law*, 903.

⁹ Federico Ortino, ‘Transparency of Investment Awards: External and Internal Dimensions’, in J. Nakagawa eds., *Transparency in International Trade and Investment Dispute Settlement* (Routledge, Oxon, 2013), 119-159.

¹⁰ Mistelis, *supra* note 1, 213; Mariel Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven International Publishing 2008), 37.

initiation of disputes, related documents, arbitral awards and pleadings to be made public and provides non-parties with the ability to have certain participatory rights.¹¹ The internal dimension of these principles focuses on whether (and to what extent) arbitral decisions and related documents are comprehensible to any reader.¹²

Based on this definition, this chapter analyses the tension between the principles of confidentiality and transparency with the aim of evaluating their influence on the legitimacy of the system of ISDS and striking an appropriate balance between the two. For this purpose, the first part of this chapter will discuss the degree to which the principles are currently recognized and effectuated in ISDS. It will argue that while confidentiality retains a strong foothold in ISDS, certain recent investment treaties, Model BITs and institutions engaged in resolving investment disputes have recognized the need of incorporating greater transparency. Against the backdrop of the current state of affairs on the issue, the second part of this paper will evaluate the advantages of increased transparency in relation to the advantages of increased confidentiality. While the aim of this part is to conduct a cost-benefit analysis of increased transparency, it concludes that a blanket statement as to whether one principle trumps the other in all instances cannot be made. Therefore, the second part will conclude that both principles have their respective merits and thus, little is to be gained by treating the two as mutually exclusive. Instead, the paper will argue that an identification of the right balance between the principles requires an evaluation of their impact at different stages of the proceeding. To this end, part 3 will identify a proper balance between the principles with the aim of maximising the legitimacy of the system from the perspective of all stakeholders. The chapter concludes that to overcome legitimacy concerns, there is great need to emphasise transparency in ISDS. However, the degree of transparency provided should not be one that causes the exposure of commercial secrets and sensitive information regarding the parties involved in the disputes. In addition, it should not unfairly burden the parties. Furthermore, the chapter will argue that while essential, the provision of transparency alone cannot overcome the legitimacy crisis. For example, there is still need for tribunals to give due regard to previous or concurrent proceedings for the legitimacy crisis to be resolved.

¹¹ Ortino, 'Transparency of Investment Awards', *supra* note 9, 136; Knahr and Reinisch, *supra* note 4, 97; and Kaufmann-Kohler, 'Non-Disputing State Submissions', *supra* note 4, 310.

¹² *Ibid.*

Transparency, however, makes essential steps towards the goal of providing such ‘due regard’ of previous/concurrent proceedings possible.

4.1. Current Trends on Transparency in ISDS

Since ISDS has historically been conceptualised as a private consent-based system, parties’ interests are generally considered to trump non-party systemic interests. This holds true even in instances where non-party systemic interests align with those of the parties in the long-term. For example, the publication of arbitral awards, as discussed below, would aid in the creation of a consistent jurisprudence which would translate into providing clarity to the parties’ vis-à-vis their rights and obligations before a dispute arises. In the short term, however, at least one party would prefer keeping the award (or any information relating to the dispute) confidential. Thus, both states and arbitral tribunals are motivated to recognise and implement the requirements of confidentiality, out of fear that doing otherwise would incentivise investors to take their business elsewhere.¹³

On the other hand, since ISDS awards define whether the regulatory and administrative actions of states are lawful or not, they naturally affect the rights of citizens and other stakeholders. Based on legitimacy concerns, this public interest element has necessitated calls for the re-evaluation of the scope of the confidentiality principle in ISDS.¹⁴ The impact of these demands is made evident given that in recent decades, states have become more receptive to the argument that affected groups should be provided access to information regarding ISDS proceedings and if possible participate in them.¹⁵ It is unsurprising then that in the last few decades, amendments allowing for the establishment of greater transparency and openness in ISDS have been made in a few international investment agreements.¹⁶

¹³ Joshua Karton, ‘A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards’ (2012) 28 *Arbitration International* 445-487, 448.

¹⁴ Even in other fields, it has been argued that public interest requires more transparency as an exception to the principle of confidentiality. Menaker, *supra* note 4, 129, Dimsey, *supra* note 10, 38; Meg Kinnear, ‘Transparency and Third-Party Participation in Investor-State Dispute Settlement’ (2005) Symposium on Making the Most of International Investment Agreements: A Common Agenda, 2, available at: <https://www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf> (Last accessed March 18, 2017).

¹⁵ David Collins, *An Introduction to International Investment Law*, (Cambridge University Press, 2017) 227.

¹⁶ Menaker, *supra* note 4, 129; Egonu, *supra* note 3, 482.

Thus, while ISDS has traditionally been viewed as a secretive dispute settlement mechanism, advances towards greater transparency have been made in the last two decades.¹⁷ This part focuses on transparency provision in investment treaties concluded by states that have become more amenable to demands for the improvement of transparency in ISDS.¹⁸

4.1.1. Rules on Transparency and Confidentiality under Investment Treaties

4.1.1.1. North American Free Trade Agreement (NAFTA) Chapter 11

A bare reading of the NAFTA suggests that it is considerably generous in its approach to transparency regarding information on initiation of claims. Article 1126 (13) expressly obligates the NAFTA Secretariat to maintain a public register of arbitration claims.¹⁹ Interestingly, however, while such registers do exist, they can only be accessed by visiting the Secretariat office in the state of the disputing party.²⁰ This concern is slightly remedied given that NAFTA arbitration claims are usually disclosed on governmental websites. It cannot however be suggested that the issue has been resolved as (usually) there is a significant time lag between the date of initiation and date of publication.²¹

NAFTA does not expressly include any provision that either allows or disallows non-party participation, be it passive (observation rights, access to documents) or active (*amicus curiae*)²². It does, however, allow certain participatory rights to non-disputing

¹⁷ Alessandra Asteriti and Christian J. Tams, 'Transparency and Representation of the Public Interest in Investment Treaty Arbitration' in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010), 792.

¹⁸ Namely, North American Free Trade Agreement (NAFTA, 1994) available at: <https://www.italaw.com/sites/default/files/laws/italaw6187%286%29.pdf> (last accessed March 27, 2017); Canada Model Foreign Investment Protection Agreement (Canadian New Model FIPA), (2004) available at: <https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (last accessed March 27, 2017); and see U.S. Model BIT, (2004) and amended version (2012) available at: <https://www.state.gov/documents/organization/188371.pdf> (last accessed March 27, 2017).

¹⁹ *Ibid.*, NAFTA, Article 1126 (13).

²⁰ J. Anthony VanDuzer, 'Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation', 52 McGill Law Journal, 681-724.

²¹ VanDuzer, *supra* note 20, 703.

²² Amicus curiae might simply be defined as "friend of a court" who can aid tribunals with their expertise regarding the issue at hand or providing the tribunal a special perspective or understanding of the case,

parties to the agreement. For instance, Article 1128 empowers a non-disputing party to make submissions to a tribunal on questions regarding the interpretation of the NAFTA.²³ While notice must be provided to the disputing parties, their consent is immaterial to the exercise of this right. Moreover, Article 1129 allows non-disputing parties the right to have access to the evidence tendered to the tribunal and the written arguments of the disputing parties.²⁴ However, concerns are expressly provided for. For instance, the non-disputing party in receipt of documents/information under Article 1129 must treat it as if it were a disputing party.²⁵ In practice, this simply translates into the requirement that the non-disputing party is bound by any interim measure on confidentiality issued by the tribunal.

Finally, NAFTA does provide a degree of transparency vis-à-vis access to the final award. Article 1137(4) provides that both Canada and United States can unilaterally publish awards against them. While the consent of the investor is completely immaterial in this regard, it may unilaterally publish an award as well. Such provision of transparency, however, does not exist where Mexico is one of the parties to the dispute. In such instance, the requirement of party consent dominates. Thus, awards cannot be published without the consent of both disputing parties.

In any case, NAFTA does not extend the rights of access to information and active participation in the proceedings to third-party stakeholders.²⁶ This has changed in recent decades. In *Methanex* dispute, the first recorded amicus curiae application to participate in an investor–state proceedings was submitted by the International Institute for Sustainable Development (IISD), which followed by submissions from non-disputing NAFTA members and NGOs.²⁷ Although, these submissions were rejected, the tribunal held that it had the jurisdiction to accept *amicus curiae* briefs.²⁸

or who has a strong interest in the proceedings. For more information regarding active participation please see 4.3.3.2. Active Participation

²³ NAFTA, supra note 18, Article 1128.

²⁴ NAFTA, Article 1129(1).

²⁵ NAFTA, Article 1129(2).

²⁶ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001) ¶ 1, (hereinafter FTC Note on Transparency).

²⁷ *Methanex Corporation v. United States of America*, UNCITRAL.

²⁸ *Ibid.*, Decision on Authority to Accept Amicus Submissions (25 January 2001), ¶53,

The *Loewen*²⁹ and *Metalclad*³⁰ tribunals also stated that nothing in the NAFTA precluded the parties from giving the public access to information regarding the arbitration.

In light of this arbitral practice, the Free Trade Commission (FTC) has also recognised the need for enhancing transparency. Therefore, in 2001, the FTC adopted an Interpretative Note on Transparency (FTC Note) which states in part:

*“The NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules. Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of: i. confidential business information; ii. Information which is privileged or otherwise protected from disclosure under the Party's domestic law; and iii. Information which the Party must withhold pursuant to the relevant arbitral rules, as applied.”*³¹

While this is a giant-stride towards providing transparency vis-à-vis access to documents, the FTC Note does not address the concern around providing the right to observe oral hearings. However, under NAFTA Article 1120(1) the claimant has the choice of selecting either the UNCITRAL or the ICSID Arbitration Rules or the ICSID Arbitration (Additional Facility) Rules. This choice impacts the issue as while the UNCITRAL rules provide for in camera hearing,³² the ICSID Arbitration Rules and the ICSID Arbitration (Additional Facility) Rules empower the tribunal to “decide

²⁹ *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction (5 January 2001) (hereinafter *Loewen*, Decision on Competence and Jurisdiction).

³⁰ *Metalclad*, supra note 2, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information (27 October 1997) (Hereinafter *Metalclad*, Decision on Revealing Information).

³¹ *Ibid.* NAFTA Free Trade Commission, Statement of the Free Trade Commission on Non-disputing Party Participation, (7 October 2003), (hereinafter *FTC Statement*) available at: <http://www.naftaclaims.com/commissionfiles/Nondisputing-en.pdf>.

³² In practice, hearings under NAFTA have been broadcast by television in three cases: *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1 (hereinafter *UPS*); *Methanex Corporation v. United States of America*, UNCITRAL (hereinafter *Methanex*); and *Canfor Corporation v. United States of America*; *Terminal Forest Products Ltd. v. United States of America*, UNCITRAL (hereinafter *Canfor*).

*with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings”.*³³

Moreover, while the FTC Note requires disclosure of documents and other information relating to the proceedings, to date the practice had been for tribunals to give an order in the initial stages of the proceedings regarding the scope and extent of such disclosures.³⁴ These orders have almost invariably been based on party consent. Interestingly, however, orders regarding the scope of such disclosures have become more generous with time. For example, in early cases such as *Ethyl*³⁵ the order limited disclosure to notice of intent to file a claim to arbitration, both the statement of claim and the statement of defence, and any order given by the tribunal.³⁶ Orders in later disputes such as *Pope & Talbot v. Canada*, on the other hand, allow for a more extensive disclosure, allowing non-party stakeholders to access to “*written submissions, transcripts of oral submissions, correspondence from the tribunal, evidence, formal responses of the parties to tribunal questions, and all submissions from non-disputing state parties.*”³⁷

Thus, while in practice NAFTA allows for substantial transparency, no right to transparency is guaranteed. Allowing access to information regarding the initiation of disputes is of little value if such information is not disseminated in a reasonable manner. Similarly, while the Interpretative Note on Transparency advocates provision of information and documents tendered during the course of the proceedings, they lack binding effect. Indeed, legitimacy concerns on the issue cannot be appeased if the provision of transparency is left to the discretion of the tribunal regardless of how generous tribunals may tend to be towards such requests. It is, therefore, asserted that there is need to amend the treaty itself to guarantee sustainable support for the legitimacy of NAFTA chapter 11.

³³ UNCITRAL Arbitration Rules, Article 28(3); ICSID Arbitration Rules, article 32(2); and ICSID Arbitration (Additional Facility) Rules, Rule 39(2).

³⁴ *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Procedural Order (2 July 1998); and *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Procedural Order No. 3 (10 June 1999).

³⁵ *Ibid.*

³⁶ *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Amended Procedural Order on Confidentiality No. 5 (17 September 2002), 3.(a).

³⁷ *Ibid.*

In particular, NAFTA must make provisions for amicus participation in detail. Moreover, it must provide for swift (through a reasonable medium) disclosure of information relating to; initiation of claims, party submissions and amici curiae briefs, evidence tendered to the tribunals, and awards (including interim orders). This is not to say that such 'right to transparency' is to be absolute. As discussed in part 3 below, a proper balance between the principles of transparency and confidentiality requires access to information to be subject to the protection of confidential information. In any case, the unwillingness among the NAFTA states party to amend its content, by addition or otherwise, push the possibility of such reform to the outer boundaries of improbability. On the other hand, the recent practice of tribunals and the statements of the FTC recognise the need for providing transparency in ISDS. This becomes more evident when one considers that most BITs concluded today continue to be completely silent vis-à-vis transparency.

4.1.1.2. Recent Model BITs

The discussion above demonstrates that while confidentiality retains a strong foothold in ISDS, certain states such as the United States and Canada have become more receptive to calls for greater transparency. In fact, recent Model BITs of the two states incorporate even greater transparency, relative to what is required by the Interpretative Note on Transparency.³⁸

The US Model BIT is remarkable in that it specifically defines “non-disputing party” and makes extensive provisions for their participation. For instance, Article 29(2) provides that:

*“The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements....”*³⁹

³⁸ Ortino, supra note 9, 126.

³⁹ The US Model BIT (2012), supra note 18, Article 29(2).

A liberal view on ‘passive participation’ for non-party stakeholders is further adopted in Article 29 which obligates the respondent to disclose “(a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, briefs and amicus submissions submitted to the tribunal; (d) minutes or transcripts of hearings of the tribunal; and (e) orders, awards, and decisions of the tribunal.”⁴⁰

The US Model BIT also contains provisions that extends ‘active participation’ in the proceedings to non-party stakeholders.⁴¹ Article 28 (2) of the US Model BIT allows non-disputing parties the right to make both oral and written submissions to the tribunal regarding the interpretation of the treaty. Moreover, the treaty recognizes active participation that goes beyond aiding its interpretation. Article 23(3) grants the tribunal the authority to “accept and consider amicus curiae submissions from a person or entity that is not a disputing party.”⁴² A blind eye is not, however, turned to confidentiality concerns. In fact, the BIT recognizes a ‘duty’ of both tribunals and the parties to protect confidential information that needs to be kept secret.⁴³

The Canadian New Model Foreign Investment Protection Agreement (FIPA) contains similar provisions. Article 38 of the FIPA provides that hearings are to be open to the public⁴⁴ and allows all documents to be made publicly available unless the parties agree otherwise.⁴⁵ It similarly recognises the importance of the protection of confidential information and imposes a duty on the tribunal and the parties to take necessary precautions.⁴⁶ The FIPA also regulates non-party participation in detail, and draws attention to the necessary conditions that the tribunal must consider before allowing such participation, including the burden on the parties that it would impose.⁴⁷ It is, however, more generous than the US Model BIT in one regard. While both recognize the right of third-party stakeholders to have access to the award subject to

⁴⁰ Ibid., Article 29(2).

⁴¹ Ibid., Article 28(2) and (3).

⁴² Ibid

⁴³ Article 29(2) of 2012 The US Model BIT provides: “*However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.*” 2012 The US Model BIT, supra note 18.

⁴⁴ Canadian New Model Foreign Investment Protection Agreement (2012), supra note 18, Article 38(1).

⁴⁵ Ibid. Article 38(3).

⁴⁶ Ibid. Article 38(3),(4),(5),(6),(7), and (8).

⁴⁷ Ibid. Article 39. The US and Canada signed their BITs with other countries in line with these models.

the deletion of confidential information, the FIPA elevates transparency in this regard to being non-derogable even by agreement between the parties.⁴⁸

4.1.2. Transparency and Confidentiality under the Rules of ISDS Mechanisms

4.1.2.1. ICSID Convention,⁴⁹ Regulations and Arbitration Rules

“There is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources.”⁵⁰

ICSID launched its first transparency efforts in 1985 culminating in changes in its formal rules of procedure in 2006.⁵¹ Transparency under ICSID is most evident regarding the availability of information on the initiation of a dispute. By virtue of regulation 22 of the Administrative and Financial Regulations,⁵² the initiation of a dispute must be registered and publicised on the ICSID website.⁵³ ICSID rules further allow third parties to attend hearings, and since 2006 such permission is automatic unless a party objects.⁵⁴ Moreover, ICSID Rules do not require the consent of the parties to be obtained for ICSID tribunals to accept active participation requests made

⁴⁸ While article 38.3 of the FIPA provides: “[A]ll documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information”, article 38.4 emphasises that “[N]otwithstanding paragraph 3, any Tribunal award under this Section shall be publicly available, subject to the deletion of confidential information.” Thus article 38.4 excludes implementation of 38.3.

⁴⁹ Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965) (hereinafter ICSID Convention).

⁵⁰ *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, (hereinafter *Biwater*) Procedural Order No. 3, (29 September 2006), ¶ 121.

⁵¹ Emilie M. Hafner-Burton and David G. Victor, 'Secrecy in International Investment Arbitration: An Empirical Analysis' (2016) 7 *Journal of International Dispute Settlement*, 161-182, (hereinafter *Hafner-Burton and Victor, Empirical Analysis*) 162-172, 179.

⁵² ICSID, Administrative and Financial Regulations, Regulation 22.1. The provisions regarding amicus curiae participation under ICSID Arbitration Rules are similar to the ICSID Convention.

⁵³ *Ibid.*

⁵⁴ ICSID Rules of Procedure for Arbitration Proceedings (1968, last amended 2006) (ICSID Arbitration Rules), Rule 32(2) provides that “Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information”.

by non-party stakeholders (*amicus curiae*).⁵⁵ However, although the consent of parties is not required, the tribunal is required to consult with the parties before accepting *amicus curiae*.⁵⁶ Similarly, the tribunal may allow non-parties “to attend or observe all or part of the hearings, subject to appropriate logistical arrangements” unless one of the parties objects.

However limited, such transparency is a result of consistent and prolonged public pressure.⁵⁷ Although a trend towards greater transparency in ISDS under ICSID is evident,⁵⁸ confidentiality remains a significant principle.⁵⁹ Particularly, oral and written submissions made by the parties, experts and witnesses remain mostly confidential.⁶⁰

The principle of confidentiality similarly retains a strong foothold under the ICSID rules regarding the publication of awards. Article 48 (5) of the ICSID Convention states that “the Centre shall not publish the award without the consent of the parties”. Thus, even though the ICSID Convention allows for the publication of information regarding initiation of disputes on the ICSID website, the tribunal cannot publish awards unless both parties consent.⁶¹ Where such consent is granted, Regulation 22 of the Administrative and Financial Regulations requires publication of awards “in an appropriate form with a view to furthering the development of international law in relation to investments.”⁶²

⁵⁵ Ibid. Rule 37(2) provides that “*After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute ...*”.

⁵⁶ Buys *supra* note 3, 121; and Egonu, *supra* note 3, 483.

⁵⁷ Hafner-Burton and Victor, *Empirical Analysis*, *supra* note 51, 175; see also Christopher Schreuer and et al., *The ICSID Convention: A Commentary*.

⁵⁸ Ruth Teitelbaum, ‘A Look at the Public Interest in Investment Arbitration: Is It Unique? What Should We Do About It?’ *Berkeley Journal of International Law Publicist* 5 (2010), pp. 54-62.

⁵⁹ Laverde, *supra* note 4, 122.

⁶⁰ Julie A. Maupin, ‘Transparency in International Investment Law: The Good, the Bad and the Murky’, in Andrea Bianchi and Anne Peters, *Transparency in International Law*, (Cambridge University Press, 2013), 142-171, 154.

⁶¹ ICSID Convention, Art 48(4).

⁶² ICSID Administrative and Financial Regulations, Regulation 22.

The confidentiality provision of the ICSID Arbitration (Additional Facility) Rules⁶³ was similar to the provisions of the ICSID Convention.⁶⁴ Unsurprisingly then, a rule similar to Article 48(5) of the ICSID Convention was contained in Rule 48(4) of the ICSID Arbitration Rules before 1984. In 1984, the rules were amended to allow tribunals to publish excerpts of the legal rules applied by tribunals.⁶⁵ The 2006 amendments imposed the duty on the ICSID to “*promptly include in its publications excerpts of the legal reasoning of the Tribunal.*”⁶⁶

This amendment seemed to provide a degree of transparency as even in instances where one of the parties is against the publication of the award, some basic information would still be published by the tribunals. According to Schreuer, this amendment aims for identification of certain aspects of the practice under the Convention to elucidate their application.⁶⁷

This rule suffers from one severe limitation. It only applies to the final award. In practice, however, the ICSID has treated other decisions of tribunals, such as procedural orders and preliminary decisions on jurisdiction, as falling within the scope of the amended rule.⁶⁸

Beyond publishing excerpts, the ICSID rules imposes a duty of confidentiality on tribunals. Rule 13(2) of the Arbitration Rules, for instance, specifically requires arbitrators to sign a declaration stating that they will keep “confidential [...] the contents of any award made by the Tribunal”.⁶⁹

Such a limitation, however, is not imposed upon the parties. Rather it is well settled that the parties may disclose any information relating to the dispute, so long as they

⁶³ This provides arbitration, conciliation, and fact-finding services for certain disputes that are not included in the scope of the ICSID Convention.

⁶⁴ ICSID Arbitration (Additional Facility) Rules, supra note 33.

⁶⁵ Ortino, supra note 9, 120.

⁶⁶ Ibid.

⁶⁷ Schreuer and et al., supra note 57, 820.

⁶⁸ Ibid. 823.

⁶⁹ ICSID Arbitration Rules, supra note 5464, Article 13(2).

have not entered into a confidentiality agreement.⁷⁰ It is therefore not surprising that most decisions rendered by ICSID tribunals make their way into the public domain.⁷¹

However, in instances where the parties have not entered into a confidentiality agreement, they can and often do request the tribunals to restrict disclosure. In this regard, practice shows that even though arbitral tribunals tend to accept the requests of restricting the disclosure of important documents, they recognize that the parties cannot be completely prevented from discussing the case.

Despite these leaps towards greater transparency, arbitration under ICSID is still considered to be a confidential dispute resolution system. To a degree, this can be attributed to the specific preferences of the parties. Hafner-Burton et al, for instance, demonstrate that parties involved in investment disputes under ICSID after the 2006 reforms were “*more likely to conceal the outcome of arbitration than are the parties to disputes that took place prior to ICSID’s intensive efforts to increase transparency*”.⁷² Ortino similarly argues that “*since 2007, there appears to be a marked increase in ICSID tribunal decisions not publicly available.*”⁷³

4.1.2.2. UNCITRAL Rules

Unlike ICSID, UNCITRAL does not have a central secretariat responsible for the publication of information regarding the initiation of disputes. The access of non-party stakeholders to such information is, therefore, severely curtailed. Moreover, historically UNCITRAL Arbitration Rules⁷⁴ provided extremely restrictive rules regarding access to hearings or publications of awards as hearings were not open to the public, and the awards could not be published without the parties’ consent.⁷⁵ In

⁷⁰ Schreuer and et al., supra note 57, 822; Egonu supra note 3, 484; Delaney and Magraw, supra note 4.

⁷¹ Ortino, supra note 9, 121.

⁷² Emilie Hafner-Burton, Zachary Steinert-Threlkeld and David G. Victor, ‘Predictability versus Flexibility: Secrecy in International Investment Arbitration’, (2015) Laboratory on International Law and Regulation Working Papers, Paper No.18, 34.

⁷³ Ortino, supra note 9, 128.

⁷⁴ UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) available at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>.

⁷⁵ Ibid. Art 28(3), Art 34(5). Article 34(5) was also amended in 2010 and an exception to the rule of parties’ consent to publish the award. According to this amendment “[A]n award may be made public

fact, the rules were designed in a manner that left great residual discretion to the parties to resolve transparency issues through agreements. Barring agreement, tribunals would resolve any transparency issues by employing their general powers to regulate the proceedings.⁷⁶ Given the fragmented nature of ISDS, tribunals adopted inconsistent approaches. However, in 2014 the UN General Assembly adopted UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration,⁷⁷ significantly changing UNCITRAL's approach towards transparency.⁷⁸

The UNCITRAL Rules on Transparency provide that hearings shall be in public, and documents generated as a part of the arbitration shall be published.⁷⁹ These changes cannot, however, apply to the disputes arising from investment treaties that were concluded before 1 April 2014, unless the parties to these treaties agree otherwise.⁸⁰ Even though this reform represents a massive change from the status quo, that it is only prospective means that almost 3000 previously signed investment treaties need to be amended so that transparency can be operationalized through consent.

Moreover, even though the UNCITRAL Rules on Transparency have been lauded as “*the most wide-ranging set of transparency commitments seen thus far in international practice*”,⁸¹ they recognise the need to balance transparency with confidentiality-related concerns. Article 7 recognizes that confidentiality-related concerns act as exceptions to transparency.⁸² This provision, therefore, provides the tribunal with the

... where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority”.

⁷⁶ For example, see the approaches adopted in UPS, supra note 32, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, (17 October 2001); Methanex, supra note 32, Decision of the Tribunal on Petitions for Persons to Intervene as ‘Amici Curiae’(hereinafter Decision on Amici Curiae), (15 January 2001); Glamis Gold Ltd. v. The United States of America, UNCITRAL, Decision on Application and Submission by Quechan Indian Nation, (16 September 2005) (hereinafter Glamis Gold).

⁷⁷ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014) (hereinafter UNCITRAL Rules on Transparency), available at: <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> (last accessed March 17, 2017).

⁷⁸ Mark B. Jennings, 'The International Investment Regime and Investor-State Dispute Settlement: States Bear the Primary Responsibility for Legitimacy' (2016) 17(2) Business Law International 127-152, 130.

⁷⁹ UNCITRAL Rules on Transparency, supra note 77, Art 6(1) and Art 3(1).

⁸⁰ Ibid. Art 1(1).

⁸¹ N. Jansen Calamita, ‘Dispute Settlement Transparency in Europe’s Evolving Investment Treaty Policy’, (2014) 15 Journal of World Investment and Trade, 667.

⁸² UNCITRAL Rules on Transparency, supra note 77, Article 7(3). Article 26(2) of the UNCITRAL Arbitration Rules also allow the tribunal to “*take action that would prevent, or refrain from taking*

power to balance transparency with confidentiality and prevents disclosure of information and limits access to proceeding in certain instances. Moreover, the rules leave the determination of whether the information is confidential or protected to the arbitral tribunals. The tribunal need only consult the parties on the matter.

The upshot is that the rules are based on the recognition of the ‘right to transparency’ with confidentiality operating as an exception to the rule. In other words, the rules provide the right of transparency to non-party stakeholders, and the consent/approval of the parties is immaterial to the exercise of these rights.⁸³ Parties may, however, petition to have this right limited in certain instances. Such an approach towards transparency is surprising, especially when one considers the fact that over 80% of BITs concluded between 2010-2013 did not address the matter of procedural transparency at all.⁸⁴

4.1.3. Concluding Remarks

Lack of transparency is one of the major criticisms of ISDS.⁸⁵ Indeed, most investment treaties continue to be negotiated in secret and do not make express provisions regarding non-party participation.⁸⁶ Institutional rules similarly were silent on the issue of procedural transparency, leaving a great deal of discretion to arbitral tribunals and the parties on the matter.⁸⁷ Yet the ‘public’ nature of these disputes has resulted in calls for shift of focus from confidentiality requirements to those of transparency.

action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself’ without specifically referring to the confidentiality concerns. UNCITRAL Arbitration Rules, supra note 74, Article 26(2).

⁸³ In cases where the tribunal wishes to ‘invite’ rather than ‘accept’ submissions, it must consult with the parties. Article 5(1).

⁸⁴ Cristoffer N. Mollestad, ‘See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement’, 2014, PluriCourts Research Paper No. 14-20, 38.

⁸⁵ VanDuzer, supra note 20, 684; Esme Shirlow, ‘Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures’ (2017) 8(1) Goettingen Journal of International Law 73-99, 85; Ruth Teitelbaum, ‘A Look at the Public Interest in Investment Arbitration: Is it Unique? What Should We Do About it?’, (2010) 5 Berkeley International Law Publicist, 54-62.

⁸⁶ Ibid., Shirlow, 86; and Mollestad, supra note 84, 38.

⁸⁷ Ibid., Shirlow, 86; Ibid., Mollestad, 36-38; Maupin, supra note 60; and Knahr and Reinisch, supra note 4, 116.

As the cost/consequences of arbitration are imposed on the citizens of a host state, in the form of, for example, the future provision and cost of public utilities, those concerned with the award in a particular case or, even larger systemic interests such as the development of jurisprudential body of the law – i.e. academics, practising lawyers, investors, citizens of the host state, etc. wish to have access to the way treaty provisions are being interpreted. Mistelis aptly notes that “*the definition of significant terms such as 'investment', 'creeping expropriation', are elaborated authoritatively more often by arbitration tribunals than by national court decisions.*”⁸⁸ It is therefore unsurprising that many institutions that deal with investment disputes have either adopted or are considering the adoption of mechanisms geared towards transparency.⁸⁹

This shift is for instance visible in recent NAFTA FTC statements, UNCITRAL Rules on Transparency and amendments to the ICSID Rules. Apart from institutions involved in the resolution of investment-related disputes, advances towards transparency have been made in recent model BITs of various countries. While limited, there are indeed a growing number of investment treaties that are taking a liberal approach towards the provision of transparency in the resolution of investment disputes.

However, even in instances where institutions have recognized systemic interests, the provision of transparency has not come at the expense of the interests that confidentiality seeks to protect. In fact, the conflict between the interests of the parties and systemic interests have only been balanced to the extent that the latter can be promoted without undermining the former. In other words, the provision of transparency has been limited in instances where the operation of the principle would have an actual impact on the interests confidentiality aims to protect. The arbitration rules that allow for non-party active participation discussed above, for instance, limit such participation by imposing the obligation upon the tribunal to ensure that submission made by non-disputing parties “*do not disrupt the proceeding or unduly burden or unfairly prejudice either party*”.⁹⁰ Similar provisions exist regarding the

⁸⁸ Mistelis, supra note 1, 230.

⁸⁹ Ibid.

⁹⁰ ICSID Arbitration Rules, supra note 54, Rule 37(2); UNCITRAL Rules on Transparency, supra note 77, Article 4.

publication of documents submitted and statements made to tribunal which may be considered as ‘confidential’ or ‘protected’.⁹¹

In any case, while it is clear that significant advances are being made in the provision of transparency in ISDS, it is difficult to pass a value judgement on these advances. On the one hand, while transparency clearly aids in establishing and maintaining the legitimacy of the system from the perspective of non-party stakeholders, it may well operate to undermine it from the perspective of the disputing parties. It is therefore essential to analyse the utility of both principles from the perspective of both the parties and non-party stakeholders.

4.2. Advantages and Disadvantages of the Principles of Transparency and Confidentiality

To identify the impact of the operation of the principles of confidentiality and transparency on the legitimacy of the system, and whether an appropriate balance between the two principles exists, this part will analyse this tension and will compare the advantages and disadvantages of these principles from the perspective of various stakeholders. The utility of these principles can roughly be summed up under four categories, discussed in turn below.

4.2.1. Consistency and Predictability

Transparency aids in bringing consistency to the system of ISDS, while confidentiality operates to undermine it.⁹² As discussed in chapter five, consistency provides many beneficial consequences to the system. For instance, it aids in the uniform evolution of case law. Such consistency, however, is dependent upon the availability of previous

⁹¹ Ibid. UNCITRAL Rules on Transparency, Article 7.

