

CHAPTER 1

REIMAGINING TRANSPARENCY: ENHANCING SYSTEMIC GOVERNANCE AND ACTUAL LEGITIMACY IN INVESTMENT ARBITRATION

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I INTRODUCTION

The traditional opacity of the investment arbitration regime, resulting from the importation of the confidentiality principle from commercial arbitration, has in recent decades raised doubts over its legitimacy. Public interest areas traditionally considered as the exclusive domains of sovereign states, the operations of which citizens as its beneficiaries have a right of scrutiny, are now thought to be constrained and usurped by ephemeral investment arbitration processes multifariously inaccessible and unaccountable to the public.

The investment arbitration regime is an extra-judicial recourse mechanism against a state, applying a corpus of law separate from domestic legal principles, which is afforded exclusively to foreign investors. Disputes that typically impinge on the allocation of state resources and key public interests – such as environmental protection, health, and public safety – are determined by individual arbitrators of undisclosed backgrounds. Its processes and outcomes are also generally kept secret from the public. It is, therefore, unsurprising that a long-standing perception of a legitimacy deficit in the system exists and that this has, in turn, generated widespread public resistance towards investment agreements, clear from the recent discussions on the CETA,¹ TPP,² and TTIP.³

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1 Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union.

Efforts have been made by the investment arbitration community to address the legitimacy deficit, primarily through the disclosure of information linked to investment arbitrations. In camera hearings have been dispensed with in favour of public hearings, which are now increasingly common in modern investment agreements with arbitral tribunals keen on the use of live video streaming facilities to widen the hearing audience. Central repositories of published arbitral awards and cause papers widely accessible to the public have also been created. The possibility of *amicus curiae* submissions by non-disputing parties have also become a systemic feature.

Such has been the remedial strategy over the past decades with the inclusion of varying combinations and degrees of the above measures in individual investment agreements discretely concluded between states. This has resulted in incoherence in transparency standards globally, which has produced a fragmentary response inadequate to dispel the perceived illegitimacy of the system. Initial responses to this fragmentation, such as the 2006 amendments to the ICSID Arbitral Rules and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules),⁴ attempted to streamline transparency standards through amendments to arbitral rules, a common denominator of existing investment agreements. Their impact, however, was muted given the non-participation of various arbitral institutions still endorsive of the confidentiality prized by commercial arbitration and, even amongst participating institutions, the differing transparency standards employed by each set of arbitral rules. Further, investment agreements falling outside the ambit of transparent arbitral rules, either by the absence of an arbitration mechanism or the selection of opaque versions of arbitral rules, remain a significantly large proportion of existing investment agreements.

Equally inhibitive is the temporally demarcated ambit of the UNCITRAL Transparency Rules, which omits investment agreements preceding the Rules. The

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- 2 Trans-Pacific Partnership (TPP), a preferential trade and investment agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America, and Vietnam. The newly-elected President of the United States of America, Donald Trump, has recently announced that the country has pulled out of the agreement.
 - 3 Transatlantic Trade and Investment Partnership (TTIP), a preferential trade and investment agreement between the United States of America and the European Union.
 - 4 The Transparency Rules came into effect on 1 April 2014 and prescribe a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-state arbitration.

Mauritius Convention⁵ was recently drafted to fill this lacuna by mandating the retrospective application of the UNCITRAL Transparency Rules to omitted investment agreements. However, the instrument's impact has been largely muted due to its limited reception worldwide.

Even if the Mauritius Convention gathered its aspired subscriptions, it should be questioned if the transparency regime therein would have addressed the core legitimacy deficit of the investment arbitration regime. Focusing on the mere improvements of public perception of systemic legitimacy, the current remedial philosophy is centred on perceived legitimacy, whilst leaving the system's actual legitimacy lagging. These are two complementary aspects of legitimacy between which this paper draws a distinction.⁶ Perceived legitimacy refers to the perception of credibility of a regime in the eyes of its beneficiaries. Actual legitimacy is a normative value premised on the conformity of a regime with certain objective requirements for legitimate decision-making. The requisite criteria of actual legitimacy in this paper's focus are accountability and equal protection, the absences of which create systemic imbalances of power and governance deficits.⁷ Accountability refers to the ability of governance beneficiaries to hold decision-makers answerable for misfeasance. Equal protection is a comparative value which requires all governance beneficiaries to be afforded the same level of legal protection by the decision-maker.

Current disclosure requirements ignore the system's inability to address conflicts of interest, the systemic concentration of decisional power, and the unequal protection afforded to domestic and foreign investors occasioned by the artificial dualism between domestic and international investment laws, two corpora of law which, though substantially overlapping, are developed in isolation.⁸ Further, when transparency becomes more extensive, investors are incentivised to settle disputes with respondent states the outcomes of which are confidential under

5 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) which was opened for signature on 17 March 2015.

6 The authors draw inspiration from the work of Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 AJIL 510, 536. For a holistic discussion on the multifarious definitions of legitimacy, see Peter Fabienne, 'Political Legitimacy' (*Stanford Encyclopaedia of Philosophy*, Winter 2014) <<http://plato.stanford.edu/entries/legitimacy/>> accessed 23 November 2016.

7 The authors are cognizant of the multidimensional and diverging definitions of legitimacy and the definitional challenges it poses, a proper treatment of which is beyond the length of this paper.

8 For a related discussion on the effect of this substantive dualism on the domestic rule of law and institutions, see generally Nitin Nadkarni and Lim Tse Wei, 'Trans-Pacific Partnership Agreement: The Continued March of Private Justice' [2016] LR 574.

the current transparency rules despite their public impact being equal to that of investment arbitral awards. The conjunctive result of these deficiencies is an existing investment arbitration regime that lacks actual legitimacy.

It is argued that there is a need for a shift to a remedial philosophy premised on actual legitimacy. The present investment arbitration regime contains a suboptimal architecture of systemic accountability due to the presumption of confidentiality therein. In this respect, this paper notes that accountability operates on multiple levels, and not merely at the state level.

The acts of a state, namely its laws and executive decisions, are held to account by the public – comprising its citizens and non-citizens, including foreign investors – who, by various accountability mechanisms, ensure that state governance pursues public interests. Accountability mechanisms may take the form of administrative reforms and market forces, common to both democratic and non-democratic states. It is this balance of power which legitimates the system of national governance. By contrast, under investment agreements, foreign investors are afforded an exclusive, confidential right of accountability against respondent state on sovereign actions constituting the investment dispute. Confidentiality and exclusivity deprives citizens of the respondent state of their traditional right of holding the disputed sovereign action to account.

It is apposite to note that accountability also operates at a corporate level. The actions of corporations are routinely scrutinised by members of the public who will sanction corporate maladministration, especially those contrary to public interest, through market forces. Again, the confidentiality of investment arbitrations prevents the public from exercising disciplinary forces on corporate maladministration. These collectively form the legitimacy and governance deficits in the system of governance constructed by investment agreements.

Future transparency reforms should remedy the above legitimacy and governance deficits of the investment arbitration regime. The ambit of transparency measures should be enlarged to include the mandatory disclosure of settlement agreements, arbitral awards, and arbitrator appointments in investment arbitration, some of which are features not novel under international law as this paper will show.

It is expected that the expansion of transparency would raise concerns that it denatures investment arbitration by attenuating confidentiality, the oft-assumed incentive for the mechanism's utilisation. This paper challenges the immanence of confidentiality in the investment arbitration regime. Confidentiality, a derivative philosophy of commercial arbitration, was never an intended characteristic of the investment arbitration regime, which bears greater resemblance to administrative

law mechanisms rather than commercial arbitration. Thus, it is doubtful if confidentiality should be maintained in its current form in the investment arbitration system. Transparency should instead be welcomed.

