

CHAPTER 5

THE IMPORTANCE OF TRANSPARENCY FOR LEGITIMISING INVESTOR-STATE DISPUTE SETTLEMENT: AN AUSTRALIAN PERSPECTIVE

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[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.¹

Justice ought to be the primary objective of any system of dispute resolution. But justice is not enough. Political and legal institutions, whether domestic, like a court, or international, like the international system of investor-State dispute settlement (ISDS), depend on perceptions of justice for their survival. More broadly, if an institution is perceived to be not desirable by the constituency that supports it, the very survival of that institution is in jeopardy.

These ideas are captured by the concept of 'legitimacy', an idea that has been the subject of academic scrutiny for many years.² Thomas M Franck wrote on legitimacy in international relations, and described it as 'the generic label we have placed on factors that affect our willingness to obey commands'.³ Some characteristics of legitimacy are addressed below. At the outset, it is worth recognising three points. Firstly, if people allege that an institution lacks legitimacy, they are manifesting dissatisfaction with the institution.⁴ Secondly,

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1 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Lord Hewart CJ).

2 David D Caron "The Legitimacy of the Collective Authority of the Security Council" (1993) 87 *American Journal of International Law* 552 at 556 at fn. 19.

3 Thomas M Franck *The Power of Legitimacy Among Nations* (Oxford, 1990) at 150.

4 David D Caron, above n 2, at 557.

legitimacy is relational, and so an international institution may be perceived as legitimate in one demographic and illegitimate in another. Thirdly, legitimacy impacts human behaviour, and so can translate to real consequences for institutions perceived to be lacking in it.

This chapter addresses the connection between the transparency of ISDS and the legitimacy of ISDS. If you sought to distil it to a single point, it would be that transparency is a necessary condition of the legitimacy of ISDS. To be clear: the paper does not assert that universal transparency is a panacea for the legitimacy crisis that ISDS faces.⁵ It makes a more limited point: If ISDS is to survive in a form that is desirable – a form that will advance international development – then it must be consistently transparent.

I OVERVIEW OF TRANSPARENCY IN ISDS

At a general level, 'transparency' can be equated with 'openness': a transparent dispute resolution process is open to the public. In the context of ISDS, 'transparency' tends to refer to the extent to which the public may be alerted to, gain information about, and perhaps participate in, proceedings organised to adjudicate an investor's claim.⁶

The *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*⁷ provide an ideal statement of what transparent ISDS looks like. They are not the only statement: ISDS under other frameworks, including ICSID, provides for transparency to varying degrees.⁸ Still, the *UNCITRAL Rules on Transparency* provide a useful subject-matter for identification of the following core elements of transparent ISDS.

Firstly, transparency requires public access to basic information that provides some identity to the dispute. For the *UNCITRAL Rules*, that information includes

5 On that point, see eg Susan D Franck "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2005) 73 *Fordham Law Review* 1521.

6 Jack J Coe Jr "Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership" (2006) 54 *Kansas Law Review* 1339 at 1339.

7 *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* GA Res 68/109, 68th sess, 68th plen mtg, Agenda Item 79, A/68/PV.68 (2013) <www.un.org/en/ga/search/view_doc.asp?symbol=A/68/PV.68> (*Rules on Transparency*).

8 On ICSID; see also on NAFTA: J Anthony VanDuzer "Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation" (2007) 52 *McGill Law Journal* 681 at 687.

the party names, the economic sector involved and the treaty under which the claim is being made.⁹

Secondly, transparency requires public access to the tribunal proceedings. Hearings of arbitrations will be public to the extent that an open hearing will not undermine the integrity of the arbitral process or divulge confidential information.¹⁰ An extension of an open tribunal is the potential for the proceedings to be reported on.¹¹

Thirdly, transparency requires knowing what the tribunal decided. This could involve the publication of orders, decisions and awards of the arbitral tribunal.¹²

These are the most important characteristics of transparent ISDS. The *UNCITRAL Rules on Transparency* provide for many other examples. The Transparency Register is particularly significant, and ought to be commended.¹³ The public will gain access to basic information regarding ISDS conducted under the *UNCITRAL Arbitration Rules* by the publication of key documents on the Internet.¹⁴

The arrival of the *Transparency Rules*, and more recently, the *Draft Convention on Transparency in Treaty-Based Investor-State Arbitration*, are indicative of a welcomed trend towards transparency in ISDS.¹⁵ However it is only a trend, and there is a long way to go before ISDS is truly open. The *Transparency Rules* provide for what is effectively an opt-in regime.¹⁶ Transparency is avoidable if States want to avoid it. Without consistent transparency, ISDS will lack legitimacy.

