# Australia's Rejection of Investor-State Arbitration: A Sign of Global Change

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# AUSTRALIA'S REJECTION OF INVESTOR–STATE ARBITRATION: A SIGN OF GLOBAL CHANGE

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## I. INTRODUCTION

Many countries have lately sought to reassess the efficacy of international investment agreements, and investment arbitration in particular. Nicaragua and Venezuela have both signaled their intention to terminate existing Bilateral Investment Treaties (BITs) including provisions for investment arbitration.[1] Ecuador has denounced the International Centre for Settlement of Investment Disputes (ICSID), the primary source of investment arbitration. Romania attempted to withdraw from the Swedish–Romanian BIT, only to then be subject to an investment arbitration award that purported to bind it "irrevocably" to that agreement. China traditionally restricted investor–state provisions in BITs until its more recent emergence as a leading capital exporter,[2] whereas the

* For related studies, *see* Leon E. Trakman, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?* 46 J. World Trade 83 (2012); Leon E. Trakman, *Choosing Domestic Courts over Investor–State Arbitration: Australia's Repudiation of the Status Quo,* 35 UNSW L.J. (forthcoming 2012). The author thanks the editors of these journals for their work on these related studies; Susan Franck, Jurgen Kurtz, Luke Peterson, Colin Picker, and Lisa Toohey for their comments on this chapter, and Kunal Sharma for his research assistance.

[1] For commentary on these events, as well as investment arbitration in Latin America generally, see Scott Appleton, *Latin American Arbitration: The Story behind the Headlines,* International Bar Association, *available at* http://www.ibanet.org/Article/Detail.aspx?ArticleUid=78296258-3B37-4608-A5EE-3C92D5D0B979.

[2] On China's shifting position in regard to investment arbitration, see Vivienne Bath & Luke Nottage, (eds) Foreign Investment and Dispute Resolution Law and Practice in Asia (2011) chs 1, 4 and 5.

Philippines negotiated to exclude investment arbitration in its free trade treaty with Japan in 2007.[3] One result is that bilateral investment agreements themselves are under attack. Another result is that investment arbitration is not assured as the pervasive medium through which investor–state disputes will be resolved in the future.

Although the Australian government's position is more moderate than the stance taken by these South American states, Australia is the first developed state to openly indicate that it will no longer agree to the adoption of arbitration within its Bilateral and Regional Trade Agreements (BRTAs). The effect of this policy shift is that henceforth the Australian government may negotiate that investment disputes with foreign investors be heard by domestic courts of law, rather than be resolved by international investment arbitration.[4] In a trade policy statement released on April 12, 2011, the Australian government confirmed that it would no longer negotiate treaty protections "that would confer greater legal rights on foreign businesses than those available to domestic businesses" or that would "constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses."[5]

This approach adopted by Australia reflects the view that domestic courts, not investment tribunals, are more appropriate bodies to resolve investment disputes between domestic states and foreign investors, in the same manner as domestic courts decide "other" domestic disputes.[6] The inference is that a domestic court can protect the rights of foreign investors while preventing them from receiving investment benefits beyond those provided to domestic investors. It is also presumed that, if investment arbitration privileges foreign investors, it undermines the national interest, and if it detracts from the national interest, local courts ought to replace it.[7] A third option is conceivable: that investors who feel that their rights have been violated can seek diplomatic intervention by their home states. However, that is not a practical mechanism

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[3] *See* Shotaro Hamamoto & Luke Nottage, *Foreign Investment in and out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor–State Dispute Resolution* (Sydney Law School Research Paper No 10/145); Transnat'l Dispute Mgmt. (2010), *available at* http://ssrn.com/abstract=1724999.

[4] *Trading Our Way to More Jobs and Prosperity* (Gillard Government Trade Policy Statement, released by Australia's Trade Minister, Craig Emerson, Apr. 2011), http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state [hereinafter Policy]. For a comment on the Australian government's Policy announced on Apr. 12, 2011, see Luke Peterson, *Australia Rejects ISA Provision in Trade Agreements: Don't Trade Our Lives Away* (Apr. 19, 2011), http://donttradeourlives-away.wordpress.com/2011/04/19/australia-rejects-investor-state-arbitration-provision-in-trade-agreements/. *See generally* Leon E. Trakman, *Foreign Direct Investment: Hazard or Opportunity?* 41 Geo. Wash. Int'l L. Rev. 1 (2010).