This paper begins by examining, in Section 2, the philosophical core and the system of governance constructed by investment agreements and its distinction from commercial arbitration. This informs the panoramic analysis of Section 3 of the diminution of confidentiality in investment arbitration and the development of transparency measures leading up to the UNCITRAL Transparency Rules and Mauritius Convention. Section 4 discusses the muted impact of existing transparency measures as augments of actual legitimacy before presenting a proposed selection of reforms and its justifications.

II THE SYSTEM OF GOVERNANCE UNDER INVESTMENT AGREEMENTS

2.1 Decentralised Genesis of Investment Agreements

The theoretical core of investment treaty arbitration is an econo-legal bargain between foreign investors and States: in return for inflowing foreign investment, a host State agrees to waive in its disputes with foreign investors a part of its sovereignty to private arbitration tribunals.⁹

As companies and citizens of capital exporters amassed wealth, they exported some of that capital abroad, typically into less developed nations where these investments were perceptibly vulnerable to regulatory caprice and expropriation risks in the host state. Such risks were pronounced at the height of national revolutions and decolonisation, evidenced by the uncompensated expropriations during the Russian and Mexican revolutions.¹⁰ The expropriation of foreign affiliates and their assets also intensified shortly after the mid-20th century wave of decolonisation.¹¹

Against these governmental takings, a foreign investor could do little to respond. Prior to the investment agreements, foreign investors' remedies were limited to: (1) negotiating directly with the sovereign of the host state; (2) suing the foreign sovereign in the host state's own courts; and (3) requesting their home government to negotiate diplomatically, or take other actions, on their behalf.¹²

9 For further explanation of this position, see generally Nadkarni and Lim (n 8).

10 United Nations Conference on Trade and Development, *Taking of Property* (UNCTAD/ITE/IIT/15) 4-5.

11 *Ibid.*

12 This avenue had the possibility of escalating into primitive remedies such as gunboat diplomacy.

These remedies were considered wholly unsatisfactory for the resolution of investment disputes. Politically-driven diplomatic recourse and the vagaries of suits in a non-neutral forum offered little assurance of an effective outcome to investors, which deterred foreign investment.¹³

This incentivised industrialised countries to institutionalise substantive protections for the investments of their nationals through investment agreements.¹⁴ It is apposite to note that these efforts were and remain decentralised with states entering into discrete investment agreements of varying levels of investment protection. Early investment agreements took the form of bilateral investment treaties (BITs) signed between two States.¹⁵ Over the past two decades, the number of investment treaties has tripled¹⁶ with nearly 170 countries having signed onto

13 Due to space constraints, this article is unable to consider the divergent views on the correlation between the rule of law and investment decisions. Some view that BITs may sometimes function as substitutes for domestic institutional quality. As such, developing countries that sign more BITs with developed countries receive more FDI flows as investment decisions are predicated on the existence of the rule of law. See generally Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment in Developing Countries?' (*LSE Research Online*, 2005) <<http://eprints.lse.ac.uk/archive/00000627>> accessed 26 August 2016. A contrary view is that:

it is generally recognized that investment decisions, and thus FDI flows, are determined by a variety of economic, institutional and political factors, including the size and growth rate of the host-country market, availability of raw materials or labour. It would therefore be unreasonable to expect that any individual factor, let alone a BIT, could be isolated and 'credited' with a decisive impact on the size or increase of FDI flows. Even such important locational determinants as large and growing markets, or oil deposits ... do not work alone as FDI determinants, but only in tandem with other factors.

See UNCTAD, *Bilateral Investment Treaties in the Mid 1990s* (UNCTAD/ITE/IITi) 122.

14 Valentina Vadi *Analogies in International Investment Law and Arbitration* (Cambridge University Press, 2016) 50.

15 The first BIT was signed between Germany and Pakistan in 1959. By the mid-1960s, Malaysia, Thailand, Sri Lanka and the Republic of Korea also had entered into such arrangements with Germany. Halle and Peterson observe that "other developed countries were slower to push for comparable arrangements with Asian Governments, but by the 1970s, countries such as France, Switzerland and the United Kingdom were well on the way to concluding such agreements with multiple Asian Governments." See Mark Halle and Luke Erik Peterson *Investment Provisions in Free Trade Agreements and Investment Treaties: Opportunities and Threats for Developing Countries* (UNDP Discussion Paper, UNDP Regional Centre Colombo 2005).

16 In 1992, there were approximately 700 BITs, rising to more than 900 BITs between 150 countries in 1995. This has increased markedly today with the existence of global total to 3,304 treaties. See United Nations Conference on Trade and Development, *World Investment Report 2016* (UNCTAD/WIR/2016) xii; Susan Franck "The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2005) 73 *Fordham L Rev* 1521, 1522-23. Note also that nearly half of the existing 3,300 international investment agreements are due to expire and are, thus, ripe for recrafting. Over 1300 bilateral investment treaties entered their termination or renegotiation stages at the end of 2013. See United Nations Conference on Trade and Development *International Investment Policymaking in Transition:*

one or more BITs to date. More extensive treaties such as multilateral investment treaties, economic integration agreements, and preferential trade and investment agreement have also been adopted in recent years.

Investment agreements typically articulate a series of substantive economic rights, aimed at recompensing investors for the risk taken in exporting capital. These rights include guarantees of appropriate compensation for expropriation, freedom from arbitrary or discriminatory government actions, guarantees of national treatment of foreign investments, promises of fair and equitable treatment, assurances that the host state will provide foreign investments with full protection and security, undertakings that the host state will fulfil its obligations under existing private contracts, and assurances that foreign investments will receive treatment no less favourable than that accorded under international law.¹⁷ These substantive rights do not form part of and are developed separately from domestic law.

Most significant is the creation of a regime of direct recourse by the foreign investor against the government of the host state,¹⁸ ie investment arbitration, to enforce the above substantive rights.¹⁹ Under this mechanism,²⁰ an investor could elect²¹ to commence arbitration proceedings in accordance with the stipulated procedure (typically under the rules of the International Centre for Settlement of

Challenges and Opportunities of Treaty Renewal (IIA Issues Note, No 4, June 2013) (UNCTAD/WEB/DIAE/PCB/2013/9) 1.

- 17 See generally, Susan Franck "Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law" (2006) 19 *Pacific McGeorge Global Business Law Journal* 337, 342.
- 18 It should be noted that though the availability of investment arbitration is the norm, not all investment treaties provide for the recourse mechanism. An example of this is the Germany-Malaysia BIT.
- 19 "By the end of 2015, a total of 444 investment treaty arbitration proceedings are known to have been concluded. About one third of all concluded cases were decided in favour of the State (claims dismissed either on jurisdictional grounds or on the merits) and about one quarter were decided in favour of the investor, with monetary compensation awarded. Twenty-six per cent of cases were settled; the specific terms of settlements often remain confidential." For more comprehensive statistics on investment treaty arbitration, see United Nations Conference on Trade and Development, *World Investment Report 2016* (UNCTAD/WIR/2016) 107.
- 20 It is interesting to note that the first generation of investment agreements, for example the Germany-Pakistan BIT of 1959, provided for the referral of disputes to the International Court of Justice (ICJ). In the Germany-Pakistan BIT, when disputes arose concerning the interpretation or application of the treaty, such disputes were to be taken to the ICJ for settlement if agreed by both parties. The inclusion of the ICJ in ISDS is not *de rigueur* today.
- 21 See Eric Gottwald "Leveling the Playing Field: Is it Time for a Legal Assistance Centre for Developing Nations in Investment Treaty Arbitration?" (2007) 22(2) *Am U Int'l L Rev* 237.