9 *Rules on Transparency*, above n 7, at art 3.1.

10 *Rules on Transparency*, above n 7, at art 6, see also art 7.

11 Ronald Bernstein *Handbook of Arbitration Practice* (Sweet & Maxwell, 1987) [13.6.3], quoted in *Esso* (1995) 183 CLR 10, 27 (Mason CJ); the right to report on open court proceedings: *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 55 (Kirby P).

12 *Rules on Transparency*, above n 7, at art 3.1.

13 UN Secretary-General through the UNCITRAL Secretariat "United Nations Commission on International Trade Law, *Transparency Registry*" (19 June 2014) <www.uncitral.org/transparency-registry/en/introduction.html>.

14 Keith Loken "Introductory Note to UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration" (2013) 52(6) *American Society of International Law* 1300 at 1300.

15 J Anthony VanDuzer, above n 8, at 686.

16 Keith Loken, above n 14, at 1300.

II THE LEGITIMACY OF ISDS

Legitimacy is a malleable term with a variety of applications. Franck frames it primarily in relation to rules of international law.¹⁷ Others apply it to the normative justification of governments,¹⁸ the credibility of non-governmental organisations,¹⁹ or even 'movements' like fair trade.²⁰ The concept has been applied specifically to ISDS on numerous occasions.²¹ When applied to laws and legal institutions, the concept denotes that a law or institution ought to be accepted as authoritative.²²

Adopting this understanding, it is important to note that an institution or law lacking legitimacy is not often simply ignored. For example, in Australia, people do not simply ignore laws they disagree with (perhaps with the exception of Internet piracy laws).²³ Instead, they seek to change those laws through democratic processes. A legitimacy problem is not merely a problem of branding; it is the problem of whether a law or institution will survive the vicissitudes of public will. Perceptions of illegitimacy produce law reform.

Legitimacy can be distilled into various characteristics. Building on Franck's work, Charles H Brower identifies three, which can be usefully applied to ISDS. They are:

- predictable operation;
- conformity, in relation to historical practice; and

17 Thomas M Franck, above n 3, at 150.

18 Eg, Jeff Spinner-Halev *Enduring Injustice* (Cambridge, 2012) at 130.

19 L David Brown *Creating Credibility – Legitimacy and Accountability for Transnational Civil Society* (Kumarian Press, 2008) at 5.

20 Eg, Alex Nicholls "What Gives Fair Trade Its Right to Operate? Organizational Legitimacy and Strategic Management" in Kate MacDonald and Shelley Marshall (eds) *Fair Trade, Corporate Accountability and Beyond – Experiments in Global Justice* (Ashgate, 2010) at 93.

21 Eg: Susan D Franck "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2005) 73 *Fordham Law Review* 1521; Charles H Brower "Structure, Legitimacy, and NAFTA's Investment Chapter" (2003) 36 *Vanderbilt Journal of International Law* 37; Jeffrey Atik "Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques" (2003) 3 *Asper Review* 215; Naveen Gurudev "An Evaluation of Current Legitimacy-based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process" (2005) 6 *San Diego International Law Journal* 399.

22 Susan D Franck, above n 21, at 1584.

23 Eg, Mahesh Sharma "Downloading 300 gigabytes is small time in the world of pirating' (17 June 2014) *The Sydney Morning Herald* <www.smh.com.au/digital-life/digital-life-news/downloading-300-gigabytes-is-small-time-in-the-world-of-pirating-20140616-zs9nk.html> at 9.

- incorporation of fundamental values shared by the governed community.²⁴

These characteristics provide a useful framework for considering the relationship between the transparency and legitimacy of ISDS.

III ASSESSING THE SIGNIFICANCE OF TRANSPARENCY TO THE LEGITIMACY OF ISDS

A Predictable Operation

The publication of judicial reasoning is a hallmark of Australian justice. Indeed, it is characteristic of the common law. The publication of reasons is important because it shows the public that the judge is applying precedent. In common law systems, publication of reasons is closely associated with the rule of law itself.²⁵ One of the core characteristics of the rule of law is predictability of operation.

By contrast, the failure of a tribunal to publish an award provides some potential for unpredictability. Without a formal doctrine of precedent, and without even the persuasive power of a critical public making arbitrators feel self-conscious, tribunals have room to make inconsistent decisions.²⁶

Without a doctrine of precedent, ISDS will continue to fall down on the predictability criterion. However, transparency could create an informal culture of accountability and so could provide the right conditions for predictable decision-making. Greater transparency by consistent publication will not solve this issue, but it would be a step in the right direction.