[5] *See* Policy, *supra* note 4, at 1–2.

[6] *See* Leon E. Trakman, *Foreign Direct Investment: An Australian Perspective*, 13 Int'l Trade & Bus. L. Rev. 31, 48–53 (2010); Thomas Westcott, *Foreign Investment Issues in the Australia–United States Free Trade Agreement*, Australian Government: The Treasury, *available at* http://www.treasury.gov.au/documents/958/pdf/06_foreign_investment_policy_ausfta.pdf.

[7] On this view, see David Schneiderman, Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise chs. 2, 6 (2008).

for resolving all disputes, and governments are generally loath to intervene on behalf of private investors who are resource-intensive, as this may undermine state-to-state relations. A further option is for foreign investors to enter into contracts directly with states, including negotiating terms governing the settlement of investment disputes. However, that option is inaccessible to the vast majority of investors who lack the economic resources and political influence to negotiate such contracts with host countries. The further proposal by the Australian government is that "Australian business will need to make their own assessments about whether they to want to commit to investing in those countries [with greater risk]." This, too, is problematic because it leaves Australian investors to resolve investor–state disputes in the domestic courts of a myriad of host countries. A further risk, to Australia itself, is that Australian businesses will restructure their foreign investments through offshore entities that have more favorable BIT dispute resolution provisions, removing themselves from the regulatory and taxation regimes of Australia.

However, it is arguable that outbound Australian investors who bring ISA claims against recalcitrant states under BITs to which Australia is not a state party benefit both Australia and its outbound Australian investors. In particular, outbound investors can bring ISA, claims against states that have limited "rule of law" traditions, by relying on BITs between those states and intermediary states. This enables Australian investors to lodge claims against states whose courts those investors do not trust. An incidental benefit is that, given the resort by Australian outbound investors to intermediary states, the Australian government need not conclude BITs with ISA provisions with states that lack established rule-of-law traditions.

One can debate whether the Australian government is unqualifiedly committed to this policy. There has been no indication that it will seek to withdraw from existing BITs and FTAs that provide for investor–state arbitration (ISA). However, in the interests of uniformity, it may conceivably insist on renegotiating some or even all existing BITs that provide for ISA. It may also insist on negotiating more protective dispute resolution provisions with countries whose domestic standards of legal protection are lower than Australia's, in effect capping protection for foreign investors at Australia's domestic standard of protection. These interventions by the Australian government seem unlikely to eventuate given its comments that Australian businesses need to make their own assessment of the risks of investing in host countries abroad. It may also be that the Australian government has yet to arrive at firm responses to these issues. A successor Liberal government, in turn, may retreat from this policy, reverting to a widely accepted reliance on ISA, particularly with respect to developed countries. A particular difficulty for the Australian government is that it is currently negotiating a Trans–Pacific Strategic Partnership Agreement in which the United States is a dominant party. An issue will be whether Australia can negotiate to be included in this multilateral partnership that is likely to endorse ISA, while still being able to opt out of investor–state arbitration.

What is now known is that the Australian government's Policy Statement is based less on unremitting faith in domestic courts to resolve investor–state disputes than

in disdain for ISA in particular. That disdain stems from the draft research and final Reports of the Australian Productivity Commission (APC), a public commission in Australia charged by the federal treasurer with the specific task of making recommendations on future trade and trade policy statements.[8] However, the APC's Report did more than challenge investor–state arbitration. It proposed more pervasively that Australia negotiate bilateral and regional trade and investment treaties in stages, that it first reach agreement on non-contentious issues, that it conclude treaties in order of their net benefit to Australia, that it cease to adopt ISA to resolve disputes in such treaties, and that it increase consultation with industry stakeholders and consumer representative groups.[9]