Investment Disputes ("ICSID")²² or the UNCITRAL Arbitration Rules).²³ Typically, the process will be confidential and privy only to the disputants, though this nature has seen a partial reversal in recent years.

2.2 The Legal Enclave of Investment Agreements and the Disruption of Accountability in Investment Disputes

Accountability functions to expose and sanction governance abuses.²⁴ It entails the right of the governed to hold decision-makers to a set of operative standards, non-observance of which is sanctioned which, in extreme cases, culminates in the de-recognition of legitimacy and authority. Accountability mechanisms may take on non-exhaustive forms, including hierarchical accountability, legal accountability, and market discipline,²⁵ all common to any system of governance. In this regard, the existing discourse on accountability in investment arbitration has been focused on state accountability. This paper views this as an unsatisfactory focus that omits key related governance systems. Accountability should instead be seen as operating on multiple levels, namely: the claimant foreign investor vis-à-vis the respondent state; the respondent state vis-à-vis other foreign investors; the respondent state vis-à-vis its citizens; and the claimant foreign investor vis-à-vis the respondent state's citizens.

The actions of a state, encompassing its laws and executive decisions, are held to account by the public comprising its citizens and non-citizens, including foreign investors. This is a mechanism aimed at ensuring that state governance pursues public interests. Maladministration may give rise to judicial review by affected citizens. Public outcry and bad publicity concerning wrongful state actions may lead to changes in administrative membership. Actions disruptive of favourable market conditions, such as interest rate revisions and fiscal tightening, are disciplined by markets participated by domestic and foreign investors. These

22 ICSID, one of the five organisations of the World Bank, was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). The ICSID Convention is a multilateral treaty aimed at furthering the World Bank's objective of promoting international investment. ICSID also provides arbitral rules for the conduct of investment arbitrations. These include the ICSID Arbitration Rules and the ICSID Additional Facility Rules, which are collectively the most commonly used arbitral rules in investment arbitration presently.

23 Investment arbitrations administered under the UNCITRAL Arbitration Rules are typically ad hoc in nature.

24 Ronald Oakerson "Governance Structures for Enhancing Accountability and Responsiveness" in James L Perry (ed) *Handbook of Public Administration* (San Francisco, CA, Jossey-Bass 1989).

25 For a comprehensive analysis of various accountability mechanisms see generally Grant and Keohane "Accountability and Abuses of Power in World Politics" (2005) 99(1) APSR 29.

mechanisms impose corrective forces on state administration to preserve its legitimacy.

Similar accountability mechanisms are also present at non-state levels. Modern corporate governance sees companies being accountable to an expanded range of stakeholders. Proper corporate governance is hitherto equated with holistic corporate social responsibility which entails the alignment of corporate activities with public interests.²⁶ It is common for corporate maladministration impinging on public interests to attract public and market sanctions. Environmental disasters occasioned by corporate activities have attracted public censure and negative trading sufficient to spur corrective actions by misbehaving companies.²⁷

It should be noted that for any accountability mechanism to operate optimally, information on governance abuses is necessary as asymmetrical information enables undisclosed governance abuses to escape scrutiny and sanction. Accordingly, investment arbitration, which exists in a confidential legal enclave, disrupts all of the above accountability mechanisms. The arbitration mechanism and protections therein are privileges exclusive to foreign investors due to the carving out of domestic investors from investment agreements.²⁸ Domestic investors are not able to regulate state actions on investments through investment arbitration. Thus, investment arbitration is an accountability mechanism exclusive to foreign investors. This disruptive effect is compounded by the secrecy of disputes preventing domestic actors from knowing the impugned maladministration by the state and its scrutiny at a national level. Resultantly, in particular investment disputes, the state is accountable solely to the claimant foreign investor with other governance beneficiaries marginalised.²⁹

26 This is due to the adoption of the "Enlightened Shareholder Value" which is the idea that corporations should pursue shareholder wealth with a long-run orientation that seeks sustainable growth and profits based on responsible attention to the full range of relevant stakeholder interests.

27 An indicative example of this was the Gulf of Mexico oil spill caused by the mishandling of drilling activities by British Petroleum.

28 *Gami Investments Inc v The Government of the United Mexican States* Final Award, 15 November 2004

29 It is also apposite to note that foreign investors may elect to bypass domestic courts in the enforcement of investment agreements as domestic courts lack jurisdiction over investment protections. This regime of extra-judicial recourse creates an "escape clause" capable of completely detaching foreign investors from domestic courts in relation to its investments in the host State. The investment arbitration regime facilitates the privatisation of justice, sanctioned by public international law and supported by international institutions, and which, due to cost considerations, is accessible only by economically powerful private actors. See Nadkarni and Lim (n 8).

A similar information asymmetry exists in investment arbitration at the corporate level. Disputants who are foreign companies would have the propriety of their actions escape the review of the polity. This may result in an unsanctioned marginalisation of various stakeholders whose interests are directly impacted by the disputed corporate actions, which is a recurring complaint in the transparency discourse.

Further, unequal protection features in the legal enclave of investment arbitration. The separation of investment protections from domestic law creates an artificial legal dualism between the investment protections afforded to domestic and foreign investors. A corollary implication is that the operative standards to which the same state action are judged differs according to the nationality of the investor, which results in a potential disparity in governance standards and a depreciation in the actual legitimacy of the investment arbitration regime. This is elaborated further in Section 4.4.

2.3 The True Nature of the Legal Enclave and the Incongruence of Confidentiality

It is apposite to consider the adequacy of the theoretical underpinnings of the above legal enclave. The investment arbitration regime is in effect a form of global administrative law in that the regime primarily aims to realign state actions with public interests rather than contractual bargains. Its traits, bearing resemblance to judicial review, appear distinct to commercial arbitration. This bears heavily on the transparency debate in investment arbitration as the confidentiality principle is a derivative philosophy of commercial arbitration.³⁰ It should therefore be questioned if the links and extrapolations, particularly the confidentiality principle, drawn between investment arbitration and commercial arbitration are tenable.

The historical *raisons d'etre* of the two regimes are distinct. Commercial arbitration arose from organisational practices of merchant guilds in the twelfth and thirteenth centuries. To enter the merchant trade, one required the membership of merchant guilds that were tasked by the borough government with the out of court resolution of disputes between its members. One's agreement to submit future trade disputes to the arbitrations by his guild prior to litigating the matter elsewhere was a condition for guild membership.³¹ By contrast, investment arbitration was

30 *Aguas del Tunari SA v Republic of Bolivia* ICSID Case No. ARB/02/3, Letter from ICSID to Petitioner dated 29 January 2003, 2.

31 Earl S Wolaver "The Historical Background of Commercial Arbitration" (1934) 83 U Pa L Rev 132.

conceived as an introduction of substantive constraints of state actions, not as a complement to an existing recourse mechanism.

Another distinction is the absence of a contractual link between the disputants in investment arbitration. Investment agreements are consensual instruments agreed between states without the input of investors. It can be conceptually argued that investment agreements contain no arbitration agreement between the claimant investor and respondent state from which an implied confidentiality right may arise.³²

This paper is cognisant of the view that while the investor may not be a party to the investment agreement, the agreement serves as an open invitation by the state to arbitrate, the requisite contractual base to which the implied right of confidentiality may attach. It is doubtful, however, if such an implied right of confidentiality exists even in commercial arbitration given its inconsistent provision worldwide. Most arbitral rules are silent on confidentiality. Further, confidentiality in commercial arbitration appears to be a regional phenomenon with its rejection in multiple jurisdictions. Thus, it is doubtful that the investment arbitration regime ever had room for confidentiality. This is a crucial consideration for future transparency reforms and discourse.

