

Legitimacy Issues in Investor-Treaty Arbitration and How a Permanent Court May Be the Best Solution

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Abstract

Investor-treaty dispute settlement is used by States and investors to resolve disagreements that investors may have with regard to their investment in the host state. Disputes are usually resolved through arbitration, and the process has all the trappings of general commercial arbitration. However, there have been calls for the system to be replaced by a permanent court structure. If a permanent court is the next step, this must mean that the current system has legitimacy issues which may be resolved by a permanent structure.

This article explores three problems with the current system: inconsistent decisions, lack of appeals, and lack of transparency. These are serious issues which affect the legitimacy of the current system. The discussion focuses primarily on the International Centre for Settlement of Investment Disputes (ICSID) system as this is the most common choice, and some mention is made of the United Nations Commission on International Trade Law (UNCITRAL) system. Throughout the article, I analyse the problems associated with these and how a permanent court may address these legitimacy issues. My argument is that a permanent court can weed out inconsistent decisions, have a fair and real appeals structure, and be sufficiently transparent as to as to allow or facilitate interested groups to act as *amicus curiae*. The discussion makes reference to the draft Transatlantic Trade and Investment Partnership (TTIP) because, through this, the European Union (EU) has proposed a potential permanent court structure.

I. Introduction

In 2008, Gus Van Harten, a professor at Osgoode Hall Law School in Toronto, Canada, submitted a conference paper where he called for the establishment of a permanent court for investment disputes to replace the arbitration-dominated Investor-State Dispute Settlement (ISDS) regime.¹ Fast forward to today, and the idea of a permanent court for investment disputes has become a hot topic of debate amongst academics.² In addition,

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¹ Osgoode Digital Commons, Van Harten, G, *A Case for an International Investment Court*, 15 July 2008, at <digitalcommons.osgoode.yorku.ca/all_papers/259> (accessed 17 November 2018).

² See García-Bolívar, OE, “Permanent Investment Tribunals: The Momentum is Building Up” in Kalicki, JE and Joubin-Bret, A, eds, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff, 2015), 399; Schill SW, “Editorial: US Versus EU Leadership in Global Investment Governance” 17 *The Journal of World Investment and Trade* (2016), at <booksandjournals.brillonline.com/docserver/journals/22119000/17/1/22119000_017_01_S001_text.pdf?expires=1542480583&id=id&accname=guest&checksum=5EB485599113868BA0DE57A8FDB99>

the European Union (EU) Commission recently proposed an actual permanent court in its Transatlantic Trade and Investment Partnership (TTIP) Draft Proposals to replace the current ISDS regime.³

If a permanent court is the logical next step in ISDS, this means that the current system has serious legitimacy issues that need to be addressed. This paper will discuss the issues of inconsistency, lack of appeals and the lack of transparency. Throughout, I will attempt to show that there are serious legitimacy issues and that a permanent court may be the best solution for these problems.

II. Serious Legitimacy Issues in the Current ISDS Regime

I will be dividing this discussion into three parts to show three serious legitimacy issues in the current ISDS regime. The first part deals with issues of inconsistency in ISDS awards. The second part looks into the lack of appeals system, whilst the third part discusses the lack of transparency under the current regime. In each part, I will analyse how these issues have given rise to serious legitimacy concerns and will propose potential solutions to address them.

Through this, I aim to convince you that ISDS currently has serious legitimacy issues that need to be addressed and that the creation of a permanent court may be the best solution to address all three issues simultaneously.

A. Inconsistency

The problem of inconsistency in investment treaty arbitrations is not new and has been raised frequently by scholars.⁴ Inconsistencies in investment disputes have been noted in the interpretation of several areas including the most-favoured nation (MFN) clause,⁵ umbrella clauses,⁶ and even in defining the type of ‘investment’ in Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs).⁷ Whilst these areas are far too numerous to go into all at once given the length of this paper, I will focus on the inconsistencies in the interpretation of the MFN clause for the purposes of this section. This is because decisions related to MFN clauses have generally given rise to very differing decisions, which thus makes an exploration of MFN in ISDS the best example

ADB> (accessed 17 November 2018); Ketcheson J, “Investment Arbitration: Learning from Experience”, in Hindelang, S, and Krajewski, M, eds, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press), 2016), 109.

³ Chapter 2, European Union, *Transatlantic Trade and Investment Partnership Draft Proposals*, September 2015, (TTIP Draft Proposals), at <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> (accessed 18 November 2018).

⁴ Franck S, SD, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions” 73(4) *Fordham Law Review* (2005), at <ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4062&context=flr> (accessed 18 November 2018); Alvarez, JE, *The Public International Law Regime Governing International Investment*, (Brill Nijhoff 2011) 442.

⁵ Banifatemi, Y, “The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration,” in Bjorklund, AK, Laird, IA and Ripinsky, S, eds, *Investment Treaty Law: Current Issues III: Remedies in International Investment Law and Emerging Jurisprudence in International Investment Law* (British Institute of International and Comparative Law, 2009) 242.

⁶ Sinclair, AC, “The Umbrella Clause Debate,” in Bjorklund, AK, Laird, IA and Ripinsky, S, eds, *Investment Treaty Law: Current Issues III: Remedies in International Investment Law and Emerging Jurisprudence in International Investment Law* (British Institute of International and Comparative Law 2009) 311.

⁷ Alvarez, *supra* nt 4, 446.

to show the problem of inconsistencies. In this regard, I will show examples of certain inconsistencies that have arisen in arbitral decisions and how these inconsistencies affect parties to the dispute. Following this, I will explain how these inconsistencies suggest a potential deficiency in the legitimacy in ISDS.

1. What inconsistencies have arisen when tribunals interpret the Most-Favoured Nation (MFN) clause?

The MFN clause is a very common provision in investment treaties and was originally developed to prevent a host State from discriminating amongst different investors of varying nationalities.⁸ In essence, a treaty with such a clause means that the State promises not to grant another State more favourable conditions than the ones offered in the treaty at hand.