Importantly, without transparency, the public can never justifiably believe that ISDS is predictable. How can we judge that it is operating predictably if we cannot see how it is operating? Perceptions of predictability are just as important as actual predictability for the future of the institution.

24 Charles H Brower "Structure, Legitimacy, and NAFTA's Investment Chapter" (2003) 36 *Vanderbilt Journal of Transnational Law* 37 at 51 cited in J Anthony VanDuzer "Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation" (2007) 52 *McGill Law Journal* 681 at 691.

25 Thomas Walde "Confidential Awards as Precedent in Arbitration – Dynamics and Implication of Award Publication" in Yas Banifatemi (ed) *Precedent in International Arbitration* (Juris, 2008) at 113, 115.

26 Eg, Susan D Franck, above n 21, at 1545.

B Historical Practice

Historical practice affects legitimacy by association. Change can be hard to digest, so if an innovation conforms to a widely accepted historical practice, it may be easier to swallow.²⁷

Investment treaties are not particularly new, and neither is ISDS.²⁸ However, even in the 20th century, investor disputes were preceded by hundreds of years of open judicial dispute resolution. Further, the explosion of ISDS disputes is a modern phenomenon.²⁹ Private resolution of very public disputes should be treated as a departure from the orthodoxy of the post-War international legal system.³⁰

The initiation of the *Philip Morris* arbitration³¹ was a departure from historical practice, and a shock to the system for many Australians. Our High Court's Chief Justice, Robert French, recently delivered a speech to fellow judges, questioning the future impact of ISDS on the rule of law in Australia.³² He emphasised that tribunals are not required to act like courts, and said that 'Questions have been raised about the consistency, openness and impartiality of decisions made in ISDS arbitrations.'³³ The Chief Justice identified two legitimacy concerns for ISDS's lack of transparency for Australians: it is both a violent departure from a historical practice of open dispute resolution, and an affront to our values.

27 Charles H Brower "Structure, Legitimacy, and NAFTA's Investment Chapter" (2003) 36 *Vanderbilt Journal of Transnational Law* 37 at 54.

28 Karl-Heinz Böckstiegel "Commercial and Investment Arbitration: How Different are they Today?" (2012) 28(4) *Arbitration International* 577 at 577-8.

29 Eg, United Nations Conference on Trade and Development (UNCTAD) *Recent Developments in International Investment Agreements (2008-2009)*, ILA Monitor No 3 (2009) <www.unctad.org>.

30 Julie Soloway "NAFTA's Chapter 11 – The Challenge of Private Party Participation" (1999) 16 *Journal of International Arbitration* 8 at 10, cited in Naveen Gurudev "An Evaluation of Current Legitimacy-based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process" (2005) 6 *San Diego International Law Journal* 399 at 425, fn 176.

31 *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, Written Notification of Claim pursuant to Agreement Between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (22 June 2011).

32 Robert French "Investor-State Dispute Settlement – A Cut above the Courts?" (Speech delivered at Supreme and Federal Court Judges' Conference, Darwin, 9 July 2014).

33 *Id.*, at 1.

C *Widely-held Values*

1 *Transparency*

Transparency itself is a widely held value.³⁴ It is a virtue of any manifestation of government in a liberal democracy, and it is a virtue in any decision-making process.

The principle of open justice is a reflection of the value of transparency. The principle reigns supreme in the Australian justice system, as it does throughout much of the world.³⁵ French CJ described it as 'an essential characteristic of courts'.³⁶

Applying this principle, Australian courts are open. Proceedings are heard in an open court to which any member of the public has admission.³⁷ Evidence is presented publicly.³⁸ Arguments are made in open court, and submissions are often published on the Internet.³⁹ When a judge decides the case, the reasons are made public.⁴⁰ In short: courts are transparent.

Open justice makes our courts better. It creates confidence in the administration of justice,⁴¹ and confidence in the judiciary as a facilitator of dispute resolution.

The key point for ISDS is that people believe that open dispute resolution provides for fairness. Openness itself has become a virtue. A lack of transparency

34 Naveen Gurudevan "An Evaluation of Current Legitimacy-based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process" (2005) 6 San Diego International Law Journal 399 at 426.

35 Australia does not have a monopoly on open justice. It is seen in the United States' Sixth Amendment; in Article 14 of the *International Covenant on Civil and Political Rights*; in 'le principe de la publicité' ... it is everywhere. See JJ Spigleman "The Principle of Open Justice: A Comparative Perspective" (2006) 29(2) University of New South Wales Law Journal 147; Peter Wright "The Open Court: The Hallmark of Judicial Proceedings" (1947) 25 Canadian Bar Review 721.