This chapter has several key objectives in relation to these matters. The first is to challenge the APC's contention that ISA should be rejected on grounds that it is objectively inferior to other mechanisms of dispute resolution. Although other methods, such as diplomatic intervention, political risk insurance, investor–state contracts, and so forth remain open, the most practical alternative to ISA is domestic litigation. However, domestic litigation is as open to criticism as is ISA. The second key objective of the chapter is to evaluate the consequences of resorting to domestic courts, as distinct from ISA to resolve investment disputes. The conclusion is that poking metaphorical holes in ISA is offset by the debilitating holes in domestic courts attempting to resolve investor–state disputes transparently, evenhandedly, and in particular, consistently and fairly. Indeed, ISA provisions in BITs provide a greater level of uniformity, predictability, and security than does resort to domestic courts. The chapter makes recommendations for changes to ISA that may reasonably accommodate some perceived deficiencies in it, that redress some of Australia's concerns, and that enable Australia to participate in investment treaties in which ISA is most likely to prevail. The chapter concludes by arguing against the Australian government's summary rejection of ISA because that rejection lacks an entirely justifiable basis. The government has also failed to provide a sustainable alternative, beyond open-ended reliance on domestic courts, once ISA is abandoned. The risk to Australia is in facing treaty isolation as a result of domesticating investment disputes before domestic courts in a manner that Australia's key partners in the region and elsewhere reject.

This chapter does not examine the economic costs of subjecting investment disputes to domestic litigation, given that insufficient time has elapsed since Australia's

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[8] Productivity Commission (Australia), Bilateral and Regional Trade Agreements (Final Report, Nov. 2010, released Dec. 13, 2010), *available at* http://www.pc.gov.au/projects/study/trade-agreements [hereinafter PC FR]. For the Draft Research Report, *see* Productivity Commission (Australia), Bilateral and Regional Trade Agreements (Draft Research Report, July 16, 2010), *available at* http://www.apo.org.au/research/bilateral-and-regional-trade-agreements; Draft Research Report also on file with author [hereinafter PC RR]. On submissions invited by the Commission, see, for example, Patricia Ranald & Harvey Purse, *Supplementary Submission on behalf of the Australian Fair Trade and Investment Network (AFTINET) to the Productivity Commission Review into Bilateral and Regional Trade Agreements*, *available at* http://www.pc.gov.au/__data/assets/pdf_file/0015/102525/subdr068.pdf. *See also* Trakman, *supra* note 6.

[9] PC FR, *supra* note 8, Part D.

new policy statements to allow for such an analysis. However, it does maintain that the alleged economic costs that the Productivity Commission imputes to ISA are insufficiently established to justify rejecting ISA out of hand. Even if there are susceptible economic grounds to hold that the costs of ISA undermine its viability, and its fairness, these arguments need to be assessed on principled grounds. Doubts about ISA also need to take into account principled objections to its alternatives, notably to domestic courts, to resolve investor–state disputes.

## II. BACKGROUND: THE APC REPORT

A primary consideration impelling the Australian government's policy stance is domestic public policy. The government's central concern is that foreign investors, notably foreign drug companies, will invoke investment arbitration to challenge Australia's sovereignty, and public interest in regulating industrial relations, public health, safety, and the environment. These concerns are understandable. Foreign drug companies are increasingly likely to challenge the Australian government's restrictions on access to and the price of foreign-manufactured drugs, such as under the Pharmaceutical Benefit Scheme (PBS). A related concern is a potential challenge to prospective Australian law requiring the plain packaging of tobacco products. Philip Morris has already initiated investment arbitration against the Republic of Uruguay under the Switzerland–Uruguay BIT, and has since launched a formidable challenge against Australia.[10]

Despite rhetoric about the national interest, the political and economic subtext behind Australia's new policy may be more complex in nature. There are growing doubts about the perceived economic merits of trade and investment arbitration. Reflecting these doubts are comments of the APC specifically making recommendations on