However, problems in the interpretation of the MFN clause arose from the case of *Maffezini*⁹ where the Tribunal adopted a broad interpretation of the MFN clause which allowed the investor to import elements of a more favourable dispute resolution clause in another BIT. In this case, the dispute resolution clause in the Argentina-Spain BIT required the investor to wait 18 months before submitting the case to international arbitration.¹⁰ However, the investor was able to use the MFN clause to import a six month waiting period from the Chile-Spain BIT and thus avoid the 18 month waiting period.¹¹ This decision sparked a debate that led to later tribunals either adopting the expansive approach used by the *Maffezini* Tribunal¹² or expressly rejecting the *Maffezini* approach in favour of a narrower approach.¹³

For instance, whilst the Tribunal in *Impregilo*¹⁴ adopted the *Maffezini* approach, one of the arbitrators, Professor Brigitte Stern, in her dissenting opinion, categorically rejected the *Maffezini* approach because, in her view, it modifies the fundamental conditions of access to the rights granted in the BIT.¹⁵ In other words, Professor Stern takes the view that because dispute resolution clauses concern access to ISDS, an MFN clause cannot modify the very conditions of this access. Thus, we start to see that tribunals disagree on the actual legal principles that should be applied.

Other tribunals have tried to widen the principle further. For instance, the Tribunal in *Rosinvest*¹⁶ held that the Respondent consented to arbitrate under the Stockholm Chamber of Commerce by using the widely drafted MFN clause in the

⁸ Chalamish, E, "The Future of Bilateral Investment treaties: A De Facto Multilateral Agreement?" 34(2) *Brooklyn Journal of International Law* (2009) 324, at <brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1185&context=bjil> (accessed 18 November 2018).

⁹ ICSID, *Emilio Agustín Maffezini v The Kingdom of Spain*, ARB/97/7, 25 January 2000 (Decision of the Tribunal on Objections to Jurisdiction).

¹⁰ *Emilio Agustín Maffezini v The Kingdom of Spain*, ARB/97/7, 25 January 2000 (Decision of the Tribunal on Objections to Jurisdiction), para 19.

¹¹ ICSID, *Emilio Agustín Maffezini v The Kingdom of Spain*, ARB/97/7, 25 January 2000 (Decision of the Tribunal on Objections to Jurisdiction), para 39.

¹² ICSID, *Siemens A.G. v. Argentine Republic*, ARB/02/8, 3 August 2004 (Decision on Jurisdiction).

¹³ ICSID, *Plama Consortium Limited v. Republic of Bulgaria*, ARB/03/24, 8 February 2005; ICSID, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ARB/02/13, 9 November 2004 (Decision on Jurisdiction).

¹⁴ ICSID, *Impregilo v Argentina*, ARB/07/17, Award (21 June 2011 (Award)).

¹⁵ ICSID, *Impregilo v Argentina*, ARB/07/17, 21 June 2011 (Dissenting Opinion of Professor Brigitte Stern), para 49.

¹⁶ SCC, *RosInvest v Russia*, V/079/2005, October 2007, (Award on Jurisdiction).

United Kingdom-Soviet BIT to import a clause from the Denmark-Russia BIT.¹⁷ Through this, the investor was able to arbitrate under a mechanism that was not listed in the original BIT and thus further expanded the approach taken in *Maffezini*. This is especially important because the Tribunal in *Maffezini* attempted to set limits to their approach. These were that an MFN clause could not be used to circumvent exhaustion of local remedies, a fork in the road clause, a choice between domestic and international courts, and nor could it be used to change a forum.¹⁸ Thus, the Tribunal in *Rosinvest* although seemingly following the *Maffezini* approach, gave a decision which is inconsistent with the limits set in *Maffezini*.

However, other tribunals such as the one in *Plama* seem to distance themselves from the *Maffezini* decision and describe the latter as one reached under exceptional circumstances.¹⁹ As such, the tribunal in *Plama* held that an MFN provision ‘does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them’.²⁰ Thus, the Tribunal did not allow the investor to import more favourable dispute resolution terms from another BIT. In essence, the Tribunal in *Plama* attempted to limit the *Maffezini* principle.

Hence, what we effectively have is what has been described as a differing and contrasting two-class approach to MFN interpretation – an expansive class and a narrow class.²¹ What is clear is that all of the approaches mentioned are inconsistent. This leads to several questions to which there are no clear answers. Should an investor be allowed to import more favourable terms with certain limits? Or can we ignore these limits and make the claimant consent to an entirely different forum? Or does the importation of different dispute resolution clauses improperly modify fundamental conditions for access to dispute resolution? Or should the basic rule be that no importation can occur unless all parties have explicitly agreed to it? These inconsistencies in investment law have an impact on the investors who rely on ISDS, and ultimately affect the legitimacy of ISDS.

2. How do inconsistencies affect the legitimacy of the ISDS regime?

The rule of law is essential to have a functioning system for those participating in the global economy.²² One of the primary elements of legitimacy when talking about the rule of law is coherence.²³ This requires consistency in interpreting and applying rules so as to

¹⁷ SCC, *RosInvest v Russia*, V/079/2005, October 2007, (Award on Jurisdiction), para 73.

¹⁸ ICSID, *Emilio Agustín Maffezini v The Kingdom of Spain*, ARB/97/7, 25 January 2000 (Decision of the Tribunal on Objections to Jurisdiction), para 63.

¹⁹ *Plama*, ICSID, *Plama Consortium Limited v. Republic of Bulgaria*, ARB/03/24, 8 February 2005; ICSID, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ARB/02/13, 9 November 2004 (Decision on Jurisdiction), para 226.

²⁰ *Ibid.*, 223; ICSID, *Plama Consortium Limited v. Republic of Bulgaria*, ARB/03/24, 8 February 2005; ICSID, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ARB/02/13, 9 November 2004 (Decision on Jurisdiction), para 223.

²¹ Egli, G, “Don’t Get Bit: Addressing ICSID’s Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions” 34(4) *Pepperdine Law Review* (2007) 1066, at <digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1183&context=plr> (accessed 18 November 2018).

²² Lerner R, RL, “International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade” (2001) 231, at <digitalcommons.law.byu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2058&context=lawreview> (accessed 18 November 2018).