36 *Hogan v Hinch* (2011) 243 CLR 506, 530 (French CJ); see also JJ Spigleman "The Principle of Open Justice: A Comparative Perspective" (2006) 29(2) University of New South Wales Law Journal 147.

37 *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

38 *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 450 (Lord Diplock).

39 Eg, High Court of Australia *Current cases – submissions* (June 2014) <www.hcourt.gov.au/cases/current-cases-submissions>.

40 *Ives v State of Western Australia [no 2]* [2010] WASC 221, [5] (Le Miere J); see also Frank Kitto "Why Write Judgments?" (1992) 66 Australian Law Journal 787 at 790.

41 *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [15], [19]-[30] (Lord Steyn).

can be combined with the point that arbitrators are appointed by the disputing parties to bolster the straw-man argument that ISDS tribunals are biased. Transparency will build confidence in the system.

2 *Democracy*

Transparency and democracy go hand in hand.⁴² In a democracy individuals should have access to information that concerns matters of public interest,⁴³ as a well-informed electorate is essential to the success of responsible government.

The very presence of a State as a party to the arbitration raises a public interest because the nationals and residents of that State have an interest in how the government acts during the arbitration and in the outcome of the arbitration. Moreover, the existence of this public interest has implications for the conduct of the arbitration: According to principles of human rights law and good governance, government activities should be subject to basic requirements of transparency and public participation.⁴⁴

So for example, as Australian citizens have an interest in the success of the tobacco plain packaging laws,⁴⁵ they also have an interest in Philip Morris's challenge to the laws, and a moral right to be aware of the proceedings.

Transparency of ISDS allows individuals to be informed of the true cost of domestic laws, and conversely, of their governments' commitments under investment treaties.

3 *Rule of Law*

Even in non-democratic societies, the principle of transparency is fundamentally important. On one view, transparency is a necessary condition of the application of

42 Cf Julie Soloway "NAFTA's Chapter 11 – The Challenge of Private Party Participation" (1999) 16 *Journal of International Arbitration* 8 at 10 cited in Naveen Gurudevan "An Evaluation of Current Legitimacy-based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process" (2005) 6 *San Diego International Law Journal* 399 at 425, fn 176.

43 Daniel Barstow Magraw Jr and Niranjali Manel Amerasinghe "Transparency and Public Participation in Investor-State Arbitration" (2009) 15(2) *ISLA Journal of International and Comparative Law* 337 at 349-9.

44 Center For International Environmental Law International Institute For Sustainable Development *Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations* (December 2007) <www.ciel.org/Publications/CIEL_IISD_RevisingUNCITRAL_Dec07.pdf> at 4 quoted in: Julie Lee "UNCITRAL's Unclear Transparency Instrument: Fashioning the Form and Application of a Legal Standard Ensuring Greater Disclosure in Investor-State Arbitrations" (2013) 33 *Northwestern Journal of International Law & Business* 439 at 446.

45 Tobacco Plain Packaging Act 2011 (Australia).

the rule of law. Any society that espouses the rule of law ought to be open in matters that affect the public interest.⁴⁶

Citizens cannot determine that there is a 'rule of law' without seeing it in operation. In the investment arbitration sphere, transparency allows the people to see that investor-State arbitration is conducted according to law. The transparent conduct of ISDS is a simple application of principles of good governance.

IV SO WHAT?

Accepting the proposition that ISDS lacks legitimacy, one might still ask whether that makes a practical difference.⁴⁷ It does, and the current environment in Australia reflects that.

In April 2011 the Australian Government announced that it would not accept ISDS provisions in future investment treaties.⁴⁸ With a change to a conservative Government in 2013, that position changed. Australia will now consider the inclusion of ISDS provisions on a case-by-case basis.

However, that position is in jeopardy. In 2014, Senator Peter Whish-Wilson of the Australian Greens party introduced an anti-ISDS bill into the Parliament of Australia, titled the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014. It was a Bill so brief that it can be reproduced here in its entirety:

A Bill for an Act to protect Australian laws by banning investor state dispute settlement provisions, and for related purposes

The Parliament of Australia enacts:

1. Short title

This Act may be cited as the Trade and Foreign Investment (Protecting the Public Interest) Act 2014.

2. Commencement

This Act commences on the day after this Act receives the Royal Assent.