⁹² Dimsey, *supra* note 10, 35-40; Charles H. Brower, ‘Structure, Legitimacy, and NAFTA’s Investment Chapter’ 36(1) *Vanderbilt Journal of Transnational Law*, 37-94, 51; Yas Banifatemi, ‘Consistency in the Interpretation of Substantive Investment Rules: Is it Achievable?’, in Ehandi and Sauvé eds, *Prospects in International Investment Law and Policy*, (Cambridge University Press, 2013), 200; United Nations Conference on Trade and Development (UNCTAD), Transformation of the International Investment Agreement Regime, 17 December 2014, TD/B/CII/EM4/2, 3 (hereinafter UNCTAD, Transformation of the IIA Regime); and Alexander J. Belohlavek, ‘Confidentiality and Publicity in Investment Arbitration, Public Interest and Scope of Powers Vested in Arbitral Tribunals’ (2011) 2 *Czech Yearbook of International Law* 23.

arbitral awards to future tribunals. While there is no rule of binding precedent in ISDS, the aim of consistency in rulings requires arbitrators to give 'due regards' to previous interpretations of similarly worded investment obligations. The term 'due regards' as used here simply requires that arbitrators cite relevant previous awards and where possible provide reasons for either following or diverging from them. Such an approach has the additional advantage of fostering improvements in the substantive standards of IIL, as through the identification of the problematic areas in the system it results in a greater academic discussion, thereby allowing for the creation of better laws and institutions.⁹³ However, because of the operation of the principle of confidentiality, many arbitral awards remain undisclosed. Thus, the operation of the principle of confidentiality limits the opportunity to ensure development of consistency in interpretation.⁹⁴

A transparent system also provides predictability to the parties. If awards are not published, it makes it difficult for future claimants to gauge the likelihood of success or failure of their claims *ex-ante*.⁹⁵ The principle of transparency in this regard operates to reduce the number of cases brought before tribunals. This is because the availability of previous arbitral awards concerning similar issues and claims would motivate parties to settle their disputes rather than opt for arbitration.⁹⁶ Moreover, parties would have a better understanding of their chances of success or otherwise and would be less inclined to expend resources in arbitration. This would especially hold true in instances where unmeritorious suits are filed.⁹⁷

⁹³ Knahr and Reinisch, *supra* note 4, 115; Karton, *supra* note 13, 466; Delaney and Magraw, *supra* note 4, 763; Fry and Repousis, *supra* note--, 807; Harrison, *supra* note--, 3; Daniel Barstow Magraw and Niranjali Manel Amerasinghe, 'Transparency and Public Participation in Investor-State Arbitration', (2009) 15(2) *ILSA Journal of International & Comparative Law*, 337-360, 351-2; Susan Franck, 'The Legitimacy Crisis in Investment Treaty' (2005) 73 *Fordham Law Review* 1521-1626, 1544-45; Mark Feldman, 'International Arbitration and Transparency', (2016) Peking University School of Transnational Law Research Paper No. 16-12, 10.

⁹⁴ *Ibid.*; Karton *supra* note 13, 459; Colin Yc Ong, 'Confidentiality of Arbitral Awards and the Advantages for Institutions to Maintain a Repository of Awards' (2005) 1(2) *Asian International Arbitration Journal* 169-180, 177; Amanda L. Norris and Katina E. Metzidakis, 'Public Protests, Private Contracts Confidentiality in ICSID Arbitration and the Cochabamba Water War' (2010) 15 *Harvard Negotiation Law Review*, 31-75, 62; Alexis C. Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration', (2001) 16 *American University International Law Review* 969-1025, 1004; and Anjanette H. Raymond, 'Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?', (2005) 16 *American Review of International Arbitration* 479-515, 501.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* For more information about consistency, please see Chapter 3.

⁹⁷ Raymond *supra* note 94, 507; Karton, *supra* note 13, 471; Norris and Metzidakis, *supra* note 94, 61.

Confidentiality, on the other hand, is premised on the argument that ISDS is a mechanism that exists to resolve disputes between the parties and thus, must give priority to their interests over those of non-party stakeholders. Tribunals may not, therefore, disclose awards as doing so would go beyond the rationale for creating the tribunals. Predictability is therefore undermined because awards are not made public.

In defence of the principle of confidentiality, Paulsson and Rawding argue that the publication of awards and reasoning might lead to re-litigations, which would do more harm than benefit.⁹⁸ This argument is far from convincing. At the end of every arbitration or litigation, there is always a losing party who would like to re-litigate if given the opportunity. The publication of awards can hardly affect this decision. Consequently, the principle of confidentiality cannot be said to operate to minimize re-litigations.

4.2.2. Collusion, Commercial Secrets and Reputation of Parties

Greater transparency in ISDS helps prevent collusion to a degree.⁹⁹ The possibility of collusion between the government of the host state and the investor arises in instances where the state would like to adopt certain positions in private which it could not do if its constituency was watching.¹⁰⁰ The principle of transparency, therefore, limits the possibility of collusion by providing third parties access to information regarding the proceedings, thereby allowing for public scrutiny. The *Metalclad v. Mexico* case exemplifies this. In 1997, Metalclad (a US-based company) referred the dispute to ICSID, claiming that the Mexican state of San Luis Potosi violated the NAFTA when it prevented the company from opening its waste disposal plant.¹⁰¹ In the contract between Metalclad and the Mexican Federal government, Metalclad agreed to take over a waste disposal facility and reopen it after cleaning up pre-existing contaminants. However, the Governor prevented Metalclad from reopening it, on the basis of an

⁹⁸ Paulsson and Rawding, *supra* note 2, 50.

⁹⁹ Ong, *supra* note 94, 176; Karton, *supra* note 13, 466; Delaney and Magraw, *supra* note 4, 762; Magraw and Amerasinghe, *supra* note 93, 346; Schill, *Five Times Transparency*, *supra* note 6, 370; Laverde, *supra* note 4, 126; Menaker, *supra* note 4, 129; Egonu, *supra* note 3, 482.

¹⁰⁰ *Metalclad*, Decision on Revealing Information, *supra* note 30.

¹⁰¹ *Ibid.*

environmental impact assessment report which stated that an ecological sensitive underground alluvial stream existed on the site of the facility. Metalclad argued that the actions of the government expropriated its future profits, and sought \$90 million (which exceeded the combined annual income of every family in the county where the facility was located) in damages. Interestingly, the claimant argued that the Mexican Federal government unofficially wished to take the issue before ICSID, rather than Mexican courts, as such an approach would allow it to “*deflect political fall-out of forcing the state to open the facility*”.¹⁰² This case, therefore, raised the possibility of collusion between governments and investors, to inflict undesired and hazardous investments on the public.¹⁰³

On the other hand, implications of democratic impropriety, notwithstanding, economic considerations require that the host state and the investor alone participate in the resolution of disputes brought before arbitration. Indeed, as the utility of ISDS partly lies in it being less expensive than other forms of dispute resolution mechanisms, an increase in costs to the parties would de-incentivise its use. Therefore, from the perspective of the parties, limits of confidentiality that operate to increase transaction costs would give rise to legitimacy concerns. Confidentiality limits the costs in many instances as it operates to allow host states to make economically justifiable decisions that would be politically unpopular in their state. Moreover, transaction costs would greatly increase if non-party stakeholders had a right to transparency – passive or active.¹⁰⁴ Clearly, requiring the dissemination of documents, information, orders, awards, etc. would lead to an increase in costs. Costs would similarly increase if tribunals were obligated to hear the submissions of non-party stakeholders.¹⁰⁵

¹⁰² Karton supra note 13, Norris and Metzidakis, supra note 94, 101; Andrew Jackson and Matthew Sanger, *Dismantling Democracy: The Multilateral Agreement on Investment (MAI) and Its Impact* (Canadian Centre for Policy Alternatives, 1998) 126; Fiona Beveridge, *The Treatment and Taxation of Foreign Investment Under International Law* (Manchester University Press, 2000) 155; Public Citizen, *Our Future under the Multilateral Agreement on Investment*, available at: <https://www.citizen.org/our-work/globalization-and-trade/our-future-under-multilateral-agreement-investment> (last accessed March 31, 2017).

¹⁰³ Ibid.

¹⁰⁴ Delaney and Magraw, supra note 4, 763; Magraw and Amerasinghe, supra note 93, 354.

¹⁰⁵ There are some precautions to curb these costs and make the proceedings more efficient; such as prescribing page limits for non-party participation, limiting the material that tribunals and the parties would have to consider, or using strategic collaborations. For example, in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* case, five NGOs collaborated to participate in the proceedings. See *Biwater Gauff*, supra note 50; Hafner-Burton and Victor, *Empirical Analysis*, supra note 51, 162; Delaney and Magraw, supra note 4, 763; Magraw and Amerasinghe, supra note 93, 352; David

Furthermore, transparency carries the risks of exposure of commercial secrets and negatively impacting the reputation of the parties, both of which carry a high ‘cost’.¹⁰⁶ In a business environment, reputation is very important.¹⁰⁷ Disclosing information on back-door negotiations, messy trade-offs, wrongdoings and other sensitive information might undermine the credibility of the parties' future business.¹⁰⁸ The impact of such concerns is evident in cases like *Aguas del Tunari v Bolivia*.¹⁰⁹ In September 1999, through a process shrouded in secrecy with just one bidder, Bolivia's government privatized the public water systems of the city of Cochabamba by selling rights to a company controlled by the California engineering giant, Bechtel. Bechtel's company raised water rates which sparked a citywide protest. Eighteen months later Bechtel and its co-investor, Abengoa of Spain, filed a \$50 million claim against Bolivia before the ICSID. For four years thereafter, Bechtel and Abengoa saw their companies and corporate leaders dogged by protest, damaging press, and public demands from five continents. This led them to drop the case for a token payment of 2 bolivianos (30 cents).

Thus, from the perspective of the parties, it would seem that allowing transparency would adversely impact on the system's legitimacy at least to the extent that it operates to limit the ability of the parties to pursue arbitration without any external pressure. Confidentiality regarding all information relating to the dispute, however, would operate to reduce external pressure and remove the need for continuously making explanations to the public. It is therefore suggested that the proceedings might go smoother and the possibility for parties to come to a mutually-agreed solution increases in a pro-confidentiality framework.¹¹⁰ This is especially true if confidentiality does

Stasavage, ‘Open-Door or Closed-Door? Transparency in Domestic and International Bargaining’ (2004) 58 Intl Org 667-703.

¹⁰⁶ Knahr and Reinisch, supra note 4, 118; Laverde, supra note 4, 114; Buys, supra note 3, 123; Egonu, supra note 3, 482; Ortino, supra note 9, 132.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.; Stasavage, supra note 105, 668; Delaney and Magraw, supra note 4, 763; Magraw and Amerasinghe, supra note 93, 354; Buys, supra note 3, 123; Paulsson and Rawding, supra note 2, 50; Hafner-Burton and Victor, Empirical Analysis, supra note 51, 161-182, 162-172; Norris and Metzidakis, supra note 94, 50; and Ong, supra note 94, 170.

¹⁰⁹ *Aguas del Tunari, SA v. Republic of Bolivia*, ICSID Case NO. ARB/02/3.

¹¹⁰ Norris and Metzidakis, supra note 94, 53; Karton, supra note 13, 471; Egonu, supra note 3, 486; Buys, supra note 3, 138; and Gary B. Born, *International Commercial Arbitration* (2nd ed., Kluwer 2009) 2256.

indeed operate to motivate parties to be more willing to admit and discuss certain facts that they would be reluctant to do otherwise. For example, transparency carries the risk of exposing important trade secrets, especially information that might be advantageous to competitors.¹¹¹ Confidentiality, in contradistinction, would operate to enable parties to discuss such information during the proceedings without fearing disclosure. In the *Aguas del Tunari* case discussed above, for instance, the investor argued that it could not disclose the financial model that it uses for increasing prices because it constitutes a commercial secret and is sensitive information regarding its business.¹¹²

In any case, economic efficiency and reputation-related concerns only remain relevant if ISDS is viewed as a mechanism that gives primacy to the interest of the parties over that of the various stakeholders to a particular arbitration. Limiting transparency to this extent, therefore, is only justifiable if one ignores the public dimensions of ISDS and focuses on legitimacy from the perspective of the parties alone. Contrariwise, providing access to information would constitute progress towards developing/restoring the legitimacy of the system from the perspectives of non-party stakeholder.

4.2.3. Politicization of Disputes

There is argument that transparency in arbitral proceedings carry the potential of politicising the dispute.¹¹³ This argument stems from the assumption that transparency seeks to allow home states to come to the aid of investors, which increases the tension between the host and home states.¹¹⁴ Indeed such confrontation between two states was one of the primary reasons for the creation and success of the current investment arbitration regime.¹¹⁵ However, this argument overlooks that tribunals and treaty-makers do not see non-party participation as adding a new party to the dispute. Rather non-party participation is seen as a way of managing the dispute settlement proceedings and benefitting from non-parties' expertise and knowledge, thereby

¹¹¹ *Ibid.* Sensitivity of information is on a case-by-case basis; for some, it might be technical data and expertise, while for others, it might even be the existence of such dispute itself.

¹¹² *Aguas del Tunari*, *supra* note 109.

¹¹³ *Ibid.* Paulsson and Rawding, *supra* note 2, 50.

¹¹⁴ Kaufmann-Kohler, 'Non-Disputing State Submissions', *supra* note 5, 326.

¹¹⁵ *Ibid.*

obtaining a better understanding.¹¹⁶ Thus, participation in the proceedings on the part of the home state is not necessarily detrimental from a legitimacy perspective.

2.4. Quality and Accuracy of Arbitral Awards and Orders

Transparency is also argued to improve the quality and accuracy of awards and reasoning.¹¹⁷ However, as most awards are confidential, this argument is far from being evidenced. Thus, there is no way to know whether publishing awards has indeed increased the quality of decision making in ISDS.¹¹⁸

Theoretically speaking, knowledge on the part of the arbitrators that their awards will be read by the public would operate to incentivise expending more time and resources to improve the quality of arbitral awards. Moreover, the quality and accuracy of awards would also increase as a result of allowing non-party participation, as their submissions would provide additional perspective, knowledge, and insight. Such non-party participation would allow for a better understanding of the factual and legal issues of the dispute (on the part of the tribunal).¹¹⁹

On the other hand, the quality of reasoning may be impaired as a result of the operation of the principle of transparency. Indeed the principle of confidentiality is a significant tool to secure testimony and evidence.¹²⁰ In its absence, witnesses might feel reluctant to provide testimony or to give the whole truth as they know that they will be scrutinised by the public.¹²¹

¹¹⁶ See *Methanex*, supra note 32, Decision on Amici Curiae, ¶ 11; and *UPS*, supra note 32, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (2001) ¶ 36.

¹¹⁷ *Ong*, supra note 94, 176; *Karton*, supra note 13, 466; *Delaney and Magraw*, supra note 4, 762; *Schill, Five Times Transparency*, supra note 5, 370; *Laverde*, supra note 4, 126; and *Norris and Metzidakis*, supra note 94, 61.

¹¹⁸ Reaching more accurate decisions is even more important for international arbitration since arbitral awards are generally final, and under most of the international arbitral systems, there are no appeal mechanisms. *Ibid.* 345; and *Schill, Five Times Transparency*, supra note 6, 370.

¹¹⁹ *Magraw and Amerasinghe*, supra note Amerasinghe 93, 346.

¹²⁰ *Norris and Metzidakis*, supra note 94, 56.

¹²¹ *Ibid.*, and *Barry Leon and John Terry*, 'Special Considerations When a State is a Party to International Arbitration', (2006) 61(1) *Dispute Resolution Journal*, 68-77, 74.

2.5. Concluding Remarks

Theoretically, the provision of greater transparency in ISDS has multiple consequences. The disputing parties may feel threatened because of the potential prejudice caused by greater transparency and public participation.¹²² Moreover, transparency may operate to increase costs and delays. These concerns would encourage disputing parties to settle their dispute before taking it to arbitration or during the proceedings (but before an award is rendered).¹²³ Consequently, from the perspective of the disputing parties, transparency would be detrimental to the legitimacy of the system. Ultimately, it might result in parties' reluctance to refer to ISDS, and taking their dispute to other dispute resolution mechanisms that guarantee confidentiality.¹²⁴

While the perspective of the disputing parties' vis-à-vis the legitimacy of the system is undeniably important, it is difficult to deny that the perspective of other stakeholders should also be considered.¹²⁵ From the perspective of non-party stakeholders, the principle of transparency is argued to make ISDS more in line with constitutional values, such as the rule of law and democracy,¹²⁶ and enhance human rights including the right of access to information.¹²⁷ This, in turn, enhances the public confidence in ISDS by fostering the public's perception of the system's fairness.¹²⁸

¹²² Karton, *supra* note 13, 471; Egonu, *supra* note 3, 486; Buys, *supra* note 3, 138; and Born, *supra* note 110, 2256.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Schill, *Five Times Transparency*, *supra* note 6, 373; Magraw, Plagakis, and Schifano, *supra* note 1, 10.

¹²⁶ Delaney and Magraw, *supra* note 4, 761; Magraw and Amerasinghe, *supra* note 93, 346; Schill, *Five Times Transparency*, *supra* note 6, 363; UNCTAD, *Transformation of the IIA Regime*, *supra* note 92, 3; Calamita, *supra* note 81, 651; James Harrison, 'Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration' (2011) University of Edinburg Working Paper, Paper no: 2011/01, 2 (hereinafter Harrison, 'Recent Developments'); James D. Fry and Odysseus G. Repousis, 'Towards a New World for Investor-State Arbitration through Transparency', (2015) 48 *N.Y.U. J. INT'L L.* 805; and UNCITRAL Report: *Settlement of Commercial Disputes: Preparation of a Legal Standard on Transparency in Treaty-Based Investor-State Arbitration*, Working Group II (Arbitration and Conciliation) of the work of its fifty-third session (Vienna, 4–8 October 2010), A/CN.9/712, (20 October 2010), ¶ 17.

¹²⁷ *Ibid.* Indeed providing greater transparency and allowing participation assist to create an overall sense and confidence of democracy and good governance.

¹²⁸ *Ibid.*; Bennaim-Selvi, *supra* note 3, 801; and Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?', (2008) 41 *Vanderbilt Journal of Transnational Law* 775-832, 775.

Since arbitration is not a cheap dispute settlement system in absolute terms, allowing public participation might be disadvantageous for the NGOs or third parties in developing countries (relative to those in the developed world). Confidentiality, on the other hand, would expedite arbitrations and prevent increased cost and delays, ultimately bringing an overall 'sense of efficiency'.¹²⁹

Thus, whether the need for confidentiality outweighs that of transparency (and vice-versa) is based on the nature of the interest each principle operates to protect.¹³⁰ This does not mean that the two interests are always mutually exclusive.¹³¹ Rather, the argument recognises that each principle is intrinsically valuable and thus a blanket statement of one trumping the other cannot stand. A more detailed analysis needs to be undertaken to determine the appropriate balance between the two. Ascertaining this balance hinges (to a large degree) upon the impact of the principles at different stages of the arbitral proceedings. Therefore, the next section evaluates the impact of the principles at different stages of the arbitral proceedings, the view of balancing the interests of both the parties and non-party stakeholders' vis-à-vis the impact on them because of the application of the principles.

4.3. Balancing Transparency with Confidentiality in ISDS

As mentioned above, the principle of transparency focuses on the extent to which knowledge of initiation of disputes, the relevant documents, participatory rights to the proceeding, and arbitral decisions are provided/accessible (or otherwise) to non-party stakeholders. As each concerns different stages of the lifecycle of the dispute, they will be discussed separately below.

4.3.1. Norm-Making

Even before initiating a dispute, transparency concerns around the negotiation of investment agreements exist. In particular, these concerns refer to the extent to which

¹²⁹ Ibid. Bennaim-Selvi, 804; and Dora Marta Gruner, 'Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform' 41 *Columbia Journal of Transnational Law*, 923, 964, 959.

¹³⁰ Ibid. Bennaim-Selvi, 802-04.

¹³¹ Ibid.

non-party stakeholders are provided “access to negotiating documents, position papers, and consolidated draft texts” of the investment agreements, along with the text of the treaty itself.¹³²

The foundational texts of the multilateral investment conventions discussed above (NAFTA, ICSID, and UNCITRAL) have always been publicly available. Similarly, the texts of current bilateral and multilateral investment treaties (which now stand at more than 3000 in number) are accessible online.¹³³

Providing access to the text of ratified treaties, however, is of little value unless the process by which the treaties are concluded is made transparent. Traditionally, the contents of investment agreements or any other information regarding them would only be made ‘public’ after their ratification/signing. Even the development and drafting of boilerplate treaties was conducted behind closed doors by internal agency bureaucrats.¹³⁴ For most capital-exporting countries, these boilerplate treaties would subsequently be copied in the drafting of future BITs, which as Maupin notes “were often signed as ‘photo ops’ by visiting dignitaries upon the occasion of official state visits.”¹³⁵

As discussed in part 2 above, states preferred secrecy in negotiating treaties given the perception that transparency would operate to limit the ‘frankness’ between the parties during negotiations. Moreover, they were concerned that their bargaining position would be negatively impacted because of transparency.¹³⁶ If the public knows the process and the content of these negotiations, states would be compelled to include minimum standards of transparency and participation clauses required of ISDS into these agreements. This would provide more opportunities for representing public

¹³² Ibid.

¹³³ Examples of useful websites that provide access to investment treaties and agreements and also to useful links are <http://investmentpolicyhub.unctad.org/IIA>, <https://www.italaw.com/investment-treaties>, [http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-Tools.aspx](http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Tools.aspx).

¹³⁴ An empirical study conducted by Lauge Skovgaard Poulsen and Emma Aisbett highlights the lack of transparency in this regard by arguing that investment treaties in the 1990s were concluded in the thousands without much, if any, input on the part of non-party stakeholders or the legislative branches of various states. Lauge Skovgaard Poulsen and Emma Aisbett, ‘When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning’, (2013) 65(2) World Politics.

¹³⁵ Maupin, *supra* note 60, 7.

¹³⁶ Shirlow, *supra* note 85, 75.

interests, and would have a positive impact on the perception of the legitimacy of the system on the part of non-party stakeholders.

As demonstrated in part 1, transparency has indeed made significant inroads into the process of treaty formation since the late 1990s. Various states, especially capital exporting ones, have incorporated a great degree of transparency in the manner in which their model BITs are drafted.¹³⁷ This phenomenon has been described as the rise of “a new generation of model BITs.”¹³⁸ Draft texts of the recent model BITs of both the United States and Canada for instance were routinely disclosed to the public for review and comment. A similar trend is visible in various other developed states, and it seems that adopting transparent processes in the formation of investment treaties has become the ‘norm’ at least in developed democratic states.¹³⁹

This trend of transparency, however, does not allow access to non-party stakeholders to the negotiation table. Rather, they have, for instance, on occasion been given access to negotiation records, position papers or been provided the opportunity to voice their concerns/preferences through consultation.¹⁴⁰ Moreover, attempts to effectuate transparency have been made through the engagement of the public in the development of model investment treaties.¹⁴¹ Transparency in treaty negotiations, therefore, is of a ‘passive’ character to the extent that third party stakeholders do not have any right to intervene or participate otherwise in actual treaty negotiations.

The consequences of such limited transparency can be remedied to a degree, however, if states remain ‘true’ to the contents of the model investment treaty (which have been drafted with public consultation) as representing the ‘ideal’ bargain. This does not mean that the state may enter future treaties only on those terms, but rather that it forms

¹³⁷ Maupin, *supra* note 60, 8.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ See, for instance, European Commission (EC), ‘Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)’ Commission Staff Working Document - Report SWD (2015) available at: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf (Last accessed February 19, 2017); and Australian Senate Standing Committee on Foreign Affairs, Defence and Trade References, Blind Agreement: Reforming Australia’s Treaty-Making Process (2015), 39–57, available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report (Last accessed February 19, 2017).

¹⁴¹ See, for example, US Model BIT (2012), or Canadian New Model FIPA (2004).

the basis of future negotiations. While it is hard to ignore the increase in negotiation costs, delay and ‘strategic’ issues if third parties were given access to treaty negotiations, model investment treaties do not suffer from any such concern. Thus, model investment treaties are an already existing tool for the achievement of greater transparency which if employed properly can represent an appropriate balance between the principles of transparency and confidentiality at this pre-arbitration stage.

4.3.2. Initiation of Disputes

Initiation of disputes is the second stage at which transparency concerns arise. Proponents of greater transparency advocate the announcement of the initiation of the dispute to the public along with the identities of the parties and the subject matters of the dispute. As discussed in part 1 above, many institutions that deal with investment disputes already allow such disclosure. The time of initiation is of particular importance not only to the host state’s citizens but also to investors involved in similar businesses, international organisations and public interest groups, etc.

Knowing about the initiation of a dispute is essential to ensure that those who wish to submit *amicus curiae* briefs can do so in a timely manner. Indeed, researching and drafting *amicus* submissions is very time-consuming and as will be discussed in greater length below, the legitimacy perception of the system is influenced by the degree to which active participation in ISDS is extended to third parties. A provision ‘allowing’ active participation, however, would be meaningless unless it ‘enables’ the parties to adequately participate. Accordingly, as information regarding the initiation of disputes is essential to enable interested third parties to research, draft and submit briefs on time, not providing such information raises legitimacy concerns at different stages of the ISDS.

Apart from enabling active participation, information regarding the initiation of investment disputes is essential for other investors (investing in the host state or already involved in similar businesses there). Such information would notify investors

about the potential of being involved in such disputes thereby allowing them to anticipate risks and take appropriate precautions.¹⁴²

On the other hand, most of the disadvantages of transparency discussed in part 2 above do not really apply at this stage. For instance, providing a registration system and publishing information regarding the initiation of disputes online (as done by the ICSID) does not increase the magnitude of costs or the likelihood of delay in the proceedings. Moreover, since only the existence of the disputes and the issues involved would be published, there would generally be no risk of publishing sensitive information.¹⁴³

It, therefore, seems that the disadvantages of transparency at this stage from the perspective of the parties are not at odds with its advantages. Thus, permitting transparency at this stage does not encroach on the interests that confidentiality is sought to protect.

It may, however, be argued that confidentiality concerns are undermined to the extent that prompt public disclosure of information regarding the initiation of a dispute allows for third-party participation as *amici curiae*. This criticism stems from an underlying presumption that the private nature of the ISDS mechanism is inherently averse to any form of third party participation – as it is not subject to previous party consent. This chapter, however, recognizes that the public ‘backlash’ that ISDS has witnessed in recent years requires legitimacy concerns to be addressed for the system to remain viable. A high level of public access to the dispute settlement process is necessary to ensure public acceptance of the result and the democratic accountability of the process. This is not to say that *amicus* participation should be allowed in all instances – rather, as will be discussed in detail in the section below, it simply recognises that *amicus* participation should not be ‘banned’ outright. Thus, the fact that disclosure of information regarding initiation of disputes would allow for third-party intervention is an argument in favour of, not against, the provision of transparency at this stage.

¹⁴² Delaney and Magraw, *supra* note 4, 764; Karton, *supra* note 9, 469; and Raymond, *supra* note 94, 503-504.

¹⁴³ As mentioned before, sensitivity of information is determined on a case-by-case basis. For some, it might be technical data and expertise, while for others, it might even be the existence of such dispute itself. Therefore, theoretically, there might be exceptions to the argument here.

4.3.3. Procedural Developments

4.3.3.1. *Passive Participation*

Passive participation relating to the conduct of an arbitration proceeding can be categorized into two types – access to documents and observation rights. Each is discussed in turn below.

4.3.3.1.1. *Access to Documents*

Information provided to tribunals during ISDS proceedings in the form of, for example, written pleadings, witness statements, expert reports, and evidence of parties, lack transparency under most investment agreements.¹⁴⁴ The situation is the same under the rules of various (major) institutions involved in the resolution of investment disputes. Indeed, the ICC, SCC and LCIA rules do not allow the tribunal to give access to non-party stakeholders to submissions made by the disputing parties, witnesses and experts.¹⁴⁵ Rather, operating on the theory of consent, they require the approval of both disputing parties for any such information to be disclosed.¹⁴⁶

Consent is considered so important under some of these rules that a party is not even allowed to unilaterally disclose any information regarding the proceedings unless it obtains prior approval from the other party.¹⁴⁷ The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules), however, take a different approach, recognizing “*the importance of ensuring transparency in investor-state dispute resolution.*”¹⁴⁸ They provide non-party

¹⁴⁴ The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, for example, are an exception to this.

¹⁴⁵ International Chamber of Commerce (ICC) Arbitration Rules, (2017); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules, (2017); The London Court of International Arbitration (LCIA) Arbitration Rules, (2014).

¹⁴⁶ Ibid. The SCC Arbitration Rules, Article 46.

¹⁴⁷ The LCIA Arbitration Rules, supra note 145, Article 30.1.

¹⁴⁸ Report of the United Nations Commission on International Trade Law, 41st session, (16 June – 3 July 2008), ¶ 314, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V08/555/08/PDF/V0855508.pdf?OpenElement> (Last accessed 12 March 2018).

stakeholders with the right of access to information subject to confidentiality concerns. The difference in approach adopted under the UNCITRAL Transparency Rules can be explained, in part, by the fact that unlike the ICC, SCC and LCIA, the UNCITRAL Transparency Rules were formulated specifically for investment arbitration as opposed to arbitration in general – and that too at a time when the recognition of the need for incorporating more transparency in ISDS had become widely recognized.

The difference in treatment afforded under institutional rules developed particularly for investment arbitration, rather than for arbitration in general, is further manifested in the manner in which the ICSID rules have been interpreted. Though created for investment arbitration, the ICSID rules lack transparency on providing access to information to non-party stakeholders. Interestingly, however, scholars and arbitrators often imply transparency requirements into the ICSID text, on the grounds that transparency is an essential component of the principle of ‘minimum standard of treatment’ under customary international law.¹⁴⁹ For example, while the ICSID Arbitration (Additional Facility) Rules do not mandate nor prohibit disclosure of the pleadings of the parties, they have been interpreted to allow tribunals to order disclosure of information/documents even in instances where one party objects.¹⁵⁰

This reveals that there is growing recognition amongst the epistemic community “comprised of arbitrators, counsel, experts, scholars, institutional employees, journalists, treaty negotiators, government advisors, and a select few knowledgeable civil society advocates”¹⁵¹ of the public dimension of ISDS and the resultant need to promote transparency vis-à-vis providing access to information to non-party stakeholders.¹⁵²

Even though it is difficult to argue, on the basis of confidentiality concerns, that all information should be publicly disclosed, there are certain advantages of having a degree of transparency in this regard, as detailed in part 2 above. At the risk of

¹⁴⁹ Maupin, *supra* note 60, 15.

¹⁵⁰ Piero Foresti and others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01, Award, (4 Aug 2010), ¶¶ 27-29. In this case, disputing parties were ordered to disclose their pleadings to all Tribunal. However, before the disclosure occurred, the claimant decided to discontinue the case.

¹⁵¹ Maupin, *supra* note 60, 4.

¹⁵² Maupin, *supra* note 60, 4.

repetition, examples of such advantages include development in the quality of awards, and indeed the entire ISDS structure, as a result of greater and more informed debate within the ‘epistemic community’ regarding legitimacy concerns. Moreover, such passive participation rights allow for the possibility of active participation. This is because, without access to information concerning the dispute, non-parties who would like to submit amicus curiae briefs would have to rely on other (probably unreliable) sources for information which makes it very difficult for them to provide meaningful assistance to the tribunal.¹⁵³

On the other hand, there will always be legitimacy concerns surrounding the publication of sensitive and/or confidential information. For instance, in the case of *Biwater Gauff v. Tanzania*, one of the parties unilaterally disclosed important documents to the potential detriment of the other party.¹⁵⁴ Therefore, it is not uncommon to come across scholarly articles and tribunal decisions that frame the issue, not in terms of ‘how to strike a balance between the requirements of two principles’ but rather in terms of ‘whether parties and tribunals have a general duty of confidentiality or transparency’.

The legitimacy debate has clearly revealed that adopting such an either-or approach is tantamount to clinging to the masts of sinking ships. Demands for complete transparency on the part of non-party stakeholders are as unhelpful and irrational as the insistence by some in the arbitral community that transparency cannot be operationalized to any degree without sensitive or confidential information being compromised. Instead of staring at opposite extremes, the interests of both sides will be best addressed if they began from the common concern that the lack of transparency in the ISDS regime is creating a legitimacy crisis.

Given the sensitivity of rules, created specifically for investment arbitration, to stakeholders’ perception regarding their legitimacy and their reaction to innovating methods of increasing transparency in recent decades,¹⁵⁵ the best bet may well be on

¹⁵³ Ibid.

¹⁵⁴ *Biwater*, supra note 50.

¹⁵⁵ ICSID Secretariat, Discussion Paper, ‘Possible Improvements of the Framework for ICSID Arbitration’ (22 Oct 2004) available at:

increased transparency in the future.¹⁵⁶ Based on the trend, it is argued that the balance between the principles of confidentiality and transparency on the question of access to information/documents lies in recognising the public law dimensions of ISDS, and the elevation of the principle of transparency to the status of default norm. Confidentiality concerns then should be addressed by issuing confidentiality orders, effectively shifting the determination of the extent of redactions of written documents before dissemination, to the tribunal. Such a stance would allow third parties access to relevant information while protecting sensitive/confidential information.