²³ Egli, *supra* nt 21, 1079.

give the impression of fairness to all parties involved.²⁴ This does not necessarily mean that inconsistent decisions are immediately unfair and unjust. According to Professor Thomas Franck, as long as inconsistent decisions can be explained by a ‘justifiable distinction’ from where a clear legal principle emerges and the parties are satisfied, then legitimacy is not undermined.²⁵ In other words, an inconsistent decision is fine if it is a different application of the same rule that has been clearly explained and distinguished. This is one of the ways in which the law has developed.

However, it has been seen above that the differences in decisions of tribunals in MFN cases have not arisen because of clear distinctions to the rule, but because tribunals are unable to decide the scope, extent and requirement of application of the rule. This marked inconsistency in decisions has led some commentators to give a dim outlook on investment arbitration. For instance, Nigel Blackaby of Freshfields Bruckhaus Deringer said that a ‘system where diametrically opposed decisions can legally co-exist cannot last long’.²⁶ Others have noted that the lack of coherence in ISDS has ‘raised the spectre of a legitimacy crisis’.²⁷ This is correct because parties have no certainty as to whether a particular rule will be accepted or thrown out, and they cannot look to past decisions for clarity given how opposing certain decisions can be. This confusion ultimately defeats one of the primary objectives of BITs, that is to eliminate uncertainty regarding the substantive and procedural aspects of investment protection.²⁸ Therefore, inconsistent decisions have negatively affected the legitimacy of ISDS.

With this in mind, it is important to find an explanation for these inconsistencies and possible solutions to address the problem. Two explanations have been raised by scholars thus far. These are firstly, the ‘growing pains’ of the system, and secondly the different outlooks of ISDS arbitrators when it comes to their role. I will approach these in turn.

Firstly, some authors have tried to explain this lack of coherence in ISDS as temporary ‘growing pains’.²⁹ They believe that ISDS is currently in a state of adolescence, and as it grows it shall correct its mistakes and erroneous decisions will be thrown out.³⁰ In other words, these inconsistencies are natural and the system should just be left to converge over time. With due respect to commentators, I do not agree with this proposition. The problem with the view that ISDS will eventually converge is that it does not address the current legitimacy problem of the regime. If tribunals continue making inconsistent decisions as they grapple with the law, parties may feel that the current system is unfair towards them which may lead to ISDS falling out of favour with parties.³¹ Therefore, waiting for the system to converge is not a suitable approach to dealing with the legitimacy problems in ISDS – it simply ignores the current very serious

²⁴ Franck, *supra* nt 4, 1585.

²⁵ Franck, TM, *The Power of Legitimacy Among Nations*, (Oxford University Press 1990), 163.

²⁶ Goldhaber, M, “Wanted: A World Investment Court” 3 *Transnational Dispute Management* (2004) 1, at <transnational-dispute-management.com/article.asp?key=197#citation> (accessed 18 November 2018) (quoting Nigel Blackaby of Freshfields Bruckhaus Deringer).

²⁷ Franck, *supra* nt 4, 1586.

²⁸ Egli, *supra* nt 21, 1080.

²⁹ Alvarez, *supra* nt 4, 447.

³⁰ Alvarez, *supra* nt 4, 448.

³¹ International Institute for Sustainable Development, Ripinsky, S, *Venezuela’s Withdrawal From ICSID: What it Does and Does Not Achieve*, 13 April 2012, at <<https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>>. For instance, Bolivia withdrew from the ICSID Convention for reasons including their belief that the system is unfair.

issues in the hopes that the system will ‘fix itself’. In my opinion, it would be better to develop a body of rules for investment law rather than wait for convergence – a point I explore later in this section.

The second explanation offered is that ISDS arbitrators have different conceptions of what their role is.³² One group of arbitrators see their role as that of commercial arbitrators with the sole purpose of resolving the dispute even if that means ignoring ‘rules’ set by previous tribunals.³³ This is because they are chiefly concerned with giving unanimous decisions as these are less likely to be challenged and more likely to be regarded as legitimate.³⁴ In other words, this group believes their role is to provide a decision for the parties and nothing more.

However, the second group of arbitrators differ in that they regard ISDS as a form of ‘public law’ adjudication.³⁵ Thus, this group sees their role as akin to being a judge on the International Court of Justice (ICJ).³⁶ They are more concerned with setting out the law in a way that State parties would accept, and which is more in line with the general expectations of the international body of public international lawyers.³⁷ This dichotomy between the perceived roles of arbitrators is one of the explanations offered to explain the inconsistency in decisions.³⁸

What is needed is a suitable solution that can address the different perceived roles of ISDS arbitrators, and that can aid – or intensify – the convergence of investment law into a body of rules. A potential solution is a sitting panel of judges that could stem from a permanent court structure. These judges would have a defined role and can build a body of investment law rules rather than simply wait for convergence, thus increasing both certainty and coherence.

The TTIP Draft Proposals (TTIP)³⁹ show how this could work in practice. They list the criteria for potential judges sitting in the court of first instance. Article 9 of TTIP states that judges are appointed for a term of six years, and shall have ‘qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence ... and ... have demonstrated expertise in public international law’.⁴⁰ By limiting the scope of the judges to public international lawyers, a permanent court would have a body of judges who all have a similar outlook on what their role entails, and as previously explained, are more willing to set out the law rather than merely solve a dispute. This is similar to the structure of the International Tribunal for the Law of the Sea (ITLOS) which specifies certain criteria for judges and which, according to scholars, generally has no serious problems of inconsistency.⁴¹ This also

³² Alvarez, *supra* nt 4, 449.

³³ Alvarez, *supra* nt 4, 451.

³⁴ Paulsson J, “Awards – and Awards”, in Bjorklund, AK, Laird, IA and Ripinsky, S, eds, *Investment Treaty Law: Current Issues III: Remedies in International Investment Law and Emerging Jurisprudence in International Investment Law* (British Institute of International and Comparative Law 2009), 100.

³⁵ Alvarez, *supra* nt 4, 450.

³⁶ Walde, T, “Remedies and Compensation in International Investment Law” 5 *Transnational Dispute Management* (2005), at <transnational-dispute-management.com/article.asp?key=557> (accessed 18 November 2018).

³⁷ Alvarez, *supra* nt 4, 451.