[10] On Australia's tobacco legislation, See *Tobacco Plain Packaging Act 2011* (Cth). See series of steps leading up to the passage of the Act, see <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome% *See generally* Matthew C. Porterfield & Christopher R. Byrnes, *Philip Morris v Uruguay: Will Investor–State Arbitration Send Restrictions on Tobacco Marketing up in Smoke?*, Inv. Treaty News, July 12, 2011, http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/ (last visited July 31, 2011); Andrew D. Mitchell & Sebastian M. Wurzberger, *Boxed In? Australia's Plain Tobacco Packaging Initiative and International Investment Law*, 27 Arb. Int'l 623 (2011), *available at* http://ssrn.com/abstract=1896125; Simon Chapman & Becky Freeman, *The Cancer Emperor's New Clothes: Australia's Historic Legislation for Plain Tobacco Packaging*, 340 Brit. Med. J. 2436 (May 5, 2010); Tania Voon & Andrew Mitchell, *Implications of WTO Law for Plain Packaging of Tobacco Products*, Public Health and Plain Packaging of Cigarettes: Legal Issues (2011), http://ssrn.com/abstract=1874593. Philip Morris International, *Submission to the Office of the US Trade Representative*, Jan. 25, 2010, *available at* http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a81289. On Philip Morris' initiation of an action against Australia in terms of the Australia–Hong Kong Free Trade Agreement, see http://www.pmi.com/eng/media_center/press_releases/pages/PM_Asia_plain_packaging.aspx. On Philip Morris' unsuccessful litigation against the prime minister of Australia, see Philip Morris Limited v Prime Minister [2011] AATA 556 (Aug. 2011). *See further Case S389/2411,* High Court of Australia <http://www.hcourt.gov.au/cases/case-s389/2011>; *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012).

future trade and investment policy. In essence, the Commission's report found no overwhelming economic rationale in support of ISA mechanisms in trade and investment agreements. Indeed, at its core the Commission found limited economic value in the BRTAs concluded to date. Craftily stated, the Commission noted that "current processes for assessing and prioritising BRTAs lack transparency and tend to oversell the likely benefits."[11] The APC's Report continued: "At a minimum, the economic value of Australia's preferential BRTAs has been oversold."[12] A recent analysis of the APC's report emphatically asserts that the APC's approach was based on a set of problematic assumptions and omissions, including a failure to fully understand the international legal and political implications of rejecting ISA, as well as a failure to take into account the effect of this rejection on outbound investment.[13]

At issue is whether the APC's assumptions are valid that the costs of ISA outweigh any ancillary benefits, whether declining to incorporate ISA into investment treaties will cause a "regulatory chill" on public authorities, whether reliance on domestic courts to resolve investment disputes will undermine the democratic process of law making, and whether ISA will distort the efficient flow of investments.[14] Further at issue are institutional impediments associated with ISA raised by the APC, as identified in Section VI below.

The reality is that it is speculative at best whether ISA does more to chill than encourage regulation of foreign direct investment (FDI). One can as readily hypothecate that governments may regulate foreign investment more efficiently and fairly by incorporating ISA into BITs than the contrary.

What, then, are the principled reasons in favor of domestic courts resolving investment disputes between host states and foreign investors? What are the principled arguments to the contrary? One answer is that the APC's concerns are defensible, at least in part.[15] Australia has a legitimate economic interest in reducing defensive costs that restrict its domestic policy space arising from entry into investment treaties. The problem is that the APC fails to balance these costs against the potential offensive gains to outbound Australian capital. For example, why would the Australian government avoid investment arbitration in its BITs with developed states that are net FDI importers from Australia, and that Australia perceives as having legal systems that are comparable to Australia's?

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[11] PC RR, *supra* note 8, at xiv.

[12] *Id.* at xxii.

[13] Jurgen Kurtz, *Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication*, ICSID Rev. (forthcoming 2012).

[14] PC FR, *supra* note 8, 271–72.

[15] *See* Jurgen Kurtz, 'Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication' (2012) 27 *ICSID Review* 65. Aug. 2, 2011, *available at* http://www.asil.org/insights110802.cfm (noting that the Productivity Commission's Report, although offering a rigorous quantitative analysis of the net economic benefits of BITs, fails to take into account the dynamism of international law: "critical barriers to foreign investment do not usually take the form of simply border measures whose effects are easily quantifiable."); Hamamoto & Nottage, *supra* note 3.

The macroeconomic concern that dispute resolution mechanisms, especially investment arbitration, can be costly is a double-edged one. Investor–state arbitration does expose states to the risk of costly, fractious, and dysfunctional disputes with deep-pocket foreign investors of the likes of Philip Morris.[16] Weighed against this is the unfairness of denying foreign investors in general access to "neutral" arbitration, the cost to them of having to submit their investor–state disputes to domestic courts of host states in which proceedings are potentially more adversarial than arbitration, and the potential denial by domestic courts of natural justice on dubious national interest grounds. A further macro-political and economic cost to Australia is the prospect of being isolated from potentially lucrative investment treaties with leading trade partners that insist on the adoption of ISA. This concern is most likely to eventuate under the Trans-Pacific Partnership Agreement in which the vast majority of state parties are likely to prefer ISA over domestic litigation. Nor is Australia's rejoinder justified that at least Australian courts are preferable institutions to dispense natural justice than ad hoc investment tribunals in the absence of further legitimation.[17] These competing arguments are considered in greater detail below.