3. Investor state dispute settlement provisions

46 On the rule of law in non-democratic societies, see Brian Z Tamanaha "The rule of law for everyone?" (2002) 55 Current Legal Problems 97 at 98-100.

47 David D Caron "The Legitimacy of the Collective Authority of the Security Council" (1993) 87 American Journal of International Law 552 at 554.

48 Luke Nottage "Throwing the Baby Out with the Bathwater: Australia's New Policy on Treaty-Based Investor-State Arbitration and its Impact in Asia" (2013) 37(2) Asian Studies Review 253.

The Commonwealth must not, on or after the commencement of this Act, enter into an agreement (however described) with one or more foreign countries that includes an investor state dispute settlement provision.

The Senator is not alone on this issue. Quite a few organisations made submissions to a Senate Committee considering the Bill, and many supported it.⁴⁹

The Bill is still before the Senate, but will ultimately fail on the recommendation of that Senate Committee, which is dominated by that same conservative Government.⁵⁰ The takeaway is that ISDS is contentious, and contrary to the values of many in the Australian community. ISDS lacks political legitimacy in Australia.

The broader point is that a lack of legitimacy at the domestic level matters. It creates the conditions that produce Bills antithetical to ISDS, and pivots in national policy like that of the Australian Government in 2011.⁵¹ A lack of legitimacy at a domestic level can cause countries to refuse to include ISDS provisions in investment treaties. Thus national experiences can have a significant impact on the future of this area of law.

Ultimately, these policy shifts will undermine the institution of ISDS. They will impact the negotiation of future investment treaties. For Australia, this includes the Trans-Pacific Partnership, the Pacific Trade and Economic Agreement (PACER Plus), the Regional Comprehensive Economic Partnership Agreement (RCEP), and other significant negotiations.

Turning back to transparency: this is an issue that is important for many countries around the world. Transparency is held in high esteem in many places, including in common law countries like the UK and Canada. It is important that these countries are not alienated by ISDS, and so remain engaged in the system of international investment agreements. If these treaties are to support development,

49 Appendix 1 – Public submissions' in Senate Standing Committees on Foreign Affairs, Defence and Trade "Inquiry into the Trade and Investment (Protecting the Public Interest) Bill 2014 – Report" (27 August 2014) <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Report/e01>.

50 Senate Standing Committees on Foreign Affairs, Defence and Trade "Inquiry into the Trade and Investment (Protecting the Public Interest) Bill 2014 – Report" (27 August 2014) <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Report>

51 Luke Nottage "Throwing the Baby Out with the Bathwater: Australia's New Policy on Treaty-Based Investor-State Arbitration and its Impact in Asia" (2013) 37(2) *Asian Studies Review* 253.

then it is important that investors from places like Australia are protected, and so motivated to invest in places that need it.

The future success of ISDS will require investment treaties to include strong measures for transparency. The *UNCITRAL Rules on Transparency* are a means for States to achieve that. But even if they do adopt that position for future treaties, it will not be enough. Unless transparency is provided for across the board, investors like Philip Morris can treaty shop and gain the protection of old investment agreements that lack transparency measures. Unless the *Draft Convention* is broadly adopted, this will continue to be a problem for ISDS based on the UNCITRAL Arbitration Rules.

Consider an ideal counterfactual: ISDS becomes universally transparent across the Board. It is no longer opt-in. Assume it is no longer opt-out. Even in that ideal universe, ISDS would have a legitimacy problem. This chapter does not seek to address that problem, but it is worth noting. A fundamental issue remains: ISDS provisions give rights to foreign investors not enjoyed by domestic citizens. ISDS will always run against the grain of the widely-held value that 'like cases ought to be treated alike', and that all are equal before the law.⁵² Transparency is a step towards legitimacy, but it will not legitimise the institution of ISDS by itself.

Author's note: Since this paper was presented, the *Draft Convention* became finalised. In December 2014 the United Nations General Assembly adopted the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* ('*Mauritius Convention on Transparency*'),⁵³ providing a streamlined mechanism for States to adopt the *UNCITRAL Rules on Transparency*. The author makes a case for broad uptake of the *Mauritius Convention*.⁵⁴

52 HLA Hart *The Concept of Law* (2nd ed, Clarendon Press, 1997) at 159.

53 *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, GA Res 69/116, UN GAOR, 69th sess, 68th plen mtg, Agenda Item 76, UN Doc A/ RES/69/116 (18 December 2014) annex, 3.

54 See João Ribeiro and Michael Douglas 'Transparency in Investor-State Arbitration: The Way Forward' (2015) 11(1) *Asian International Arbitration Journal* 49.