³⁸ Alvarez, *supra* nt 4, 451.

³⁹ TTIP Draft Proposals; This is chosen because these are the most current and real proposals for an actual permanent court system.

⁴⁰ Article 9, TTIP Draft Proposals.

⁴¹ Karaman IIV, *Dispute Resolution in the Law of the Sea, (Publications on Ocean Development, (Vol. 72, Leiden/Boston: Martinus Nijhoff Publishers 2012), 288.*

immediately solves the problem of different perceived roles of ISDS arbitrators and contributes towards greater coherence of ISDS decisions. Additionally, a relatively small panel of judges could potentially develop a coherent body of investment law rules, thus increase certainty for parties, and therefore convergence.

The development of a body of investment law jurisprudence is not one which ISDS stakeholders would resist because literature shows that, over time, investment tribunals have increasingly started to cite previous awards.⁴² Therefore, having a coherent set of rules developed by sitting judges would be a better way to fix the problem of inconsistency rather than waiting for the system to automatically correct itself by ‘throwing out the bad decisions’ as has been previously suggested.⁴³ This solution would decrease inconsistency and, in turn, increase the level of certainty for parties involved in ISDS and therefore restore legitimacy.

B. Appeals

The creation of an appeals facility for ISDS is not a new suggestion. The International Centre for the Settlement of Investment Disputes (ICSID) has previously considered introducing one, and various scholars have written about it.⁴⁴ Currently, parties arbitrating under ICSID can request an annulment of the award under very narrow grounds through an annulment committee.⁴⁵ Parties using other institutions such as the United Nations Commission on International Trade Law (UNCITRAL) do not have recourse to a similar mechanism and thus can only challenge its enforcement under the New York Convention or at the place of arbitration.⁴⁶

This section will focus solely on the ICSID annulment committee given its uniqueness to ISDS. I will show the problems that have come about under the current system, how these problems are serious enough to affect the legitimacy of ISDS, and why the creation of an appeals tribunal is desirable and can restore legitimacy to ISDS.

1. What are the problems associated with the current system?

Under Article 52 of the ICSID Convention, parties can attempt to get an award annulled under very limited grounds. These are:

- a. that the tribunal was not properly constituted;
- b. that the tribunal has manifestly exceeded its powers;
- c. that there was corruption on the part of a member of the tribunal;

⁴² Weidemaier W, WMC, “Towards a Theory of Precedent in International Arbitration” 51 *William and Mary Law Review* (2010) 1908, at <scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=https://www.google.co.in/&httpsredir=1&article=1325&context=faculty_publications> (accessed 18 November 2018).

⁴³ Commission, JP, “Precedent in Investment Treaty Arbitration: —A Citation Analysis of a Developing Jurisprudence,” 24(2) *Journal of International Arbitration* (2007) 24 J.154.

⁴⁴ ICSID Secretariat, DISCUSSION PAPER: *Possible Improvements of the Framework for ICSID Arbitration*, 22 October 2004, at <icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> (accessed 18 November 2018); Qureshi, AH, “An Appellate System in International Investment Arbitration?”, in Muchlinski, P, Ortino, F and Schreuer, C, eds, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), 1160.

⁴⁵ Article 52, International Centre for Settlement of Investment Disputes, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 14 October 1966 (ICSID Convention).

⁴⁶ Article V, United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958 (New York Convention); Franck, *supra* nt 4, 1551.

- d. that there has been a serious departure from a fundamental rule of procedure; or
- e. that the award has failed to state the reasons on which it is based.⁴⁷

It should be noted from the outset that a tribunal being mistaken in either the law or facts of the case are not grounds for annulment. I will now use two decisions from annulment committees to demonstrate the problems associated with this system. The first decision will show how the constrained rules of the annulment committee affect the legitimacy of ISDS, whilst the second will show how some committees give an expansive interpretation to Article 52 of the ICSID Convention which, in turn, affects the legitimacy of the current ICSID annulment committee system.

If we look at the case of *CMS*,⁴⁸ the Argentinian government had lost an arbitration against an American company for various regulatory measures it had undertaken during the Argentine financial crisis.⁴⁹ The Tribunal did not accept the Argentinian government's defence of necessity, which fell under Article XI of the BIT.⁵⁰ Argentina thus decided to apply for annulment of the award on the grounds that the tribunal had manifestly exceeded its powers and failed to state reasons.⁵¹

On analysing the award, the Annulment Committee noted that the Tribunal had made 'manifest errors of the law' in its interpretation of Article XI, and that there were significant lacunae in the award such that it was 'impossible for the reader to follow the reasoning' for certain issues.⁵² Despite these serious criticisms of the award, the Committee recognised the narrow limits to its jurisdiction and concluded that the award could not be annulled under the grounds argued by Argentina.⁵³ In the words of the Committee, it 'cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal'.⁵⁴ The Committee recognised that although there were errors and lacunas in the application of Article XI, the Tribunal nonetheless applied it which is what it was tasked with doing.⁵⁵

This situation is one where the Committee has followed the ICSID annulment rules to the letter. It recognised that it had narrow jurisdiction and used its limited powers to come to a decision.⁵⁶ The problem is that when the rules are followed to the letter, an annulment committee does not have enough powers to address situations where it believes that a tribunal has made serious errors in the interpretation of the law. This, in my view, directly affects the legitimacy of ISDS. In the previous section, I touched on how the concept of coherence and predictability relate to the legitimacy of the rule of law. Here, it is important to note that the concepts of justice, fairness, and the opportunity for review also link to the legitimacy of the rule of law.⁵⁷ In other words, if a

⁴⁷ Article 52(1), ICSID Convention.

⁴⁸ ICSID, *CMS Gas Transmission Company v Argentine Republic*, ARB/01/8, 25 September 2007 (Annulment Proceeding - Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic).

⁴⁹ ICSID, Decision on the Application for Annulment of the Argentine Republic, para 30.

⁵⁰ ICSID, Decision on the Application for Annulment of the Argentine Republic, para 38.

⁵¹ ICSID, Decision on the Application for Annulment of the Argentine Republic, para 2.

⁵² ICSID, Decision on the Application for Annulment of the Argentine Republic, paras 97 and 130.