## III. CHALLENGING ISA

An initial observation is that the Australian government and the Productivity Commission are not alone in their doubts about the value of ISA. Related concerns were expressed in a comparatively recent report by the UNCTAD:

> Moreover, the financial amounts at stake in investor–State disputes are often very high. Resulting from these unique attributes, the disadvantages of international trade and investment arbitration are found to be the large costs involved, the increase in the time frame for claims to be settled, the fact that ISDS cases are increasingly difficult to manage, the fears about frivolous and vexatious claims, the general concerns about the legitimacy of the system of investment arbitration as it affects measures of a sovereign State, and the fact that arbitration is focused entirely on the payment of compensation and not on maintaining a working relationship between the parties.[18]

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[16] *See Philip Morris Asia Initiates Legal Action against the Australian Government over Plain Packaging*, *Phillip Morris International* (News Release, June 27, 2011), http://www.pmi.com/eng/media_center/press_releases/pages/PM_Asia_plain_packaging.aspx. On the prelude to this conflict, see Liv Casben, *Tobacco Companies Rally against Plain Packaging*, ABC News (online), Apr. 29, 2011, http://www.abc.net.au/news/stories/2010/04/29/2885343.htm. *See also Tobacco Company Files Claim against Uruguay over Labeling Laws*, International Centre for Trade and Sustainable Development, Mar. 10, 2010, http://ictsd.org/i/news/bridgesweekly/71988/.

[17] *See* Policy, *supra* note 4, at 1–2.

[18] *Investor–State Disputes: Prevention and Alternatives to Arbitration*, UNCTAD Series on International Investment Policies for Development (May 2010), at xxiii, *available at* http://www.unctad.org/en/docs/diaeia200911_en.pdf. *See also Investor–State Disputes: Prevention and Alternatives to Arbitration II*

The Australian government has asserted that it supports the principle of national treatment: that domestic and foreign businesses are to be treated equally under the law. An inference is that foreign investors ought not to benefit from investor–state arbitration as a dispute resolution process that is not ordinarily available to domestic investors and that would place local investors at a comparative disadvantage. Thus, APC's research report noted: "Dispute settlement processes should not afford foreign investors in Australia with access to litigation options not normally afforded to local investors."[19] These localized considerations notwithstanding, reliance on domestic courts to decide investment disputes carries its own risks. Can the Australian government be reasonably assured that foreign trade and investment partner states will respect the rule of law in deciding foreign investor–state disputes abroad? At a functional level, what framework would domestic courts apply in resolving investment disputes? Would they apply local laws? How would any claim for breach of BIT protections be presented to a domestic court? When would a foreign investor be entitled to bring a claim again a host state for breach of the fair and equitable treatment standard? When, if ever, would a domestic court directly apply international investment law to an investor–state dispute? To what extent could national courts be relied upon to demonstrate their willingness and ability to exercise discretion in displaying fairness toward foreign investors, conceivably at the expense of the host state?

The APC presents an ambitious answer to the rule of law question in particular. Its answer is for Australia to provide developing country partners with infrastructure and related financial support to reform their economies, including presumably by redressing Australian concerns about access to justice in investor–state disputes before the courts of "host" states.[20]

A further self-help remedy proposed is for Australian investors abroad to develop their own mechanisms to assess the risks of relying on foreign domestic courts to resolve investment disputes with foreign host states.[21] In this regard, political risk insurance is one conceivable, albeit underdeveloped, avenue of risk avoidance that is available to Australian investors abroad.[22]

Interestingly, the APC noted that it "received no feedback from Australian businesses or industry associations indicating that ISDS provisions were of much value or importance to them."[23] Nevertheless, the absence of feedback from the private sector does not necessarily imply acquiescence in the APC's inference that businesses do not value investor–state arbitration. The more likely inference is that businesses were not

(Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution, Lexington, VA, Susan D. Franck & Anna Joubin-Bret eds., Mar. 29, 2010), http://www.unctad.org/en/docs/webdiaeia20108_en.pdf.