4.3.3.1.2. Public Hearing

Providing transparency in the form of access to public hearings remains extremely controversial. The SCC, the ICC, the UNCITRAL and the LCIA rules expressly require hearings to be held in private.¹⁵⁷ As discussed in part 1, however, significant advances have been made in providing transparency in hearings – particularly in the realm of institutional rules specifically designed for investment arbitration. The UNCITRAL Transparency Rules, for instance, adopt a general rule of transparency on the issue, subject to confidentiality concerns. While the UNCITRAL Transparency Rules attempt to find a balance between the requirements of the two principles, the majority of academic commentary on the issue continues to take an either-or approach.

Extreme 1: Unfettered Right to Access

Various commentators differentiate between the functions performed by domestic courts and investment arbitral tribunals, to justify adopting the right of access to hearings in the latter. They argue that providing access to hearings in domestic courts is premised on the facts that their legal interpretations are authoritative and create judicial precedent.

<https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> (Last accessed March 14, 2017).

¹⁵⁶ ICSID Arbitration Rules, supra note 54, Rule 37; and ICSID Arbitration (Additional Facility) Rules, supra note 33.

¹⁵⁷ Unless the parties agree otherwise. ICC Arbitration Rules, supra note 145, Article 26(3); SCC Arbitration Rules, 145, Article 32(3); LCIA Arbitration Rules, supra note 145; and UNCITRAL Arbitration Rules, supra note 74, Article 28(3).

To the extent that ISDS creates arbitral precedent, it cannot be stated that ISDS only governs the relations between the disputing parties. As explained in Chapter five, there is a growing trend of referring to previous awards in ISDS – the upshot of which is the refinement of the body of IIL, which in turn has an impact on domestic policies and laws. In the words of Gary Born and Ethan Shenkman:

“[T]o the extent investor-state tribunals are, in effect, making law (their decisions being treated by other tribunals as highly persuasive authority), transparency in tribunal decisions helps the law develop in a coherent fashion and enables investors and governments alike to conform their conduct to evolving legal standards.”¹⁵⁸

Those belonging to this category, therefore, argue that if the law making powers of domestic courts and ISDS tribunals are so similar, then similar ‘public’ controls should be imposed on both. In other words, as the factors that justify providing transparency in hearings at domestic courts exist in ISDS, hearings in the latter should be transparent as well.

Extreme 2: No Access

Those belonging to this category stress that allowing non-party stakeholder access to proceedings would be detrimental on at least three levels. First, providing access to hearings would have a negative impact on the ‘integrity of the arbitral process’ – particularly on the speed and economic efficiency of ISDS. Briefly, efficiency concerns in this regard focus on the time increase caused because of the need to arrange suitable facilities and to organise security. Second, they argue that transparent hearings would inevitably lead to the dissemination of confidential or otherwise sensitive information. Finally, they point towards the risk that opening hearings to the public would operate to re-politicise investment disputes.

¹⁵⁸ Gary Born and Ethan Shenkman, ‘Confidentiality and Transparency in Commercial and Investor-State International Arbitration’ in Catherine A. Rogers and Roger P. Alford (eds), *The Future of Investment Arbitration* (OUP 2009) 5-42, 39.

The Middle Ground

Under the lens of ‘access to justice’, ‘rule of law’ and ‘public accountability’, it is hard to argue against the proposition that hearing should be open to the public, with measures in place to guard against the dissemination of confidential or otherwise sensitive information. In fact, the provision of transparency in such a manner would adequately address all of the legitimacy concerns discussed under the heading, *Extreme 2: No Access* above.

First, the concern about increase in costs and delays in order to arrange suitable facilities and organise security overlooks that demanding transparency in hearings is not the same as demanding physical access to them. Transparency concerns vis-à-vis access to hearings can indeed be minimized by holding hearings in camera and subsequently webcasting them. While webcasting and procurement of the necessary audio/visual equipment, etc. could increase costs, it would be negligible compared to the advantages brought by transparency (and even in absolute terms).

Moreover, providing transparency and protecting sensitive information are not mutually exclusive. The tribunal can cater to both by redacting sensitive/confidential information while disseminating all the rest.

It is further argued that transparency should be the default rule here. While the author recognizes the often made argument that ISDS is based on the presumption of party autonomy, the argument fails to account for the context within which ISDS operates. It is asserted that since ISDS tribunals are involved in the creation of an ‘arbitral’ body of law, limiting the procedural autonomy of parties is warranted. However, default access granted to non-party stakeholders would only mean that they are *presumptively* open to the public i.e. the tribunal has the power to redact information.

As the parties (as opposed to the tribunal) are best able to argue what information is sensitive/confidential, a duty to protect confidential information should not be imposed on tribunals. Thus while tribunals must give due regard to reasonable concerns of the parties when deciding whether to provide non-party stakeholders access to the

recorded hearings, the onus of proving that providing public access to hearings would have a detrimental impact on parties, which should be placed on the parties.

Placing the onus on the parties here makes sense as they are best-suited to argue their interests. If fundamental unfairness cannot be proved by evidence, it seems fair that the parties would have to bear “*minor interferences with the ‘integrity of the arbitral process.’*”¹⁵⁹

Finally, the worry that transparent proceedings might ‘re-politicise’ investor-state disputes seems misplaced in an era where public concern over intrusion by ‘secret tribunals’ into sovereign regulatory powers is itself politicizing the disputes and generating a popular backlash against the entire ISDS regime. Indeed, a growing number of commentators from the commercial arbitration world appear to accept that transparent proceedings should be the norm in investor-state disputes.¹⁶⁰ Some even suggest that many investors would happily accept this if they could obtain the assurance of fairer and more predictable dispute settlement in exchange.¹⁶¹

4.3.3.2. *Active Participation*

Amicus curiae is broadly translated as “friend of a court”.¹⁶² The appointment of experts to aid courts/tribunals is well recognized in international dispute adjudication.¹⁶³ For instance, the dispute settlement proceedings of both the European Court of Human Rights (ECHR) and the World Trade Organisation (WTO) have been known to appoint amicus curiae.¹⁶⁴ Amicus curiae, however, is not strictly limited to

¹⁵⁹ Schill, supra note 9.

¹⁶⁰ Maupin, supra note 60, 14; Delaney and Magraw, supra note supra note 4, 775; Lance Bartholomeusz, ‘The Amicus Curiae before International Courts and Tribunals’ (2005) 5 Non-State Actors and International Law 209-286, 211; Katia Fach Gomez, ‘Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favourably for the Public Interest’ (2012) 35 Fordham International Law Journal 510-564, 517.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid., Delaney and Magraw; and Ibid., Bartholomeusz; Ibid., Fach Gomez.

¹⁶⁴ Ibid. Bartholomeusz, 211; Ibid. Fach Gomez, 519-23; Christina Knahr, ‘Transparency, Third Party Participation and Access to Documents in International Investment Arbitration’ (2007) 23(2) Arbitration International 327-356, 327-28. See also art. 36(2) of the European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 222, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf, and art.17(9) of the WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, available at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

those who can provide a special perspective or have expertise about the case at hand.¹⁶⁵ Rather, the term also alludes to submissions made by non-parties who have a strong interest in the proceedings.¹⁶⁶

Notably, *amicus curiae* never become an active party to the dispute. They only (generally) make written submissions, observe hearings and/or assist tribunals.¹⁶⁷ Thus, the power to appoint *amicus curiae* is a tool for tribunals that allows them to gather more information and develop a better understanding of the case.¹⁶⁸ From the perspective of non-party stakeholders, it represents an opportunity to have a voice in a decision making process that deals with public law issues.¹⁶⁹

In practice, Schill notes that while tribunals were historically reluctant to accept *amicus* briefs, they have shown greater willingness to do so in the last two decades.¹⁷⁰ This is hardly surprising given the inclusion of rules on *amicus* participation in the UNCITRAL Transparency Rules, the FTC Note, and the ICSID rules (post-2006).¹⁷¹ Moreover, as discussed above, various states have included detailed provisions on *amicus* participation in their model BITs.¹⁷²

Concerns regarding the provision of *amicus* participation however linger. Proponents of adopting the principle of confidentiality on the issue point towards five drawbacks of allowing *amicus* participation:

- 1) *Costs and delay*: One of the reasons parties find ISDS as an attractive dispute resolution system lies in its cost and time effectiveness. Allowing *amicus* participation, however, increases both. For instance, delay and cost are incurred by the parties in responding to *amicus* briefs. Similarly, the

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.; Ruscalla, *supra* note 5, 15.

¹⁶⁷ Fach Gomez, *supra* note 162, 517; Mistelis, *supra* note 1, 225, Eloïse Obadia, 'Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration', (2007) 22(1) ICSID Review - Foreign Investment Law Journal, 349-379, 366-67.

¹⁶⁸ Ibid.

¹⁶⁹ Schill and Djanic, *supra* note 6, 22-23.

¹⁷⁰ Ibid. 24.

¹⁷¹ ICSID Arbitration Rules, *supra* note 54, article 37(2); and UNCITRAL Rules on Transparency, *supra* note 77, article 4.

¹⁷² See Canadian New Model FIPA, *supra* note 18, article 39; and US Model BIT, *supra* note 18, article 28(3).

overall cost and timescale of ISDS would increase to the extent that the tribunal spends time in considering amicus requests and briefs. Some of these delays have been curtailed by imposing page limits (discussed above) and strict time limits for submission. Additionally, the tribunals have the discretion to use the brief if they find it helpful – they are not bound.

- 2) *Disclosure of sensitive information*: Discussed in detail above.
- 3) *Equal protection and procedural autonomy*: Interestingly, investors have raised concerns in certain previous ISDS disputes regarding the possibility that accepting amicus briefs would undermine the rule of equal procedural protection of both parties.¹⁷³ The argument is premised on the perception that amicus curiae briefs are likely to present arguments in support of the host state's case.¹⁷⁴

Moreover, those who view ISDS solely from the lens of the consent theory argue that allowing the submission of amicus briefs operates to limit the procedural autonomy of the parties.¹⁷⁵ Proponents of this position argue that the parties have the right to be the sole source of information that the tribunal considers unless the parties themselves agree otherwise. Holding otherwise, proponents argue, would be tantamount to the imposition of an extra burden on the parties.¹⁷⁶

Indeed, allowing amicus participation imposes the burden to respond to amicus briefs on the parties. While it is true that the parties are not ‘legally’ obligated to respond, it is seldom in their interest to leave incorrect facts

¹⁷³ Methanex, supra note 32, Decision on Amici Curiae, ¶ 50.

¹⁷⁴ Magraw and Amerasinghe, supra note 93, 355.

¹⁷⁵ Banifatemi, supra note 92, 325; Karton supra note 13, 467; Egonu, supra note 3, 487; Magraw and Amerasinghe, supra note note 93, 355; Eugenia Levine, ‘Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third Party Participation’ (2011) 29(1) Berkeley Journal of International Law 200-224, 206; and Jorge E. Viñuales, ‘Amicus Intervention in Investor-State Arbitration’, (2007) 61(4) Dispute Resolution Journal 72-81; Brigitte Stem, ‘The Intervention of Private Entities and State as “Friends of the Court” in WTO Dispute Settlement Proceedings in Patrick F.J. Macrory et al, *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2005) 1427, 1456.

¹⁷⁶ Ibid.

and arguments un-rebutted.¹⁷⁷ While concerns regarding the abuse of amicus participation are accepted,¹⁷⁸ this thesis disagrees with concerns regarding the limitation of the parties alleged ‘inherent right’ to control the information presented to the tribunal. In fact, it is asserted that the identification of relevant and legitimate facts and arguments (otherwise unknown to the tribunal) is nothing but beneficial to ISDS. In any case, identifying relevant facts and providing arguments do not affect the ‘pre-planned’ tactics of the investor. The possibility of responding to amicus briefs that contain additional facts and arguments than what the investor would wish to submit to the tribunal is no different from anticipating the opposing party's submissions or questions from the tribunal.

- 4) *Impossible to grant uniform access*: Unlike concerns mentioned above that are primarily based on considerations of confidentiality, this is more of a criticism of amicus participation itself. It is argued that considerable expenses incurred in amicus participation limit access of non-party stakeholders belonging to developing states, who may, therefore, remain unrepresented in the process. Such concerns, however, are increasingly being recognized and mechanisms are being developed to remedy the issue. For instance, developing states’ NGOs have increasingly begun to collaborate with their counterparts in developed states, especially where the procedural rules of ISDS require the submission of a single brief.¹⁷⁹
- 5) *Conflict of interest*: Proponents of confidentiality argue that while mechanisms have been made to detect conflicts of interests between parties and arbitrators; the same does not stand true for the non-party stakeholder-arbitrator relationship.

While the above considerations do hold merit, they do not justify a complete rejection of transparency. Rather, they constitute the raw data for ascertaining the optimal

¹⁷⁷ Brigitte Stern, ‘The Intervention of Private Entities and State as “Friends of the Court” in WTO Dispute Settlement Proceedings’, in Patrick F.J. Macrory et al., *The World Trade Organization: Legal, Economic and Political Analysis*, (Springer, 2005) 1427-1458, 1456.

¹⁷⁸ Especially considering that amicus curiae are not required to prove the facts they present.

¹⁷⁹ Magraw and Amerasinghe, *supra* note 93, 355.

balance between the extremes of complete transparency and confidentiality. Thus, it is argued that transparency in the form of amicus participation should be provided to the extent that the above concerns can be minimized. This would clearly minimize the disadvantages of providing transparency thereby ensuring that the balance tilts in favour of transparency in a cost-benefit analysis on the issue.

- 1) *Minimizing costs and delays:* Introducing page limits and time scales in the submission of briefs will minimise costs and delays associated with amicus participation. This is far from a novel proposition as such limits have been adopted by ISDS tribunals in the past,¹⁸⁰ usually based on institutional rules. The Interpretative Note on Transparency, for instance, prescribes a 25-page limit to all amicus briefs.¹⁸¹

Another tool already being employed to reduce costs and delays in this regard is the incentivising of strategic collaborations. In *Biwater*, for example, five different NGOs collaborated and submitted one brief.¹⁸² It is argued that requiring non-party stakeholders to submit a single brief limits the number of documents that the tribunal should consider, thereby reducing both costs and delays. Co-extensively, costs incurred by the parties because of considering and responding to amicus briefs would also be limited. Moreover, such collaboration would also operate to limit the inevitable repetition of issues raised or arguments made in briefs, thereby furthering efficiency in this regard.

Moreover, it is argued that costs and delays associated with amicus participation can also be reduced if non-party stakeholders are provided access to documents and information in a timely manner. Providing information/documents such as primary orders or pleadings would increase the efficiency of non-party stakeholders given that without such access they would have to dig out information from relatively less reliable sources.¹⁸³

¹⁸⁰ *Biwater*, supra note 50, Procedural Order No.5, ¶ 60; Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission (12 February 2007), (hereinafter Suez, Decision on Five NGOs) ¶ 27.

¹⁸¹ FTC Statement, supra note 31, B.2(b), B.3(b).

¹⁸² *Biwater*, supra note 50, Procedural Order No.5, ¶ 60.

¹⁸³ Magraw, Plagakis, and Schifano, supra note 1, 17.

Indeed such research could be very expensive and time-consuming, thereby increasing the cost incurred by those acting as amicus and increasing the overall timeframe of the proceedings. As discussed above, while information dissemination carries a cost, the same has been greatly minimized by the advent of the internet.

- 2) *Granting uniform access:* Requiring third parties to submit a single brief also tackles the issue of the lack of uniform access. As discussed above, the argument of non-uniform access is premised on the fact that amicus participation carries costs for those submitting amicus briefs, thus non-party stakeholders belonging to the third world may be unable to participate.

It is asserted that incentivising/requiring the submission of a single brief also allows non-party stakeholders to spread the cost, thereby minimizing the cost incurred by each individual stakeholder. There is, however, the possibility of an increase in costs because of transnational communications in instances where the collaborating non-party stakeholders belong to different states. Moreover, the process of collaborating itself can cause delays, especially in instances where the non-party stakeholders hold different perspectives.

- 3) *Remedying the possibility of a conflict of interests:* Certain institutional rules already require entities seeking to act as amicus to provide information about themselves. Such information can be used to ascertain whether there is a potential conflict of interest between potential amicus curiae and the arbitrators. Unfortunately, however, these rules have not been developed for identifying conflicts of interest and therefore are not completely fit for this purpose. It is, therefore, asserted that further refinement of such rules and their inclusion in treaties and institutional rules would go a long way to ensure that only those entities that do not have a potential conflict of interest with the arbitrators are allowed to act as amicus. Indeed, while the appointment of an entity as amicus does not elevate it to the position of a party to the dispute, it is asserted that they should be treated as such for

ascertaining conflicts to ensure that the right of the parties to procedural fairness is respected.

- 4) *Protection of confidential information:* While a lot of ink has been spilled in academic commentary regarding the risk of inadvertent dissemination of confidential information because of increased transparency, it is asserted that these concerns are greatly exaggerated. There are tried and tested mechanisms in place that minimise such risks. Of these mechanisms, the most widely used and indeed the most efficient is the power given to tribunals under most institutional rules and investment treaties to issue confidentiality orders. Under certain institutional rules such as ICSID, however, the determination of which information is confidential is left to the parties. It is asserted that such a stance greatly diminishes advancements towards transparency. A better approach would be to empower the tribunal in all instances to objectively determine, with the help of the parties, what information is in fact confidential. Once such determination is made, the tribunal could simply redact that information rather than ruling out the dissemination of an entire document. It is therefore completely possible to balance the concerns of confidentiality with the need to provide information to those interested in acting as amicus.

- 5) *Concerns of unfair prejudice:* While it is well established that amicus participation should not “unfairly prejudice any disputing parties”¹⁸⁴ and that each party has the right to ‘equal protection’, the same does not equate to ruling out all briefs simply because of the perception that they generally support the case of the host state.¹⁸⁵ Indeed, NGOs and public interest groups are not the only ones that are allowed to participate, rather the home states of investors and other states that are not a party to the arbitration might also ask for leave to participate in the proceedings.

¹⁸⁴ UNCITRAL Rules on Transparency, supra note 77, Article 4(5); ICSID Arbitration Rules, supra note 54, Article 37.

¹⁸⁵ For instance, Methanex Corp. supra note 32, Decision on Amici Curiae, ¶ 50.

Moreover, to the extent to which arbitrators are experienced and objective they would not accept the submissions made in amicus briefs as granted. Rather the substantive content of every submission would allow tribunals to make an objective determination of whether the submission unfairly prejudices any of the parties. Simply because a submission favours or supports the case of one of the parties does not equate to unfair prejudice. The difference it is asserted hinges on the merits of the submissions themselves. Case law supports this proposition as tribunals do not equate support of one party's case as prejudicial to the other party.¹⁸⁶

However, these submissions might still create an appearance of providing one party with an unfair reinforcement that would affect the balance of the dispute, which undermines the parties' confidence in the system mentioned above.¹⁸⁷ It is argued that these concerns can be minimized by providing procedural safeguards such as limiting instances of abuse of process and allowing parties adequate opportunity to respond to non-party submissions.¹⁸⁸

- 6) *Abuse of process*: The possibility of abuse of process if amicus participation is allowed means that discussions do not end with identifying whether non-parties should participate or not. Rather, it continues with the question of the extent to which they can participate.¹⁸⁹ It is argued that concerns surrounding the potential abuse of process can be remedied if tribunals adopt the following standards for amicus participation.
 - a) The standard of proximity of interest: According to this, the non-party stakeholder applying to act as amicus should have a significant interest in the dispute, or the public nature of the dispute should allow for such

¹⁸⁶ Ibid. Methanex, ¶¶ 36-37, Biwater, supra note 50, Procedural Order No. 5, ¶¶ 59-60; UPS, supra note 1, ¶ 69.

¹⁸⁷ Bennaim-Selvi, supra note 3, 805.

¹⁸⁸ UNCITRAL Rules on Transparency, supra note 77, article 4(5); ICSID Arbitration Rules, supra note 54, rule 37.

¹⁸⁹ Knahr, supra note 164, 327-28.

participation.¹⁹⁰ Various institutional rules have adopted this standard, though the fragmented nature of ISDS has limited uniformity in this regard. For example, while the ICSID Arbitration Rules and the UNCITRAL Rules include personal interest as a requirement, they do not mention general public interest.¹⁹¹ The Interpretative Note on Transparency, on the other hand, includes both personal and public interest.¹⁹² In any case, it is asserted that tribunals should only accept amicus briefs from stakeholders that have either public or personal interest in the proceeding.

Public interest as used here is two-fold.¹⁹³ First, public interest is the interest of those who will be affected by the award, for example, the citizens of the host state. The second type refers to the interest of humanity as a whole, such as environment and human rights issues.¹⁹⁴

Personal interest, in contradistinction, refers to those stakeholders that could potentially be affected by the award. Examples of those with such an interest include investors engaged in similar businesses in the host state and, other states that may be affected by interpretations of IIL standards. Unfortunately, current rules that provide for the requirement of personal interest are unclear concerning the degree of such interest. The ICSID Arbitration Rules and the UNCITRAL Rules, for instance, require the stakeholder to have a 'significant' interest in the proceedings.¹⁹⁵ While the use of the vague term 'significant' has created problems of uniform interpretation, a trend towards a liberal interpretation seems to be developing. In *Glamis Gold and UPS*, for instance, it was held that any interest that is affected (directly or

¹⁹⁰ Schliemann, *supra* note 1, 370; Egonu, *supra* note 3, 483; and Mistelis, *supra* note 1, 231; VanDuzer, *supra* note 20, 713; Obadia, *supra* note 167, 361-64, see also the Interpretative Note on Transparency, *supra* note 31, ¶¶ A.3, B.6, and B.7; Methanex, *supra* note 32, Suez, Decision on Five NGOs, *supra* note 180; Biwater, *supra* note 50, Procedural Order No.5; *Glamis Gold*, *supra* note 76.

¹⁹¹ ICSID Arbitration Rules, *supra* note 54, rule 37(2); and UNCITRAL Rules on Transparency, *supra* note 77, article 4(2)(d).

¹⁹² Interpretative Note on Transparency, *supra* note 31, Section B(6)(c) (d).

¹⁹³ See, for example, Biwater, *supra* note 50; ¶¶ 51-53; Methanex, *supra* note 32, ¶ 49.

¹⁹⁴ Schliemann, *supra* note 1, 373; and Choudhury, *supra* note 128, 791.

¹⁹⁵ ICSID Arbitration Rules, *supra* note 54, rule 37(2); and UNCITRAL Rules on Transparency, *supra* note 77, article 4.

indirectly) because of the dispute in question should be seen as an adequate personal interest.¹⁹⁶

- b) Scope of participation: Furthermore, only those amicus submissions that provide a different perspective, knowledge, or insight than what has been provided by parties should be accepted. Indeed, there is little utility in submissions that do not provide additional information to tribunals thereby helping them resolve some factual or legal issues.¹⁹⁷ This standard is especially valuable, considering that tribunals are procedurally restricted to the information provided by the parties.

4.3.3.3. *Publications of Awards*

Confidentiality concerns on the issue of publication of awards sit on two basic grounds. First, the requirement for confidentiality is asserted based on the need to protect specific interests of the parties. Proponents of confidentiality, in this regard, usually argue that public access to awards should be completely barred, because it is not always possible to ascertain *ex-ante* whether the interests of the parties would be negatively impacted because of disclosure.¹⁹⁸

The second justification for confidentiality at this stage focusses upon the need to preserve the private dispute settlement nature of the ISDS mechanism. Proponents of this view argue that being purely a private dispute settlement mechanism, ISDS has no business in the development of legal norms.¹⁹⁹ Allowing the publication of awards, they argue, would be tantamount to introducing in ISDS a “*tension between the need for justice in the specific case and the need for certainty and coherence in the law more broadly.*”²⁰⁰ Moreover, given that tribunals tend to consider previous awards –

¹⁹⁶ Ibid. Glamis Gold, *supra* note 76, and UPS *supra* note 32. For another example see *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011.

¹⁹⁷ Ibid., and Andrew Newcombe and Axelle Lemaire, ‘Should Amici Curiae Participate in Investment Treaty Arbitrations?’, (2001) 5(1)1 *Vindobona Journal of International Commercial Law and Arbitration*, 22-40, 36-37.

¹⁹⁸ See Ortino, ‘Transparency of Investment Awards’, *supra* note 9, 132; Buys *supra* note 3, 123; Schreuer and et al., *supra* note 57, 826.

¹⁹⁹ Blackaby, *supra* note 1, 5.

²⁰⁰ Ortino, ‘Transparency of Investment Awards’, *supra* note 9, 133.

requiring publication of awards would risk reference to incorrect awards – which would undermine the system as a whole.²⁰¹ Similarly, there are concerns that even selective publication of awards would undermine the system because such publication would only provide a pin-hole view of the larger corpus of philosophies discussed in all awards (including unpublished ones).²⁰²

It is asserted that the concerns above are based upon a complete rejection or ignorance of the nature of ISDS as a dispute settlement mechanism that has implications for public policy. In addition, it only strengthens the legitimacy crisis as it operates to exclude the concerns of third-party stakeholders. Adopting such an approach, therefore, is tantamount to signing the death warrant of the system as a whole. Moreover, such an approach completely ignores that transparency indeed promotes certain interest of the parties to the arbitration as well.

It is asserted that party interests and the interests of the system (systemic interests) are not completely mutually exclusive on the issue of providing transparency in the publication of awards. As discussed in part 2 of this chapter, providing transparency in ISDS awards ensures clarity and predictability. Indeed, clarity and predictability are also in the interests of the parties, thereby alleviating legitimacy concerns, to a degree, from the perspective of all stakeholders.²⁰³ Moreover, dissemination of awards promotes consistency in ISDS thereby enabling future parties to comply with the requirements of the law.²⁰⁴ Ortino and Schreuer also argue that “*secrecy surrounding the outcome of arbitration is likely to arouse suspicion rather than instil confidence in the host government as well as in the investor.*”²⁰⁵

Moreover, permitting transparency in arbitral awards does not affect various party interests such as minimizing costs and delays. As publication of awards occurs once the arbitral process has ended, there cannot be an issue of delay. Costs, on the contrary, as maintained throughout this chapter, have become an unjustifiable concern to the

²⁰¹ Ortino, ‘Transparency of Investment Awards’, supra note 9, 132; Buys supra note 3, 123; Schreuer and et al., supra note 57, 826.

²⁰² Ibid.

²⁰³ Delaney and Magraw, Procedural Transparency, 761-62.

²⁰⁴ Ibid.; Blackaby, supra note 1, 7; Schreuer, supra note 828; Ortino, supra note 9, 133; Egonu, supra note 3.

²⁰⁵ Ibid. Schreuer, 827; and Ortino, 133.

extent that transparency can be effectuated using the internet, which it definitely can in case of publication of awards.

It is, therefore, asserted that the main conflict between party and systemic interests on the issue lies primarily in the conflict between the interests of the parties to protect confidential information. Indeed, parties have a strong interest in keeping awards confidential if they contain sensitive business information, or even if the tribunal holds that the party acted improperly. It is, however, difficult to see how the publication of such information would operate to further the interests of non-party stakeholders. It is, therefore, submitted that in this regard, confidentiality concerns should take/be given primacy over the demands of transparency.

Dissemination of those parts of the awards that interpret IIL standards and are of general application, on the other hand, would seldom, if ever, have an impact on the legitimate confidentiality concerns of the parties. It is, therefore, asserted that vis-à-vis such parts of the awards, the interests of consistency, transparency and coherence outweigh the confidentiality concerns of the parties. The issue therefore is, how should such transparency be effectuated?

It is asserted that parties should not have the final say in what constitutes confidential information. As argued in the section on dissemination of information presented during the proceedings, determination on what constitutes confidential information should be left to the tribunals. The parties should indeed be given the opportunity to present arguments in this regard with a view to aiding the tribunal in identifying confidential information. Once the tribunal has differentiated between confidential information and those parts of the award that deal with issues of general application, the latter should be disseminated to the public. Such an approach it is argued would cater for both the legitimate interests of the parties and other stakeholders, thereby minimising legitimacy concerns surrounding the ISDS system.

Conclusion

ISDS has historically been characterised as a confidential dispute settlement mechanism primarily because most institutional rules and investment treaties did not contain provisions on the degree of transparency that should be attached to the proceedings arising from their breach. The last few decades, however, has seen the ISDS system evolving to make provisions for greater transparency. Indeed, the process of making investment treaties has become increasingly transparent in the developed world, and even in various developing democratic countries. Similarly, institutional rules that have specifically been tailored for ISDS (as opposed to arbitration in general) have made significant leaps in the direction of greater transparency. For example, amendments to the ICSID, and the NAFTA Interpretative Note on Transparency allow arbitral awards to become more transparent. Given the responsiveness of such institutional rules to the need of transparency, the best bet may well be to further provide transparency in ISDS in the future.²⁰⁶

Underlying this evolution is the recognition that ISDS disputes involve public interest issues. Public interest in ISDS can rise from several sources. For instance, since ISDS proceedings define whether the regulatory and administrative actions of states are lawful or not, they naturally affect the rights of citizens and have an impact on other stakeholders.²⁰⁷ Moreover, although arbitral awards do not have binding precedential value, they still have a significant impact on the evolution of IIL, thereby affecting the interests of the epistemic community of ISDS.²⁰⁸ On these grounds, it is argued that public participation is a necessary step to correct the system's perceived legitimacy crisis.²⁰⁹

Transparency issue in ISDS does not, however, end with providing greater transparency through treaty provisions and institutional rules. On the contrary, it continues with the debate on the extent to which arbitral proceedings, documents and

²⁰⁶ Maupin, *supra* note 60, 21. See also ICSID Arbitration Rules, *supra* note 54, Rule 37; ICSID Arbitration (Additional Facility) Rules, *supra* note 33, Rule 41(3); ICSID Secretariat, Discussion Paper, *supra* note 155.

²⁰⁷ Menaker, *supra* note 4, 129; Dimsey, *supra* note 10, 38; Magraw and Amerasinghe, *supra* note 93, 339; and Meg Kinnear, *supra* note 14.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

awards are/ought to be comprehensible to the readers. Unfortunately, no determinative study exists on the impact of transparency on non-party stakeholder education and understanding.²¹⁰ Borrowing from studies on the impact of transparent domestic judicial systems on non-party understanding, however, indicates that only a handful of non-party stakeholders are likely to acquire knowledge and understanding of the system through direct observation of court proceedings and access to documents submitted to courts.

Indeed the provision of transparency is of little value if arbitral decisions and related documents are not comprehensible to the nonprofessional reader. Concerns here include issues of language, the existence of an intelligible and detailed guide such as a table of contents, and the reasoning that underlies the tribunals' decision.

While certain investment rules that recognise these concerns permit making proceedings and documents comprehensible, the issue is far from being resolved. For instance, while the texts of both the ICSID Convention and UNCITRAL Arbitration Rules²¹¹ require tribunals to provide reasons upon which their award is based, they do not explicitly require the reasoning to be clear, coherent, accurate and logical. It is, however, comforting to find that the academic community has identified this concern and the majority of published commentaries on the issue interpret the provisions to include the requirements of consistency, coherence and clarity.²¹²

Moreover, the fragmented nature of ISDS acts as a significant barrier to the possibility of adopting the same standards of transparency across the board. The solution, it is asserted, lies in the recognition and balancing of the legitimacy concerns of the various stakeholder. Indeed, demands for complete transparency or confidentiality would do little more than erode the perceived legitimacy of the system. A better approach, therefore, lies in working towards a common ground through proactive debate. Innovative techniques to foster such debate, have already been adopted by the practices of various developed and certain developing democratic states in the formation of their model BITs. Indeed such innovations would give birth to their own critics. This,

²¹⁰ Ortino, *supra* note 9.

²¹¹ ICSID Convention, Article 48(3); and UNCITRAL Arbitration Rules, article 34(3).

²¹² Ortino, *supra* note 9, 137; Schreuer and et al., *supra* note 4, 824.

however, is not cogent enough to avoid them, for the experiences of the NAFTA, the ICSID and model BITs in promoting transparency have demonstrated that such innovative practices gain acceptance with time.