Equally pertinent is the increasingly blurring distinction between state-owned enterprises and purely private commercial parties as states are becoming increasingly involved in commerce. State-owned enterprises are private legal entities created by the government, through the use of public funds, to participate in commercial activities on the government's behalf. Disputes involving state-owned enterprises are likely to draw on public funds otherwise multifariously allocable to the polity, such as fiscal improvements and healthcare spending. By contrast, such wide-ranging negative externalities are absent in disputes between

32 *SD Myers Inc v Government of Canada* Procedural Order No. 16, 13 May 2000, paras 7-9. For the purposes of this paper, it is worth noting the reasoning of the tribunal:

8. The Tribunal considers that whatever may be the position in private consensual arbitrations between commercial parties it has not been established that any general principle of confidentiality exists in an arbitration such as that currently before this Tribunal. The main argument in favour of confidentiality is founded on a supposed implied term in the arbitration agreement. The present arbitration is taking place pursuant to a provision in an international treaty not pursuant to an arbitration agreement between the disputing parties.

9. There is no direct contractual link between the disputing parties in the present case, and there is no arbitration agreement between them.

purely private commercial parties. Thus, it bears inquiring into the tenability of the continued presumed application of confidentiality in commercial arbitration.³³

III THE DEVELOPMENT OF TRANSPARENCY MEASURES AND THE DIMINUTION OF CONFIDENTIALITY IN INVESTMENT ARBITRATION

3.1 The Legitimacy Crisis and Resistance towards Confidentiality in Investment Arbitrations

Investment arbitration has traditionally functioned behind a veil of secrecy. While there was no explicit provision for confidentiality in arbitral rules or investment agreements, disputants have imported the principle from commercial arbitration where it existed as an unchallenged norm. In camera hearings were the norm and information on the proceedings, much less the existence of the dispute, was not disseminated to members of the public. Arbitral awards were also presumed to be confidential.

As the mechanism and its use proliferated, it became apparent that a significant number of investment arbitrations involved matters of key public interests, of which disclosure was wanting.³⁴ Disputes are often centred on public health,³⁵

33 Undoubtedly, this blurred distinction between state-owned enterprises and purely private commercial parties bears significantly on the transparency debate in commercial arbitration. Despite the authors' curiosities piqued by the subject, it is unfortunately a question lying beyond the scope of this paper. It is food for thought ripe for the international arbitration community.

34 See Kyla Tienhaara "Third-Party Participation in Investment-Environment Disputes: Recent Developments" (2007) 16 Rev Eur Comm & Int'l Env L 230, 230 which lists five aspects of investor-state disputes that clearly implicate the public interest, including the common occurrence of disputes in public service sectors or implicating the public welfare, the potential for disputes to have a chilling effect on government policy, the fact that the costs of arbitration often fall on the public budget, and the possibility of creating precedent for future cases that concern the public interest; see also Fiona Marshall and Howard Mann *Revision of the UNCITRAL Arbitration Rules: Good Governance and the Rule of Law: Express Rules For Investor-State Arbitrations Required* (International Institute for Sustainable Development, 2006).

35 See *Philip Morris Asia Ltd v The Commonwealth of Australia* PCA Case No. 2012-12, Australia's Response to the Notice of Arbitration, 21 December 2011, sect 1, 3 which summarizes the contention by Australia that the legislation challenged was grounded on public health reasons; *Methanex Corp v United States* Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part II, ch D, paras 1-30 which describes the actions which the California state government which says it enacted to protect human and environmental health; see also Investment Arbitration Reporter "Germany is Sued at ICSID by Swedish Energy Company in Bid for Compensation for Losses Arising out of Nuclear Phase-Out" (*Investment Arbitration Reporter*, 1 June 2012) <www.iareporter.com/articles/germany-is-sued-at-icsid-by-swedish-energycompany-in-bid-for-compensation-for-losses-arising-out-of-nuclear-phaseout/> accessed 20 February 2016, which discusses how Germany's decision to phase out nuclear power was spurred by the 2011 Fukushima nuclear disaster, presumably for human and environmental health reasons. This led to the dispute between Vattenfall and the German government; *Vattenfall AB and Others v Federal Republic of Germany*, ICSID Case No. ARB/12/12.

environmental protection, economic crises,³⁶ and broad human rights considerations.³⁷ Corrupt practices by state officials also featured as material allegations in investment arbitrations, a matter of direct interest to the local population.³⁸ Alongside this was a realisation of the negative externalities of investment arbitration. The costs of investment arbitrations, including legal fees and awards unfavourable to the state, are significant and draw heavily on public funds otherwise allocable to national development, which are aggravated where a dispute is decided against the state. Confidentiality prevents scrutiny of the propriety of this reallocation of public funds.

Equally concerning was any potential unconstrained maladministration by arbitrators, the individuals whose decisions create the said negative externalities of investment arbitration. This was not a fear unique to investment arbitration but one shared by all forms of extra-judicial justice, including commercial arbitration. However, the nationwide scope of the potential negative externalities of investment arbitration amplified popular concern.³⁹

Most pertinent was the realisation by the public of its inability to hold to account states on the subject matter of the investment arbitration. Information on disputes was inaccessible and, even if inadvertently disclosed, arrived belatedly after the creation of the negative externality. Also criticised was the unaccountability of ephemeral arbitral tribunals of undisclosed membership whose decisions were unalterable. The conjunctive effect of these realisations was the widespread doubt cast by the public over the legitimacy of investment arbitrations.

36 See *Abaclat v Argentine Republic*, ICSID Case No. ARB/07/5, 52-58 which summarises Argentina's fiscal crisis and the debate between the disputants as to its causes.

37 See for example, *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No ARB/05/22, Award, 24 July 2008, paras 366, 379, 380 and 387. See also *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v Argentine Republic*, ICSID Case No ARB/03/17, Order in Response for Participation as Amicus Curiae, 17 March 2006, para 18.

38 See *World Duty Free Company Limited v The Republic of Kenya*, ICSID Case No ARB/00/7, Award, 4 October 2006, paras 129, 167-88 which describes a bribe paid to the then President of the Republic of Kenya.

39 A recent manifestation of this fear was the impropriety by one of the arbitrators in the arbitration between the Republic of Croatia and the Republic of Slovenia who discussed with one party the tribunal's deliberations, the probable outcome of the arbitration, and the development of case strategies. The arbitrator even offered the possibility of lobbying with other arbitrators. For a summary of the issue, see Patricia Živković "Severe Breaches of Duty of Confidentiality and Impartiality in the Dispute between Croatia and Slovenia: Is Arbitration Immune to Such Violations?" (*Kluwer Arbitration Blog*, 29 July 2015) <<http://kluwerarbitrationblog.com/2015/07/29/severe-breaches-of-duty-of-confidentiality-and-impartiality-in-a-dispute-between-croatia-and-slovenia-is-arbitration-immune-to-such-violations/>> accessed 28 November 2016.

Poor perceptions of systemic legitimacy have led to public outcry and popular resistance against investment agreements leading to significant withdrawals from the investment arbitration regime by various Latin American countries and Australia.⁴⁰ The demise of the TPP and TTIP also evinces the perceived legitimacy deficit. This legitimacy deficit prompted a transparency movement within the investment arbitration community, efforts of which are canvassed below.

3.2 Early Transparency Inroads by NAFTA Arbitral Tribunals

Nascent transparency inroads were largely driven by NAFTA arbitral tribunals under Chapter Eleven disputes. Though the instrument generally followed the pattern of BITs and, thus, the procedural formats of ICSID and UNCITRAL, certain member states of NAFTA mandated the publication of arbitral awards.⁴¹ The disclosure of other information linked to investment arbitrations was left untreated by the investment agreement which led to the discrete deliberations on the confidentiality by various NAFTA arbitral tribunals.