[19] PC RR, *supra* note 8, section [13.20].

[20] PC RR, *supra* note 8, sections [13.19]–[13.20].

[21] *See* PC FR, *supra* note 8, at 270–71.

[22] Jurgen Kurtz, 'Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication' (2012) 27 *ICSID Review* 65.

[23] *See* PC FR, *supra* note 8, at 270–71.

attuned to the Commission's project, did not appreciate its influence on government policy, or doubted their capacity to change the Commission's view.[24]

It is possible that Australia's rejection of ISA, along with that by other countries noted in the Introduction, will undermine the work of recognized investment arbitration institutions such as the ICSID. A related hazard is that the Australian government's rejection of ISA will encourage other states to adopt more nuanced dispute resolution mechanisms, not limited to domestic courts. These concerns are reflected in part in problematic dispute resolution clauses that are incorporated into the China–New Zealand Free Trade Agreement and the possibility that New Zealand will also opt for domestic courts over investor–state arbitration.[25] Linked to these concerns is the apprehension that other developed states will follow Australia's lead, not least of all as a result of entering into BITs with Australia in which domestic courts are chosen over ISA, as is already the case in the Australia–U.S. Free Trade Agreement. At its most basic, this risk is about international investment arbitration centers losing their business to domestic courts, not just about investor–state disputes being rendered parochial.

## IV. FURTHER ALTERNATIVES

The Rejection of ISA does not mean that domestic courts are the only available avenue in resolving investor–state disputes. Investors may enter into investment partnerships with organizations such as the World Bank, regional banks, and international corporations with headquarters in Europe or the United States. They may purchase private investor insurance schemes. They may conclude ad hoc arrangements with home states, including access to government funded or private investor insurance schemes. Failing that, they may request their home states to intervene to resolve their investment disputes with host states.

The APC acknowledged these alternatives, but then discounted them in part. Although it recognized that investors may negotiate investment contracts with host countries that include dispute resolution clauses, the APC appropriately conceded that such a negotiated strategy "is more feasible for large businesses."[26] It identified

[24] Leon E. Trakman, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?*, 46 J. World Trade 83, 93 (2012). For the APC to infer that because no Australian business commented on ISDS, business interests did not value ISDS, constitutes a questionable leap of faith by the APC.

[25] Free Trade Agreement, New Zealand–China, signed Apr. 7, 2008 (entered into force Oct. 1. 2008), NZTS 19, *available at* http://chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php. On resistance to ISA in the Trans-Pacific Partnership Agreement, particularly in Australia and New Zealand, see, for example, Kyla Tienhaara, *Investor–State Dispute Settlement in the Trans-Pacific Partnership Agreement*, Submission to the Department of Foreign Affairs and Trade, May 19, 2010, *available at* www.pc.gov.au/__data/assets/pdf_file/. . . /subdr067-attachment1.pdf. *See also* Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?*, 34 B.C. Int'l & Comp. L. Rev. 27 (2011).

[26] PC FR, *supra* note 8, at 270.

the availability of political risks insurance against expropriation; however, it did not highlight the current short time frame, complexity, and limited coverage of such insurance.[27] By a process of elimination, the APC conceived that the most practical option was resort to domestic courts.

## V. IN PURSUIT OF EQUALITY

In its research report, the APC criticizes international investment arbitration:

> Cases are generally not appealable and arbitration frequently operates without the benefit of precedents (an important component of legal certainty). Additionally, particular government actions that would otherwise be non-reviewable to domestic investors may be subject to ISDS actions by foreign investors.[28]

The APC's research report goes on to note that arbitration clauses in BRTAs often accord greater rights to foreign than domestic investors,[29] BRTAs diverge over the nature of arbitration mechanisms in agreements between developed and developing countries,[30] and they do not address potential conflicts arising from mixed regional agreements such as under the proposed Trans-Pacific Partnership Agreement.[31]

The APC's research report also challenges ISA clauses for restricting future governments from regulating foreign investment in the public interest.[32] It stresses, too, that the benefits arising from the econometric measurement of bilateral investment arbitration are likely to be scant.[33]

A large issue therefore is the appearance of ISA providing foreign investors with unmerited advantages while also unduly restricting the ability of the Australian government to pursue its policy—including equalitarian—goals.