CHAPTER 5 – Issue of Inconsistency and Parallel Proceedings in ISDS

As demonstrated by the previous two chapters, the concern of inconsistency gives rise to and is in turn itself fuelled by the other two legitimacy concerns. Thus, inconsistency in ISDS is a systemic problem that must be overcome to ensure the longevity of the system of ISDS. The reason for discussing consistency after the other two legitimacy values lies in the need to underscore the issues systemic nature. Moreover, as the two preceding chapters have discussed how inconsistent interpretations of the substantive standards of IIL undermine the systems legitimacy, placing this chapter in the end allows the reader to have gained an in-depth understanding of the issues caused by substantive inconsistency before turning to the concerns of procedural inconsistency. This structure also in-turn defines the subject-matter of this chapter namely procedural inconsistency: the issue of parallel proceeding in ISDS.

The originality of this chapter lies in its approach to the identification of potentially the most effective remedies to the issue of parallel proceedings without requiring a fundamental reform of the system of ISDS as it exists today.

Introduction

“Consistency is intuitively perceived to be something valuable, a banner under which we can gather and forget our differences”¹

One of the main grounds upon which the existence and structure of international rules on investment draw their legitimacy is the provision of security and predictability to the parties. As the concept of consistency simply requires uniform interpretation and application of legal rules in similar situations, it constitutes a factor that ensures, or where there is lack of it undermines, predictability.² This is so as consistency provides

¹ Thomas Schultz, 'Against Consistency in Investment Arbitration' in Z. Douglas, J. Pauwelyn, and J. E. Viñuales (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP, 2014), 297.

² David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (2012) OECD Working Papers on International Investment (2012/03, Paris: OECD Publishing) 58.

parties with the ability to gauge (ex-ante) the probability of a successful outcome based on their rights and obligations under the governing law (predictability).

Given the advantages of consistency, it is rather disheartening that one of the major legitimacy concerns surrounding the current system of ISDS is based upon the perception that it suffers from inconsistency and incoherency.³ A lot of ink has been spilled by academic commentators on how this inconsistency continues to undermine the legitimacy of the system by creating uncertainty, unpredictability, and undercutting the legitimate expectations of states and investors alike.⁴

On the other hand, various commentators argue that the issue of inconsistency and its impact is exaggerated in academic literature.⁵ They argue that the issue would be resolved naturally, as through the passage of time tribunals will identify and agree on a list of arbitral awards that contain the correct interpretation of the law.⁶ Paulsson for instance states that “after a sustained flurry of decisions over the past decade we are already likely to see a second wave, or rather a second generation, of investment awards. Its principal characteristics will be the consolidation of dominant trends; the continued isolation of perplexing outliers among awards; and thus, quite simply, more consistent awards.”⁷

While there are instances where arbitral tribunals have taken previous arbitral awards into account, a review of available awards shows that such consideration of previous awards constitutes an exception to the de facto rule of operating in isolation. As a result, arbitral awards do not reveal signs of a trend of convergence in interpretation which Borchard, Paulsson and Gill assert to be inevitable.⁸ In any case, the practise of

³ Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 8.

⁴ Ibid.; Susan D. Franck, (2005) supra note 1, 1558; Jan Paulsson, ‘Avoiding Unintended Consequences’ in Karl P. Sauvant (eds) *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008) 253; and Judith Gill, ‘Inconsistent Decisions: An Issue to be Addressed or a Fact of Life’ in F. Ortino et al. (eds), *Investment Treaty Law: Current Issues Volume 1* (British Institute of International and Comparative Law 2006) 27.

⁵ Edwin Borchard, ‘The Minimum International Standard in the Protection of Aliens’ (1939) 33 *American Society of International Law Proceedings*; and Irene M. ‘The Costs of Consistency: Precedent in Investment Treaty Arbitration,’ (2013) 51 *Columbia Journal of Transnational Law* 418-478.

⁶ Paulsson, supra note 4, 253; and Gill, supra note 4, 27.

⁷ Ibid. Paulsson, 253.

⁸ Borchard, supra note 5.

not publicly publishing awards so as to preserve the confidentiality of the proceedings is itself a major barrier in the ability of ‘time’ to bring about such a convergence.⁹

Other proponents of the view that the issue of inconsistency and its impact is exaggerated, question whether the advantages associated with the pursuit of consistency actually outweigh its costs. According to Irene M. Ten Cate for instance, the pursuit of consistency comes at a price: giving weight to consistency in decision-making inevitably leads to a decrease in accuracy, sincerity and transparency.¹⁰ She argues that international investment law is better served by abandoning efforts to implement a consistency norm in favour of a more immediate focus on the quality of decision-making and the merits of awards. Rather than demanding greater coherence, we should ask that investment tribunals reach what they believe is the correct decision in the case before them, in accordance with their independent assessment of what the law requires.¹¹ While this thesis does agree with this view to an extent, it does not agree with the premise that sensitivity to the context and consistency in interpretation are always mutually exclusive goals. This will be discussed in greater detail below.

5.1. Degree of Consistency and Role of Arbitrators

‘Any system where diametrically opposed decisions can legally coexist cannot last long. It shocks the sense of rule of law or fairness.’¹²

While consistency is an important factor in the evaluation of the perceived legitimacy of any system of adjudication, it is necessary to recognise that all legal systems have various legal issues that remain unresolved for extended periods of time. Moreover, working through challenges to accepted thinking through litigation are part of well-functioning systems. Consistency is thus by nature a question of degree – a certain

⁹ Not all awards are published. Cheng, Tai-Heng, ‘Precedent and Control in Investment Treaty Arbitration’ 30 Fordham International Law Journal, 1014.

¹⁰ Ten Cate, supra note 5.

¹¹ Ibid.

¹² Nigel Blackaby, of Freshfields Bruckhaus Deringer, quoted in Michael D. Goldhaber “Wanted: A World Investment Court” (2004) 3(1) Transnational Dispute Management, 2.

amount of inconsistency may need to be tolerated as the system works out its approach to issues.

Moreover, consistency can only be evaluated over time. An undue emphasis on requiring consistency with the first decisions addressing a problem may not be desirable. When a legal system is confronted with a new problem in the context of disputes, it may take some time for case law to develop. In domestic systems, higher appellate courts that can choose their cases often wait until an interpretive issue has been addressed by a number of intermediate appellate courts before attempting to resolve it.¹³ In a system without an appellate structure, it may similarly take some time before a consensus on a particular approach is reached. The problem does however become acute when inconsistent decisions accumulate over time and there is no mechanism to resolve the issue in a definitive manner.

The question therefore is, what is the acceptable degree of *de facto* tolerance for inconsistency? This thesis argues that the degree of acceptable tolerance depends on the costs of wrong judgements, the need to work through legal issues and the costs of obtaining consistency. It is however, asserted that since ISDS frequently involves a review of government measures on issues that have an impact on the public such as anti-tobacco policies or environmental policies - Inconsistent approaches to the evaluation of such policies raise serious concerns for society at large. Therefore, the threshold for the acceptable tolerance of inconsistency in such instances is very low.

In any case, given the fragmented nature of ISDS and the resulting lack of a regulatory body, there is no legal obligation on the part of arbitrators to address inconsistency in rulings. Certain academics however argue that arbitrators have a moral obligation to ensure a uniform evolution of the law through the consistent interpretation and implementation of investment treaties.¹⁴ The basis of the moral obligation, as argued

¹³ Thomas W. Wälde, 'Improving the Mechanisms for Treaty Negotiation and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy' (2009) in *Yearbook on International Investment Law & Policy* 505-585, 506.

¹⁴ Gabrielle Kaufmann-Kohler, 'Is Consistency a Myth?', in Yasi Banifatemi and Emmanuel Gaillard (eds.) *Precedent in International Arbitration* (IAI Series on International Arbitration No. 5, Juris Publishing, 2008) (hereinafter Kaufmann-Kohler, *Is Consistency a Myth?*); and Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream Necessity or Excuse?' *The Freshfields Lectures* (2007) 23(3) *Arbitration International*, (hereinafter Kaufmann-Kohler, *Arbitral Precedent*) 357-378.

by the proponents of this view, is founded on the fact that role of the interpreter vis-à-vis the interpretation of treaty standards, carries greater importance in areas where the law is relatively less developed.¹⁵ Indeed clear rules can hardly ever emerge without consistency in awards and as the fragmented system of ISDS places the arbitrator alone in the position to ensure the same- seeking to impose (and justify) a moral obligation on arbitrators does seem attractive. However, as there is no scope of holding arbitrators accountable under such a moral obligation, this thesis is sceptical of it making much headway towards the goal of consistency.

Reisman on the other hand propounds a far more practically justifiable view. He argues that the only duty of arbitrators in this regard is to explain their reasoning for not following the jurisprudence constant.¹⁶ It is clear that consistency is only desirable if the awards of previous tribunals are correct, and not otherwise.¹⁷ Indeed, imposing the obligation on arbitrators to decide strictly in accordance with previous awards would undermine their ability to reach the correct decision in certain instances. However, giving them the flexibility to decide the case before them in complete isolation from previous awards would be hazardous for the system of IIL as such an approach would beget more inconsistency in interpretation.

While, it would be against the pursuit of justice to ignore the nuances of each case in favour of a formulistic application of rigid rules- this thesis does not believe that consistency and sensitivity to context of the text are necessarily mutually exclusive. In fact, it is argued that tribunals should take notice of previous awards on similar issues while retaining the power to depart from them where justified by the context. In instances where tribunals depart from previous interpretations however, in the interest

¹⁵ Gabrielle Kaufmann-Kohler, 'Is Consistency a Myth?', in Yasi Banifatemi and Emmanuel Gaillard (eds.) *Precedent in International Arbitration* (IAI Series on International Arbitration No. 5, Juris Publishing, 2008) (hereinafter Kaufmann-Kohler, *Is Consistency a Myth?*); and Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream Necessity or Excuse?' *The Freshfields Lectures* (2007) 23(3) *Arbitration International*, (hereinafter Kaufmann-Kohler, *Arbitral Precedent*) 357-378.

¹⁶ This duty to demonstrate why jurisprudence constante should not be followed is called as persuasive or argumentative burden on the arbitrator, Michael Reisman, "'Case Specific Mandates' versus 'Systemic Implications': How Should Investment Tribunals Decide" (2013) *The Freshfields Arbitration Lectures* 29(2) *Arbitration International*, 131-152; see also Stephen Schill, 'From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom' (2011) available at http://www.biccl.org/files/5630_stephan_schill.pdf, (last accessed Jan. 27th 2017).

¹⁷ Thomas Schultz, 'Against Consistency in Investment Arbitration' in Z. Douglas, J. Pauwelyn, and J. E. Viñuales (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP, 2014), 314-15.

of legal certainty, tribunals should provide reasons for doing so. In any case the impact of inconsistency on the perception of the legitimacy of the system of ISDS cannot be ignored.

5.2. Factors that Lead to the ‘Crisis of Inconsistency’

5.2.1. Lack of a Coherent System

The system of ISDS in its current form is not based on a formally recognized hierarchical structure amongst tribunals. In fact, tribunals are created on a case by case basis and therefore, exist only to settle the dispute before them.¹⁸

As disputes are resolved by a number of ‘independent’ institutional arbitral bodies and ad hoc tribunals, conflicting decisions on the interpretation of treaty provisions and the principles of customary international law are rendered. In other words, investment treaty standards such as ‘fair and equitable treatment’ (FET) and a sovereign's obligation to ‘observe its commitments’ have been interpreted by tribunals divergently. This is partly attributable to the fact that in most cases of inconsistency, different tribunals are interpreting different BITs. However, even in such instances it is difficult to ignore the fact that the provisions under analysis may be similar in their content and the disputes may have similar factual contexts.¹⁹ While the issue could be remedied if tribunals were to give due regards to previous interpretations, the lack of a coherent system makes it extremely difficult to motivate tribunals to do so.²⁰

¹⁸ Christoph Schreuer and Matthew Weiniger, ‘Conversations across Cases: Is there a Doctrine of Precedent in Investment Arbitration?’ (2008) 5(3) *Transnational Dispute Management*.

¹⁹ Susan Franck, *Legitimacy Crisis*, supra note 1, 1523.

²⁰ Certain commentators argue that the notion of stare decisis gives against the very fabric of arbitration which was developed to serve as a mechanism whereby two parties could settle their dispute which in an isolated and private setting. Christian J. Tams, ‘An Appealing Option? The Debate about an ICSID Appellate Structure’ (2006). *Essays in Transnational Economic Law Working Paper No 57*, 37; and

Unpredictability of the law caused by inconsistent interpretations is exacerbated by the weakness, or in most cases the nonexistence, of an accountability mechanism.²¹ In the case of ad hoc tribunals and most institutional ones, there is no appeals system to rectify mistakes. Even the few mechanisms that constitute exceptions to this rule, such as the annulment proceedings under ICSID, operate to provide relief to the parties of a particular arbitration and do not clarify the substantive standards of the law.²²

As the issue of inconsistent interpretations of the substantive standards of IIL has extensively been discussed in previous chapters, this chapter shall focus on inconsistency in interpretation and awards created by parallel proceedings.

5.2.2. Parallel Proceedings

The jurisdiction of an international arbitral tribunal is primarily based upon the nationality of the investor, the definition of the terms ‘investment’ and ‘investor’ and, the determination of whether the grounds for the initiation of an investment claim as contained in the relevant treaty have been satisfied. The sheer breadth of what the second factor constitutes, has become a source of controversy in recent years. In particular, various commentators question whether the extension of treaty protection through a liberal interpretation of the terms ‘investor’ and ‘investment’ are in line with the intentions of the drafters of the instruments.²³

A review of international investment arbitral awards reveals the emergence of a consensus on the adoption of a broad definition of what constitutes an investment and an investor.²⁴ In particular, since CMS v Argentina tribunals have displayed a trend of

Mariel Dimsey, *The Resolution of International Investment Disputes: Challenges and Solutions International Commerce and Arbitration*, (Volume 1, Eleven International Publishing, 2008), 41.

²¹ Thomas Franck, *The Power of Legitimacy Among Nations*, (Oxford University Press, 2010) 61.

²² Ibid.

²³ Paulsson, *supra* note 4, 253; and Gill, *supra* note 4, 27. At the very minimum, the use of treaty provisions with the view of initiating parallel proceeding can never be said to be in line with the intentions of the drafters.

²⁴ See *Société Générale, in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v The Dominican Republic* (2008) Jurisdiction Award of 19 September 2008 (LCIA Case No UN 7927) paras 115-121 available at <http://ita.law.uvic.ca/documents/SGJurisdiction.pdf>; *Noble Energy Inc. and Machala Power CIA LTD v The Republic of Ecuador and Consejo Nacional de Electricidad* (2008) Jurisdiction Award of 5 March

interpretation whereby even minority shareholders who do not have control of the company constitute investors.²⁵ Moreover, most BITs operate to protect indirect 'shareholders' i.e. entities based in a non-party state, who invest through companies established in a state that is a party to the relevant treaty.²⁶

Such a reach of treaty protections becomes problematic when it operates to allow corporate investors to hedge their bets by structuring their transactions in a manner that permits them to benefit from the protections of multiple BITs and access multiple forums. This results in the allowance of the systematic distortion of the probability of success (in the investor's favour).²⁷ Moreover, such a possibility of opportunistic behaviour can even allow investors to engage in behaviour tantamount to harassment of developing or otherwise cash strapped host states. In other words, investors can threaten cash strapped states with the initiation of claims under different BITs and in different forums, with the view of forcing them to give in to their demands.

A natural corollary of the initiation of multiple proceedings in response to the same state measure, concerning the same investment and the same set of facts, is the increase in the probability of the issuance of conflicting awards.²⁸ As discussed above IIL notoriously lacks executive authority. This, in theory, permits different tribunals to

2008 (ICSID ARB/05/12) 77-83 available at <https://www.italaw.com/sites/default/files/case-documents/ita0563.pdf>; Siemens AG v Argentina (2004) Jurisdiction Award of 3 August 2004 (ICSID ARB/02/8) paras 122-144 available at <http://ita.law.uvic.ca/documents/SiemensJurisdiction-English-3August2004.pdf>; Waste Management Inc. v Mexico (2004) Final Award of 30 April 2004 (ICSID ARB(AF)/00/3) paras 77-85 available at <https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf>; Enron Corp and Ponderosa Assets LP v Argentina (2004) Jurisdiction Award of 14 January 2004 (ICSID ARB/01/3) paras 37-57 available at <http://ita.law.uvic.ca/documents/Enron-Jurisdiction.pdf>; Azurix Corp v Argentina (2003) Jurisdiction Award of 8 December 2003 (ICSID ARB/01/12) paras 19-22 and 67-74 available at <http://ita.law.uvic.ca/documents/AzurixJurisdiction.pdf>; see also Sitanimir A. Alexandrov, 'The "Baby Boom" or Treaty-Based Arbitration and the Jurisdiction of ICSID Tribunals: Shareholders as "Investor" and Jurisdiction Ratione Temporis' (2006) 5 *The Law and Practice of International Courts and Tribunals*, 27-34.

²⁵ CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8) (Annulment Decision, September 25, 2007) available at: <https://www.italaw.com/sites/default/files/case-documents/ita0187.pdf>.

²⁶ See note 27.

²⁷ M. Dimsey, *supra* note 23, 74; and Richard Kreindler, 'Parallel Proceedings: a Practitioner's Perspective' in M. Waibel (ed), *The Backlash against Investment Arbitration: Perceptions and Reality (Kluwer 2010)* 131.

²⁸ *Ibid.*, Dimsey, 140; *Ibid.*, Kreindler, 131; and Katia Yannaca-Small, 'Parallel proceedings' in P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) (Hereinafter Yannaca-Small, Parallel Proceedings) 1009.

arrive at different results, which may not necessarily be reconciled with each other, but which may be permitted to stand in isolation and contradiction.

Compare for instance the cases of *CME v. Czech Republic* and *Lauder v. Czech Republic* where in, on similar facts, related parties and similar if not identical legal norms, one tribunal dismissed the claim of Ronald Steven Lauder (an American investor) while the other awarded CME (a Dutch company controlled by Mr Lauder) \$ 270 million plus 10% interest.²⁹

5.2.2.1. *Parallel Proceedings and Inconsistent Awards- Case Study*

5.2.2.1.1. *CME v. Czech Republic and Lauder v. Czech Republic*

In 1992, Mr. Lauder wanted to invest directly in a Czech license-holding television station through his German company.³⁰ The Czech Media Council however wanted Mr. Lauder to invest indirectly through a '*joint venture company*' called CNTS that involved a licence provider (CET 21), a finance and programme provider, an operator (CEDC), and a local bank.³¹ According to the Czech Media Council this scenario was more acceptable to the public and would also be suitable for Mr. Lauder since he could exploit the licence through a 'split ownership structure' between the licence provider and operator.³² However, in 1995 the Media Council initiated proceedings against CNTS on the basis of a newly enacted domestic media legislation, claiming that company had lost its broadcasting licence as a result of its split ownership structure.³³ Moreover, a criminal investigation was initiated against CNTS on the grounds of illegal broadcasting.³⁴ In response, CNTS changed its structure superficially and the

²⁹ Ibid.; Susan Franck, Legitimacy Crisis, supra note 1, 1560, Judith Gill, 'Inconsistent Decisions: An Issue to be Addressed or a Fact of Life' in F Ortino et al (eds), *Investment Treaty Law: Current Issues* (Volume 1, British Institute of International and Comparative Law 2006), *Lauder V Czech Republic*, (Ad Hoc- UNCITRAL Arbitration Rules) Final Award, 3 September 2001 (hereinafter London award) available at: <https://www.italaw.com/sites/default/files/case-documents/ita0451.pdf>, *CME Czech Republic B.V. V Czech Republic*, (Ad Hoc – UNCITRAL Arbitration Rules) Partial Award of 13 September 2001 and IIC 62 (2003) available at: <https://www.italaw.com/sites/default/files/case-documents/ita0178.pdf>, Final Award of 14 March 2003 (Stockholm Award hereafter) available at: <https://www.italaw.com/sites/default/files/case-documents/ita0180.pdf>.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

proceedings were suspended. However, in 1998 and 1999, Dr. Zelezny (the owner of CTE 21) began to acquire programming for CET 21 from sources other than CNTS and Mr. Lauder's profits began to decrease.³⁵ Furthermore, in a private correspondence the Media Council confirmed that the “business relations between the operator of broadcasting and service organizations are built on a nonexclusive basis”, so Dr. Zelezny severed CET 21 from CNTS and started broadcasting through another company.³⁶

In 1999, Mr. Lauder and CME (a company that Mr Lauder controlled) initiated proceedings against Czech Republic separately before different tribunals and under different treaties.³⁷ The tribunals before whom the respective disputes were brought were a London tribunal (considering whether there had been a breach of the US-Czech BIT) and a Stockholm tribunal (considering whether there had been a breach of the Netherlands-Czech BIT). While both tribunals agreed that the actions of the Czech government amounted to discrimination they disagreed on all other essential issues including expropriation, FET, full protection and security, and compliance with minimum obligations under international law.³⁸

The London Tribunal was of the opinion that the only instance of discrimination was the non-provision of a licence to Mr. Lauder and the refusal to allow him to invest directly in 1992. The Stockholm Tribunal however stated that the actions of the Media Council between 1996 and 1999 were discriminatory. Unfortunately, the tribunal did not discuss how it had reached this conclusion.³⁹

On the issue of expropriation, the Stockholm tribunal found that the actions of the Czech government amounted to illegitimate expropriation, while the London tribunal

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid., Susan Franck, Legitimacy Crisis, *supra* note 1; 1563, OECD, International Investment Perspectives (OECD Publishing, 2006) 226-239; Christian J. Tams, ‘An Appealing Option? The Debate about an ICSID Appellate Structure’ (2006). Essays in Transnational Economic Law Working Paper No 57.

³⁹ Ibid.

found otherwise. This was rather surprising since the clauses on expropriation contained in the two BITs were largely identical.⁴⁰

Another difference in the conclusions reached by two tribunals was on the issue of FET- which was similarly astonishing as both treaties framed the principle in similar terms.⁴¹ The London tribunal stated that the actions of the Media Council did not violate the principle of FET because Media Council was only doing its duty to ensure compliance of the Law.⁴² The Stockholm Tribunal however, was of the opinion that the Media Council was intentionally undermining the foreign investment “by evisceration of the arrangements....”⁴³

The tribunals also reached different conclusions on the obligation to provide full protection and security to the investors, even though the standard was phrased in identical terms under both BITs.⁴⁴ The London Tribunal concluded that the Czech Republic did not violate the obligation of providing full protection and security, and

⁴⁰ Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment (US-Czech BIT, Oct. 22, 1991) available at <https://2001-2009.state.gov/documents/organization/43557.pdf>. Accessed at 16th November 2016)

The Art. III(1) of the US-Czech BIT, provides that: “Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (“expropriation”) except: for public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2)”, and

Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (Netherlands-Czech BIT, 1991) available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/968>. (Last accessed on Nov 16, 2016). Art. 5 of the Netherlands-Czech BIT also provides that: “Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with: (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory; (c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in any freely convertible currency accepted by the claimants.”

⁴¹ Article II(2)(a) of the US-Czech BIT provides that: “Investment shall at all times be accorded fair and equitable treatment...” US-Czech BIT, supra note---, and article 3.(1) of the Netherlands-Czech BIT provides that: “Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors” Netherlands-Czech BIT, supra note 41.

⁴² London Award supra note 32, 68.

⁴³ Stockholm Award, supra note 32.

⁴⁴ Article II(2)(a) of the US-Czech BIT provides that: “investment shall enjoy full protection and security...”, US-Czech BIT, supra note---, and article 3(2) provides that: “... each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned”, Netherlands-Czech BIT, supra note 41.

neither the actions of the Media Council nor the change of the Media Law were a danger for Mr. Lauder.⁴⁵ The Stockholm Tribunal on the other hand concluded that the Czech Government had failed to provide full protection and security to Mr. Lauder's investment.⁴⁶

Finally, the tribunals reached opposite conclusion vis-à-vis the Czech Republic's obligation to comply with principles of international law.⁴⁷ While the London tribunal concluded that there was no failure to comply with principles of international law by the Czech Government,⁴⁸ the Stockholm Tribunal concluded that Czech Government failed to treat foreign investors in accordance with standards of international law by undermining the investment intentionally, expropriating the value of that investment, treating the investor unfairly, and failing to provide full protection and security.⁴⁹

5.2.2.2. *Types of Parallel Proceedings*

Parallel ISDS proceedings occur when multiple arbitral proceedings between parties of the same constructive identity⁵⁰ exist (ongoing or completed) which stem from an alleged breach of the same investment law obligation of the state.⁵¹ In this context, parallel proceedings can arise in two distinct situations:

- 1) When the same parties initiate multiple proceedings under the same investment instrument.

⁴⁵ London Award, supra note 32.

⁴⁶ Stockholm Award, supra note 32.

⁴⁷ Article II(2)(a) of the US-Czech BIT provides that: "*investment ... shall in no case be accorded treatment less than that required by international law*", US-Czech BIT, supra note---, and article 3(5) provides that: "*If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement*", Netherland-Czech BIT, supra note 41.

⁴⁸ London Award, supra note 32.

⁴⁹ Stockholm Award, supra note 32.

⁵⁰ The term same constructive identity is used here to refer to "*affiliated entities representing fully or partly congruent economic interests*". See Hanno Wehland, 'The Regulation of Parallel Proceedings in Investor-State Disputes' (2016) 31(3) ICSID Review, 576-596.

⁵¹ Filip De Ly and Audley Sheppard, 'ILA Final Report on Lis Pendens and Arbitration' (2009) 25(1) *Arbitration International* 3-34, 32, and Peter R. Barnett, *Res Judicata, Estoppel, and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law*, (Oxford: Oxford University Press, 2001) 9.

- 2) When the same parties initiate multiple proceedings under different instruments in response to the same state measure affecting the same entity.

Apart from parallel proceedings, inconsistency arises as a result of multiple proceedings which arise when genuinely different parties:

- 3) Initiate multiple proceedings under the same instrument in response to the same state measure affecting the same entity.
- 4) Initiate proceedings under the different instruments in response to the same state measure affecting the same entity.

Since situations 3 and 4 above concern genuinely different parties (not of the same constructive identity) they do not qualify as 'parallel' in the strict sense of the word. However, as they pose the same problems (inconsistency in particular) as those posed by parallel proceedings, this chapter shall analyse both parallel and multiple proceedings.

As a result of word limit constraints and the relevance to the focus of this research, several manifestations of parallel proceedings will not be analysed in this chapter. In particular, instances of vertical parallel proceedings i.e. where the same issue is concurrently brought before an arbitral tribunal and a domestic court will not be analysed. Therefore, this thesis will not discuss the efficacy of mechanisms such as 'fork-in-the-road' clauses. In addition, despite their significance to the topic of parallel proceedings, this chapter does not address the topic of contract vs treaty arbitration claims.

5.2.2.3. Issues caused by Parallel Proceedings

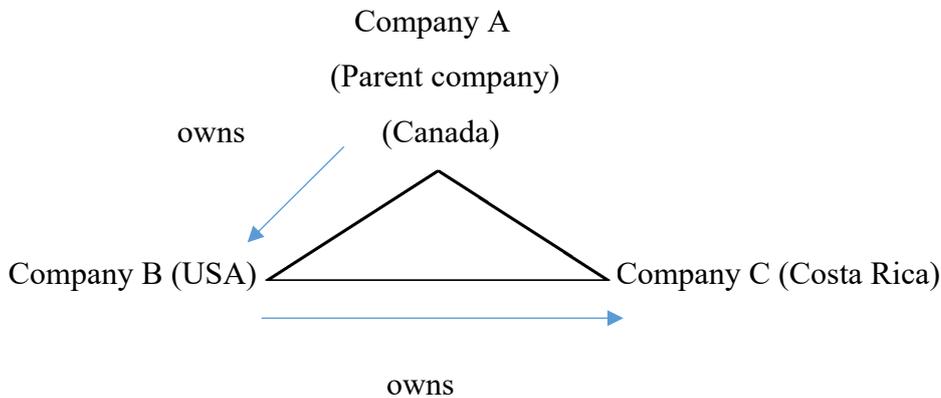
As demonstrated by the Czech Republic cases discussed above, parallel proceedings have the potential to create problems such as conflicting factual and legal determinations, and inconsistent remedies.⁵² Apart from the obvious fact that parallel

⁵² Yannaca-Small, *supra* note 31.

proceedings and their corollary- inconsistent awards undermine legal certainty and procedural fairness, they can be critiqued on two other (yet interrelated) planes.

First, parallel proceedings diminish the economic advantages associated with ISDS. Based on the sum of participant utility, this perspective analyses the impact of parallel proceedings on the certainty of legal norms, transaction costs (associated with dispute settlement) and the ability to access effective legal remedies.⁵³ It is argued that by forcing parties to re-arbitrate disputes (concurrently or otherwise) parallel proceedings greatly increase the cost burden associated with ISDS. As it is the investor as opposed to the state who has the power to initiate arbitral proceedings, developing or otherwise cash strapped states are most vulnerable to the cost increase associated with parallel claims.

Second, parallel proceedings are problematic on an administrative plane as they act as a hindrance in the efficient functioning of the system of ISDS which is based upon a network of investment treaties. Take for instance the possibility of double recovery (a nightmare from the administrative efficiency perspective) that parallel proceedings pose, elaborated in the diagram below.



As company B owns Company C it has the right of a direct investor to initiate a claim under Article 10.28 of the DR-CAFTA.⁵⁴ Company A, the parent company, on the other hand would also have the right of an enterprise investor with an investment under

⁵³ See A. Reinisch, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3 The Law and Practice of International.

⁵⁴ The Dominican Republic - Central America - United States Free Trade Agreement 5 August 2004 available at: <https://fas.org/sgp/crs/row/RL31870.pdf>.

Article 1 of the Canada-Costa Rica FIPA.⁵⁵ In such a case, both A and B could recover under breach of two different treaties in front of different tribunals based on the same state measure with respect to the same company (Company C). Furthermore, as A owns B, A would be the beneficiary of the pecuniary damages received by B.

5.2.2.4. Proposed Solutions to the Issue of Parallel Proceedings

In order to identify the relevant mechanisms applicable in the context of ISDS, it is necessary to keep certain crucial contextual factors in mind. In particular, while the system of ISDS is fragmented there are certain counter balances which are relevant for the management of parallel proceedings. Most important among these counter balances are:

- A) The fact that most investment instruments have a high degree of similarity in both language and content (rights and obligations)⁵⁶ and
- B) Most investment arbitrations have been filed under a small set of procedural rules like ICSID, UNCITRAL, ICC and the Stockholm Chamber of Commerce.⁵⁷

With this context in mind, this chapter will now turn to the identification of the mechanisms aimed at preventing parallel proceedings in the realm of ISDS. To this end, the question of whether guidance can be drawn from the rules of general international law and/or domestic legal frameworks, will be examined. Moreover, this chapter will assess how investment agreements regulate the issue - with particular attention to the process of consolidation of claims.

⁵⁵ Agreement between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments 18 March 1998 (entered into force 29 September 1999) available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/601>.

⁵⁶ For example, Robin F Hansen notes that most BITS and other international investment instruments include 'shares' in their definition of investment. Robin F. Hansen 'Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties.' (2010) 73(4) *The Modern Law Review* 523-550, 535

⁵⁷ World investment report

5.2.2.4.1. Popular legal mechanisms

All national legal regimes recognize the issues raised by parallel proceedings and have developed tools to ensure that they do not occur. The most popular of these tools are the principles of *res judicata*, *lis pendens* and the procedural rules on consolidation of claims.⁵⁸

a) Res judicata

According to the principle of *res judicata*, once a judgement/ award has been issued the parties cannot initiate subsequent proceedings based on the same cause of action and issues.⁵⁹ In other words, the principle of *res judicata* ensures that the subject matter of a decision cannot be re-litigated.⁶⁰ Therefore, the function of *res judicata* is to minimize inconsistent awards through the guarantee of legal security vis-à-vis the finality of an award. Various commentators argue that *res judicata* constitutes a ‘general principle of law recognized by civilized nations and as a result, is a rule of general international law.’⁶¹ Certain commentators have even referred to it as a rule of customary international law.⁶² Others however disagree, for example the Expert Opinion in *CME Czech Republic BV v The Czech Republic* stated “*Under public international law, res judicata has a limited recognition, as equivalent to finality of a decision, but that it does not prevent a different adjudicatory body, absent a specific treaty provision to the contrary, from hearing either in parallel or subsequently a dispute being substantially the same than another one, previously examined by another body, if this body has competence in accordance with its own jurisdictional basis*”.⁶³

⁵⁸ The common law world also relies heavily on the procedural rules of forum non-conveniens and anti-suit/arbitration injunctions to combat the problem of parallel and multiple proceedings. *Smith Kline & French Laboratories Ltd v Bloch* [1983] 2 All ER 72 (Ct App), as cited in Russell J. Weintraub, *International Litigation and Arbitration: Practice and Planning*, (Carolina Academic Press, 2001) 265.