⁵³ ICSID, Decision on the Application for Annulment of the Argentine Republic, para 158.

⁵⁴ ICSID, Decision on the Application for Annulment of the Argentine Republic, para 136.

⁵⁵ *Ibid.*

⁵⁶ Maslo, PB, "Are the ICSID Rules Losing Their Appeal? Annulment Committee Decisions Make ICSID Rules a Less Attractive Choice for Resolving Treaty-Based Investor-State Disputes" 54(1) *Virginia Journal of International Law* (2014) 2.

⁵⁷ Franck, *supra* nt 4, 1584.

party that has participated in ISDS is later told by an annulment committee that the tribunal made manifest errors in its interpretation of the law but that there is nothing that can be done to remedy the situation, would this not affect the legitimacy of ISDS?

The reason this occurs is that the current system promotes finality of awards over accuracy.⁵⁸ However, this is not always beneficial for the parties involved. Practitioners have noted that an ‘adverse final award is obviously adversely final’ and can thus have an impact on confidence in the system,⁵⁹ and scholars have noted that accuracy of the law is generally of greater benefit to parties to investment arbitration than finality.⁶⁰ Therefore, this suggests that the current annulment committee system which has narrow grounds of review in order to promote finality is deficient when it comes to providing legitimacy in the ISDS system.

In contrast to this, there are cases where the annulment committee has not been able to restrain itself as in the *CMS* case and has instead assumed a wide perception of its functions. An example of this is the *Enron* case which also concerned measures taken by the Argentinian government during its economic crisis.⁶¹ When interpreting a particular rule, the Committee found that the Tribunal had correctly identified the governing law, the relevant rules, and had applied it. However, it disagreed with the way and reasoning which the Tribunal used to interpret the rule in question and found this to be in excess of its powers.⁶² In essence, the Committee allowed an annulment for what they believed was an error of law by interpreting it as a ‘manifest’ excess of powers.⁶³ Therefore, in contrast to the *CMS* Committee, the *Enron* Committee seems to be almost assuming the role of an appellate body.

What is most surprising is that the ground which the *Enron* Committee used to annul the case was not one argued by Argentina – it was entirely created and developed by the Annulment Committee.⁶⁴ This decision was also heavily criticised by scholars who believe that the committee overstepped its powers and tried to assume the role of an appellate body by allowing an annulment for an error of law.⁶⁵ In addition, later annulment committees also recognised that the *Enron* Committee went too far in its decision.⁶⁶

⁵⁸ Walsh, TW, “Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?” 24(2) *Berkeley Journal of International Law* (2006) 444, 459.

⁵⁹ Veeder, VV, “The Necessary Safeguards of an Appellate System” 2 *Transnational Dispute Management* (2005) 6, at <transnational-dispute-management.com/article.asp?key=401> (accessed 18 November 2018); Veeder also notes that parties to investment arbitration differ from parties to commercial arbitration in that they may not always want finality.

⁶⁰ Walsh TW, *supra* nt 58, 461; However, Walsh notes that whilst it should be of greater theoretical benefit but that because generally the United States and investors tend to win investment arbitrations, there is currently little financial incentive for them to currently want an appeal system to promote more accurate awards.

⁶¹ ICSID, Decision on the Application for Annulment of the Argentine Republic.

⁶² ICSID, Decision on the Application for Annulment of the Argentine Republic, para 393.

⁶³ *Ibid.*

⁶⁴ Schreuer, C, “From ICSID Annulment to Appeal Half Way Down the Slippery Slope” 10 *The Law and Practice of International Courts and Tribunals* (2011) 220, at <univie.ac.at/intlaw/wordpress/pdf/lape_010_02_211_225.pdf> (accessed 18 November 2018).

⁶⁵ Friedland, P and Brumpton, P, “Rabid Redux: The Second Wave of Abusive ICSID Annulments” 27(4) *American University International Law Review* (2012) 727, 745.

⁶⁶ ICSID, *Togo Electricité and GDF-Suez Energie Services v Republic of Togo*, ARB/06/7, 6 September 2011, (Decision on Annulment); ICSID, *Continental Casualty Company v The Argentine Republic*, ARB/03/9, 16 September 2011 (Decision on Annulment 2011).

The issue of committees going beyond their powers and assuming the role of an appellate body has occurred before in the annulment decisions in *Fraport*, *Amco*, and *Sempra*.⁶⁷ These instances further demonstrate the deficiencies of the current annulment system. This is because these decisions may affect the trust that parties have in the ICSID system because the committees in question contravene and go beyond the language of the ICSID Convention by assuming the role of an appellate body.⁶⁸ In addition, when annulment committees such as *Enron* develop arguments in favour of a party, the other party may feel that the system lacks fairness. This perception may lead a party to question the legitimacy of the annulment committee mechanism.

Therefore, the situation we have is one where if the annulment grounds are followed to the letter, the result can lead to unfairness which may, in turn, affect the legitimacy of ISDS. Moreover, certain committees harm the legitimacy of the current annulment committee system by going beyond the powers assigned to them in order to annul awards. Clearly, some reform of the system is needed. However, merely finding ways to ensure expansive tribunal decisions do not occur would still leave a *CMS*-like situation which still harms the legitimacy of ISDS. In my opinion, the best solution is introducing an actual appeals system for ISDS.

2. How would the creation of an appeals system protect the legitimacy of ISDS?

At the outset, I believe it is important to mention that parties should be able to challenge awards on the basis of an error of law. This is important because it will help uphold the legitimacy of ISDS in terms of the rule of law as explained in the previous section. In addition, as I explained in the previous section, the finality of awards should not be the sole focus of an ISDS system if finality compromises accuracy. Whilst this view may seem shocking to a commercial arbitrator, it is important to remember that investment arbitration involves issues of substantial public interest which thus makes accepting erroneous decisions less justifiable in the name of finality than in commercial arbitration.⁶⁹ The idea of promoting fairness over finality by introducing an appellate mechanism to investment arbitration has also been proposed by scholars such as Platt.⁷⁰ Therefore, allowing awards to be reviewed, whilst perhaps sacrificing the concept of finality, is not necessarily a negative outcome because of the public interest of ISDS and because it would increase fairness and thus legitimacy in the system.