Multiple arbitral tribunals found that confidentiality was not a feature of NAFTA investment arbitrations. In this regard, the first transparency inroads were made by the arbitral tribunal in *Ethyl Corporation v Canada* which allowed an application for the publication of disputant filings but stopped short of permitting public hearings.⁴² The later tribunal in *SD Myers v Canada* extended this transparency inroad by expressly rejecting the presumption of confidentiality in investment arbitrations citing the absence of a contractual base to which an implied term of confidentiality could attach. Consequently, the parties could disclose arbitral documents, including pleadings and submissions, alongside public access to the hearings. This decision reverberated with the NAFTA Free Trade Commission who in 2001 issued an Interpretive Note affirming the absence of presumed confidentiality in investment arbitration.⁴³ Subsequent arbitral tribunals

40 Several countries have retreated from the investment arbitration system. Australia recently announced that it would no longer include investment arbitration provisions in its future investment agreements. Several Latin American countries, namely Bolivia, Ecuador, Venezuela, countries have withdrawn from ICSID. South Africa has announced that it will not renew its existing investment agreements.

41 NAFTA, Annex 1137.4. Canada and the United States of America agreed to the publication of awards to which it was a party. Mexico, however, took a more reserved position of deference to the publication requirements of the arbitral rules applicable to the individual dispute.

42 *Ethyl Corporation v Canada*, Award on Confidentiality 28 November 1997.

43 NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provision. Available at <www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp> ("Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes

further expanded the transparency philosophy of the earlier NAFTA tribunals by allowing *amici curiae* submissions, then unprecedented in investment arbitration.⁴⁴

More noteworthy was the idea underlying this transparency philosophy – the perceived legitimacy deficit – of which the reasoning of the *Methanex v United States of America* tribunal is an indicative example:⁴⁵

There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties...There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent or conversely be harmed if seen as unduly secretive.

3.3 *Reforms to the Arbitral Rules of ICSID and UNCITRAL*

The transparency inroads of the NAFTA regime gave the necessary impetus for other investment arbitration regimes to review their procedural formats. Of central importance were the 2006 reforms to the arbitral rules of ICSID, which presently accounts for approximately 63% of known investment arbitration proceedings.⁴⁶

By comparison to NAFTA, ICSID has taken a more reserved position on transparency. The Centre now publishes basic procedural details concerning each dispute registered with it, such as the existence and status of the proceedings. An opt-out regime of award publication was adopted, similar to NAFTA, though one not mandatory in nature as either disputant may withhold the requisite consent.⁴⁷ Where the award is not published, arbitrators are required to disclose excerpts of their legal reasoning, which may provide useful factual and legal overviews of the

the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal").

44 *Methanex Corporation v United States of America*, Decision of the Tribunal on Petitions from Third Persons to intervene as "amici curiae", 15 January 2001.

45 *Ibid* para 49.

46 United Nations Conference on Trade and Development, *Investor-State Dispute Settlement: Review of Developments in 2015* (IIA Issues Note, No 2, 2016) (UNCTAD/WEB/DIAE/PCB/2016/4); the relevant statistics have been conveniently compiled at United Nations Conference on Trade and Development at <<http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution>> accessed 22 December 2016.

47 ICSID, *ICSID Convention, Regulation and Rules* (ICSID/15/Rev, 1 January 2003) 99-127; Rules of Procedure of Arbitration Proceedings (Arbitration Rules), rule 48(4); ICSID, ICSID Additional Facility Rules, rule 53.

disputes.⁴⁸ Third parties may also now apply to file *amicus curiae* submissions under the amended ICSID arbitral rules.⁴⁹

However, these measures of ICSID omit critical components of transparency. Public access to hearings is not presumed available.⁵⁰ The transparency of hearings is within the discretionary purview of the tribunal, whose decision to permit open hearings must yield to an objection by either disputant.⁵¹ The amended ICSID arbitral rules are also silent on the publication of disputant filings, which has led to several ICSID arbitral tribunals to refuse such disclosures.⁵² Though an inroad was made by the tribunal in *Piero Foresti v South Africa*, which ordered the disclosure of pleadings to *amici curiae*, this has not been the normal practice in ICSID arbitrations.⁵³

Similar concerns were seen in the 2010 amendments by UNCITRAL, whose rules collectively account for about 26% of known investment arbitration proceedings,⁵⁴ to its arbitral rules which saw an absence of transparency measures, possibly to accommodate its originally intended application in commercial arbitration. While the UNCITRAL Arbitration Rules (2010) permitted the publication of arbitral awards, this was an opt-in regime under which awards were not readily published save where all disputants agree.⁵⁵ Similarly, the rules of other

48 An example of such an excerpt is *Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine*, ICSID Case No ARB/08/8, Excerpts of Award, 1 March 2012 made pursuant to Rule 48(4) of the ICSID Arbitration Rules of 2006.

49 ICSID, *ICSID Convention, Regulation and Rules* (ICSID/15/Rev, 1 January 2003); Rules of Procedure of Arbitration Proceedings (Arbitration Rules), rule 37.

50 However, when hearings were made public, ICSID tribunals were receptive towards the use of technology to maximize the audience of the hearing. The *Pac Rim Cayman LLC v Republic of El Salvador* arbitration was the first ICSID live internet broadcast of a public hearing. See *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5.

51 ICSID, *ICSID Convention, Regulation and Rules* (ICSID/15/Rev, 1 January 2003) 99-127; Rules of Procedure of Arbitration Proceedings (Arbitration Rules), rule 32(2).

52 *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No 5, 2 February 2007.

53 *Piero Foresti, Laura de Carli & Others v The Republic of South Africa*, ICSID Case No ARB(AF)/07/01, Award, 4 August 2010. Note, however, that the disclosures did not actually occur as the dispute was settled before the public disclosure of details of the claim.

54 United Nations Conference on Trade and Development, *Investor-State Dispute Settlement: Review of Developments in 2015* (n 46).

55 UNCITRAL Arbitration Rules 2010, art 34(5).

major arbitral institutions,⁵⁶ occasionally applied in investment arbitration, were resistant towards the transparency movement in investment arbitration.

3.4 Transparency Inroads by BITs

The adoption of transparency was not confined to just arbitral rules. Widespread public concern about the secrecy in investment arbitration and the perceived legitimacy deficit spurred governments to rethink the content of modern BITs.

Adopting the NAFTA transparency *acqui*, Canada and the United States of America were the first to incorporate wide transparency measures into their model BITs. The 2004 revision to the United States of America Model BIT provides for an opt-out regime of transparency with little discretion conferred to arbitrators over deviations from it.⁵⁷ Disclosure of core components of investment arbitrations were expressly provided for, including disputant filings, hearing minutes, and *amicus* submissions.⁵⁸ Similar pro-transparency revisions were made by Canada, and Norway, a non-NAFTA member, to its model BITs.

However, the impact of these transparency reforms was muted. Most BITs were already concluded prior to these transparency reforms, which left a significant proportion of BITs and disputes arising thereunder confidential. Of its 39 existing BITs, the United States of America only concluded two BITs by using its 2004 Model BIT. The proportion was less stark for Canada for which only 15 of its existing 43 BITs contained the transparency reforms. It should be noted that these transparency reforms were not followed by many other countries.

