

Table of Contents

Preface	VII
Table of Contents	IX
Abbreviations	XV
Chapter 1. Introduction	1
1.1. Background	1
1.2. Significance of the Problem.....	5
1.3. Research Questions	6
1.4. Brief Overview of Literature.....	7
1.5. Methodology and the Originality of the Research.....	12
Chapter 2. The Legitimacy of the Investor-State Dispute Settlement (ISDS) System	15
2.1. Introduction	15
2.1.1. Traditional Approaches to Normative Legitimacy	23
2.1.1.1. Source: State Consent.....	23
2.1.1.2. Procedure: Fairness of Process	26
2.1.2. Limitations of the Traditional Normative Approach	27
2.1.2.1. Debunking Myths: Resolution of Disputes under Examination and Impact of Decisions Limited to the Litigating Parties	27
2.1.3. Concluding Remarks for Normative Legitimacy	30
2.2. Belief in Legitimacy.....	32

2.2.1. Brief Introduction to the Existing Literature	33
2.2.2. Factors Affecting Belief in Legitimacy	35
2.2.2.1. Consistency.....	35
2.2.2.2. Transparency.....	37
2.2.2.3. Regulatory Space.....	38
2.2.2.4. Expertise.....	40
2.3. Conclusion.....	42
Chapter 3. The Issue of Regulatory Space in International Investment Law	45
3.1. Introduction	45
3.2. Defining the Right to Regulate.....	51
3.2.1. What is Included in the Scope of the Right to Regulate?.....	51
3.2.2. What the Right to Regulate Does not Encompass.....	53
3.3. Refinement of Investment Standards	56
3.3.1. Indirect Expropriation	57
3.3.2. Fair and Equitable Treatment	61
3.3.3. Non-discrimination	67
3.3.4. Concluding comments.....	70
3.4. General Exception Clauses	71
3.4.1. Types of General Exception Clauses.....	71
3.4.2. General Exception Clauses in Practise and Concluding Remarks	74
3.5. Insertion of Positive Language Regarding Regulatory Interests in International Investment Agreements.....	76
3.5.1. An Overview of General Positive Language on Regulatory Interests.....	77
3.5.2. Declaratory Right to Regulate.....	81
3.5.3. The Inclusion of Non-economic Policy Objectives in the Preamble.....	84
3.5.4. Concluding Remarks	87
3.6. Conclusion.....	88

Chapter 4: The Principles of Transparency and Confidentiality in International Investment Arbitration.....93

4.1. Introduction93

4.2. Current Trends on Transparency in ISDS..... 97

 4.2.1. Rules on Transparency and Confidentiality under Investment Treaties..... 99

 4.2.1.1. North American Free Trade Agreement (NAFTA) Chapter 11 99

 4.2.1.2. Recent Model BITs..... 103

 4.2.2. Transparency and Confidentiality under the Rules of ISDS Mechanisms..... 105

 4.2.2.1. The ICSID Convention Regulations and Arbitration Rules 105

 4.2.2.2. UNCITRAL Rules 109

 4.2.3. Concluding Remarks111

4.3. Advantages and Disadvantages of the Principles of Transparency and Confidentiality..... 113

 4.3.1. Consistency and Predictability.....114

 4.3.2. Collusion, Commercial Secrets and Reputation of Parties.....116

 4.3.3. Politicisation of Disputes 120

 4.3.4. Quality and Accuracy of Arbitral Awards and Orders 120

 4.3.5. Concluding Remarks 121

4.4. Balancing Transparency with Confidentiality in ISDS 123

 4.4.1. Norm-Making 123

 4.4.2. Initiation of Disputes 126

 4.4.3. Procedural Developments..... 128

 4.4.3.1. Passive Participation 128

 4.4.3.1.1. Access to Documents 128

 4.4.3.1.2. Public Hearing 132

 4.4.3.2. Active Participation 135

 4.4.3.3. Publications of Awards 144

4.5. Conclusion 147

Chapter 5. Issue of Inconsistency and Parallel Proceedings 151

5.1. Introduction 151

5.2. Degree of Consistency and Role of Arbitrators 153

5.3. Factors that lead to the ‘crisis of inconsistency’ 156

5.3.1. Lack of a coherent system..... 156

5.3.1.1. Parallel Proceedings and Inconsistent Awards- Case Study..... 160

5.3.1.2. Types of Parallel Proceedings..... 163

5.3.1.3. Issues Caused by Parallel Proceedings 165

5.3.1.4. Proposed solutions to the issue of parallel proceedings 166

5.3.1.5. Popular legal mechanisms 167

5.3.1.6. Concluding Remarks on the Parallel Proceedings 180

Chapter 6 - Possible Solutions 183

6.1. Introduction 183

6.2. The Creation of a Multilateral Agreement on Investment..... 184

6.2.1. General Observations..... 184

6.2.2. The Extent to which an MAI Can Remedy the Legitimacy Crisis 188

6.2.2.1. Inconsistency..... 188

6.2.2.2. Regulatory Autonomy..... 189

6.2.2.3. Transparency..... 191

6.3. A Case for the Establishment of a Permanent Two-tiered Investment Court..... 193

6.3.1. General Observations..... 193

6.3.2. Establishment of a Court of First Instance – the International Investment Court (IIC)..... 195

6.3.3. Establishment of an Appellate Mechanism 204

6.3.3.1. Proposed Methods of Establishing an Appeals Mechanism under the Current ISDS System..... 205

6.3.3.2. The Issue of Finality and the Efficiency of the Proceedings.....	209
6.3.4. The Extent to which a Permanent Two-tiered Investment Court Can Remedy the Legitimacy Crisis.....	212
6.3.4.1. Inconsistency	212
6.3.4.2. Regulatory Autonomy.....	215
6.3.4.3. Transparency.....	216
6.4. An Interim Measure	221
6.4.1. Proposal - The creation of an Investment Law Advisory Council (ILAC) modelled on the CISG Advisory Council (AC).....	221
6.4.2. Impact of the ILAC on the Legitimacy Crisis:	224
6.4.2.1. Consistency.....	224
6.4.2.2. Transparency.....	225
6.4.2.3. Regulatory Space.....	225
6.4.3. Further Observations.....	226
6.5. Conclusion.....	227
Chapter 7: Conclusion	231
7.1. Overview of the Research	231
7.1.1. Legitimacy.....	231
7.1.2. Regulatory Space	233
7.1.3. Transparency	235
7.1.4. Consistency.....	236
7.1.5. Proposed solutions	239
Bibliography.....	243