However, merely amending the ICSID Convention to add extra grounds of review to Article 52 is not a good approach to creating such an appellate mechanism. This is because under Article 66 of the ICSID Convention, all proposed amendments can only be effective once all Contracting States have approved and ratified the amendment.⁷¹ Understandably, the prospect of achieving this is unlikely. Additionally, it would only be

⁶⁷ ICSID, *Fraport AG Frankfurt Airport Serv. Worldwide v. Republic of the Philippines*, ARB/03/25, 23 December 2010 (Decision on Annulment); ICSID, *Amco Asia Corp. v. The Republic of Indonesia*, ARB/81/1, 16 May 1986 (Decision on Annulment); ICSID, *Sempra Energy International v The Argentine Republic*, ARB/02/16, 29 June 2010 (Decision on Annulment).

⁶⁸ Friedland and Brumpton, *supra* nt 65, 756.

⁶⁹ Yannaca-Small, K, "Improving the System of Investor-State Dispute Settlement" 1 *Organisation for Economic Co-operation and Development Working Papers on International Investment, (OECD Working Papers on International Investment)* (2006) 48, at <oe.cd.org/china/WP-2006_1.pdf> (accessed 18 November 2018).

⁷⁰ Platt R, "The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?" 30(5) *Journal of International Arbitration* (2013) 531.

⁷¹ Friedland and Brumpton, *supra* nt 65, 758.

a solution for ICSID and not have an impact on other bodies such as UNCITRAL. A better approach would be to create an appeals mechanism from the ground up which interested States can sign up to.

The grounds of appeal could be modelled on TTIP which includes the proposal for an appellate body. These grounds are 1. that the Tribunal has erred in the interpretation or application of the applicable law; 2. that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; and, 3. those grounds provided for in Article 52 of the ICSID Convention.⁷² These grounds are wide enough such that the legitimacy concerns in terms of fairness and the rule of law would be addressed, and narrow enough such that losing parties cannot launch an appeal for anything they want and thus increase costs as a result.⁷³

A good comparator for the potential success of such an appeals mechanism would be the World Trade Organization (WTO) Appellate Body as it is the only international third-party adjudicative system with an appeals mechanism for trade law.⁷⁴ The WTO Appellate Body has been praised as a system in which parties have confidence, and with a high degree of predictability given dissents are so rare.⁷⁵ In addition, it is made up of a standing body of members who are appointed for a four-year term which allows the system to benefit from collective expertise and thus helps encourage consistency and reduces unpredictability.⁷⁶ The fact that the WTO has such a successful appellate body – which commentators note has not had the same legitimacy crisis that ICSID has faced – demonstrates that it can serve as a model for an ICSID appeals mechanism.⁷⁷ Therefore, having an appellate mechanism can potentially increase fairness and contribute to the legitimacy of ISDS as it has done in the WTO system.

Whilst this may sacrifice the concept of finality, it will promote fairness and thus increase the legitimacy in the system. TTIP shows the potential form this appellate mechanism could take, whilst the successes of the WTO Appellate Body demonstrate the potential benefits such a system could have.

C. Transparency

The issue of transparency in international investment arbitration is one which has increasingly become the focus of attention amongst parties to ISDS, scholars, and the general public.⁷⁸ The tensions which bring about legitimacy concerns is because of the hybrid nature of ISDS which, on the one hand, is a public international law process involving States, and on the other hand is rooted in arbitration which is a private form of

⁷² Article 29, TTIP Draft Proposals.

⁷³ In addition, having a small number of judges with set qualifications for the appeals mechanism – the TTIP proposals allows for six judges with expertise in public international law – would overcome any potential problems in terms of inconsistency as identified in the first part of this discussion.

⁷⁴ Ngangjoh-Hodu, Y and Ajibo, C, “ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration” 6(1) *Journal of International Dispute Settlement* (2015), 308.

⁷⁵ *Id.*, 313.

⁷⁶ *Id.*, 322.

⁷⁷ *Id.*, 328.

⁷⁸ Euler, D, Gehrig, M and Scherer, M, eds, *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Cambridge University Press 2015), 1.

dispute resolution.⁷⁹ Therefore, it is important that the right balance is struck between these two notions whilst also protecting the legitimacy of ISDS.

In this section, I will start by describing how transparent current proceedings are under the current regime and associated problems. Following this, I will explain what improvements could be made to improve transparency. My discussion will touch on the transparency proposals in the TTIP as well as the new UNCITRAL directive on transparency in investment arbitration. Hence, I will show that ISDS currently has serious transparency issues that need reform.

1. How transparent are proceedings under the current regime?

If transparency is merely the publication of awards, then investment arbitration is very transparent. Whilst BITs and the ICSID Convention say little about transparency, in practice, there is not as much confidentiality as compared to traditional commercial arbitration.⁸⁰ For instance, according to Article 48(5) of the ICSID Convention, ICSID is required to seek parties' consent that the award be published. However, in the absence of such consent, the centre publishes excerpts of the legal reasoning.⁸¹ The situation is similar for investment arbitrations occurring under the London Court of International Arbitration (LCIA) or other national arbitral institutions.⁸² Therefore in terms of publication of awards, investment arbitration is much more transparent than commercial arbitration.

However, when it comes to the issues of public access and the involvement of *amicus curiae*, investment arbitration is rather closed. With regards to public access, investment arbitration is held *in camera* and the public does not have access to neither the pleadings nor the oral hearings.⁸³ When it comes to the involvement of *amicus curiae*, this has only been allowed in limited circumstances.⁸⁴ For instance, before the new transparency rules came into effect, UNCITRAL Tribunals were only mandated to conduct arbitrations in a manner it considered appropriate and therefore could use their discretion when deciding to permit *amicus curiae*.⁸⁵

By contrast, ICSID has more detailed rules regarding *amicus curiae*, albeit still limited. Under ICSID *amicus curiae* are allowed to file written submissions regarding matters that are within the scope of the dispute.⁸⁶ In doing so the tribunal must consider whether 1. the submission would assist it in determining a factual or legal issue related to the proceedings by bringing a perspective or particular knowledge or insight different from that of the parties; 2. the submission would address a matter within the scope of the dispute; and 3. the non-disputing party has a significant interest in the proceeding.⁸⁷ Tribunals are also required to ensure that the submission does not disrupt the proceedings

⁷⁹ *Id.*, 20.