⁵⁹ Jose Magnaye and August Reinisch, ‘Revisiting Res Judicata and Lis Pendens in Investor-State Arbitration’ (2016) 15(2) *The Law & Practice of International Courts and Tribunals*, 264-286.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*; Article 38 of the International Court of Justice Statute for instance lists a general principle of law recognized by civilized nations as a source of international law. Statute of International Court of Justice, Chapter XIV of the United Nations Charter, available at: http://legal.un.org/avl/pdf/ha/sicj/sicj_e.pdf.

⁶² William S. Dodge, ‘National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata under Chapter Eleven of NAFTA’, (2000) 23 *Hastings Int'l & Comp L Rev.* 357.

⁶³ See Giorgio Sacerdoti, ‘Case T 8735-01-77, The Czech Republic v. CME Czech Republic B.V. - Expert Opinion of Professor Sacerdoti’ (2005) 5 *Transnational Dispute Management*, 109.

In any case, *res judicata* as a mechanism to combat parallel proceedings has certain limitations. First, the principle only applies when a judgment/award has already been rendered and therefore has no application in cases of concurrent proceedings.⁶⁴ Moreover, as ISDS hinges primarily upon party consent, international tribunals find it extremely difficult to apply the principle in instances where parallel proceedings are initiated by parties of different identities. In other words, as parties to the current proceedings cannot be said to have consented to the initiation of the previous arbitration, in practise the principle can only apply to proceedings that involve the same parties, relief and cause of action.⁶⁵

b) Lis pendens

Unlike *res judicata*, *lis pendens* is a tool developed to combat the issue of concurrent proceedings. It holds that if a dispute between the same parties based on the same subject matter is being adjudicated before a judicial body, it cannot be adjudicated before another adjudicatory body until the first one concludes its proceedings and issues an award.⁶⁶

Awards wherein ISDS tribunals have mentioned the principle are very scarce and do not offer much discussion on its nature or scope.⁶⁷ Most of these awards simply state that the requirements of the principle have not been met without discussing how the tribunal reached this conclusion.⁶⁸ Other awards simply dismiss the applicability of the principle in the realm of ISDS, again without any discussion.⁶⁹

⁶⁴ Magnaye and Reinisch, supra note 59.

⁶⁵ Yannaca-Small, supra note 31, 1013, and Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2004) 22. There are however severe limitations to these principles. In particular, to be invoked the disputes must involve the same parties and the same cause of action.

⁶⁶ Ibid p.1013, and Ibid. Shany, 20.

⁶⁷ Magnaye and Reinisch, supra note 60.

⁶⁸ see for example S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo, ICSID Case No. ARB/77/2.

⁶⁹ see for instance Southern Pacific Properties (Middle East) Limited (SPP) v. Arab Republic of Egypt, ICSID Case No. ARB/84/3.

Limitations: No Investment tribunal to date has denied jurisdiction on the grounds of *lis pendens*.⁷⁰ In any case, like *res judicata* (and based upon the same grounds) the applicability of *lis pendens* is severely limited in instances where parallel proceedings are initiated by parties of different identities. The water is further muddied by the growing acceptance of the view that even in instances of parallel proceedings initiated by the same party, *lis pendens* has no application so long as each proceeding is initiated under the breach of a different treaty.⁷¹

This view is based upon the fact that the source of law for ISDS tribunals is a multitude of investment agreements and that the jurisdiction of tribunals is not obligatory (as in the case of national courts) but is rather based on consent. As a result, certain commentators argue that the arbitration provisions of different treaties should be viewed as equivalents of contractual arbitration clauses.⁷² Professor Sacerdoti for instance argues that “*it would be contrary to the object and purpose of the BIT at issue to deny an investor on these grounds the right to pursue arbitration in order to seek protection against breaches under the terms of the treaty*”.⁷³

Indeed both, the lack of a singular coherent legal system, and the consensual basis of ISDS act as a great hindrance to recognition of *lis pendens* as a rule of Public International Law (PIL) capable of being referred to as the law applicable to the substance of the dispute. This does not however mean that tribunals have always disregarded the issues posed by concurrent proceedings. Rather in certain though rare instances, they have held that they inherently possess the powers to exercise comity towards tribunals before whom the proceedings have been initiated first-in-time. On these grounds, these tribunals have suspended their proceedings (as opposed to declining jurisdiction).⁷⁴ Moreover, such discretion has also been exercised in the realm of ISDS on the basis of the general principles of international law in instances of abuse of process.⁷⁵ It is submitted that these instances provide evidence of the fact that while bleak, the candle of hope is far from extinguished- there is scope for the

⁷⁰ Douglas D. Reichert, ‘Problems with Parallel and Duplicate Proceedings: The Litispendence Principle and International Arbitration’ (1992) 8(3) *Arbitration International* 237-256, 237.

⁷¹ Magnaye and Reinisch, *supra* note 60, 264-286.

⁷² Sacerdoti, *supra* note 61, 109.

⁷³ *Ibid.*

⁷⁴ This approach was adopted by the SPP tribunal back in 1988. *SPP v. Egypt* *supra* note 65.

⁷⁵ See for instance, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5.

evolution of anti-parallel proceeding mechanisms through a contextual interpretation of investment treaty terms and the rules of general international law.

Since the greatest limitations in the applicability of both the principles discussed above lies in the requirements of strict similarity in the identity of the parties, object and cause of action in the proceedings pending before tribunals- each must be analysed in turn. In particular this thesis agrees with the fact that the principles should never apply in instances where proceedings are initiated by completely different parties. However, as these principles can play a crucial role in the fight against opportunistic parallel proceedings- this thesis will analyse the ‘triple identity approach’ in order to gauge the degree to which these principles may remedy the issue in the context of ISDS.

1) Identity of Parties

While tribunals have adopted a broad interpretation of what constitutes an investor - they have almost always interpreted the condition of ‘same parties’ very narrowly. In particular they interpreted the condition to require that the parties be identical in all respects.⁷⁶

Given the fact that most BITs include ‘shares’ in the definition of an investment and investor, but do not provide guidance on the quantum of shareholding required⁷⁷- a narrow interpretation of the identity criterion allows certain corporation/investment structures access to a range of investor nationalities.⁷⁸ This in turn increases the potential of parallel proceedings as investors have access to protection under multiple BITs and other investment instruments with regards to the same state measure.

Professor Sacerdoti’s expert opinion in the *CME v Czech republic*⁷⁹ best captures this trend of narrow interpretation on the matter. He argued that theories related to ‘piercing the corporate veil’ have only been adopted when “some additional factual element concerning the relationship at issue has also been shown, such as fraud on part of the

⁷⁶ See for example *Benvenuti & Bonfant v. Congo*, supra note 64.

⁷⁷ John Savage, ‘Investment Treaty Arbitration and Asia: Review of Developments in 2005 and 2006’ (2007) 3(1) *Asian International Arbitration Journal*, 1-79.

⁷⁸ Most states have Investment treaties in force with multiple states. Hansen, supra note 56, 542.

⁷⁹ Sacerdoti, supra note 61.

parent company to avoid being bound by the contract that it made the subsidiary sign; intervening in the negotiations of the deal; taking advantage of the contract ...”⁸⁰.

Unsurprisingly the tribunal in the CME dispute adopted this view and refused to find common identity between Mr Lauder and CME- a company that Mr Lauder himself controlled. This refusal allowed the second proceeding to continue without any influence of the prior award in *Lauder v The Czech Republic*. What was surprising was the tribunal’s conclusion that “only in exceptional cases, in particular in competition law, have tribunals or law courts accepted a concept of a ‘single economic entity’, which allows discounting of the separate legal existences of the shareholder and the company, mostly, to allow the joining of a parent of a subsidiary to an arbitration.”⁸¹

This is patently untrue as certain ISDS tribunals have departed from the narrow interpretation in favour of one that looks at the underlying economic reality for jurisdictional purposes.⁸² For example, in the cases of *Amco v Indonesia*⁸³ and *Klockner v Cameroon*⁸⁴, the ICSID tribunals adopted an approach that looks at the underlying economic reality on the issue of ‘economic unity’ vs ‘separate legal personality’. It is therefore argued that if tribunals are willing to pierce veils to facilitate investment treaty claims, there seems to be little justification for refusing to do so for the purposes of *lis pendens* and *res judicata*.

Companies in a corporate group connected through a common control structure must not be allowed the possibility to abuse process by re-litigating the same dispute through the invocation of different nationalities. It is therefore argued that the corporate veil must be pierced and the actual control of a corporate claimant must be taken into account in order to minimize parallel proceedings.⁸⁵ The fragmented nature of ISDS and the consensual nature of arbitration however, leave little room for

⁸⁰ This view was adopted by the tribunal see *CME v. The Czech Republic* case, *supra* note 32.

⁸¹ *Ibid.*

⁸² This has been done to facilitate investment treaty claims.

⁸³ *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1.

⁸⁴ *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2.

⁸⁵ The arguments for and against piercing corporate veils generally, at domestic and international law, comprise a wealth of law and literature and cannot be addressed in depth here.

discretion of arbitrators in the definition of what constitutes an investor. Therefore, an improved definition of corporate nationality can best be effectuated in the realm of IIL only if investment treaties are amended to reflect the same. One method of achieving this goal has already been suggested in academic literature - the incorporation of waiver provisions whereby a parent company waives its rights to pursue claims through subsidiaries that it effectively controls, when a claim is initiated by it.⁸⁶

Moreover, while the dominant trend in BIT construction is to define the nationality of corporate investors by reference to the state of incorporation, some BITs have employed a definition that defines nationality on the basis of the control structure.⁸⁷ It is argued that these instruments can be used as guides by drafters of future investment treaties.

2) Grounds

Both principles apply when the ‘grounds’ (or *causa petendi*) of the two claims are the same. Tribunals however have held that the disputes initiated under different treaties will more likely than not, provide different grounds even if the treaties are similarly worded. For instance in the *Shell Philippines v. Republic of the Philippines* dispute, the tribunal stated that given the possibility of differences in the contexts, objects and purposes and the subsequent conduct of the parties - the application of international law rules on the interpretation of treaties to similar rules contained in different agreements would not always lead to the same result.⁸⁸

Thus, the prevalent test for the determination of whether two or multiple claims have commonality of issues is legal rather than factual. It is however asserted that such a distinction is nothing more than fiction (based on an artificial distinction) that does more damage than good. To state that standards contained in investment treaties are intrinsically independent and autonomous is to ignore the fact that while fragmented,

⁸⁶ Hansen, *supra* note 57, 546-47

⁸⁷ See Art 1(3) of the Agreement between the Government of the Republic of Peru and the Government of the Republic of Venezuela 12 January 1992.

⁸⁸ *Shell Philippines v. Philippines Shell Philippines Exploration B.V. v. Republic of the Philippines* ICSID Case No. ARB/16/22.

IIL is a system.⁸⁹ Like every system, the legitimacy of IIL is in part based upon the extent to which it provides its users (i.e. the parties) with predictability. As a result, IIL standards should, to the extent that they are similarly phrased and incorporated with the same object, be interpreted uniformly.

Thus, it is argued that if commonality of cause of action for the purposes of *res judicata* and *lis pendens* is found when a specific state measure is questioned on the basis of a specific investment law obligation contained in the one treaty, the same reasoning should be applicable in instances of multiple proceedings under different treaties as long as the content/phrasing of the obligation is substantially the same. It is therefore necessary to look at the underlying nature of the dispute rather than its formal classification. In other words, two proceedings based on the same state act, the same factual background and invoking essentially the same legal theory, should not be viewed as completely independent claims only because they are based on different treaties.

3) Commonality of relief

Investment treaty claims almost always seek monetary damages and as such, establishing commonality of relief does not pose any major challenges.

c) Consolidation of claims

Consolidation of claims operates to combine multiple proceeding into one.⁹⁰ Therefore, the greatest limitation of consolidation in combating issues raised by parallel proceedings lies in the fact that it has no role to play when one of the proceeding has been concluded and a judgment/award has been issued. This thesis however, asserts that recognition of the need to incorporate consolidation provisions on the part of treaty drafters would result in consolidation becoming a valuable mechanism in combating issues, inconsistent awards in particular, raised by concurrent proceedings.

⁸⁹ Schill and Djanic, *supra* note 6, 29-55.

⁹⁰ Jorun Baumgartner, *Treaty Shopping in International Investment Law*, (Oxford University Press, 2016).

The basis of this assertion lies in the fact that the authority of tribunal to make a consolidation order hinges primarily upon the invoked treaty's consolidation provisions.⁹¹ As most investment agreements currently in force do not contain consolidation provisions, consolidation of proceedings are rare.⁹² The situation can be improved on three distinct planes. First, drafters of investment agreements can incorporate consolidation provisions in future treaties. To this end, lessons learnt from the few treaties that do contain consolidation provisions, such as NAFTA, can serve as valuable guides.⁹³ This would go a long way in combating the fiasco of inconsistent awards in proceedings based on the same treaty.

Second, while very bleak, there is the possibility of amending institutional procedural rules to allow for consolidation. Though this recommendation may be academic at best, as there is little hope of amending the ICSID convention or the UNCITRAL rules,⁹⁴ procedural rules that allow for consolidation of claims do exist.⁹⁵ The 2010 Arbitration Rules of the Stockholm Chamber of Commerce for instance equip the tribunal with the discretion to consolidate related arbitrations, notably without the consent of all parties.⁹⁶

Finally, where neither the treaty nor the procedural rules allow for consolidation, parties may themselves opt to consolidate proceedings or in the alternative appoint the same arbitrators in similar on-going proceedings. Such an outcome would hinder the possibility of reaching conflicting awards even in instances involving proceedings initiated in response to the same state measure based on breaches of similar obligations contained in different BITs. Even from an economic perspective, consolidation of proceeding has various efficiency related advantages. For instance, consolidation

⁹¹ Consolidation proceedings are therefore based upon party consent.

⁹² Hansen

⁹³ See Article 1126 of the NAFTA

⁹⁴ the ICSID Convention, ICSID Additional Facility Rules, and the UNCITRAL Arbitration Rules do not contain provisions on the consolidation of proceedings or joinder of parties.

⁹⁵ While the ICC Arbitration Rules at Article 4(6) do outline the possibility of appending additional claims to a legal relationship which is already the subject of an ICC Arbitration. Depending on the stage of advancement of the initial arbitration proceedings, under ICC rules additional claimants may be added on request, or according to a specific ruling of the tribunal.

⁹⁶ Art. 11 of the Stockholm Chamber of Commerce Arbitration Rules, 2010, available at: http://www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf.

minimizes transaction costs as parties save on time and other costs related with dispute resolution.

Application of the mechanisms to the three instances of parallel proceedings:

1) Opportunistic behaviour- proceedings initiated by same party

a) Parties of the same constructive identity under same treaties:

As the principle of *res judicata* constitutes a part of the *lex causae* of every investment dispute by virtue of being a recognized principle of international law, it can be applied without hindrance where parallel proceedings are initiated by investors of the same constructive identity⁹⁷.

Lis pendens on the other hand has not received recognition as a general principle of PIL and thus, can only be applied if the relevant treaty or the applicable procedural rules contain provisions to that effect. Both principles are however, unlikely to be of much help in the current climate as arbitrators have barely any authority to rely on for piecing the corporate veil- the requirement of the same identity of parties remains problematic.

Consolidation in such an instance can be of use if both proceedings are ongoing- provided the relevant treaty allows for it. Consolidation of claims would perhaps be the best mechanism available in such an instance as it would ensure that there is no inconsistency in findings of fact and law. There however is one key limitation- an award in the favour of the investors in a consolidated claim would result in double recovery (as both parties are of the same constructive identity) unless tribunals look behind the veil.

In any case, if a party initiates multiple proceedings under the same treaty in response to the same state measure, tribunals should have no difficulty in finding abuse of process.

⁹⁷ Reinisch, *supra* note 54, 44 and 55; and see *SPP v. Egypt*, *supra* note 65.

b) Parties of the same constructive identity under different treaties:

In instance such as the Czech Republic disputes i.e. parallel proceedings initiated under different treaties by investors of common identity in response to the same state measure concerning the same investment- the mechanism of *res judicata* remains available to arbitrators so long as they are willing to look behind the corporate veil. As discussed above, the fact that the proceedings have been initiated under different treaties should not be a barrier in the application of the mechanism so long as the substantive provisions under review are identical. In instances where such similarity does not exist, it cannot be said that the investor is acting opportunistically. However, the risk posed by inconsistent awards, at least to the extent of findings of fact by the tribunals, is ever present.

The application of *lis pendens* is limited in the same manner and for the same reasons as discussed in the preceding section. Consolidation of proceedings is similarly of little hope in instances of multiple proceedings based upon different treaties as well. This is because no investment agreement in force today allows for cross-treaty consolidation. Moreover, because the terms of the consent of each proceeding is distinct, arbitrators have no discretion on the matter. In such an instance consolidation is only possible if parties agree to adjudication by the same tribunal or at the very least coordinate with a view of combating the issues raised by parallel proceedings.⁹⁸

Hoping that an opportunistic party may agree to consolidation or may be willing to appoint the same arbitrators in both proceedings is naive. As such the only exercisable mechanism in the hands of arbitrators faced with such a situation may well be comity and the PIL rules on abuse of process. It is therefore argued that arbitrators should give due regards to the example set by the SPP v Egypt tribunal back in 1985- when the tribunal used its discretion to stay proceedings until an ICC arbitral award concerning the same dispute had been annulled.⁹⁹

⁹⁸ for example, by agreeing to appoint the same arbitrators in both proceedings.

⁹⁹ SPP v. Egypt supra note 65, 112; and Reinisch, supra note 54, 52.

Moreover, it is submitted that mechanisms should be put in place that motivate tribunals to look behind the veil with a view of not allowing opportunistic behaviour. Such an approach is necessary to enable the application of both *lis pendens* and *res judicata* else the fiasco raised by the Czech Republic cases is bound to resurface in the future.

2) Genuinely different yet related parties under the same treaty

Instances of multiple proceedings initiated in response to the same state measure concerning the same investment by genuinely (rather than formally) different parties can arise for example, when both majority and minority shareholders of the parent entity have the same nationality. Hypothetically speaking, if the relevant treaty provides for consolidation of claims then such instances of multiple proceedings are unlikely to pose a threat to the legitimacy of ISDS.

Recourse to the principles of *res judicata* and *lis pendens* is not possible in such instances. As discussed above, the principles of *res judicata* and *lis pendens* are only applicable when the identity of the parties is the same- or in the opinion of this thesis, substantially identical.¹⁰⁰ In any case, a perceived lack of party consent (i.e. later claimants did not consent to the first proceedings), along with a lack of *stare decisis* in international law (and in arbitration) would undermine an arbitrator's ability to make a legal finding of *res judicata* with regard to parallel proceedings concerning parties of different identities.

Provided that the proceedings concern different parties, there is no element of abuse of process based upon opportunistic considerations in the initiation of such proceedings. Therefore, it may be possible that the parties agree to the dispute being adjudicated in a single forum. On the basis of the principle of party autonomy, such an agreement would be legally binding. The parties may in the alternative agree to the appointment of the same arbitrators in both proceedings.

¹⁰⁰ De Ly and Sheppard, *supra* note 10.

Moreover, the absence of a rule on stare decisis does not mean that arbitrators cannot not take previous awards into account. In fact, reference to other rulings as a supplementary means of interpretation is allowed by the Vienna Convention on the Law of Treaties.¹⁰¹

In sum, however, there is an avoidable risk of inconsistent decisions when claims made by different investors, in relation to the same state measure.¹⁰²

3) Genuinely different parties under different treaties

As discussed above the mechanisms of res judicata and lis pendens are not applicable in instances where the parties are not of the same constructive identity. Similarly, the lack of any mechanism allowing for cross treaty consolidation renders the tool (consolidation) useless in such instances. If parties do not choose to manage their different proceedings, arbitrators can only refer to parallel treaty arbitration taking place or concluded elsewhere as a persuasive source relevant to the task of interpretation before them.

5.2.2.5. Concluding Remarks

This part of the thesis has explored the methods where by the problems associated with parallel proceedings can be reduced. In this search, this part concludes that solutions to the issue can be pursued at three planes namely text of treaties, interpretation by arbitrators and the conduct of the parties themselves.

¹⁰¹ Art.31 and Art.32 of the Vienna Convention on the Law of Treaties (VCLT) 23 May 1969. See for instance *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL (formerly Consolidated Canadian Claims v. United States of America). Hansen, supra note 56, 540.

¹⁰² Inconsistencies have arisen in unconsolidated NAFTA disputes initiated against Mexico in relation to high fructose corn syrup measures. See, *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility available at: <https://www.italaw.com/sites/default/files/case-documents/ita0244.pdf>; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, available at: <https://www.italaw.com/sites/default/files/case-documents/ita00370.pdf>; see also *Corn Products International and Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v Mexico* Order of the Consolidation Tribunal of 20 May 2005, Order of Consolidation available at: <https://www.italaw.com/sites/default/files/case-documents/ita0035.pdf>.

1) Text of treaties

On the plane of treaty text- it is argued that investment agreements should be amended to contain:

- a) A definition of investor and in particular corporate nationality, which looks at the context (reality of commonly controlled multinational corporate groups). Thus, it requires investment agreements to define the terms in a manner that motivates tribunals to a move away from the current trend of strict loyalty to legal formalism on the issue of separate legal identity. Moreover, recognizing the fact that consolidation of claims perhaps offers the best method of combating parallel proceedings when claims based on the same treaty are on-going, it is argued that additions should be made to investment agreements so as to allow for it.
- b) Provisions that operate as waiver of claims under other treaties in instances when an investor initiates the first-in-time proceeding. This is necessary since operationalizing cross-treaty consolidation is practically impossible and thus, there is no mechanism in force that combats instances of on-going claims launched by parties of the same constructive identity under different treaties.
- c) Lis pendens provisions that institute a first in time rule applicable to all unconsolidated claims regarding the same state measure made by related through not identical investors.

2) What can arbitrators do?

An arbitral tribunal should proceed to determine its own jurisdiction based on the principle of positive competence-competence, notwithstanding the fact that the issue of jurisdiction might be considered by another tribunal. However, it should have discretion to stay its own proceedings in appropriate circumstances.¹⁰³

¹⁰³ It is currently disputed whether international courts and tribunals have any power to suspend their own proceedings absent express authority See See Reinisch, *supra* note 54; Shany, *supra* note 62;

In instances where a party is acting opportunistically by imitating proceeding after a tribunal has rendered an award on the same dispute, the tribunal should look behind the corporate veil while applying the principles of res judicata.

In instances of non-opportunistic concurrent parallel proceedings concerning substantially the same issues, later in time tribunals should give due regards to the need for efficient administration of justice and efficacious coordination. Therefore, arbitral tribunals should exercise comity (a recognized general principle of PIL) and suspend its proceedings. Provided that doing so may attract criticism of those preferring a rigid literal approach to the interpretation of treaty provisions (and with a view to appease them), this thesis argues that such a step should be taken upon request by a party and when there is no material prejudice to the party opposing the request. Moreover, such a step should only be taken there is a likelihood that the outcome of the other proceedings is material to the outcome of the arbitration in question.

3) What Parties can do?

Third, parties themselves may agree to claim consolidation and joinder where possible, seek to appoint common arbitrators in parallel proceedings and avoid treaty-shopping in their pursuit of investment claims. It should however be noted that the possibility of the parties acting in such a manner would only exist in cases where they have not initiated proceedings with an opportunistic objective.

Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals', (1999) 20 Australian Year Book of International Law, 191.

Chapter 6 - Possible Solutions

Introduction

Chapter 2 defined the term ‘legitimacy’ and highlighted the specific illegitimacy concerns that bedevils the ISDS system . It argued that there are three major concerns that have given rise to the legitimacy crisis namely: inconsistency, curtailment of the regulatory autonomy of host states and the tension between principles of transparency and confidentiality. Subsequent chapters analysed each of these concerns in detail by focusing on the text of investment treaties, arbitral practice and scholarly writings. Each chapter concluded that while the legitimacy crisis can to an extent be resolved by certain specific amendments to investment agreements and institutional rules, legitimacy concerns will not disappear. The time has come for a fundamental change.

While many commentators have called for a fundamental reform of the existing system of ISDS, there is not much agreement amongst states, investors, academic commentators and their agent relatives on the identification of the correct way forward. Thus, while a number of solutions to remedy these legitimacy concerns have been advanced, there is little agreement on which should be adopted.

This chapter argues that the legitimacy crisis surrounding ISDS can be overcome, to a large extent, through the creation of a Multilateral Agreement on Investment (MAI) that establishes a standing two-tiered International Investment Court (IIC). While the establishment of a uniform statement of norms and a new centralised court structure will admittedly have certain disadvantages, on a careful weighing of the advantages and the disadvantages, the establishment of an MAI and IIC would be more beneficial than its disadvantages. Moreover, this thesis recognizes that the establishment of an MAI with a two-tiered court system would take considerable time and political effort and will. Therefore, until an MAI is created and it gains widespread approval, it is argued that there is a need for an interim mechanism to combat the legitimacy crisis. To this end, this chapter draws guidance from the field of international sales of goods and recommends the creation of an Advisory Council that publishes opinions on the correct interpretation of investment standards and other issues of IIL.

6.1. The Creation of a Multilateral Agreement on Investment

6.1.1. General Observations

Since the end of the Second World War, several attempts have been made to establish an MAI.¹ Each attempt however resulted in failure.² First, the Havana Charter,³ then the Draft Convention on Investments Abroad (also known as the Abs-Shawcross Draft),⁴ followed by the OECD Draft Convention on the Protection of Foreign Property,⁵ and the OECD Multilateral Agreement on Investment (MAI, 1998),⁶ all failed to take effect. One underlying reason for their failure is that these agreements had been drafted almost exclusively by developed countries at a time when there was a striking difference between the interests of (and the doctrinal positions adopted by)

¹ See Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle*, (Bloomsbury Publishing, 2016), 196-197, (hereinafter Subedi, 'Reconciling Policy and Principle'); Surya P. Subedi, 'The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation"' (2006) 40 *The International Lawyer*, 121, (hereinafter Subedi, 'The Challenge of Reconciling the Competing Principles'); Asif Hasan Qureshi and Andreas R. Ziegler, *International Economic Law*, (Sweet & Maxwell, 3rd ed., 2011); and Zdenek Drabek, 'A Multilateral Agreement on Investment – Convincing the Sceptics' (1998) WTO Economic Research and Analysis Division Staff Working Paper (ERAD-98-05).

² Schill states that this attempt failed, because first, developing states were not properly heard during negotiations. Second, member states could not agree on several points. Third, environmental protections and human rights issues were not properly addressed on the draft which caused a backlash from interested groups. Stephan Schill, *The Multilateralization of International Investment Law*, (Cambridge University Press, 2010), (Hereinafter Schill, *Multilateralization of IIL*)

³ The Havana Charter was the first attempt to establish the International Trade Organisation (ITO). Although it was made to regulate international trade, it also included investment rules. However, it was never enforced especially because of the refusal of a US Congress based on it being too far-reaching, curtailing states' regulatory autonomy, and being too ambiguous. Havana Charter (1948) available at: https://www.wto.org/english/docs_e/legal_e/havana_e.pdf. See also Joachim Karl, 'On the Way to Multilateral Investment Rules – Some Recent Policy Issues' (2002) 17 *ICSID Review: Foreign Investment Law Journal*, 293.

⁴ Although this draft was never implemented, it had influenced later documents regarding international trade and investment. *Ibid.*, Karl; and Schill, *Multilateralization of IIL*, *supra* note 2, 36.

⁵ As the developed and developing countries could not agree on the protection level, the draft did not garner much support. The OECD Draft Convention on the Protection of Foreign Property (1967), available at <https://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf>.

⁶ The OECD The Multilateral Agreement on Investment Draft Consolidated Text, (1998) available at: <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>.

developing and developed states.⁷ Developing states, therefore, did not believe that the draft conventions considered their interests and thus fiercely rejected them.⁸

The seemingly irreconcilable interests of developed and developing states at the time led certain commentators to conclude that establishing an MAI acceptable to all would be an impossible task.⁹ Yet the existence of varying and at times conflicting interest of a multitude of players coupled with large stakes, are the very reasons why it is now more important than ever to have a reliable, consistent, coherent and predictable ISDS system.¹⁰

Fortunately, changes in the IIL landscape in the past two decades have created a far more hospitable environment for change.¹¹ First, the inflow of FDI into the developed and developing world have reached almost similar levels in recent years.¹² This withering of the north-south divide has resulted in a significant convergence of the interests of the developed north and the developing south. Consequently, the obstacle of overcoming seemingly irreconcilable interests which hitherto constituted the primary reason for the failed attempts to establish an MAI no longer remains relevant today.

Secondly, as indicated by the UNCTAD World Investment Report 2018, the rate at which regional investment agreements are concluded is increasing even though there is significant decrease in the numbers of BITs signed each year.¹³ In fact, since 1983

⁷ Eric Neumayer, 'Multilateral Agreement on Investment: Lessons for the WTO from the Failed OECD-Negotiations' (1999, Last revised in 2010) 46(6) *Wirtschaftspolitische Blätter*, 618-628, 619; and Pierre Sauvé, 'Multilateral Rules on Investment: Is Forward Movement Possible?' (2006) 9 *Journal of International Economic Law*, 325.

⁸ Stephen Kobrin, 'Multilateral Agreement on Investment' in George Ritzer eds. *The Wiley-Blackwell Encyclopedia of Globalization*, (Blackwell Publishing, First Edition, 2012).

⁹ *Ibid.* Kobrin.

¹⁰ Neumayer, *supra* note 7, 619.

¹¹ Schill, *Multilateralization of IIL*, *supra* note 2, 44-45.

¹² UNCTAD World Investment Report 2018 'Investment and New Industrial Policies' available at: https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf. (last accessed November 1, 2018), (Hereinafter UNCTAD, WIR (2018)); See also William S. Dodge, 'Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement', (2006) 39 *Vanderbilt Journal Transnational Law* 1-37, 3; Sayeeda Bano and Jose Tabbada, 'Foreign Direct Investment from Developing Countries: Evidence, Trends And Determinants' (2012) In 53rd New Zealand Association of Economists Annual Conference, (Palmerston North); Sayeeda Bano and Jose Tabbada, 'Foreign direct investment outflows: Asian developing countries' (2015) *Journal of Economic Integration*, 359-398.

¹³ For instance, in 2017 three regional investment treaties were signed, namely: the ASEAN-Hong Kong, China Investment Agreement, the Intra-MERCOSUR Investment Facilitation Protocol and the

the lowest number of new BITs were concluded in 2017 while “negotiations for mega-regional investment agreements maintained momentum”.¹⁴ This goes to show that the international community is moving away from the fragmented system of BITs in favour of consolidated investment norms.¹⁵ This trend towards the consolidation of investment norms in turn, it is submitted, has made the possibility of the creation and widespread ratification of MAIs more possible than it was in the past.

Thirdly, investment disputes are continuously initiated at an increasing rate even though various stakeholders do not have confidence in the current ISDS system. In 2017 alone, for instance, at least 65 known investor-state disputes were initiated.¹⁶ Since disputes decided under the auspices of institutions other than the ICSID are confidential, the actual number of disputes initiated in 2017 is probably higher.¹⁷ This indicates that states are finding themselves in situations where they have to defend against substantial claims, more often than before. It therefore follows that from their perspective (and that of their agent relatives) the creation of an MAI coupled with the establishment of an adjudicative system which brings higher degrees of predictability, consistency and uniformity to IIL, will be considered as a step in the right direction. Moreover, the traditional north-south divide will not operate to undermine the creation of such an MAI to the same extent as it used to in the past. This is because now all host states, regardless of their level of economic development, stand to benefit from the existence of a unified statement of international investment norms coupled with a fair and impartial adjudicative system to interpret them.

While these developments demonstrate that it is now more possible than before to reach a consensus on complicated foreign investment issues among states belonging to different levels of economic development, certain scholars argue that the creation

Pacific Agreement on Closer Economic Relations (PACER) Plus Agreement between Australia, New Zealand and 12 Pacific Island States. *Ibid.*, 88.

¹⁴ *Ibid.*

¹⁵ Wolfgang Alschner, ‘Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?’ (2014) 17 *Journal of International Economic Law*, 271–298, 273; Anders Åslund, ‘The World Needs a Multilateral Investment Agreement’, Policy Brief Peterson Institute for International Economics’, (January 2013), 4, available at: <https://piie.com/sites/default/files/publications/pb/pb13-1.pdf> (last accessed November 1, 2018). UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (Geneva: United Nations, 2013) 103–7. Available at: https://unctad.org/en/PublicationsLibrary/wir2013_en.pdf (last accessed November 2, 2018).