3.5 UNCITRAL Transparency Rules and the Mauritius Convention

Recognition grew within UNCITRAL that its arbitration rules, originally designed for commercial arbitration, were being increasingly used in investment arbitrations which had a public interest component unconsidered by the original architects of the UNCITRAL Arbitration Rules. The resolution of this lacuna culminated in the UNCITRAL Transparency Rules, which have been incorporated into the 2013 UNCITRAL Arbitration Rules. The UNCITRAL Transparency Rules apply only to investment agreements concluded on or after 1 April 2014. Earlier investment agreements may apply the Rules where the disputants so agree or where

56 Examples of such arbitral institutions are the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), and the Swedish Chamber of Commerce (SCC).

57 This pro-transparency philosophy was retained in the 2012 Model BIT of the United States of America.

58 Model BIT of the United States of America 2004, art 29.

the respondent state and the home state of the claimant investor agree to its application after 1 April 2014.⁵⁹

The Rules are a marked shift towards transparency in UNCITRAL by requiring wide-ranging disclosures more expansive than the NAFTA *acqui*. Save where it contains categorically protected information, almost all information linked to an investment arbitration is required to be published. The list includes disputant filings, awards, decisions, *amicus curiae* submissions, expert reports, and witness statements. Publicity of hearings is also presumed under the Rules which require arbitrators to actively facilitate public access.⁶⁰

However, the Rules are limited in their reach. Their temporally demarcated ambit restricts their application to only a handful of investment agreements as most were concluded prior to 2014. For most states, this temporal demarcation means that none of their BITs fall within the scope of the Rules.⁶¹ Further, many investment agreements do not apply the UNCITRAL Arbitration Rules⁶² and, even amongst that agree to its use, a large proportion thereof expressly select opaque versions of the UNCITRAL Arbitration Rules.⁶³

The Mauritius Convention was drafted to remedy the above lacuna of the UNCITRAL Transparency Rules by mandating the retrospective application of the UNCITRAL Transparency Rules to earlier investment agreements which apply the UNCITRAL Arbitration Rules. This intended impact, however, remains unrealised given the limited reception of the Mauritius Convention which has hitherto been ratified by only a small number of states.⁶⁴ Nonetheless, the Mauritius Convention signifies the beginning of a fundamental shift away from the prevailing presumption of confidentiality in investment arbitration. With the below proposed amendments to the instrument, the Mauritius Convention could become a possible foothold for an optimal system of investment arbitration.

59 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014, art 1(2).

60 Ibid art 6(3).

61 An example of such a state is Malaysia. Its most recent BIT was concluded in 2012.

62 Of Malaysia's 43 published BITs, over half of them do not provide for the use of the UNCITRAL Arbitration Rules.

63 Two of Malaysia's 43 published BITs expressly select the use of the 1976 UNCITRAL Arbitration Rules.

64 Also to be noted is that the Mauritius Convention comes into force upon the entry of the third ratification.

IV VIABILITY OF CURRENT TRANSPARENCY MEASURES AS REMEDIES OF THE SYSTEMIC LEGITIMACY DEFICIT

4.1 Perceived Legitimacy as the Current Remedial Philosophy

Current transparency measures are aimed at improving public perceptions of the legitimacy of the investment arbitration system by dispelling fears of systemic secrecy. It is apparent from the above that the prevailing remedial strategy has been a partial bridging of the information asymmetry present in investment arbitration. However, these efforts have been selective in their coverage and remedial philosophy.

Save instances of categorically protected information, such as business secrets and national security, some existing transparency schemes afford disputants the opportunity to opt out of transparency. Disputants to ICSID investment arbitrations, which form the bulk of investment arbitrations, hold great influence over the publication of awards and public access to hearings. Though pro-transparency positions have been taken by various investment arbitral tribunals under ICSID, NAFTA, and UNCITRAL procedures, public access to multiple categories of information related to the process remains a discrete inquiry which risks inconsistency in transparency. This leaves the availability of systemic accountability as articulated in Section 2.2 unguaranteed and subject to the vagaries of the arbitral tribunal and disputants.

Further, public participation through amicus briefs has been implemented unconvincingly and may be purely symbolic. In *AES Summit Generation Limited and AES-Tisza Erömü Kft v Republic of Hungary* (AES), the European Commission petitioned to submit an amicus brief on alleged violations of protections guaranteed under the Energy Charter Treaty.⁶⁵ However, in making its substantive decision, the AES tribunal did little more than note that it took the amicus submissions into consideration. Thus, it is difficult to analyse the extent of any influence the submissions may have had on the outcome of the proceeding and, by corollary, the efficacy of the measure as an accountability mechanism.⁶⁶

A notable feature is that all transparency regimes omit the disclosure of settlement agreements in investment arbitration despite their public impact being equal to that of arbitral awards. Also omitted is information concerning the process of arbitrator appointments. While the composition of arbitral tribunals is readily

⁶⁵ *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22.

⁶⁶ *Ibid*, Award, 23 September 2010, para 8.1.

disclosed, the selection process of these key decision-makers remains a secret to the public.

It thus appears that the existing transparency strategies are in effect enhancements of the appearance of legitimacy of the investment arbitration system, i.e. perceived legitimacy, which miss the actual legitimacy crisis⁶⁷ of the system. Some of the latter are canvassed below.

4.2 Concentration of Decision-Making Power in an Epistemic Community⁶⁸

Unreflective of a global institution, there is a noticeable lack of diversity amongst investment treaty arbitration arbitrators, the network of which is dominated by a small, homogenous, and interconnected group.⁶⁹ Research shows that more than half of all investment treaty disputes were decided by an elite group of fifteen arbitrators.⁷⁰

While 83% of ICSID cases are filed against a diverse range of developing countries,⁷¹ there is little representation of these States amongst investment treaty arbitrators. The arbitrator network is dominated by individuals from Western Europe as well as Anglo-American professionals, with 69% of arbitrators coming from West Europe or North America.⁷² Similarly, nationals of specific developed countries, namely New Zealand, Australia, Canada, Switzerland, France, the UK, and the US, account for almost half of total arbitrator appointments.⁷³ A proximate concern is the concentration of global investment treaty arbitration work within a handful of large European or American commercial law firms.⁷⁴ This reinforces

67 The phrase 'actual legitimacy' is used here in the manner set out in Section 2.1.

68 See generally Nadkarni and Lim (n 8).

69 See generally Sergio Puig "Social Capital in the Arbitration Market" (2014) 25 EJIL 387.

70 Sam Luttrell "Bias Challenges in ICSID Arbitration: Unsettled Issues" in C Baltag (ed) *The ICSID Convention After 50 Years – Unsettled Issues* (forthcoming) at 12; see generally Corporate Europe Observatory "Chapter 4: Who guards the guardians? The conflicting interests of investment arbitrators" (Corporate Europe Observatory, 27 November 2012) <<http://corporateeurope.org/international-trade/2012/11/profitting-injustice>> accessed 27 August 2016.

71 Joost Pauwelyn "The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus" (2015) 109(4) AJIL 761, 786.

72 Ibid, 786.

73 Ibid.

74 Ibid.

questions about the possibility of cosy relationships both between arbitrators *inter se* and between arbitrators and the law firms that appoint them.⁷⁵

It has been suggested that cultural milieu may shape an arbitrator's doctrinal sympathies, normative inclinations, and pre-conceived notions, thereby affecting his or her analysis of information and decision-making process.⁷⁶ Resulting from this is a possible systemic mismatch of culture-dependent understanding and norms between Respondent States, which are typically developing countries, and key arbitrators. Of concern is whether this creates an arbitration regime that is systemically less sympathetic to the positions of developing countries. Proponents of investment treaty arbitration point to the presence of prominent Latin-American arbitrators.⁷⁷ However, these individuals are often, by training and residence, culturally affiliated with a more Anglo- and Euro-centric perspective.