⁸⁰ Böckstiegel KH, "Commercial and Investment Arbitration: How Different are they Today?" 28(4) *The Journal of the London Court of International Arbitration* (2012) 586.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Choudhury, B, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?" 41 *Vanderbilt Journal of Transnational Law* (2008) 786.

⁸⁴ *Ibid.*, 778.

⁸⁵ Article 17(1), United Nations Commission on International Trade Law, *Arbitration Rules as revised in 2010*, 2010, UNGA Res 65/22.

⁸⁶ Bastin, L, "The Amicus Curiae in Investor-State Arbitration" 1 *Cambridge Journal of International and Comparative Law* (2012) 208, 216.

⁸⁷ Rule 37(2), ICSID, *Rules of Procedure for Arbitration Proceedings*, 10 April 2006 (ICSID Arbitration Rules).

or prejudice one of the parties, and must give both parties the opportunity to comment on the submission.⁸⁸ However, parties are still able to veto the attendance of *amicus curiae* and they have generally been denied access to the evidentiary record presented in the hearing.⁸⁹ For instance, in the *Bernhard von Pezold* case, the Claimants vetoed the European Centre for Constitutional and Human Rights' (ECCHR) attendance of the hearings and denied them access to the evidentiary record.⁹⁰ This contributes to one of the criticisms of ISDS which is that, given that *amicus curiae* do not generally have access to the proceedings and the evidentiary record, they may not be able to provide briefs of substantive value that could pass the threshold laid out above.⁹¹ Thus, whilst there is some degree of openness when it comes to accepting *amicus curiae*, it is still rather closed.

Whilst this may seem unsurprising to a traditional commercial arbitrator, it should be stressed that investment arbitration is one of public interest. Commentators generally agree that the public has a substantial interest in arbitrations involving States.⁹² This is because investment arbitration generally involves challenges by private parties to government measures which are usually implemented to achieve public policy goals, and can result in arbitrators striking down these government measures.⁹³ As a result, there may be an impact on a State's national budget and on the welfare of the people.⁹⁴ This substantial public interest is a reason why Non-Governmental organisations (Organizations (NGOs) frequently attempt to submit briefs in investment arbitrations in order to provide expertise on issues ranging from the environment to public health which may be at stake in the arbitration.⁹⁵ This substantial public interest is one of the arguments as to why ISDS should be significantly more open to both the public and *amicus curiae* as compared to traditional commercial arbitration.

In addition to the public interest arguments, a more open ISDS mechanism would help increase public trust in the system. This is because ISDS is generally very negatively perceived by the public as a sort of '*secret court*' which places the interests of corporations above that of the public.⁹⁶ Commentators suggest that the perception of a secret court

⁸⁸ *Id.*, 217.

⁸⁹ Kluwer Arbitration Blog, Triantafylou E, *A More Expansive Role For Amici Curiae In Investment Arbitration?*, 11 May 2009, at <kluwerarbitrationblog.com/2009/05/11/a-more-expansive-role-for-amici-curiae-in-investment-arbitration> (accessed 18 November).

⁹⁰ ICSID, *Bernhard von Pezold and others v Zimbabwe*, 28 July 2015, ARB/10/15 (Award), 36.

⁹¹ Jagusch S and Sullivan J, "A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern", in Waibel, M, Kaushal, A, Chung, KH, Balchin, C, eds, *The Backlash Against Investment Arbitration. Perceptions and Reality* (Kluwer Law International 2010), 96.

⁹² Delaney, JF and Magraw, D, "Transparency and Public Interest", in Muchlinski, P, Ortino, F and Schreuer, C, eds, *The Oxford Handbook of International Investment Law* (Oxford University Press 2008), 724.

⁹³ Levine, E, "Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third Party Participation" 29(1) *Berkeley Journal of International Law* (2011) 200; Choudhury, *supra* nt 83, 778.

⁹⁴ OECD, "Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures", *OECD Working Papers on International Investment*, 2005/01, 40, at <oe.cd.org/daf/inv/investment-policy/WP-2005_1.pdf> (accessed 18 November 2018).

⁹⁵ Levine, *supra* nt 93, 209.

⁹⁶ Bastin, *supra* nt 86, 212; The Guardian, Provost, C and Kennard, M, *The obscure legal system that lets corporations sue countries*, 10 June 2015, at <theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid> (accessed 18 November 2018); The Independent, Sheffield, H, *TTIP: UK Government found secret courts in trade deal have 'lots of risk and no benefit' in its only assessment*, 25 April 2016, at <independent.co.uk/news/business/news/ttip-uk-government-only-did-

system in which the public has no input can lead to a democratic deficit in ISDS.⁹⁷ Some have gone so far as to suggest that this could generate popular backlash against ISDS.⁹⁸ This is something which tribunals have recognised and have tried their best to address. For instance, when deciding whether or not to allow *amicus curiae* briefs, the Tribunal in *Methanex* noted that the,

arbitral process could benefit from being perceived as more open or transparent or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.⁹⁹

This clearly demonstrates that tribunals are acutely aware of the criticisms and negative perceptions that surround ISDS.

Therefore, it is clear that increasing levels of transparency in investment arbitration by allowing more participation by *amicus curiae* will aid in enhancing the legitimacy of ISDS. This is important given the public interest involved in investment arbitration and because of concerns of public perception of ISDS. In addition, commentators note that increasing transparency in ISDS could lead to higher quality decision making given that the arbitrators and parties know their activities would be subject to public scrutiny, and aid in the protection of certain related public interests that may not be the subject matter of the dispute.¹⁰⁰ Whilst it has been noted that the consequences of increased transparency are potentially greater costs and delays to the process, it is generally accepted that the benefits that increased transparency would bring far outweigh the disadvantages.¹⁰¹ Therefore, the current regime is deficient and steps should be taken in order to provide greater levels of transparency in ISDS.