¹⁶ UNCTAD, *WIR* (2018), *supra* note 12, 91.

¹⁷ *Ibid.*

of something as complicated as a widely agreeable MAI is not necessary. Karl for instance argues that the increase in the number of BITs each year reveals that both states and investors are happy with the system.¹⁸ Others assert that Karl's analysis is based upon a flawed method of statistical correlation. While a large number of BITs indeed exist, Karl's approach disregards the fact that their rate of increase has greatly diminished in the past decade.¹⁹ In fact, since 2017 "*effective treaty terminations [have] exceeded the number of new treaty conclusions.*"²⁰

The discussion above highlights that the changes in the geo-politics of IIL coupled with the legitimacy crisis surrounding the ISDS system has increased the possibility to create an MAI which harmonises the rules on the regulation of IIL. A potential MAI will not be able to achieve widespread approval if it fails to adequately resolve the legitimacy crisis discussed in this thesis. The remainder of this part will therefore analyse the extent to which the MAI will be able to achieve this goal.

6.1.2. The Extent to which an MAI Can Remedy the Legitimacy Crisis

6.1.2.1. Inconsistency

Schill argues that IIL is already being multilateralised through BITs, as their structure, content, and objectives have followed a path of convergence.²¹ He therefore asserts that irrespective of differences in the wording of specific BITs, IIL provides a uniform system of investor protection based on the same general principles. This argument, however, disregards that slight differences in the language of BITs have resulted in different interpretations, even in instances where the facts of the case and the identity of the parties were almost identical.²² It is therefore argued that absent a unified statement of norms, the legitimacy crisis will subsist.

¹⁸ Karl, *supra* note 3, 300.

¹⁹ See *supra* note 13.

²⁰ It is important not to disregard that some of these treaties are terminated because of the survival clauses, however, it is also worth noting that some of parties did not choose to extend the life of the treaty so they were terminated. UNCTAD, WIR (2018), *supra* note 12, 88. According to this report, the number of effective terminations is 22, the number of newly concluded treaties, on the other hand was 18 in 2017 the lowest number since 1983.

²¹ Schill, Multilateralization of IIL, *supra* note 2, 363-364.

²² See for instances SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13 and SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6 decisions.

It is asserted that replacing the spaghetti bowl of BITs that exist today with one MAI will bring a level of substantive consistency as tribunals would have only one legal document to interpret and implement. In other words, concerns surrounding the varying formulations of investment standards under different BITs will disappear as the MAI would harmonize them. However, for the concerns surrounding inconsistent interpretations to be completely remedied it is essential that the MAI establishes a new unified system of dispute settlement. This is because, absent a unified system of adjudication, the agreement will be interpreted by the current fragmented network of tribunals leading to the continuation of inconsistency in interpretation and application.

6.1.2.2. Regulatory Autonomy

The vast majority of investment agreements in force today generally focus on the rights of investor and the responsibilities of host states, without referring to the latter's right to regulate on legitimate policy objectives. The reason for this omission lies partially in the difference of bargaining power that existed between the capital exporting north and the capital importing south when these agreements were drafted. As discussed above, the difference between the interests of these categories of states have greatly diminished in the past few decades. This situation has created an environment where all states can ostensibly agree to the need of incorporating provisions in the proposed MAI that strike an appropriate balance between the regulatory autonomy of states and investment protection.

Moreover, the impact of the smaller difference that subsists between the interests of these categories of states can further be minimised by the fact that an MAI, unlike a BIT, will not be negotiated between two states with potentially different bargaining powers. Rather the process of the formulation of an MAI can allow for 'power in numbers' i.e. developing states can act in concert thereby ensuring that their concerns are heard.²³ Therefore, it is possible that the new MAI can bring a more balanced

²³ Kobrin, *supra* note 8; Subedi, *'Reconciling Policy and Principle'*, *supra* note 1, 7; and Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press Online, 2007), 23.

approach to the issue than what currently exists and be successful in remedying the legitimacy concerns raised by the shrinking of the regulatory autonomy of host states.²⁴

Interestingly, Amarasinha and Kokott argue that an MAI would potentially be more restrictive as states may not have the same degree of flexibility that they currently enjoy vis-à-vis their right to regulate FDI in their territory.²⁵ This argument is counter-intuitive when one considers that under the current ISDS system, tribunals have tended to adopt expansive interpretations of treaty standards in favour of investors thereby curtailing the regulatory autonomy of states. In fact, this situation has led certain states to withdraw from ISDS mechanisms, terminate their BITs and/or refuse to sign others.

An MAI would be successful as, unlike first generation of investment agreements, it can incorporate language on the manner in which the competing interests of investment protection and a states' right to regulate can be balanced. By doing so the MAI would provide clearer guidance to states on the scope of their regulatory autonomy, thereby remedying concerns associated with the withering of regulatory autonomy which are raised by the manner in which the majority of current investment agreements have been formulated – i.e. they focus on investment protection while largely ignoring the non-investment policy concerns of states.²⁶

To increase the chances of the MAI being successful in this regard, it should incorporate the three analytical devices found in certain second-generation investment agreements.

- 1) Preambular language which operates to place the non-investment policy concerns of states on the same normative plane as the goals of investment protection. This would go a long way towards ensuring that arbitrators do not view non-investment policy objectives as secondary concerns limited by the primary concern of investment protection, as is overwhelmingly the case under

²⁴ Stefan D. Amarasinha and Juliane Kokott, 'Multilateral Investment Rules Revisited' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer, *The Oxford Handbook of International Investment Law*, (Oxford University Press, 2008) (Hereinafter Muchlinski et al, *The Oxford Handbook of IIL*).

²⁵ Ibid.

²⁶ Karl, supra note 3.

the current system. In other words, this approach would allow arbitrators to take the legitimate policy concerns of states into account while interpreting investment standards.

- 2) General exception clauses which require tribunals to balance specifically enumerated policy objectives in order to ascertain whether a breach of the requirements of investment protection is justified. The inclusion of general exception clauses will directly equip states with a legal right to regulate thereby largely repelling the possibility of undue restrictions on regulatory autonomy.²⁷
- 3) Language refining investment law standards in a manner that incorporates a states right to regulate while still providing adequate protections to investors. This would allow arbitrators to show a degree of deference to the right of states to adopt legitimate policy measures without falling foul of their obligations relating to investment protection.

6.1.2.3. Transparency

One of the greatest challenges facing the ISDS system is the tension between the principles of confidentiality and transparency. While this concern is most acute during the arbitral proceedings on a dispute, it arises at a stage well before a dispute is even initiated. At the pre-arbitration stage, the legitimacy of the system is in part dependent upon the extent to which non-party stakeholders are provided “access to negotiating documents, position papers, and consolidated draft texts” of the investment agreements.²⁸ While the very large majority of texts of current bilateral and multilateral investment treaties are accessible online,²⁹ providing such access is of little value unless the process by which these treaties are concluded is made transparent. The contents of investment agreements or any other information regarding them has traditionally only been made ‘public’ after their ratification/signing. Even the

²⁷ It should however be noted that exceptions are often narrowly interpreted and states invoking them carry the burden of proof.

²⁸ Ibid.

²⁹ Examples of useful websites that provide access to investment treaties and agreements and also to useful links are <http://investmentpolicyhub.unctad.org/IIA>, <https://www.italaw.com/investment-treaties>, [http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-Tools.aspx](http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Tools.aspx).

development and drafting of boilerplate treaties tend to be conducted behind closed doors by internal agency bureaucrats.³⁰ This situation has given rise to severe legitimacy concerns arising from the perceived lack of transparency in the system.

If an MAI is concluded in a manner whereby non-party stakeholders are provided with a degree of participatory rights, this concern will greatly be diminished. In particular, non-party stakeholders should have access to negotiation records, position papers and be provided the opportunity to voice their concerns/preferences through consultation.³¹ Such an approach would allow for the striking of an appropriate balance between the principles of transparency and confidentiality at the pre-arbitration stage. This is because states will be provided the degree of confidentiality necessary to adopt positions that they would not be able to adopt in public, as the provision of this ‘type’ of transparency would be of a ‘passive’ character i.e. third party stakeholders will not have a right to intervene or participate otherwise in actual treaty negotiations. Yet at the same time, non-party stakeholders would have their concerns heard as they would be able to indirectly participate in the formation of the MAI by voicing their concerns through consultations. Thus this approach would go a long way in eliminating this legitimacy concern.

6.2. A Case for the Establishment of a Permanent Two-tiered Investment Court

6.2.1 General Observations

The establishment of an MAI even without coordinating or improving the fragmented nature of the ISDS system would go a long way in resolving the legitimacy crisis if it

³⁰ An empirical study conducted by Lauge Skovgaard Poulsen and Emma Aisbett highlights the lack of transparency in this regard by arguing that investment treaties in the 1990s were concluded in their thousands without much, if any, input on the part of non-party stakeholders or the legislative branches of various states. Lauge Skovgaard Poulsen and Emma Aisbett, ‘When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning’, (2013) 65(2) *World Politics*.

³¹ See, for instance, European Commission (EC), ‘Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)’ Commission Staff Working Document - Report SWD (2015) available at: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf (last accessed February 19, 2018); and Australian Senate Standing Committee on Foreign Affairs, Defence and Trade References, Blind Agreement: Reforming Australia’s Treaty-Making Process (2015), 39–57, available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report (last accessed February 19, 2018).

is widely ratified. However, the legitimacy crisis would not be resolved unless the ISDS system is unified. In particular, there are three concerns that the establishment of an MAI alone will not be able to overcome:

- 1) The current fragmented nature of the ISDS has greatly hindered its ability to bring predictability, coherence and consistency to IIL. The existence of a unified statement of substantive norms, however, will not remedy this fragmentation and thus concerns of illegitimacy will continue to subsist. In other words, if the current dispute settlement system stays as it is, there will still be multiple mechanisms interpreting the MAI. This would lead to a situation where the existence of a unified statement of norms will not be able to guarantee uniform results. This is because the risk of tribunals reaching inconsistent interpretations of the same standard under similar circumstances would subsist.
- 2) Under the current ISDS system, arbitrators have interpreted investment standards broadly, in favour of investors. These interpretations have been criticised for a number of reasons including that they articulate doctrines far more extensively than agreed upon by the parties when the treaties were drafted, thereby curtailing the regulatory autonomy of host states. The creation of a unified statement of investment norms, it is asserted, will not be able to completely overcome the tendency of tribunals to adopt expansive interpretations that curtail the regulatory autonomy of states.
- 3) The fragmented nature of ISDS precludes the possibility of the creation of a uniform practise vis-à-vis the right of non-party stakeholders to participate in the dispute settlement process.

In light of these concerns, it is necessary to restructure ISDS in a manner that, at the very least, makes it cohesive. A centralised court structure would be capable of curtailing inconsistency in interpretation and the creation of a uniform jurisprudence on the scope of a state's regulatory autonomy. Moreover, the existence of a single dispute settlement mechanism would allow for the creation of a uniform practise vis-

à-vis the right of non-party stakeholders to participate in the dispute settlement process.

It is therefore argued that the MAI proposed in part 1 of this chapter should unify the system of ISDS by incorporating provisions that create a permanent International Investment Court, which would have exclusive jurisdiction to resolve disputes arising under the MAI. In particular, it is argued that a two-tiered court system should be established, i.e. a court of first instance and an appellate body. To the extent that these courts adhere to the principles of the rule of law and the independence of the judiciary, it is asserted that they will be able to resolve the legitimacy crisis that plague the ISDS system.³²

6.2.2 Establishment of a Court of First Instance – the International Investment Court (IIC)

The idea to replace the current ad-hoc system, wherein tribunals are set up on a case-by-case basis, with a permanent International Investment Court (IIC) is indeed a radical step, but not a novel one.³³ Some have found it too ambitious or even impossible to establish.³⁴ However, in recent years this proposal has gained significant support.³⁵ The UNCTAD World Investment Report 2015, for instance, included a

³² Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521-1625, 1618, (Hereinafter Franck, 'Legitimacy Crisis'); and Mariel Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven International Publishing, 2008), 180-184.

³³ Van Harten, supra note 23, 4; Michael Goldhaber, 'Wanted: a World Investment Court' (2004) 3 Transnational Dispute Management 26; José E. Alvarez, Investment Treaty Arbitration and Public Law by Gus Van Harten, 102 American Journal of International Law, 909, 914 (2008) (book review); Stephen W. Schill, 'The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?', (2016) 20(9) American Society of International Law.

³⁴ Chiara Giorgetti, 'Who Decides Who Decides in International Investment Arbitration?', (2013) 35(2) University of Pennsylvania Journal of International Law, 431-540, 463; and David P. Riesenberg, 'Fee Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule', (2011) 60 Duke Law Journal, 977-1013, 989.

³⁵ David M. Howard, 'Creating Consistency through a World Investment Court' (2017) 41(1) Fordham International Law Journal, 1-52, See also Anibal Sabater, 'Foreign Investment Arbitration in the Global Interdependent Economy', (2009) 18 Michigan State International Law Review, 131-141, 136. (Sabater states that "with all its imperfections, arbitration still remains an effective way to resolve investment disputes. It may be perfected, it may be replaced with a supranational investment court, but it cannot be credibly buried without having an alternative in place.").

proposal for the establishment of such a court based on the belief that it would be capable of resolving legitimacy concerns to a large degree.³⁶ Furthermore, the EU has had plans to establish a Multilateral Investment Court (MIC) for years and in March 2018 the EU Council authorised the EU Commission to start the negotiations for its establishment.³⁷

While section 2.4 of this chapter focuses on the extent to which and under what conditions the creation of an IIC can overcome the three major concerns that have given rise to the legitimacy crisis; if an IIC is to be established, it is vital that it does not increase litigation cost, contribute to delays and is perceived as impartial. The current ISDS system has received severe criticism because of high costs, long timeframes involved in the adjudication of disputes and the perception that it is biased.

6.2.2.1. Costs

Under the current ISDS system, arbitrators charge on an hourly basis and their fees depend on the amount claimed in each case.³⁸ Considering that investment disputes tend to be complicated and thus require significant time to work on, coupled with the fact that claims are usually in the millions or even beyond, the amount that arbitrators are paid can be very high. As a result, cash strapped developing countries are extremely disadvantaged and there have been instances where they have given-in to the demands of investors as they would rather avoid these exorbitant costs.³⁹

³⁶ UNCTAD World Investment Report 2015, ‘Reforming International Investment Governance’, available at: https://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (last accessed, November 8, 2018).

³⁷ The Council of the EU Press Release 144/18, (20/03/2018), available at: <https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/pdf> (last accessed, November 8, 2018).

³⁸ See for instance, ICSID Schedule of Fees (effective January 1st, 2019), it provides that “*In addition to receiving reimbursement for any direct expenses reasonably incurred, conciliators, arbitrators, commissioners and ad hoc Committee members are entitled to receive a fee of US\$3,000 per day of meetings or other work performed in connection with the proceedings, as well as subsistence allowances and reimbursement of travel expenses within limits set forth in Administrative and Financial Regulation*” available at: <https://icsid.worldbank.org/en/Pages/icsiddocs/Schedule-of-Fees.aspx>.

³⁹ It should however be noted that the concerns of high costs of adjudication operate in tandem with the high costs of remedies to give in to the demands of investors. See e.g. Report of the SRSG, Business and Human Rights: *Further Steps towards the Operationalization of the ‘Protect, Respect and Remedy’ Framework*, (2010) A/HRC/14/27, ¶¶ 20–23).

The question therefore is whether the IIC could resolve this issue or at the very least not carry additional costs. The costs of adjudication under a permanent IIC would be significantly lower than under the current system, since judges will earn salaries from the establishing institution and not the parties.⁴⁰ The WTO case provides a good analogy. Under articles 8(11) and 17(8) of the WTO Dispute Settlement Understanding (DSU), “*the expenses of persons serving on the panel and Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration*”.⁴¹

6.2.2.2. Time delays

Under the current ISDS system, the length of time it takes to resolve an arbitral dispute is long. For instance, under ICSID rules, it takes an average of four or five years⁴² to resolve a dispute and there have been instances where it took even more than ten years.⁴³

Interestingly, some commentators oppose the establishment of the IIC based the basis that it would lengthen the dispute settlement process.⁴⁴ Certain permanent international courts have remedied the issue of delays through the adoption of strict timeframes and there is little reason why the IIC could not adopt a similar approach. The WTO DSU for instance, has adopted the strict timeframes of nine months for the resolution of WTO disputes by the panel, and an additional three months for appeal.⁴⁵ Therefore, it

⁴⁰ Rob Howse, 'Designing a Multilateral Investment Court Issues and Options', (2017) 36(1) Yearbook of European Law, 209-236, 215.

⁴¹ See WTO Dispute Settlement Understanding (WTO DSU), Article 8(11), 17(8). available at: http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (last accessed, November 26, 2018).

⁴² See Adam Raviv, 'Achieving a Faster ICSID' in Jean E. Kalicki and Anna Joubin-Bret eds., *Reshaping the Investor-State Dispute Settlement System*, (Nijhoff International Investment Law Series, Volume 4, 2014).

⁴³ See for example, *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3 (the dispute lasted for over eleven years); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23 (it lasted for ten years). See also *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2; and *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile*, PCA Case No. AA662, one of the longest running case has been pending over 20 years.

⁴⁴ Christian J. Tams, 'An Appealing Option? The Debate About an ICSID Appellate Structure' (2006) Essays in Transnational Economic Law, Working Paper No: 57, 42.

⁴⁵ Although, in practice these timeframes have not been adhered to, it is argued here that it still encourages the DSB members to resolve the dispute in a timely manner. See WTO DSU, article 20.

is argued that the informal adoption of similar timeframes by the IIC would go a long way towards remedying concerns surrounding the length of time it takes for the resolution of disputes, thereby adding to its potential acceptability by all stakeholders.

6.2.2.3. *Perception of Bias*

While not as acute as the legitimacy concerns discussed in this thesis, there is a perception that arbitrators under the current ISDS system are inadequately impartial. Although there is no concrete evidence supporting this claim,⁴⁶ it is certain that the existence of such a perception damages the legitimacy of any system. In particular, this perception is based on three grounds namely: (1) arbitrators have been known to have dual roles under the current system i.e. they act as arbitrators in certain disputes and counsels in others (so-called double-hatting⁴⁷); (2) concerns of re-appointment in future disputes operate to encourage arbitrators to rule in favour of the party appointing them; and (3) the majority of arbitrators hail from developed states and therefore there is an imbalance in the representation of developing states.⁴⁸

Dual role: While a strict separation of roles between arbitrators and counsels is quite difficult to achieve under the current ISDS system, such separation would be more feasible under the IIC.⁴⁹

This is because permanent international courts have the ability to ensure that judges do not engage in any other occupations.⁵⁰ This ability stems from their terms of

⁴⁶ Susan D. Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration', (2007) 86 *North Carolina Law Review*, 1-88, 49; and Daphna Kapeliuk, 'The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators', (2010) 96 *Cornell Law Review*, 47-90, 90.

⁴⁷ Malcolm Langford, Daniel Behn, and Runar H. Lie, 'The Revolving Door in International Investment Arbitration', (2017) 20 *Journal of International Economic Law*, 301-331, and Malcolm Langford, and Daniel Behn, and Runar H. Lie, 'The Ethics and Empirics of Double Hatting' (July 24, 2017) 6 *ESIL Reflection*, No. 7.

⁴⁸ See for instance, ICSID Members of the Panels of Conciliators and of Arbitrators, available at: <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%2010%20-%20Latest.pdf>.

⁴⁹ Fernando Dias Simões, 'Hold onto Your Hat! Issue Conflicts in the Investment Court System' (2018) 17(1) *The Law & Practice of International Courts and Tribunals*, 98-116, 112.

⁵⁰ See for example, Rome Statute of the International Criminal Court (1998) (entered into force in 2002), Article 40. Similarly, the Statute of the International Court of Justice also prohibits its judges to engage in any other occupation. However, a 2017 research done by International Institute for Sustainable Development (IISD) shows that ICJ judges serve as arbitrators in ISDS disputes during their tenure. See Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'Is "Moonlighting" a Problem? The Role

employment in that the judges of permanent courts are generally tenured and are employed on a full time basis, and as a result such limitations on the adoption of dual roles can be imposed. Arbitrators in the current ISDS system on the other hand are appointed on a case-by-case basis and, as a result, limitation on their engagement in other professions is not feasible. Indeed the imposition of the requirement that arbitrators, when appointed to a particular case, must give up all other occupations would operate to discourage various highly skilled individuals from taking up the role. Consequently, there would be a great ‘brain drain’ in the area giving rise to concerns regarding the existence of sufficient expertise on the roster.

The ability of a permanent court to place limitations on judges engaging in multiple occupations is reinforced by the experience of various international and domestic courts in this regard. In fact, even in the field of investment law, the imposition of such limitations is not a novel proposal. For example, the EU is currently attempting to establish an investment court wherein judges would be prevented from engaging in any other occupation, regardless of its nature.⁵¹ If the IIC adopts a similar approach, these concerns would be significantly reduced.

Reappointment: As arbitrators are generally selected by the parties under the current ISDS system, it is argued that they are encouraged to rule in favour of the party appointing them with a view to securing reappointment in future disputes.⁵² A permanent IIC can greatly overcome these concerns if the judges of the court are tenured and have fixed salaries. As the salaries of judges under such a system will not hinge upon the number of disputes they adjudicate, the motivation for securing

of ICJ Judges in ISDS’, International Institution for Sustainable Development Commentary, available at: <https://www.iisd.org/sites/default/files/publications/icj-judges-isds-commentary.pdf>.

⁵¹ See for instance, Commission draft text Transatlantic Trade and Investment Partnership Trade in Services, Investment and E-Commerce (TTIP) – Investment, Chapter II – Investment, Section 3 – Resolution of Investment Disputes and Investment Court System, Articles 9(15) and 10(14). Available at: http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

⁵² For discussion on party-appointment and its effects on arbitrators’ independence and impartiality please see; Jan Paulsson, ‘Moral Hazard in International Dispute Resolution’ (2010) 25(2) ICSID Rev—Foreign Investment Law Journal, 339-355; and Albert Jan van den Berg, ‘Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration in Looking to the Future’, Essays on International Law in Honor of W. Michael Reisman (Mahmoud Arsanjani et al. eds., Brill Academic, 2011); William W Park, ‘Arbitrator Integrity: The Transient and the Permanent’ (2009) 46 San Diego L Rev 629; and Charles N Brower and Charles B Rosenberg, ‘The Death of the Two-Headed Nightingale: Why the Paulsson–van den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded’ (2013) 29(1) Arbitration International, 7-44.

reappointment is greatly diminished.⁵³ These concerns can be further minimized by adopting an objective procedure for the assignment of cases to judges. This is because, if the parties have a definitive say on the selection of judges hearing their case, the latter would be motivated to ‘please’ the parties.⁵⁴

Control over the appointment of arbitrators is widely considered to be one of the factors that led parties to consent to the current ISDS system.⁵⁵ Consequently, illegitimacy concerns may arise if the IIC entirely precludes the participation of the parties in the process of appointment of judges. Certain commentators have argued that states in particular might not opt for such system if they do not have control in this regard.⁵⁶

These concerns can be minimized if states are provided with a degree of control over the appointment of judges to the IIC. In other words, states could be provided the power to nominate individuals who would serve as judges. This approach would provide a voice to states in the makeup of the court while ensuring that they cannot exercise influence over judges, as they would not have a say on which judges would adjudicate cases in which they are parties. The development of an objective method of assigning particular cases to judges would limit the influence states would have over judges, while their ability to nominate judges to the court would foster legitimacy.

However, if only states have a voice, the perception of the IIC being a pro-state system would arise. Allowing investors the right to participate in the nomination of the judges of the IIC on the other hand is not feasible because of the sheer number of international investors.⁵⁷ Concerns raised by the lack of investor participation however are greatly

⁵³ Howard, *supra* note 35, 26.

⁵⁴ Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards CIDS Supplemental Report (15 November 2017), 1-127, 54. (hereinafter Kaufmann-Kohler and Potestà, CIDS Report 2017).

⁵⁵ Catherine A. Rogers, 'The Politics of International Investment Arbitrators', (2013) 12 *Santa Clara Journal of International Law* 217, 251-52; Erica A Posner and John C Yoo, 'Judicial Independence in International Tribunals' (2005) 93 *California Law Rev* 1, 7; Jeffrey Dunoff and Mark Pollack, 'The Judicial Trilemma: Judicial Independence, Accountability and Transparency in WTO Dispute Settlement and International Investment Arbitration' at PluriCourts Conference on Adjudicating International Trade and Investment Disputes: between Isolation and Interaction, (25–26 August 2016).

⁵⁶ *Ibid.* Psner and Yoo, 7; and *Ibid.*, Dunoff and Pollack.

⁵⁷ Gabrielle Kaufmann-Kohler and Michele Potestà, 'Challenges on the Road toward a Multilateral Investment Court' (2017) *Columbia FDI Perspectives: Perspectives on Topical Foreign Direct Investment Issues* No.201.

minimized by the fact that states would prefer to nominate independent and impartial judges, because they are generally in the position of both host and home states.⁵⁸

Moreover, allowing states the right to nominate judges does not mean that the judges would feel bound to rule in the favour of the state nominating them. This is because, any control that states enjoy in the nomination process, and consequently any influence they may be able to exert on judges, ends when the judges are appointed. Post-appointment, judges would be tenured and consequently states would not have any influence over the continuity of their appointment. Furthermore, in order to ensure that states cannot influence judges, judges of the IIC should not be allowed to serve on a renewable term basis. The possibility of renewal would operate to motivate judges to ‘please’ states with a view of securing their assent thereby casting doubts on the impartiality of the court.⁵⁹

North-south imbalance: Empirical studies on the issue of whether the nationality of arbitrators has an impact on their ideological predispositions and decisions in investor-state disputes have found contradicting results.⁶⁰ While this work does not assess whether a relationship between nationality and decision-making exists or not, it is argued that the perception certainly does.⁶¹ This perception translates into concerns of illegitimacy because arbitrators in the current ISDS system predominantly hail from developed states.⁶² The acceptability of the IIC can be increased if it overcomes this perception through the appointment of judges in a manner that ensures the equal representation of all categories of states.⁶³

⁵⁸ Howard, *supra* note 35, 26.

⁵⁹ Since 2017, the Obama and Trump governments have been blocking both the appointment of new judges and the renewal of the terms of existing WTO AB members. See Elvire Fabry and Erik Tate, ‘Saving the WTO Appellate Body or Returning to the Wild West of Trade?’ Jacques Delors Institute, Policy Paper No.225 (07 June 2018).

⁶⁰ Since the focus is not to prove existence of this type of bias but rather the perception of legitimacy of the system.

⁶¹ Muthucumaraswamy Sornarajah, ‘An International Investment Court: panacea or purgatory?’ (2016) Columbia Center on Sustainable Investment: Perspectives on Topical Foreign Direct Investment Issues, No. 180 (August 15, 2016) (Hereinafter Sornarajah, ‘An IIC’)

⁶² See ICSID Members of the Panels of Conciliators and of Arbitrators, *supra* note 48.

⁶³ Kaufmann-Kohler and Potestà, CIDS Report 2017, *supra* note 54, 26-37; Ruth Mackenzie, Kate Malleson, Penny Martin, Philippe Sands, *Selecting International Judges: Principle, Process, and Politics*, (Oxford University Press, 2010), 27-37. See also Cheryl Thomas, ‘Judicial Diversity in the United Kingdom and other Jurisdictions: A Review of Research, Policies and Practices’, (2005) Report for the Commission for Judicial Appointments, 55-60, cited in Kaufmann-Kohler and Potestà, CIDS Report 2017, *supra* note 54, 32. The author states that, in domestic legal systems, diversity is a significant tool to improve public confidence in the system.

However, while the argument of equal representation makes sense in theory, in practice it is difficult to implement. For instance, while in theory equal representation can be provided according to the capital-exporting and capital-importing separation between states, such a distinction is difficult to draw under the current IIL landscape where states generally act as both.⁶⁴ Moreover, while the development status of countries can be used to ensure diversity among judges, the utility of such an approach is difficult to see for the same reason. For instance, various states such as China and India, while categorised as developing economies are also significant capital exporters. As a result, certain commentators have argued that the ideological predispositions of judges belonging to these jurisdictions may well be the same as that of judges belonging to developed states.⁶⁵

While diversity on the basis of nationality or development status does not necessarily translate into the representation of diverse ideologies in the court, it is argued that it would go a long way in displacing the perception of bias. It is therefore argued that attempts should be made to ensure that the makeup of the court strikes a balance between judges hailing from developing and developed states.⁶⁶

In conclusion, the IIC would be able to resolve concerns of costs, timeframe and impartiality, as it would be able to ensure: the security of tenure and salaries of judges, adoption of strict timeframes for the resolution of disputes, prohibition of remuneration of judges from elsewhere, and provide an objective method for assigning cases to judges.⁶⁷

⁶⁴ Ibid. Kaufmann-Kohler and Potestà, CIDS Report 2017, 37.

⁶⁵ Sornarajah, 'An IIC', supra note 61.

⁶⁶ For instance, the WTO DSU article 8.2 provides that "Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience".

⁶⁷ Van Harten, supra note 23, 167-168; Kaufmann-Kohler and Potestà, CIDS Report 2017, supra note 54, 23,51; Gus Van Harten, 'Contributions and Limitations of Empirical Research on Independence and Impartiality in International Investment Arbitration' (2011) 1(4) *Oñati Socio-Legal Series*, 1-33, 3; Nathalie Bernasconi-Osterwalder et al., 'Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel', IV Annual Forum for Developing Country Investment Negotiators Background Papers New Delhi (27-29 October 2010) 1.

6.2.3. Establishment of an Appellate Mechanism

The primary motive for the proposal to create an appellate mechanism lies in the expectation that it would be able to remedy the factual and legal errors made by the IIC. Indeed, confidence in any adjudicative system hinges upon the degree to which it is perceived to reach the correct decision consistently.⁶⁸ Unfortunately, the current ISDS system is found wanting in this regard as a result of the emphasis the system places on the finality of the award to the detriment of the achievement of the correct outcome.⁶⁹ This situation is unsustainable, especially because in various instances ISDS tribunals adjudicate disputes concerning public interest issues, and involve extremely large financial claims.

Establishing an appellate body has long been one of the proposed solutions to resolve legitimacy crisis that the current ISDS system faces.⁷⁰ In particular, advocates of this approach argue that an appellate body can be created without the need of reforming the current ISDS system.⁷¹ According to this approach, while ad hoc tribunals would continue to act as the court of first instance, an appellate body would be created to hear appeals to the decisions of the existing ad hoc tribunals.

Advocates of this approach however disagree on the manner in which such an appellate body should be established. Suggested approaches include granting domestic courts the jurisdiction to hear appeals of investment disputes, establishing ad hoc appellate

⁶⁸ See Asif Qureshi, 'An Appellate System in International Investment Arbitration?' in Muchlinski et al, *The Oxford Handbook of IIL*, supra note 24, 1157.

⁶⁹ Yannaca-Small K 'Improving the System of Investor-State Dispute Settlement'(2006) OECD Working Papers on International Investment, available at: https://www.oecd.org/china/WP-2006_1.pdf. (Last accessed December 6, 2018).

⁷⁰ This idea first suggested by Sir Elihu Lauterpacht, Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge University Press, 1991) cited in David Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges' (2009) 39 *Vanderbilt Journal of Transnational Law*, 40. See also Subedi, 'Reconciling Policy and Principle', supra note 1, 205; Dimsey, supra note 32, 177; Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016), 270, (hereinafter Kurtz, *The WTO and IIL*); Debra P Steger, 'Enhancing the Legitimacy of International Investment Law by Establishing an Appellate Mechanism' in Armand de Mestral and Celine Levesque (eds), *Improving International Investment Agreements* (Routledge 2012), 4; Elsa Sardinha, 'The Impetus for the Creation of an Appellate Mechanism' (2017) 32(3) *ICSID Review*, 503–527, 507; James Crawford, 'Is there a Need for an Appellate System?' in Federico Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (British Institute of International and Comparative Law, 2006), 13, (Hereinafter Ortino, et al, *Current Issues I*); and Doak Bishop, 'The Case for an Appellate Panel and Its Scope of Review' in Ortino, et al, *Current Issues I*, 17.

⁷¹ Qureshi, supra note 68, 1157.

panels for every decision, establishing a body under each arbitral institution, or extending the jurisdiction of the WTO Appellate Body (WTO-AB) to review IIA decisions and the establishment of a central appellate mechanism.⁷² None of these proposals would be able to adequately resolve the legitimacy crisis. To this end, the next sub-part will examine the limitations of each proposal.