It has been argued that the cultural homogeneity of arbitrators is innocuous and purely coincidental. A possible explanation of the dominance of particular nationalities is the nationality restrictions in arbitrator appointments under ICSID Rules,⁷⁸ which provide that arbitrators may not be of the same nationality or be a national of either party to the dispute absent the parties' agreement. As only a few ICSID cases have been filed against Western European (3%) or North American (5%) countries, this may explain why nationals of these two regions have constituted the majority of ICSID arbitrator appointments.⁷⁹ However, it bears noting that these nationality restrictions only apply to appointments by ICSID and not to arbitrator appointments under the UNCITRAL Arbitration Rules. It is important to note that the operative restriction is nationality, rather than regional affiliation.

75% of investor-claimants are of Western European (53%) or USA (22%) nationalities.⁸⁰ Thus, a French investor-claimant is not barred from appointing a

75 See generally Corporate Europe Observatory (n 70).

76 Karen Mills "Cultural Differences and Ethnic Bias in International Dispute Resolution an Arbitrator/Mediator's Perspective" (Chartered Institute of Arbitrators, Malaysia Branch International Arbitration Conference, Kuala Lumpur, 31 March-1 April, 2006).

77 See generally Puig (n 69).

78 ICSID Convention, Article 39 and Rule 3 of Arbitration Rules. Also, see generally Pauwelyn (n 71).

79 ICSID arbitrator nominations for both regions were 47% for Western Europe and 22% for North America.

80 Pauwelyn (n 71). Also, of the 42 known new cases in 2014, 35 were brought by investors from developed countries, while only a mere 5 were brought by investors from developing countries; see United Nations Conference on Trade and Development, *Investor-State Dispute Settlement*:

Belgian arbitrator. In fact, 53% of all cases filed by investor-claimants of EU origins involved 47% of ICSID nominations having Western European nationality.⁸¹

Another explanation advanced for the cultural composition of arbitrators is the regime of party appointments of arbitrators that leads to a system of preferential attachment, which closes the network of ICSID arbitrators through high reappointment rates of prominent arbitrators. Invariably, parties are determined to prevail in their disputes and are, as such, incentivised to appoint arbitrators with normative inclinations, background, and experience that favour their positions as opposed to an untested novice arbitrator.⁸² This entrenches heuristics bias and propels repeat appointments of a few select arbitrators who become increasingly well-versed with investment treaty law with each appointment, and who have their identifiable policy preferences detectable in arbitral awards.⁸³

In investment treaty arbitration proceedings, experience and track record then probably hold greater sway than nationality. The central role of party appointments has been propounded as a possible explanation⁸⁴ for why only 50% of ICSID arbitrators and less than 30% of ICSID appointments are nationals of developing countries.⁸⁵

Further, arbitrator appointment decisions are frequently made by the private lawyers or law firms working for claimants, rather than by the claimants themselves. This is a weighty consideration as 99.6% of ICSID arbitrators are lawyers and 76% of the group have private law backgrounds where they may often serve as counsel in other ICSID arbitrations.⁸⁶ As arbitrators are typically selected for their substantial experience in international investment law, there is little prospect for the appointment of lawyers outside this legal circle which entrenches the cultural homogeneity of ICSID arbitrators.⁸⁷

Review of Developments in 2014 (IIA Issues Note, No 2, 2015) (UNCTAD/WEB/DIAE/PCB/2015/2).

81 Pauwelyn (n 71) 793.

82 *Ibid.*

83 Puig (n 69) 391.

84 Pauwelyn (n 71) 791.

85 *Ibid.*

86 *Ibid* 786.

87 Although diversity criticisms abound, the closed circle of arbitrators may be defensible. Investment arbitration routinely involves high stakes and complex issues of both substance and procedure. More importantly, the decisions of arbitrators have widespread ramifications affecting

4.3 *The Investment Arbitration System's Inability to Sanitise Conflicts of Interests*

A related criticism is that arbitrators and corporations may be "too close for comfort",⁸⁸ thus affecting their impartiality. Problematically, this criticism has been met by institutional apathy as the ICSID annulment procedure for conflict of interests appears unwilling to cleanse the system. A glaring example of this dysfunction is *Vivendi v Argentina*.⁸⁹ Argentina sought to annul an award under Article 52(1) (a) of the ICSID Convention on the ground of non-disclosure by one of the arbitrators. After the delivery of the award, it emerged that the arbitrator had, during the course of the arbitration, accepted appointment to the Board of Directors of, and was partially remunerated with shares in, an international bank which was the single largest shareholder in the claimant investor.

Despite trenchant criticisms of the arbitrator's conduct and a lengthy cautionary reflection on the numerous due diligence measures which could have been taken by the arbitrator,⁹⁰ the committee declined to annul the award.⁹¹ Despite being referred

all the nationals of a State. This is plainly an unsuitable playing field for amateur arbitrators. Given the fact that investment arbitral tribunals decide as first and last instances, it is even more crucial that their members be the best candidates. This ensures systemic integrity and credibility.

88 This article borrows the term in United Nations General Assembly, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order* (A/70/285), para 47.

89 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v Argentine Republic*), Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007, 10 August 2010 (hereinafter "*Vivendi* Second Annulment Decision").

90 The relevant extracts from the *Vivendi* Second Annulment Decision (n 89) are illustrative of the material due diligence omissions of the arbitrator:

218. ...Since a major international bank has connections with or an interest in virtually any major international company (which companies are also the most likely to end up in international arbitrations), this suggests that the positions of a director of such a bank, and that of an international arbitrator, may not be compatible and should not be, or in a modern international arbitration environment, should no longer be combined.

219. As a minimum, the ad hoc Committee sees here reason for extreme caution, especially in ICSID cases where the public interest is often strongly engaged.

220. It means foremost that anyone aspiring to a position as director in a major international bank should understand the likely extent of such a bank's interests, and the possibility of conflict should be clear in particular to all senior and experienced international arbitrators accepting such a position.

...

to the revision of the *Pinochet* case⁹² and the IBA Guidelines,⁹³ the committee accepted, seemingly at face value, the arbitrator's self-declaration of independence and impartiality. Instead, it held that the arbitrator's exercise of independent judgement was not actually impaired and that it would be unjust to deny the claimants the benefit of the award owing to the arbitrator's failures. It should be noted that the arbitrator in question remains prominent in investment treaty arbitrations.

This inability of the system to self-cleanse has been acknowledged by observers, including the United Nations,⁹⁴ and certainly merits careful consideration by industry players.

4.4 *Inequality of Investment Protections for Domestic and Foreign Investors*

Investment agreements create separate regimes of investment protection for domestic and foreign investors, two corpora of law which, though substantially overlapping, are developed in isolation. The investments of the former are protected by public and administrative law frameworks existing under domestic law. By contrast, the foreign investments are protected by a separate regime under international law set out in investment agreements.

This separation creates an artificial legal dualism in which common law natural justice⁹⁵ and eminent domain principles are adjudicated in isolation from domestic

223. This obligation cannot be considered fulfilled by simply providing the bank at the time of the appointment with a list of current arbitrations accompanied by a request to see whether there may be any conflicts of interests, as was apparently done in this case...

224. ...It is clear that Professor Kaufmann-Kohler did not ask the bank to investigate any such connections and to inform her of them.

91 *Vivendi* Second Annulment Decision (n 89):

234. The Claimants have placed great stress on the fact that according to her own declarations, Professor Kaufmann-Kohler had no actual knowledge of the connection between UBS and the Claimants until after the Award was rendered. Even though the Respondent has not accepted this declaration at face value, there is no sufficient reason for the ad hoc Committee not to believe her.

92 *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.