2. What can be done to increase transparency in ISDS?

First, it is clear that in order to be more transparent, ISDS must be open to greater involvement of *amicus curiae* that goes beyond merely providing briefs at the tribunal's discretion. This is important because trends in investment arbitration suggest that it is not only NGOs but also groups representing workers as well as other civil society groups that petition to submit briefs.¹⁰² This shows that *amicus curiae* can be a route for greater public involvement in the ISDS process. Therefore, ISDS should continue to be open to *amicus curiae* briefs from a wider group of actors to increase transparency.

However, merely accepting a wider range of *amicus curiae* is not enough. In my opinion, if ISDS is to maintain its legitimacy, it needs to go a step further. A good model for what this change could look like is the TTIP. This is because these proposals were

one-assessment-of-trade-deal-and-found-it-had-lots-of-risks-and-no-a6999646.html> (accessed 18 November 2018).

⁹⁷ Choudhury, *supra* nt 83, 786.

⁹⁸ Maupin, JA, "Transparency in International Investment Law: The Good, the Bad, and the Murky", in Bianchi, A and Peters, A, eds, *Transparency in International Law*, (Cambridge University Press 2013), 14, at <ssrn.com/abstract=2058195> (accessed 18 November 2018).

⁹⁹ UNCITRAL, *Methanex Corporation v United States of America*, 15 January 2001 (Decision of the Tribunal on Petitions from Third Persons to Intervene as 'amici curiae') 49.

¹⁰⁰ Delaney, *supra* nt 92, 779.

¹⁰¹ *Id.*, 785.

¹⁰² Levine, *supra* nt 93, at 213.

based on the results of a public consultation on ISDS in TTIP and hence should adequately address most of the concerns that the public would have.¹⁰³

Article 23(1) of the TTIP permits a tribunal to allow ‘any natural or legal person which can establish a direct and present interest in the result of the dispute to intervene as a third party’.¹⁰⁴ The role of the intervener is limited to supporting the award sought by one of the parties to the dispute.¹⁰⁵ Furthermore, if the application to intervene is granted, the intervener is allowed to receive a copy of every procedural document served on the disputing parties, has permission to attend the hearings, and may make an oral statement in addition to a written statement.¹⁰⁶ Furthermore, the intervening party is allowed to intervene all the way up to the Appeals Tribunal.¹⁰⁷

These proposals go well beyond the limits set on *amicus curiae* in the current regime. Firstly, they allow the intervening party to take a side and support one of the disputants. In my opinion, this recognises the substantial public interest in ISDS by allowing a biased party to intervene in the dispute. This would allow public interest organisations to directly and actively support government policy that is at risk of being struck down. Secondly, for the first time, these parties are granted access to all the documents in the hearings and are allowed to attend the hearings in order to make a statement. In my opinion, this would allow organisations to make more substantive submissions to the tribunal and recognises the potential stake that the public may have in the result of the arbitration.

However, the TTIP has gone a step further by incorporating the whole of the new UNCITRAL rules on transparency.¹⁰⁸ These new rules from UNCITRAL go even further to promote transparency by making many documents available to the public through an online database.¹⁰⁹ In addition, the new rules provide that all hearings will be made open to the public with the exception of such portions that need to be private in order to protect confidential information.¹¹⁰ These measures are radical when compared to the current regime which is modelled on commercial arbitration. This level of openness and increased public access will have the effect of increasing public awareness of disputes and the legitimacy in ISDS because the public would be allowed to scrutinise the whole process.¹¹¹ Therefore, this would directly address the criticisms of secrecy in ISDS that was discussed earlier. It should be noted that the Mauritius Convention on Transparency also attempts to incorporate the whole of the UNCITRAL rules on transparency into BITs, regardless of the arbitration institution proceedings are commenced in.¹¹² Assuming

¹⁰³ European Commission, “Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP),”, *Commission Staff Working Document*, 13 January 2015, at <trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf> (accessed 18 November 2018).

¹⁰⁴ Article 23(1), TTIP Draft Proposals.

¹⁰⁵ *Ibid.*

¹⁰⁶ Article 23(3), TTIP Draft Proposals.

¹⁰⁷ Article 23(4), TTIP Draft Proposals.

¹⁰⁸ Article 18(1), TTIP Draft Proposals.

¹⁰⁹ UNCITRAL, *FAQ - UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2016, at <uncitral.org/uncitral/texts/arbitration/2014Transparency_FAQ.html> (accessed 18 November 2018).

¹¹⁰ Article 6, UNCITRAL, *Rules on Transparency in Treaty-based Investor-State Arbitration*, 10 December 2014.

¹¹¹ Choudhury, *supra* nt 83, 814.

¹¹² United Nations, *The Convention on Transparency in Treaty-based Investor-State Arbitration*, 1 April 2014, UNGA 69/116.

widespread ratification of the Mauritius Convention, it will only serve to correct transparency issues in ISDS whilst ignoring other legitimacy issues discussed above.

In essence, the current ISDS regime has serious issues when it comes to transparency. These issues contribute to increasing the negative public perception of ISDS and thus harm the legitimacy of ISDS. TTIP would go a long way in addressing these issues by combining the UNCITRAL proposals with its own standards. Being more open to *amicus curiae* briefs and allowing public access to the hearings ensures that issues of substantial public interest would have a voice in the proceedings and improves the overall public image of ISDS. This, in turn, helps in increasing the legitimacy of ISDS.

III. Conclusion

The current ISDS regime has serious issues in terms of the inconsistency of awards, lack of appeals mechanism, and in the transparency of ISDS. I have shown that each of these issues give rise to serious concerns regarding the legitimacy of the process. Potential solutions were also presented to address each of these issues, and these were discussed in the context of the current TTIP Draft Proposals given that the proposals include a permanent court.

In my view, the best solution to cumulatively address all the above issues is the creation of a permanent investment court. Creating a permanent investment court from the ground up would be the most efficient way to incorporate all the potential solutions simultaneously. The court would have a system which includes a small roster of judges to ensure consistency, an appeals mechanism to ensure fairness, and incorporates the transparency suggestions discussed to maintain public confidence in the system. Thus, all the legitimacy issues raised in this discussion could be addressed by the creation of a permanent court.

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