6.2.3.1 Proposed Methods of Establishing an Appeals Mechanism under the Current ISDS System

- a) Empowering domestic courts to review arbitral decisions: Extending the jurisdiction of domestic courts to review arbitral decisions will not resolve the legitimacy crisis for three reasons. First, allowing national courts to review ISDS decisions would not remedy the issue of inconsistency as multiple domestic courts will be reviewing decisions.⁷³ Secondly, as national courts are rarely perceived to be impartial, the perception of bias would undermine the legitimacy of this approach.⁷⁴ Furthermore, there are concerns regarding whether the judges of the domestic courts of all states have the requisite expertise to resolve the complex issues raised in investment arbitration.

- b) Ad hoc appeal tribunals: Certain commentators have suggested the insertion of clauses in existing and future investment agreements that establish an appeals mechanism.⁷⁵ As appeals under this method would not operate under a multilateral investment framework, the creation of separate ad hoc appeal tribunals for each decision would be required. In other words, this method of establishing an appeals mechanism would simply add an additional appellate layer to the arbitral mechanism under the relevant treaty.

The greatest advantage of this approach lies in its simplicity; rather than requiring the difficult task of creating a new dispute settlement procedure, it

⁷² Ibid.; Franck, 'The Legitimacy Crisis', supra note 32103.

⁷³ Henri C Alvarez, 'Judicial Review of NAFTA Chapter 11 Arbitral Awards' in Frederic Bachand and Emmanuel Gaillard (ed), *Fifteen Years of NAFTA Chapter 11 Arbitration* (Juris Publishing 2009), 103–71, 170.

⁷⁴ On the perception that domestic judges are biased, see generally Donald C Nugent, 'Judicial Bias' (1994) 42 *Cleveland State Law Review*, 1-60.

⁷⁵ See Qureshi, supra note 68, 1160.

only requires the augmentation of the procedures already in existence. Moreover, this approach would potentially go a long way in remedying the errors made by the court of first instance thereby giving a degree of confidence to all stakeholders vis-à-vis the ability of the system to reach the correct decision.

This approach however, would give rise to a fragmented system of appellate tribunals which would be even less successful in remedying the legitimacy crisis than the approach discussed above. This is because domestic courts acting as appellate investment courts would at least attempt to be consistent with other courts belonging to the same jurisdiction thereby bringing a limited degree of consistency to the system. However, a fragmented system of appellate tribunals would not be bound to be consistent with one another, thereby making little progress in the resolution of the concerns of inconsistency, regulatory autonomy and transparency. Moreover, this approach to the creation of an appeals mechanism would significantly increase the cost and length of the dispute settlement.

- c) Incorporation of an appeals mechanism in the ICSID framework: A lot of ink has been spilled in academic commentary on the possibility of incorporating an appeals facility in the ICSID Convention.⁷⁶ As over 60% of reported investment disputes are settled at the ICSID, the establishment of an appeals facility would go a long way towards resolving the legitimacy crisis.⁷⁷ Proponents of this approach, however, argue that the creation of ad hoc appellate tribunals for each dispute decided under the ICSID Convention would not limit the legitimacy concerns that arise because of the fragmented

⁷⁶ The possibility of an Appellate Mechanism under ICSID has been discussed since 2004. ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration, discussion paper (22 October 2004). Moreover, some optional appeal mechanisms already exist in some arbitral institutions. See, for instance, the Rules of the European Court of Arbitration (2011); the Spanish Court of Arbitration (2011); the International Arbitration Chamber of Paris (CAP) (2011); the Arbitration Council for the Construction Industry (Netherlands, 2016); and the Grain and Feed Trade Association (GAFTA) (2016).

⁷⁷ UNCTAD, WIR (2018), supra note 12.

nature of ISDS. They, therefore, recommend the creation of single permanent appeals mechanism under the auspices of ICSID.⁷⁸

The creation of a permanent appeals mechanism under the ICSID could indeed operate to foster consistency in the case law emerging under investment agreements. Moreover, it is argued that the appellate body could develop and refine jurisprudence on the scope of the regulatory autonomy of states in IIL and increase the transparency of the process of the adjudication of investment disputes. However, all these enhancements would be limited to disputes decided by ICSID tribunals as the practise of the appellate body of ICSID would not have a definitive impact over the practise of non-ICSID tribunals. Consequently, the system would continue (though to a lesser degree) to face fragmentation resulting in inconsistent interpretations and applications of IIL.⁷⁹ In any case, the incorporation of such an appeals facility in the ICSID Convention would require the consent of all member states.⁸⁰ Given the limitations of the body in resolving the legitimacy crisis this may well translate into too much work for insufficient gain.⁸¹

- d) Extending the jurisdiction of the WTO AB: academic commentary has suggested extending the jurisdiction of the WTO AB to review ISDS decisions. This would help to create a “transparent, stable and predictable framework of investment”.⁸² Such an approach to the creation of an appellate mechanism gives rise to a number of concerns. For instance, trade-related dispute settlement under the WTO is currently limited to the adjudication of disputes between two states parties. As investment disputes involve investors, extending the jurisdiction of the WTO AB to include investor-state disputes would greatly

⁷⁸ Barton Legum, ‘Options to Establish an Appellate Mechanism for Investment Disputes’ in K Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008), 231-240, (Hereinafter Sauvant, *Appeals Mechanism*); and Jan Paulsson, ‘Avoiding Unintended Consequences’ in Sauvant, *Appeals Mechanism*, 267-280.

⁷⁹ Asif Qureshi and Shandana Gulzar Khan, ‘Implications of an Appellate Body for Investment Disputes from a Developing Country Point of View’ in Sauvant, *Appeals Mechanism*, 276-78.

⁸⁰ In particular, article 53 of the ICSID convention would have to be amended as it does not allow for an appeals mechanism.

⁸¹ Tams, *supra* note 44, 12.

⁸² Subedi, ‘*Reconciling Policy and Principle*’, *supra* note 1, 209-211.

increase the workload of the WTO AB thereby requiring significant budgetary expansion.

Moreover, it is argued that since the “*the situations in the investment disputes are different and the priorities are different,*”⁸³ granting a body that specializes in the resolution of trade disputes the authority to resolve investment disputes would not be a wise decision. For instance, there are concerns whether the WTO AB would be able to safeguard the regulatory autonomy of states, in light of its trade liberalization culture.⁸⁴ The existence of these issues and the difficulty of resolving them may well translate into the fact that extending the jurisdiction of the WTO AB is not a reasonable solution.

In any case, all these solutions would fail in resolving the legitimacy crisis as the establishment of an appellate mechanism without the creation of an MAI would not allow for the formation of an adequately uniform jurisprudence of IIL because of the difference in the content of investment agreements. If an appellate mechanism is to be established with the aim of resolving the legitimacy crisis, it should be done through a centralised adjudication mechanism.⁸⁵

6.2.3.2 *The Issue of Finality and the Efficiency of the Proceedings*

Commentators who oppose the establishment of an appeal mechanism argue that it would have an adverse effect on the finality of awards.⁸⁶ They assert that the guarantee of finality is one of the reasons why parties agreed to ISDS to begin with, and tampering with it would have a negative impact on the perception of the legitimacy of

⁸³ Michael Schneider, ‘Does the WTO Confirm the Need for a More General Appellate System in Investment Disputes?’ in Ortino, et al, *Current Issues I*, supra note 70, 103.

⁸⁴ Ibid. For an opposing view see Markus Wagner, ‘Regulatory Space in International Trade Law and International Investment Law’ (2014) 36 *University of Pennsylvania Journal of International Law*, 1-87.

⁸⁵ Mariel Dimsey, supra note 32, 180-84; Gabrielle Kaufmann-Kohler, ‘In Search of Transparency and Consistency: ICSID Reform Proposal’ (2005) 2(5) *Transnational Dispute Management*, 1-8, 5 (hereinafter Kaufmann-Kohler, ‘Transparency and Consistency’).

⁸⁶ Ian Laird and Rebecca Askew, ‘Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System’ (2005) 7(2) *Journal of Appellate Practice and Process*, 284-302, 285; Thomas W. Walsh, ‘Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality’ (2006) 24 *Berkeley Journal of International Law*, 443-462, 444.

the ISDS system.⁸⁷ Indeed, under the current system arbitral decisions are generally final.⁸⁸ They can only be set aside on very limited grounds, which generally do not include the merits of the decisions, by national courts, optional appeal mechanisms agreed to by the parties and the annulment mechanism under certain institutional rules.⁸⁹ The rationale behind the principle of finality and the very limited availability of annulment and appeal mechanisms is to encourage efficient and economic resolution of investment disputes.⁹⁰

While the establishment of an appeals mechanism provides fairness, consistency and accuracy by rendering binding awards and correcting the legal and factual errors made by the court of first instance, it does indeed undermine the principle of finality.⁹¹ Therefore, the issue hinges on whether the benefits of the creation of an appeals mechanism outweigh the advantages of the principle of finality? Moreover, even if they do, will the parties be willing to sacrifice finality over the advantages that an appeals mechanism can bring?⁹²

Historically, investors viewed the principle of finality as beneficial and strongly advocated for it. Indeed, for a period of time, investors were more likely to win arbitral disputes and therefore were against the establishment of an appeal mechanism.⁹³ A study conducted by the School of International Arbitration (SIA) in 2006, for instance,

⁸⁷ Ibid. Laird and Askew; and Ibid., Walsh.

⁸⁸ Franck, 'Legitimacy Crisis', supra note 32, 1551; and Schill, Multilateralization of IIL, supra note 2, 287; Christoph Schreuer, Loretta Malintoppi, August Reinisch, and Anthony Sinclair (ed), *The ICSID Convention: A Commentary* (CUP, 2009), (hereinafter Christoph Schreuer and others). See also Convention on Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959) article V.75; United Nations Commission on International Trade Law Model Law (UNCITRAL Model Law, 2006) article 34.

⁸⁹ Ibid. Franck; and Ibid., Schill.

⁹⁰ Christoph Schreuer and others, supra note 88, 1102.

⁹¹ Steger argues that legitimacy and consistency are 'too important to subjugate to the goal of finality, especially when cost and timing issues can be easily remedied.' Steger, supra note 70, 4. See also Dimsey, supra note 32, 177; Kurtz, Kurtz, The WTO and IIL, supra note 70, 270; Subedi, '*Reconciling Policy and Principle*', supra note 1, 205; Kaufmann-Kohler and Potestà, CIDS Report 2017, supra note 54, 2; Tams, supra note, 42; Laird and Askew, supra note 86, 286; Rowan Platt, 'The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?' (2013) 30(5) *Journal of International Arbitration*, 531-560, 531.

⁹² Walsh, supra note 86; and Kaj Hobér, 'Does Investment Arbitration Have a Future?' in Marc Bungenberg and others (eds), *International Investment Law* (Hart 2015) 1877. See also David D. Caron, Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal, 1 ICSID REV.—FILJ 21, 24 (1992) for distinction between the appeal of decisions for their legitimacy and their substantive correctness.

⁹³ Walsh, supra note 92, 445. See also UNCTAD, WIR (2018), supra note 12,

concluded that 91% of corporations viewed the possibility of appealing arbitral awards on their merits as disadvantageous since it would make the proceedings “*more cumbersome and litigation-like and essentially negates a key attribute of the arbitral process*”.⁹⁴ Host states, on the other hand, were more willing to sacrifice finality for correctness of arbitral decisions as they frequently found themselves on the losing side in investment disputes.⁹⁵ Knull and Robin for instance argue that the principles of finality operates to discourage states from consenting to ISDS.⁹⁶ This is because, as human beings, arbitrators are susceptible to human error which is unacceptable in light of the amounts at stake in ISDS disputes.⁹⁷ In other words, states wish to have the opportunity to appeal ISDS awards rather than having to pay out millions of dollars because of a mistake that the arbitrators might make.⁹⁸

While there may have been a difference in the preferences of host states and investors vis-à-vis the principle of finality in the past, there has been a convergence in such preferences in the last two decades. This is because success rates are now less in the favour of investors than before.⁹⁹ Consequently, investors are now just as willing as host states to sacrifice finality in favour of correctness. This is demonstrated by the fact that in recent years, various arbitral institutions have been using optional appeal mechanisms to attract investors and states alike to opt for them.¹⁰⁰ It is therefore concluded, that while the establishment of an appeals mechanism will indeed have a negative impact on the finality of awards, this fact alone should not be sufficient to undermine such a venture.

In any case, establishing a permanent two-tiered IIC is such a fundamental reform that it would completely alter the nature of ISDS. Its success would therefore be dependent,

⁹⁴ Queen Mary School of International Arbitration, University of London & PricewaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices*, (2006), 15 available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf (last accessed, November 26, 2018). Although more than a decade has passed since this study and there is need for an updated research on the field, the statistics might still be as valid. See also Platt, *supra* note 91, 559.

⁹⁵ *Ibid.*, Platt.

⁹⁶ William Knull and Noah Robins, ‘Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?’ (2000) 11 *The American Review of International Arbitration*, 531-577.

⁹⁷ *Ibid.*

⁹⁸ Stephen A. Hochman, ‘Judicial Review to Correct Arbitral Error: An Option to Consider,’ (1997) 13 *Ohio State Journal on Dispute Resolution*, 103-128, 104; Abraham Fuchsberg, ‘The Arbitrariness of Arbitrators,’ (1992) *New York Law Journal*, 2.

⁹⁹ See UNCTAD, *WIR* (2018), *supra* note 12.

¹⁰⁰ *Ibid.* Platt, 559.

in part, on the extent to which it would be capable of resolving the current legitimacy concerns surrounding the ISDS system. The next sub-part of this chapter will therefore analyse the impact of the creation and operation of the court on each major legitimacy concern.

6.2.4 The Extent to which a Permanent Two-tiered Investment Court Can Remedy the Legitimacy Crisis

6.2.4.1. Inconsistency

The ability of the standing two-tiered international investment court to resolve the issue of inconsistency is greatly dependent upon the extent to which the MAI gains approval. This is simply a result of the fact that the ratification of the MAI would operate to replace prior investment treaties concluded between ratifying states.¹⁰¹ Thus, acceptance by a large number of states would inevitably give rise to a situation where, in most instances, one coherent body of adjudication will be interpreting a unified statement of investment standards thereby curbing the potential of both substantive and procedural inconsistency.

Issues of procedural inconsistency would be remedied as the existence of a single structured mechanism for dispute settlement would prevent parallel proceedings by allowing great opportunities for consolidation of claims and by preventing the use of the opportunistic tactic of forum-shopping.¹⁰²

Substantive inconsistency on the other hand will be remedied as the creation of a structured adjudication system would allow for the possibility of the adoption of the doctrine of binding precedent. In particular, while awards rendered by a tribunal in a fragmented system of adjudication can only be granted the status of a ‘persuasive’ authority, awards rendered by an appellate body in a cohesive system of adjudication can be given the status of binding precedent. Doing so would allow the appellate body to create uniform interpretations of the MAI which the court of first instance would be bound by. As a result, parties would be able to view prior judgments of the appellate

¹⁰¹ Howard, *supra* note 35, 5.

¹⁰² *Ibid.*, Howard, 37; and Howse, *supra* note 40, 216.

body as the correct pronouncement of the law thereby granting them a high degree of certainty vis-à-vis their respective rights and obligations, and predictability vis-à-vis the likely outcome of any specific dispute. Thus, it is argued that with time, as the appellate body renders more judgments, a consistent jurisprudence would be created thereby bringing predictability, certainty, and fairness to the IIL and the ISDS system.

Certain scholars however argue that consistency and the adoption of the doctrine of binding precedent are not desirable if they come at expense of the correctness of the decision.¹⁰³ Ten Cate and Franck for instance argue that the fact that previous awards do not bind arbitrators under the current ISDS system is actually one of its strengths.¹⁰⁴ They argue that while arbitral practise shows that tribunals do consider previously rendered awards, their flexibility to derogate from them allows them to produce more ‘just’ rulings based on the particular circumstances of each dispute.¹⁰⁵

Although the fear that the interpretations and rulings of the appellate body may operate to produce a ‘one size fits all’ approach to IIL is valid, concerns regarding the inability of the court of first instance to derogate from such interpretations in future disputes are greatly overstated.¹⁰⁶ Indeed, it is the routine for both domestic and international courts to differentiate cases on their facts thereby precluding the application of previous awards.¹⁰⁷ Thus the creation of a two-tiered investment court would operate to bring a degree of consistency to IIL while at the same time retain the flexibility to judge cases on the basis of their particular context. However, in instances where the court of first instance differentiates a case before it from a previous ruling of the appellate body, it should provide clear reasoning for doing so.¹⁰⁸

The existence of such reasoning would contribute to the development of the IIL jurisprudence, thereby providing current and future litigants with a higher degree of

¹⁰³ Franck, ‘Legitimacy Crisis’, supra note 32, 1530; Irene M. Ten Cate, ‘The Costs of Consistency: Precedent in Investment Treaty Arbitration,’ (2013) 51 Columbia Journal of Transnational Law 418-478, 422.

¹⁰⁴ Ibid., Ten Cate; and Ibid., Franck, ‘Legitimacy Crisis’.

¹⁰⁵ Ibid., Ten Cate; and Ibid., Franck, ‘Legitimacy Crisis’.

¹⁰⁶ Howard, supra note 35, 37; Kurtz, The WTO and IIL, supra note 70, 251. See also Guiguo Wang, *International Investment Law: A Chinese Perspective* (Routledge, 2016), 571. Wang states that as the WTO jurisprudence becomes consistent in time, the number of disputes that parties brought has been decreased.

¹⁰⁷ Kurtz, The WTO and IIL, supra note 70, 251.

¹⁰⁸ Howard, supra note 35, 37.

certainty vis-à-vis their rights and obligations under IIL. In any case, the provision of detailed explanations would foster greater understanding of the law on the part of all stakeholders thereby inducing the perception of legitimacy, at least to the extent that the law would not be viewed as being uncertain and dependent upon the whims of the judges. While the proposed MAI should include provisions whereby the rulings of the IIC are given the status of binding precedent, it should also contain guidance to courts to provide clear and detailed reasoning for their decisions. This thoroughness will further operate to increase the quality of decisions which is always desirable.

Apart from making IIL uniform, the creation of a two-tiered investment court would operate to minimize concerns raised by the perception that ISDS in its current form is more concerned with the finality of an award rather than its correctness. This is because the existence of an appellate mechanism would allow for the correction of the factual and legal errors made by the court of first instance, thereby inducing the perception that the system is indeed concerned with the correctness of its decisions.

Among the proposed solutions to the achievement of consistency in IIL through the reformation of the ISDS system, the creation of a two-tiered standing court would be the most effective option. In particular, the ability of this court to develop a uniform interpretation of substantive standards would engender the inducement of clarity and predictability in IIL.¹⁰⁹

6.2.4.2. Regulatory Autonomy

Certain commentators argue that the regulatory autonomy of states would be more restricted under a standing investment court than under the current ISDS system.¹¹⁰ This concern stems from the perception that the judges of the court would invariably have strong neo-liberal prejudices which would lead to the adoption of expansive

¹⁰⁹ Franck, 'Legitimacy Crisis', supra note 32, 1617; Gantz, supra note 70, 74; Jürgen Kurtz, 'Building Legitimacy through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Vinuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford Scholarship Online 2014), 257-296, 270.

¹¹⁰ Ibid. Yackee, 434; and Sornarajah, 'An IIC', supra note 61.

interpretations of the standards of investment protection.¹¹¹ Moreover, they argue that the IIC would have the power to, and will in fact, create precedents enabling it to arrogate almost absolute power to review the scope of a state's regulatory autonomy.¹¹² Thus, they assert that such a court would become a device that sets neoliberal rules in stone because of which its creation would only exacerbate legitimacy concerns relating to the preservation of a state's regulatory autonomy.¹¹³

These commentators, however, disregard that one of the reasons that has necessitated reforming the current system is that the majority of investment agreements in force today do not provide sufficient clarity vis-à-vis the scope of a state's right to regulate in derogation of its investment obligations. In fact, they do not even mention the relevance of a state's legitimate policy concerns in the interpretation of investment standards. This lack of guidance has greatly enabled arbitral tribunals, by giving them discretion, to adopt expansive interpretations of investment standards (most notably the FET standard) thereby hindering the capacity of states to regulate on legitimate policy objectives. While certain second generation investment agreements have incorporated provisions which may be able to restrain this discretion and motivate tribunals to take the legitimate policy concerns of states into account when interpreting investment standards,¹¹⁴ they represent the exception rather than the norm. Moreover, the ability of even these second generation agreements in striking a balance between the right of states to regulate and investment protection is cast in doubt as a result of the fragmented nature of ISDS. In other words, the ability of tribunals under the current system to uniformly interpret and apply preambular language, general exception clauses and refined investment standards as contained in the second generation investment agreements is in serious doubt.

In this context, the creation of a standing court would go a long way towards ensuring consistent interpretations, thereby bringing clarity on the scope of a state's regulatory autonomy under IIL. It should however be noted that the success of the court in this regard will to a large extent be dependent on the existence of a unified statement of

¹¹¹ Ibid. Sornarajah.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ UNCTAD, WIR (2018), supra note 12.

norms. Absent such a unified statement of norms, the court would not be able to produce a coherent jurisprudence on the scope of a state's regulatory autonomy as a result of the differences in the language of the various investment agreements.

An MAI that incorporates clear guidelines enabling the adoption of a balanced approach to disputes concerning issues of regulatory autonomy coupled with the establishment of one structured permanent authority to interpret it, would go a long way towards remedying this legitimacy concern. In particular, it is submitted that the court would be able to interpret and apply the MAI in a manner which provides states with clarity regarding whether and to what extent their regulatory actions would be subject to court review and require compensation.

6.2.4.3. Transparency

A cohesive dispute settlement mechanism would be able to provide consistent interpretations on the degree to which non-party stakeholders are allowed to participate in the dispute resolution phase and have access to the decisions of the court.¹¹⁵ This is not to ignore the fact that transparency of this type can, to an extent, be provided under the current ISDS system, rather it simply recognises that the fragmented nature of the system hinders its ability to create a uniformly accepted jurisprudence on the appropriate balance between the demands for transparency and confidentiality.

For transparency related concerns to be adequately resolved, it is essential that non-party stakeholders are provided access to the negotiations that establish the IIC as well as the appellate mechanism. In other words, lack of transparency in the process leading to the establishment of the IIC would give rise to legitimacy concerns. This is made apparent by the objections raised by non-party stakeholders on the attempted creation of bilateral investment court systems under the Comprehensive and Economic Trade Agreement (CETA), the EU-Vietnam Investment Protection Agreement (IPA), and EU-Singapore IPA on the ground that they were negotiated behind closed doors. With this requirement in mind, the following discussion will provide guidance on how to

¹¹⁵ Howard, *supra* note 35, 23.

strike an optimal balance between the two competing interests, throughout the lifecycle of the dispute, by the IIC.

Transparency regarding the initiation of disputes: The existence of a single unified dispute settlement mechanism would allow for the uniform application of the rules on transparency vis-à-vis the initiation of disputes. While it is essential that the MAI contains provisions requiring the establishment of an online directory (like that operated by the ICSID) to allow for information regarding the initiation of disputes to be disseminated, the IIC can ensure that this information is published on the directory immediately. Since only the existence of the disputes and the issues involved therein would be published, there would generally be no risk of publishing sensitive information.¹¹⁶

Transparency in proceedings allowing for passive participation: The IIC can operate to strike an adequate balance between the interest of the parties to keep sensitive information confidential and the interest of other stakeholders to have access to necessary information regarding the case. This could be achieved by adopting the practise whereby transparency is made the default rule, while parties are allowed a reasonable amount of time to request the redaction of sensitive information. After the passing of such a reasonable timeframe, or the redaction of information that the court has objectively determined to be confidential, the court could webcast hearings so as to make them widely accessible in an economical manner. Both the UNCITRAL Mauritius Convention and the CETA propose this approach.¹¹⁷ Similarly, documents submitted by the parties can also be made accessible on the court's website after appropriate redactions.

The court can also resolve uncertainty regarding what constitutes a reasonable amount of time under this approach, through the informal adoption of a specific period as a vantage point. According to this proposition, the facts of each case will determine whether there are any considerations that would operate to shorten or increase the

¹¹⁶ As mentioned in the chapter on transparency, what constitutes sensitive information varies. In some disputes it might be technical data and expertise, and for others, it might even include the existence of the dispute itself. Therefore, theoretically, there might be exceptions to the argument here.

¹¹⁷ Howse, *supra* note 40, 235.

reasonable time period. Thus the adoption of a vantage point would provide the parties with a degree of clarity vis-à-vis the length of the reasonable time period while allowing the court sufficient flexibility to alter it based on the particular facts/ context of each case.

Transparency in proceeding (active participation): While the MAI should contain rules on the ability of non-party stakeholders to submit amicus briefs, the IIC can provide a uniform interpretation of what the rules entail thereby providing clarity to non-party stakeholders. Moreover, a standing court can greatly remedy some of the major concerns surrounding providing the right afforded to third parties to submit briefs namely the issues of cost, delay and abuse of process.

Costs and delay: Allowing amicus participation raises concerns regarding an increase in the costs of dispute resolution and delays in the process.¹¹⁸ Moreover, the considerable expenses associated with amicus participation operate to limit the access of non-party stakeholders belonging to developing states, who may, therefore, remain unrepresented in the process.¹¹⁹

The IIC can reduce the potential of costs and delays while ensuring uniform participation by allowing for strategic collaborations on the part of those who wish to submit briefs. It is asserted that by sharing information on the identity of those stakeholders who have requested permission to submit briefs, the IIC can enable multiple non-party stakeholders to submit a single brief thereby allowing them to spread the cost in a manner that minimizes the cost incurred by each individual stakeholder. Moreover, this approach would limit the number of documents that need be considered by the tribunal thereby further reducing both costs and delays. For the same reason, costs incurred by the parties as a result of considering and responding to amicus briefs would also be limited. Such collaboration would also operate to limit the

¹¹⁸ In order to minimise the costs and time delays, some page limits and time scales in the submission of briefs have been introduced under soe arbitration rules. The Interpretative Note on Transparency, for instance, prescribes a 25-page limit to all amicus briefs. FTC Statement, supra note 31, B.2(b), B.3(b).

¹¹⁹ Daniel Barstow Magraw and Niranjali Manel Amerasinghe, 'Transparency and Public Participation in Investor-State Arbitration', (2009) 15(2) ILSA Journal of International and Comparative Law, 337-360, 355.

inevitable repetition in issues raised or arguments made in briefs, thereby furthering efficiency in this regard.

Abuse of process: Concerns regarding the potential abuse of process because of allowing amicus participation can be remedied by the IIC through the uniform interpretation and application of the standard of proximity of interest for amicus participation contained in the MAI. As discussed above¹²⁰, the proper application of this standard would ensure that only those non-party stakeholders who have a significant interest in the dispute are allowed to submit briefs.¹²¹ While various tribunals have applied this standard in the current ISDS system, the fragmented nature of the system has limited uniformity in this regard. In particular, inconsistent interpretations on what degree of such personal interest allows for the submission of amicus briefs has generated confusion. The water is further muddied by the fact that different institutional rules phrase the standard in different terms.¹²² A single statement of the standard in an MAI coupled with the existence of a standing court with exclusive jurisdiction to interpret it would greatly increase uniformity vis-à-vis the appropriate degree of interest required to attract the right to submit amicus briefs.

¹²⁰ See chapter 4.

¹²¹ Christian Schliemann, 'Requirements for Amicus Curiae Participation in International Investment Arbitration: A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15,' (2013) 12 *Law and Practice of International Courts and Tribunals* 365-390, 370; Mabel I. Egonu, 'Investor-State Arbitration under ICSID: A Case for Presumption against Confidentiality?' (2007) 24(5) *Journal of International Arbitration* 479-489, 483; Loukas Mistelis, 'Confidentiality and Third-Party Participation: UPS v. Canada and Methanex Corp. v. USA' (2005) 21(2) *Arbitration International* 211-232, 231; J. Anthony VanDuzer, 'Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation', 52 *McGill Law Journal*, 681-724, 713; Eloïse Obadia, 'Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration', (2007) 22(1) *ICSID Review - Foreign Investment Law Journal*, 349-379, 361-64, see also NAFTA Free Trade Commission, Statement of the Free Trade Commission on Non-disputing Party Participation, (7 October 2003), (hereinafter FTC Statement), ¶¶ A.3, B.6, and B.7; *Methanex Corporation v. United States of America*, UNCITRAL, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic* ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission (12 February 2007), (hereinafter *Suez*, Decision on Five NGOs); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No.5 (2 February 2007); *Glamis Gold, Glamis Gold Ltd. v. The United States of America*, UNCITRAL, Decision on Application and Submission by Quechan Indian Nation, (16 September 2005).

¹²² Compare for instance ICSID Rules of Procedure for Arbitration Proceedings (1968, last amended 2006) (ICSID Arbitration Rules), rule 37(2) and UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014) (hereinafter UNCITRAL Rules on Transparency), article 4(2)(d) with *Ibid.*, NAFTA FTC Statement, Section B(6)(c) (d).

Access to final decisions of the court: The creation of a standing court of investment would allow for the consistent adoption of an approach to the publishing of decisions that would strike an appropriate balance between the interest of transparency and confidentiality. In particular, the court can establish and consistently apply the practise of allowing the parties to request the redaction of sensitive information from the final decision before it is published. Once the court has differentiated between confidential information and those parts of the award that deal with issues of general application, the latter can be disseminated to the public at a low cost by uploading it onto the IIC website. Indeed, the dissemination of those parts of the awards that interpret IIL standards and are of general application would seldom, if ever, have an impact on the legitimate confidentiality concerns of the parties. The publication of the court's rulings on the IIC website, provided the MAI is widely ratified, would further lead to the creation of a central directory of decisions.

6.3. An Interim Measure

The establishment of an MAI that creates a two-tiered court system is no mean feat and would take considerable time. Therefore, until the creation of an MAI and it gaining widespread approval, it is argued that there is a need for an interim mechanism to combat the legitimacy crisis. To identify such interim mechanism, this thesis borrows from the field of the international law on the sale of goods.

6.3.1. Proposal - The creation of an Investment Law Advisory Council (ILAC) modelled on the CISG Advisory Council (AC)

The enactment of the United Nations Convention on Contracts for the International Sale of Goods (the CISG)¹²³ was with the aim to unify and standardise the law of the international sale of goods.¹²⁴ It was however recognized during the drafting stages of

¹²³ United Nations Convention on Contracts for the International Sale of Goods (CISG, Signed in 1980, and entered into force in 1988). Website of the United Nations Commission on International Trade Law (UNCITRAL) http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (accessed December 20, 2018).

¹²⁴ Ibid. Art.7(1) of the CISG states that the interpretation of this Convention should be in accordance with '*its international character and the need to promote uniformity in its application and the observance of good faith in international trade*'. Additionally, according to Art.7(2) '*Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in*

the CISG that the existence of a unified statement of norms would not guarantee uniform interpretation and implementation by national courts and arbitral tribunals.¹²⁵ Therefore, in order to ensure (as far as possible) the uniform interpretation of the CISG, the possibility of establishing an official interpretative committee under the auspices of UNCITRAL was discussed extensively.¹²⁶ Developing and socialist states, however, were concerned that a majority of the members of the committee would invariably belong to developed and capitalist states and thus the committee would operate to impose western principles of commercial law on them.¹²⁷ That the interpretations of the committee were to have binding authority exacerbated this concern. The proposal was therefore unable to gain the requisite degree of consensus and discussions on it were aborted.¹²⁸

Fifteen years thereafter, a private initiative called the CISG Advisory Council (AC) was formed in order to further the goal of a uniform interpretation of the CISG under the sponsorship of the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies at Queen Mary, University of London.¹²⁹

The issue of the impartiality of the members of the AC was overcome by separating the membership of the AC from the membership of the CISG. This was achieved by limiting the membership of the AC to respected academics who do not represent any member states or domestic legal cultures.¹³⁰ Moreover, the issue that the interpretative body could impose western principles of commercial law on developing and socialist states was resolved by limiting the power of the AC to publishing 'persuasive' opinions on the correct interpretation of the substantive articles of the CISG. In other

conformity with the law applicable by virtue of the rules of private -international law. ' Thus, the courts and tribunals, and also the advisory bodies should follow the Art.7 of the CISG when they are interpreting the provisions of the CISG.

¹²⁵ Roderick Munday, 'The Uniform Interpretation of International Conventions', (1978) 27 The International and Comparative Law Quarterly, 450-459 cited in Joshua D. Karton and Lorraine de Germiny, *Has the CISG Advisory Council Come of Age?*, (2009) 27 Berkeley Journal International Law, 447-495, 450.

¹²⁶ Ibid., Karton and Germiny.