93 International Bar Association (IBA), IBA Guidelines on Conflicts of Interest in International Arbitration.

94 United Nations General Assembly (n 88) paras 47-52.

95 Investment treaty law was intended to be developed in the context of ICSID as a functional substitute for the constitutional and administrative law of the host State which investors

considerations. In this respect, investment protections under international investment agreements are more than "functionally comparable to the constitutional guarantees and administrative law principles at the domestic level".⁹⁶ A useful reference is the fair and equitable treatment (FET) concept of investment treaty law which concerns the protection of legitimate expectations and the prohibition of arbitrary and discriminatory measures. These elements are substantially similar to common law judicial review principles. As a consequence, the operative standards to which the same state action are judged differs according to the nationality of the investor, which culminates in a possible inequality of accountability standards. This inequality of investment protections throws into doubt the actual legitimacy of the investment arbitration system.

4.5 *The Pursuit of Actual Legitimacy as the Remedial Philosophy*

Apparent from the above discussion is that the existing transparency regime has left many actual legitimacy deficits unaddressed in its pursuit for perceived legitimacy. It is thus proposed that future transparency reforms pursue the enhancement of systemic actual legitimacy.

In this respect, the mandatory disclosure of settlement agreements should be considered. Settlement agreements bear outcomes with impacts equal to that of arbitral awards. Payments by the state under such agreements would reallocate public resources in the same manner as unfavourable arbitral awards. The secrecy of settlement agreements, however, prevents the public from scrutinising the actions by the disputants to the case and the resultant reallocation of resources which impedes the systemic accountability regime articulated in Section 2.2. A further case for this measure is its pre-emptive effect. As transparency intensifies in the investment arbitration system, disputants are incentivised to settle their disputes. Against this, should settlement agreements remain outside the ambit of transparency, existing measures would be counterproductive and exacerbative of the actual legitimacy crisis of investment arbitration. It should be noted that the mandatory disclosure of settlement agreements is not a novel measure under international law. Under the dispute settlement regime of the World Trade Organisation (WTO), disputants must notify the WTO of any settlement, both its

distrusted. See Jan Kleinheisterkamp "Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions" (2015) 78(5) *Modern Law Review* 793, 811.

96 SW Schill *International Investment Law and Comparative Public Law* (Oxford, Oxford University Press 2010) 28.

existence and content.⁹⁷ Underscoring this notification system is the need for consistency between settlement agreements and the WTO Agreement and benefits afforded to non-disputing member states. Any settlement agreement leading to the impairment or nullification of third party state benefits would be disallowed. This is a supranational system of accountability analogous to the overall system of accountability articulated in Section 2.2 which would be optimised by the adoption of this proposed measure.

The authors recognise that the selection of arbitrators is not necessarily contingent on public opinion but rests on the expertise of the arbitrator candidates. However, public scrutiny does sanitise and legitimate the process. Public sunlight on the appointment process compels investment arbitration figures to ensure that conflicts of interests of arbitrators are fully considered in appointments. The risk of conflicts may arguably disincentivise repeat appointments of select arbitrators which would operate to diversify the community of investment arbitrators. This would concomitantly dispel occasions and perceptions of backscratching and partiality in investment arbitrations, and the consequent perceived illegitimacy of investment arbitral awards.

Future transparency reforms should not be constrained by the need for confidentiality in investment arbitration. While the authors accept that they are categories of information for which secrecy is apropos,⁹⁸ the investment arbitration regime should not be thought of as general balancing exercise between the competing themes of public interest and confidentiality. Given its historical origin and administrative function, it is inapt to consider confidentiality as a general principle and presumption of investment arbitration.

Further, the pursuit of transparency would operate to remove the artificial legal dualism between domestic and international investment protections. Domestic and international law whilst, separate corpora of law, inherently entail mutual scrutiny of decisions.⁹⁹ An indicative example is denial of justice claims under international law, which encompasses procedural impropriety and, more importantly,

97 Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, article 3.5 and 3.6.

98 Examples would include confidential business information and matters relating to national security.

99 For a comprehensive overview of this mutual process, see Christoph Schruer "Interaction of International Tribunals and Domestic Courts in Investment Law" in Arthur W Rovine (eds) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2010)* (Brill, 2011).

misapplications of law by domestic courts.¹⁰⁰ This necessitates an inquiry by investment arbitral tribunal into the impugned decision of a domestic court and its legal reasoning, the analysis of which will bind and inform subsequent domestic judicial decisions. Reciprocally, domestic courts have, in setting aside proceedings, analysed the awards of investment arbitral tribunals in non-ICSID disputes.¹⁰¹ Exemplifying this is *Metalclad v Mexico* in which the Supreme Court of British Columbia partially annulled the award of an investment arbitral tribunal having analysed the tribunal's finding that the breach of fair and equitable treatment standard was caused by a lack of transparency.¹⁰² This would be a judicial finding to be observed by arbitrators intending the enforceability of their awards in Canada.¹⁰³ Given the necessarily symbiotic development of international and domestic investment law, it is counterproductive to their growth if investment arbitral awards and filings are kept confidential unless and until the enforcement of the award is resisted. The mandatory publication of awards, rather than the prevailing opt-in regime, bridges the development gap between domestic and international law. The result would be congruity and equality of investment protections, a feature augmentative of systemic actual legitimacy.

V CONCLUSION

The remedial philosophy of existing transparency measures in investment arbitration is misplaced. Rather than pursuing the enhancement of the institution's perceived legitimacy, the pursuit of actual legitimacy should inform future transparency reforms. The democratisation of information traditionally privy only

100 The ICSID tribunal defined denial of justice in the following terms: "A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. There is no evidence, or even argument, that any such defects can be ascribed to the Mexican proceedings in this case. There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law"; see *I Robert Azinian, Kenneth Davitian, & Ellen Baca v The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, paras 102-103.

101 Under the ICSID regime, arbitral awards are not amenable to scrutiny by the courts of member states. See ICSID Convention, art 53.

102 *United Mexican States v Metalclad, Canada*, Supreme Court of British Columbia, 2 May 2001, 2001 BCSC 664.

103 Similar instances of judicial scrutiny have occurred with NAFTA awards. *United Mexican States v Metalclad, Canada*, Supreme Court of British Columbia, 2 May 2001, 2001 BCSC 664, 1529, 5 ICSID Reports 236, 6 ICSID Reports 52; *United Mexican States v Feldman Karpa*, Ontario Superior Court of Justice, 3 December 2003, 8 ICSID Reports 500; Ontario Court of Appeal, 11 January 2005, 9 ICSID Reports 508; *Attorney-General of Canada v S.D. Myers*, Judicial Review, Federal Court of Canada, 13 January 2004, 8 ICSID Reports 194; *Raymond L Loewen v United States*, US District Court for the District of Columbia, 31 October 2005, 10 ICSID Reports 448.

to the investment arbitration community can optimise the traditional structure of accountability and governance, inadvertently disrupted by investment arbitration.

Equal protection, another aspect of actual legitimacy, will also be improved by transparency. The disclosure of arbitral awards eradicates the artificial legal dualism between domestic law and international investment laws created by the investment arbitration regime. Both corpora of law are inherently interlinked and necessarily develop symbiotically. Confidentiality of investment arbitrations, however, wedges a development gap between the two which risks unequal investment protection dependent on the nationality of the investor. Thus, transparency is necessary for the congruity and equality of protections afforded to investors.

In light of these ideas, future transparency reforms should further expand the ambit of transparency whilst being unconstrained by confidentiality. Whilst often thought as a general principle of investment arbitration, the system's architecture and origins, which bears greater resemblance to administrative law mechanisms rather than commercial arbitration, never intended a presumption of confidentiality.