¹²⁷ Ibid.

¹²⁸ Ibid. Karton and Germiny. The creation of such a mechanism would require the assent of member states which would be very difficult, if at all possible, to attain.

¹²⁹ Ibid., Karton and Germiny, 451.

¹³⁰ Welcome to the CISG Advisory Council (CISG-AC), Scope and Aims, <http://www.cisgac.com/>.

words, the non-binding nature of these opinions pre-empted concerns of the imposition of the ideological preferences of western states.

As the opinions of the AC are not binding,¹³¹ their utility hinges upon the extent to which adjudicatory bodies consider them.¹³² A review of awards and decisions rendered under the CISG reveals that both ad hoc arbitral tribunals and national courts consider the opinions of the AC to be ‘highly persuasive’ authority.¹³³ Consequently, commentators have argued that the opinions of the AC have had great success in the achievement of uniformity in the interpretations of the CISG.¹³⁴

The primary reason for the success of the AC lies in its make-up. That the opinions rendered by the AC are those of respected academics from around the world imbued them with great ‘persuasive authority’. Moreover, as the opinions rendered by the AC are based upon a degree of consensus of its members, they are perceived to be more authoritative than individual academic commentaries or scholarly articles. In other words, based on the same logic that the consensus of opinion amongst a number of courts is likely to be perceived as more veracious in comparison with an opinion adopted by one court, the opinion of a number of scholars (AC opinions) takes precedence over the opinions of individual scholars.¹³⁵

The creation of a similarly constituted IIL Advisory Council (ILAC) in the IIL realm would go a long way in resolving the legitimacy concerns that the ISDS system faces. In order for such proposal to be adopted, certain tweaks in the operation of the AC are necessary. In particular, the AC does not accept requests on behalf of individuals even though its Draft Charter does not include a provision on who can request the AC to

¹³¹ Joshua Karton and Lorraine de Germigny, ‘Can the CISG Advisory Council Affect the Homeward Trend?’ (2009) 13(1), *The Vindobona Journal of International Commercial Law and Arbitration*, 90-91, (Hereinafter Karton and Germigny, ‘Homeward Trend’).

¹³² *Ibid.*

¹³³ The CISG opinions has been relied on and cited by some national courts such as US and Dutch courts. See for instance *Tee Vee Toons, Inc. v. Gerhard Schubert GmbH*, 00 Civ. 5189 (RCC) (S.D.N.Y. Mar. 28, 2002); and *Gerechthof Arnhem*, LJN BL7399, (9 March 2010), 4.8.

¹³⁴ Ingeborg Schwenzer and Pascal Hachem, ‘The CISG – Successes and Pitfalls’ (2009) 57(2) *The American Journal of Comparative Law*, 457-478.

¹³⁵ That is tribunals give greater deference to the CISG-AC’s opinions than commentaries or articles by individual scholars.

issue an opinion.¹³⁶ Indeed, in the IIL realm where one of the parties to the dispute is a private individual/organization, the ILAC must be empowered to accept requests from them for it to fulfil its intended purpose. With this in mind, this sub-part shall evaluate the extent to which the creation of a similar advisory body in the IIL realm will be beneficial to the system.

6.3.2. Impact of the ILAC on the Legitimacy Crisis

6.3.2.1. Consistency

Paulsson and Gill argue that the ISDS system will naturally evolve in a manner whereby it would be able to resolve the issue of inconsistent interpretations.¹³⁷ They base this assertion on the premise that consensus will develop in arbitral jurisprudence regarding the identification of awards which contain the correct pronouncement of the law.¹³⁸ Thus they argue that with time, arbitral jurisprudence under the current IIL system will develop in a manner whereby the issue of inconsistent interpretations of investment standards will be remedied.¹³⁹ While severity of the legitimacy crisis requires immediate action as time is of the essence and thus it is not feasible to wait for the system to naturally evolve in such a manner, it is argued that as an interim measure the creation of an ILAC can act as a catalyst for creating and identifying awards which contain the correct pronouncement of the law. In other words, if ISDS tribunals consistently refer to the opinions of the ILAC, a reliable jurisprudence would develop much sooner than it would if the system is left to evolve without any intervention.

¹³⁶ Ibid. However, the CISG-AC does accept topic requests from member states, international organisations, counsel, professional associations, or adjudicative bodies.

¹³⁷ Judith Gill, 'Inconsistent Decisions: An Issue to be Addressed or a Fact or Life' in Ortino, et al, *Current Issues I*, supra note 70, 24-27; Jan Paulsson, 'Avoiding unintended consequences' in K Sauvart (ed), *Appeals Mechanism in International Investment Disputes*, (Oxford University Press, 2008), 241-265, 253. See also generally Schill, *Multilateralization of IIL*, supra note 2.

¹³⁸ Ibid., Gill; Ibid., Paulsson, 253 See also Andrea Bjorklund, 'The Continuing Appeal of Annulment: Lessons from Amco Asia and CME' in T Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005), 219.

¹³⁹ Ibid., Gill; Ibid., Paulsson, 253.

6.3.2.2. Transparency:

The impartiality of the ILAC, to the extent that the members are neither representative of states or investors, would enable it to adopt an objective view on the issue of the correct balance between the principle of transparency and confidentiality in ISDS. In particular, if the ILAC decides to render an opinion on this issue, it can objectively assess each stage of the process of arbitration with a view to balancing the pros and cons of providing transparency at each stage. Such opinions of the ILAC on the issue would provide guidance to those charged with the negotiation and drafting of future investment treaties and institutional rules, and can even act as a catalyst to the amendment of provisions on the issue as they exist in current treaties and institutional rules.

6.3.2.3 Regulatory Space:

Interpretations of the scope of investment standards such as FET, Most Favoured Nation and Indirect Expropriation by the ILAC can greatly increase certainty around the scope of a state's regulatory autonomy under IIL, provided that these interpretations are referred to by tribunals when interpreting investment standards under particular treaties. This is because, opinions on investment standards, if widely referred to, can foster a degree of consistency in IIL thereby providing both states and investors a degree of predictability vis-à-vis their rights and obligations. In particular, the ILAC can provide clarity on issues such as the relationship between FET and MST under customary international law; the degree of importance to be attached to the purpose of a state measure in the determination of whether it amounts to indirect expropriation; and how the term 'like circumstances' should be interpreted while determining whether regulatory measures adopted by states amount to discrimination. It is clear that these opinions would be of a general nature, in that the ILAC would not be interpreting any particular investment agreement. But they could nevertheless provide guidance to future tribunals thereby aiding in the resolution of this particular legitimacy concern.

6.3.3. Further Observations

The AC provides essential lessons on how the proposed ILAC should structure its opinions. Rather than being concise and without reasoning, the AC's opinions are divided into two sections; 'opinion' and 'comment'.¹⁴⁰ The opinion section which is widely referred to as 'black letter', consists of a bullet point list of principles.¹⁴¹ The comment section, on the other hand, consists of a detailed discussion on the issue under examination and provides clear reasoning on why the AC adopted a particular stance.¹⁴² As such, the opinion section contains a quick guide to the rules laid down while the comment section provides reasoning for their adoption.¹⁴³ This approach to the drafting of opinions enables future tribunals to understand the reasoning behind the adoption of the particular stance on the issue and improves their ability to apply it in future disputes. Moreover, as most stakeholders are not lawyers, the provision of clear reasoning in non-technical terms aids them in understanding the philosophy behind the adoption of a particular stance, thereby allowing the AC to justify its approach to all. This access to justification of opinions, in turn, it is argued, imbues the AC with a greater degree of legitimacy.

Having established that the proposed ILAC would be capable of aiding to curtail the legitimacy crisis; it is argued that the proposed ILAC would retain the advantages of the current ISDS system such as finality, confidentiality and the free flow of ideas.

- 1) Finality: By restricting itself to giving opinion on the law as opposed to adjudicating on specific disputes, the ILAC shall have no impact on the much-heralded principle of finality.
- 2) Confidentiality: Based on the same reasoning above, since the proposed ILAC, following the example of the AC, would not be concerned with specific disputes or their facts, its functioning would not have an impact on confidentiality concerns.
- 3) Free flow of ideas: By referring to academic commentary and published awards, the opinions of the proposed ILAC would fuel further debate on the

¹⁴⁰ Karton and Germiny, supra note 125, 470.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

issues upon which it pronounces its opinions as is evidenced in the case of the AC.

Conclusion

This chapter argues that there is need for a fundamental reform in the field of IIL in general and ISDS in particular. It proposed that the most viable solution is to reach consensus on replacing all investment treaties with an MAI, and to establish a standing two-tiered International Investment Court to interpret it.¹⁴⁴ The adoption of this proposal, would go a long way towards resolving the legitimacy crisis that the current system faces.

In particular, the MAI would lead to the unification of IIL norms thereby making them much more accessible and clearer. The existence of a unified statement of norms would further allow for consistent interpretations, as arbitrators would no longer be able to justify inconsistent interpretations based on minor differences in the wording of investment treaties. Moreover, the MAI can incorporate clear guidance on the right of a state to regulate in derogation of its commitments under IIL. This is achievable through the incorporation of: (1) preambular language that makes specific reference to the non-investment policy objectives of states, (2) general exception clauses and (3) language refining investment standards.

The MAI would further alleviate concerns regarding the lack of transparency under the current ISDS system. This is achievable by providing all stakeholders a degree of participation rights in the negotiations leading to the creation of the MAI and through the incorporation of express rules on the provision of transparency. In particular, the MAI should incorporate clear rules on: (1) the right of non-party stakeholders to have access to documents submitted to the adjudicating body subject to redaction of sensitive information, (2) the manner in which non-party stakeholders may act as amicus in disputes and, (3) the publishing of the final awards rendered by the

¹⁴⁴ As mentioned throughout this research, it is difficult to make such fundamental change in the system. There are many questions to be addressed for such establishment, including the status of the national courts, status of the arbitrator, recognition and enforcement of decisions that are pending in appeal, and status of non-parties. See also Legum, *supra* note 78, 121.

adjudicating body thereby making them more accessible than under the current ISDS system.

The existence of a unified statement of norms would not guarantee uniform results. These concerns however can be remedied by the standing court that would be established to interpret the MAI. Indeed, the creation of standing court will remedy the concerns of inconsistent interpretations that arise because of the fragmented nature of ISDS, as only one court would be interpreting the document. Furthermore, the creation of an appellate body can ensure that any mistakes of law or facts made by the court of first instance can be remedied thereby infusing a degree of legitimacy in the system from the perspective of all stakeholders. This is because, as discussed extensively in the chapter on legitimacy, the degree to which a court is perceived to consistently reach the correct decision has a large impact on its legitimacy. Moreover, consistency in interpretation would be further guaranteed as the rulings/interpretations of the appellate body would have the status of binding precedent thereby ensuring that the court of first instance follows them in future disputes.

Furthermore, the creation of a standing court of arbitration could allow for a greater degree of transparency in the system of adjudication. In particular, the court can publish information regarding the initiation of disputes and the final judgment through an online presence. Moreover, while the MAI would contain rules on the provision of transparency, the existence of one court interpreting them would ensure consistency in interpretation and application.

Finally, for the same reason, the establishment of a standing court would go a long way towards the provision of predictability vis-à-vis the regulatory autonomy of states under IIL. The ability of the court in producing consistent interpretations of investment standards would allow states with a great degree of clarity on the scope of their right to regulate.

While the creation of a unified statement of norms and one court to interpret them would go a long way in remedying the legitimacy crisis the current system is perceived to be suffering from, the achievement of such a fundamental reform would be no mean feat and would take considerable time. In light of these limitations, this chapter

proposes the creation of an ILAC modelled on the CISG-AC, as an interim measure. It is argued that while the ILAC would not be able to overcome all the concerns of legitimacy discussed in this thesis, it would go a long way in minimizing their impact. In particular, while the system of IIL and ISDS would continue to remain fragmented, the ILAC would be able to curb concerns regarding the lack of consistency, transparency and certainty of the scope of a state's regulatory autonomy, by issuing opinions on these matters. As the ILAC would be constituted of highly respected academics in the field who do not represent any legal culture or state, arbitral tribunals would view the opinions rendered by the ILAC as having highly persuasive authority. Indeed this has been the case in the experience of the CISG-AC. It is however noted, that for this interim measure to be implemented, concerns regarding the source of their funding would need to be overcome. In other words, before the ILAC can be created it is essential to identify how the body would be funded.

Chapter 7: Conclusion

This thesis highlighted the fact that most stakeholders perceive the system of ISDS to lack certain legitimacy factors that are expected of an adjudicative system. The factors that cause the legitimacy crisis are: the curtailment of states' regulatory space, lack of transparency and inconsistency. This thesis analysed each factor with the view of formulating recommendations whereby these concerns can be limited as far as possible without requiring a fundamental reform of the system of ISDS. It was however concluded that while these recommendations would go a long way in improving the situation vis-à-vis the perception of legitimacy, they would not be able to adequately remedy the legitimacy crisis. In other words, this thesis concludes that there is a need for fundamental reform of the system of ISDS for it to be 'legitimised'. To this end, this thesis recommends the creation of a Multilateral Agreement on Investment and a two tiered Investment Court. While the MAI and an investment court have been proposed in the literature on the area, this thesis provides an original method for their creation which is tailored for the purpose of averting the legitimacy crisis.

The following sections will summarise the findings of each chapter and will highlight the recommendations that have been made.

7.1. Legitimacy

This thesis began by identifying the factors that legitimise the system of ISDS. To this end it explored the traditional approaches to normative legitimacy namely, state consent and procedural fairness. It was however found that the traditional approach to normative legitimacy suffers from two inter-related limitations i.e. the framework falsely assumes that international courts only operate to resolve disputes brought before them and that their judgments in such disputes affect only the litigants to a case.¹ These limitations of the traditional approach led to the conclusion that while state consent and procedural fairness provide the basis for an institution's authority, and are therefore extremely important; they are not enough for sufficient legitimacy. In particular, while states and investors play a substantial

¹ Nienke Grossman, 'The Normative Legitimacy of International Courts' (2013) 86 *Temple Law Review*, 61-106, 68 (hereinafter Grossman, 'The Normative Legitimacy'), 75; Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach', (2012) 106(2) *The American Journal of International Law*, 225-270, 246; Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981), 22, 26.

role in providing jurisdiction to an international adjudicative body, the continuance of its legitimacy hinges on the perception of other stakeholders as well.

This thesis therefore identified legitimacy factors taking into account the fact that states are not the sole or even unitary actors within the realm of international law, and their preferences are shaped by various actors such as: political parties, NGO's (both domestic and international), other private parties and voters.² It also recognized that not all constituencies would always uniformly perceive the legitimacy of any international adjudicative body i.e. while some consider it to be legitimate, others might not. Thus, the values of legitimacy identified by this thesis are based on the understanding that these values are not universal as they vary among actors on various lines, and as such a standard that perfectly captures the multitude of differing views of all actors on the issue of legitimacy cannot be created. That said, what is required to legitimise an institution is not the same inquiry as what is the most optimal institution. Thus, a seminal contribution of this thesis is the identification of a shared perspective of evaluation that allows for the achievement of coordinated support for an institution without having to compromise the most elementary normative commitments.

In identifying the factors that legitimise the system of ISDS, from the perspective of non-party stakeholders, this thesis took inspiration from the works of Weber, Frank, Grossman and Bodansky. It concluded that in addition to state consent and procedural fairness, the legitimacy of ISDS hinges in part upon the extent to which it is consistent, transparent and operates in line with the expectation of stakeholders (the issue of regulatory space).

Having identified the factors that legitimise the system of ISDS this thesis evaluated the extent to which each of these legitimacy values exist in ISDS in separate chapters.

7.2. Regulatory Space

The chapter on regulatory space chronologically evaluates the impact IIL and ISDS have had on the right of states to regulate in derogation of their investment commitments. Beginning in the late nineteenth century the thesis observed that the principle of sovereignty historically operated to place the regulation of economic activities solely within the regulatory power of the state in whose geographic boundaries the economic activities occurred.³ This was simply

² Harold Hongju Koh, 'Transnational Legal Process', (1996) 75 Nebraska Law Review, 181-207, 192-93.

³ Wagner, M., 'Regulatory Space in International Trade Law and International Investment Law' (2014) 36 University of Pennsylvania Journal of International Law, 1-87, 4.

an attribute of the principle of sovereignty as recognized under customary international law.⁴ With the rise of globalisation, however, states began to enter into international investment agreements that ostensibly placed restrictions on their regulatory freedoms.⁵ The primary reason why states were willing to limit their regulatory autonomy was identified to lie in their desire to attract FDI.

Through extensive engagement with the text and interpretations of early investment agreements this thesis observed that the investment law regime was initially crafted with the primary view of attracting FDI through the creation of a stable environment for the protection of investment. This singular objective of the system, however, generated legitimacy concerns based on the perception that host states had given up too much policy space.⁶

A detailed study of the relevant literature on the subject (including but not limited to treaty text, arbitral awards and academic commentary) allowed for the fabrication of recommendations that allow for investment interests to be balanced with a state's legitimate non-investment policy objectives in the interpretation of investment treaties. Specifically this thesis recommends the incorporation of general exception clauses, new preambular language and interpretative statements, in international investment agreements.⁷

It was however concluded that while the incorporation of these three devices for promoting a balance between investment protection and non-investment policy objectives would be a step in the right direction, they alone would not be able to adequately settle the legitimacy crisis that arises from concerns regarding the shrinking of regulatory space. This is because, delegating the responsibility of balancing a state's non-investment obligations with its investment obligations to ISDS tribunals touches upon other legitimacy concerns discussed in this thesis. To the extent that ISDS is plagued by a crisis of inconsistency and is viewed as a hybrid dispute settlement mechanism where arbitrators are drawn from private international law backgrounds who might not be sensitive to non-investment concerns, the legitimacy crisis based upon the perception of the curtailment of regulatory autonomy will subsist. Thus, the existence of other legitimacy concerns fuel the legitimacy crisis caused by the perceived curtailment of regulatory autonomy. If however these concerns are adequately addressed (which it is later argued is possible through the creation and wide spread ratification of an

⁴ Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, (Cambridge University Press, 2008).

⁵ In other words, circumscribing the unhindered regulatory capacity a state enjoys in the absence on investment agreements is simply an exercise of a states sovereign right.

⁶ UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, UNCTAD Series, 23.

⁷ Wagner, *supra* note 3, 37.

MAI), it is asserted that incorporating the three devices discussed above, in investment agreement(s) will go a long way towards reaching a compromise between “*the forces of multilateralism or globalization, represented at one extreme by those who would prefer to see the regime remain as it was constructed during the 1990s, and the forces of social and environmental protection—represented at the other extreme by those who would prefer to see the regime dismantled.*”⁸ Such a compromise it is argued will resolve this legitimacy crisis faced by the investment law regime while continuing to protect the interests of investors.

7.3. Transparency

The chapter on transparency observed that ISDS can historically be characterised as a confidential dispute settlement mechanism, primarily because most institutional rules and investment treaties drafted before the turn of the twenty first century did not contain provisions on the degree of transparency that should be attached to the proceeding arising from their breach. In the last two decades, however, the system of ISDS has been evolving to make provisions for greater transparency. For instance, institutional rules that have specifically been tailored for ISDS (as opposed to arbitration in general) have made significant leaps in the direction of greater transparency.⁹

The thesis identified that underlying this evolution is the recognition of the fact that ISDS disputes involve public interest issues. There are several sources from which public interest in ISDS can arise. For instance, since ISDS proceedings define whether the regulatory and administrative actions of states are lawful or not, they naturally affect the rights of citizens and have an impact on other stakeholders.¹⁰ Moreover, although arbitral awards do not have binding precedential value, they still have a significant impact on the evolution of IIL, thereby having an impact on the interests of the epistemic community of ISDS.¹¹ On these grounds, it is argued that public participation is a necessary step to correct the system’s perceived legitimacy crisis.¹²

⁸ Ibid., 1075.

⁹ See also ICSID Arbitration Rules, Rule 37; ICSID Arbitration (Additional Facility) Rules, Rule 41(3); ICSID Secretariat, Discussion Paper.

¹⁰ A. Menaker, ‘Piercing the Veil of Confidentiality: The Recent Trend towards Greater Public Participation and Transparency in Investor-State Arbitration’ in Yannaca-Small, K. (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues*, (Oxford University Press, 2010) 129-160, 129; Mariel Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven International Publishing, 2008), 38; D. Magraw, and N. M. Amerasinghe, ‘Transparency and Public Participation in Investor-State Arbitration’, (2009) 15(2) *ILSA Journal of International & Comparative Law*, 337-360, 339; and Meg Kinnear, ‘Transparency and Third-Party Participation in Investor-State Dispute Settlement’ (2005) *Symposium on Making the most of International Investment Agreements: A Common Agenda*.

¹¹ Ibid.

¹² Ibid.

In light of this, this thesis identifies the solution to this issue to lie in the recognition and balancing of the legitimacy concerns of the various stakeholders. Indeed, demands for complete transparency or confidentiality would do little more than erode the perceived legitimacy of the system. The main contribution of this chapter lies in the fabrication of recommendations on the manner in which the two principles can be balanced during the drafting of the investment agreement and during each stage of the arbitration proceedings. These recommendations are based on the recognition of the concerns the proponents of these principles have and are therefore based entirely on safeguarding their interests. In doing so, the thesis seeks to provide a method of balancing the conflicting principles in a manner acceptable to as many stakeholders as possible.

The chapter concludes that while these recommendations would be a step in the right direction they will not be sufficient to avert the legitimacy crisis. This is because of the fact that the fragmented nature of ISDS acts as a significant barrier to the possibility of the adoption of the same standards of transparency across the board. that the adoption of innovative techniques to foster uniformity in the law and consistency in interpretation, is required (provided in chapter 6). Till then inspiration should be taken from the recent practices of various developed and certain developing-democratic states in the formation of their model BITs in a manner that fosters debate and allows for the voices of various stakeholders to be heard.

7.4. Consistency

While consistency is an important factor in the evaluation of the perceived legitimacy of any system of adjudication, it is necessary to recognise that all legal systems have various legal issues that remain unresolved for extended periods of time. Moreover, working through challenges to accepted thinking through litigation are part of well-functioning systems. Consistency is thus by nature a question of degree – a certain amount of inconsistency may need to be tolerated as the system works out its approach to issues.

The question therefore is, what is the acceptable degree of *de facto* tolerance for inconsistency? It is in the answer to this question that a part of the contribution of this thesis can be found. This thesis argues that the degree of acceptable tolerance depends on the costs of wrong judgements, the need to work through legal issues and the costs of obtaining consistency. It is however, asserted that since ISDS frequently involves a review of government measures on issues that have an impact on the public such as anti-tobacco policies or environmental policies - Inconsistent approaches to the evaluation of such policies raise serious concerns for society

at large. Therefore, the threshold for the acceptable tolerance of inconsistency in such instances is found to be very low.

Given the fragmented nature of ISDS and the resulting lack of a regulatory body, however there is no legal obligation on the part of arbitrators to address inconsistency in rulings. Moreover, as disputes are resolved by a number of 'independent' institutional arbitral bodies and ad hoc tribunals, conflicting decisions on the interpretation of treaty provisions and the principles of customary international law are rendered. This is partly attributable to the fact that in most cases of inconsistency, different tribunals are interpreting different BITs. However, even in such instances it is difficult to ignore the fact that the provisions under analysis may be similar in their content and the disputes may have similar factual contexts.¹³ While the issue could be remedied if tribunals were to give due regards to previous interpretations, the lack of a coherent system makes it extremely difficult to motivate tribunals to do so.¹⁴

Moreover, the thesis found that the fragmented nature of the system of ISDS allows investors to act opportunistically and institute parallel proceedings. A review of arbitral awards also disclosed a tendency on the part of tribunals to adopt expansive definition of the terms 'investment' and 'investor'¹⁵, allowing corporate investors to hedge their bets by structuring their transactions in a manner that permits them to benefit from the protections of multiple BITs and access multiple forums.

¹³ Franck, S. F., 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', (2005) 73 *Fordham Law Review* 1521-1625, 1523.

¹⁴ Certain commentators argue that the notion of *stare decisis* gives against the very fabric of arbitration which was developed to serve as a mechanism whereby two parties could settle their dispute which in an isolated and private setting. Christian J. Tams, 'An Appealing Option? The Debate about an ICSID Appellate Structure' (2006). *Essays in Transnational Economic Law Working Paper No 57*, 37; and Mariel Dimsey, *The Resolution of International Investment Disputes: Challenges and Solutions International Commerce and Arbitration*, (Volume 1, Eleven International Publishing, 2008), 41.

¹⁵ See *Société Générale, in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v The Dominican Republic* (2008) Jurisdiction Award of 19 September 2008 (LCI A Case No UN 7927) paras 115-121 available at <http://ita.law.uvic.ca/documents/SGJurisdiction.pdf>; *Noble Energy Inc. and Machala Power CIA LTD v The Republic of Ecuador and Consejo Nacional de Electricidad* (2008) Jurisdiction Award of 5 March 2008 (ICSID ARB/05/12) 77-83 available at <https://www.italaw.com/sites/default/files/case-documents/ita0563.pdf>; *Siemens AG v Argentina* (2004) Jurisdiction Award of 3 August 2004 (ICSID ARB/02/8) paras 122-144 available at <http://ita.law.uvic.ca/documents/SiemensJurisdiction-English-3August2004.pdf>; *Waste Management Inc. v Mexico* (2004) Final Award of 30 April 2004 (ICSID ARB(AF)/00/3) paras 77-85 available at <https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf>; *Enron Corp and Ponderosa Assets LP v Argentina* (2004) Jurisdiction Award of 14 January 2004 (ICSID ARB/01/3) paras 37-57 available at <http://ita.law.uvic.ca/documents/Enron-Jurisdiction.pdf>; *Azurix Corp v Argentina* (2003) Jurisdiction Award of 8 December 2003 (ICSID ARB/01/12) paras 19-22 and 67-74 available at <http://ita.law.uvic.ca/documents/AzurixJurisdiction.pdf> ; see also Sitanimir A. Alexandrov, 'The "Baby Boom" or Treaty-Based Arbitration and the Jurisdiction of ICSID Tribunals: Shareholders as "Investor" and Jurisdiction Ratione Temporis' (2006) 5 *The Law and Practice of International Courts and Tribunals*, 27-34.

A natural corollary of the initiation of multiple proceedings in response to the same state measure, concerning the same investment and the same set of facts, is the increase in the probability of the issuance of conflicting awards.¹⁶ As discussed above IIL notoriously lacks executive authority. This, in theory, permits different tribunals to arrive at different results, which may not necessarily be reconciled with each other, but which may be permitted to stand in isolation and contradiction.

Drawing from the procedural law of domestic legal systems and US tax law, this thesis recommended the adoption of certain mechanisms that can be adopted to curtail the possibility of parallel proceedings namely *res judicata*, *lis pendens* and consolidation of claims. *Res judicata* operates to curb the potential of the re-litigation of disputes once an award has been rendered. *Lis pendens* on the other hand is a tool developed to combat the issue of concurrent proceedings. It holds that if a dispute between the same parties based on the same subject matter is being adjudicated before a judicial body, it cannot be adjudicated before another adjudicatory body until the first one concludes its proceedings and issues an award.¹⁷ The applicability of both *lis pendens* and *res judicata* however is limited by the requirement that the identity of the parties and the grounds for the claim must be the same. Thus, they are unable to limit parallel proceedings in instances where parties of the same constructive identity initiate disputes under different investment agreements.

Consolidation of claims on the other hand operates to combine multiple proceeding into one.¹⁸ Therefore, the greatest limitation of consolidation in combating issues raised by parallel proceedings lies in the fact that it has no role to play when one of the proceedings has been concluded and a judgment/award has been issued. Moreover, the authority of tribunal to make a consolidation order hinges primarily upon the invoked treaty's consolidation provisions.¹⁹ As most investment agreements currently in force do not contain consolidation provisions, consolidation of proceedings are rare.²⁰

¹⁶ Ibid., Dimsey, 140; Ibid.; and Katia Yannaca-Small, 'Parallel proceedings' in P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) (Hereinafter Yannaca-Small, *Parallel Proceedings*) 1009.

¹⁷ Ibid p.1013, and Ibid. Shany, 20.

¹⁸ Jorun Baumgartner, *Treaty shopping in international investment law*. Oxford University Press, 2016.

¹⁹ Consolidation proceedings are therefore based upon party consent.

²⁰ Hansen

In light of these limitations, this chapter agrees with those preceding it and argues that there is need for a fundamental reform in the system of ISDS for it to be legitimised. What this fundamental reform entails formed the subject matter of chapter 6.

7.5. Proposed Solutions

In light of the fact that the solutions that can be adopted without requiring a fundamental reform of the system of ISDS would not be capable of adequately resolving all three concerns that have given rise to a crisis of legitimacy – This chapter argues that there is need for a fundamental reform in the field of IIL and ISDS. It proposed that the most viable solution is to reach consensus on replacing all investment treaties with an MAI, and to establish a standing two-tiered Investment Court to interpret it.²¹ The adoption of this proposal, it is argued, would go a long way in resolving the legitimacy crisis that the current system is suffering from.

In particular, the MAI would lead to the unification of IIL norms thereby making them much more accessible and clearer. The existence of a unified statement of norms would further allow for consistent interpretations as arbitrators would no longer be able to justify inconsistent interpretations on the basis of minor differences in the wording of investment treaties. Moreover, the MAI can incorporate clear guidance on the right of a state to regulate in derogation of its commitments under IIL. The MAI would further alleviate concerns regarding the lack of provision of transparency under the current system of ISDS. This can be achieved by providing all stakeholders a degree of participation rights in the negotiations leading to the creation of the MAI and through the incorporation of express rules on the provision of transparency during all stages of the dispute settlement process.

It is however argued that the existence of a unified statement of norms would not guarantee uniform results. These concerns can be remedied by the standing two-tiered court that would be established to interpret the MAI. Indeed, the creation of standing court will remedy the concerns of inconsistent interpretations that arise as a result of the fragmented nature of ISDS, as only one court would be interpreting the document. Furthermore, the creation of an appellate court can ensure that any mistakes of law made by the court of first instance can be remedied thereby infusing a degree of legitimacy in the system from the perspective of all stakeholders.

²¹ As mentioned throughout this research, it is difficult to make such fundamental change in the system. There many questions to be addressed for such establishment, including the status of the national courts, status of the arbitrator, recognition and enforcement of these decisions that are pending in appeal, and status of non-parties. See also B Legum, ‘Visualizing an appellate system’ in Fderico Ortino et al (eds), *Investment Treaty Law: Current Issues Volume 1* (British Institute of International and Comparative Law 2006), 121.

This is because, as discussed extensively in the chapter on legitimacy, the degree to which a court is perceived to consistently reach the correct decision has a large impact on its legitimacy. Moreover, consistency in interpretation would be further guaranteed as the rulings/interpretations of the appellate body would have the status of binding precedent thereby ensuring that the court of first instance follows them in future disputes.

Furthermore, this chapter argued that the creation of a standing court could allow for a greater degree of transparency in the system of adjudication. In particular, the court can create its own website at a very low cost which would allow it to publish information regarding the initiation of disputes and the final judgment. Moreover, while the MAI would contain rules on the provision of transparency, the existence of one court interpreting them would ensure consistency in interpretation and application.

Finally, for the same reason, the establishment of a standing court would go a long way in the provision of predictability vis-à-vis the regulatory autonomy of states under IIL. In other words, the ability of the court in producing consistent interpretations of investment standards would allow states with a great degree of clarity on the scope of their right to regulate.

While the creation of a unified statement of norms and one court to interpret them would go a long way in remedying the legitimacy crisis that the current system is perceived to be suffering from, the achievement of such a fundamental reform would be no mean feat and would take considerable time. Moreover, issues of funding and the identification, or even the creation, of an institution to host these reforms would need to be resolved. In light of these limitations, this thesis proposes the creation of an Investment Law Advisory Council (ILAC) modelled on the CISG-AC, as an interim measure. It is argued that while the ILAC would not be able to overcome all the concerns of legitimacy discussed in this thesis, it would go a long way in minimizing their impact. In particular, while the system of IIL and ISDS would continue to remain fragmented, the ILAC would be able to curb concerns regarding the lack of consistency, transparency and certainty of the scope of a state's regulatory autonomy, by issuing opinions on these matters. As the ILAC would be constituted of highly respected academics in the field who do not represent any legal culture or state, it is argued that arbitral tribunals would view the opinions rendered by the ILAC as having highly persuasive authority. Indeed this has been the case in the experience of the CISG AC. It is however noted, that for this interim measure to be implemented, concerns regarding the source of their funding would need to be overcome. In other words, before the ILAC can be created it is essential to identify how the body would be funded.

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