This viewpoint may not be unique as countries sometimes diverge in their treatment of international trade and investment law, including in dispute resolution. Bilateral trade agreements occasionally refer investment disputes between foreign investors and host states to the domestic courts of host states, most notably in the Free Trade Agreement between Australia and the United States. There are proclivities, too, for the United States to opt for domestic courts in future bilateral and regional investment agreements, albeit less profoundly articulated than those of the

[27] *Id.* at 320.
[28] PC RR, *supra* note 8, section [13.20].
[29] *Id.*
[30] *Id.* at section [19].
[31] *Id.* at section [13.20].
[32] *Id.* at section [9.11], [13.20].
[33] *Id.* at section [14.5].

Australian government.[34] In addition, legislatures sometimes prefer domestic courts to arbitration in resolving trade and investment disputes, notably under the U.S. Trade Act 2002.[35] The Australian government is also not alone in seeking to protect domestic investors from foreign investors. The Bipartisan Trade Promotion Authority Act of 2002 in the United States and the consequent 2004 U.S. Model BIT challenged trade-distorting barriers by which foreign investors acquired "greater substantive rights with respect to investment protections" than domestic investors.[36] However, although the legislative intent in the United States was to amend ISA in the interests of local investors, it fell markedly short of rejecting ISA out of hand.[37]

The Australian government's position is nevertheless distinctive in insistence on national treatment to investors in every investment treaty it concludes in order to ensure "that foreign and domestic businesses are treated equally under the law."[38] Whether domestic courts will accord equal treatment to domestic and foreign investors remains to be seen. Some scholars espouse the view that all countries engage in a measure of discrimination against foreign investors, however much the Australian Policy is based on equal treatment of foreign and domestic investors.[39]

The across-the-board submission of trade and investment disputes to domestic courts, enunciated by the Australian government, is unusual in two respects. First, countries historically resolved investment disputes diplomatically through negotiations between host and home states on behalf of their investors abroad. Though it remains a theoretical option, this diplomatic process is no longer prevalent, given the development of regional and bilateral treaties enabling foreign investors to proceed directly against host states. Second, countries with comparable cultural histories and legal systems have greater reason to conclude bilateral treaties in which they place mutual trust in each other's legal and judicial systems. The assumption is that such treaty partners are most likely to agree to each other's courts resolving investor–state

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[34] *See generally* Mark Kantor, *The New Draft Model U.S. BIT: Noteworthy Developments*, 21 J. Int'l Arb. 383 (2004); Trakman, *supra* note 6, at 79–81; Westcott, *supra* note 6; Peter Drahos & David Henry, *The Free Trade Agreement between Australia and the United States*, Brit. Med. J. 1271 (May 29, 2004); Philippa Dee, The Australia–US Free Trade Agreement: An Assessment (Paper prepared for the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, June 2004), *Pacific Economic Papers* (No 345, 2005), http://crawford.anu.edu.au/pdf/pep/pep-345.pdf; Drusilla K. Brown, Kozo Kiyota & Robert M. Stern, *Computational Analysis of the US FTAs with Central America, Australia and Morocco*, 28 World Econ. 1441 (2005). *See also Free Trade Agreements with Australia*, Office of the United States Trade Representative, http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta.

[35] The Trade Act was passed on Aug. 6, 2002. *See* Trade Act 2002, Pub. L. No. 107-210, 116 Stat. 933, 994 (2002) [hereinafter *Trade Act*].

[36] *See* Trade Act div B (Bipartisan Trade Promotion Authority) § 2102(b)(3).

[37] *See* Kantor, *supra* note 34, at 383.

[38] Policy, *supra* note 4, at 14.

[39] Jurgen Kurtz, 'Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication' (2012) 27 *ICSID Review* 65." Kurtz relies on the commentary of Joseph Stiglitz to assert that "'all countries engage in some discrimination' against foreign investors," and concedes that "protectionism is a political temptation that is not confined to any political or legal tradition."

disputes due to long-standing, and deeply engrained, trade and investment relationships, similarities in legal traditions, and "trust" that the others' courts will apply mutually affirmed rules of law and principles of natural justice. Despite the rhetoric, BITs that refer investment disputes to domestic courts, notably under the Australia–United States Free Trade Agreement are the exception, not the norm.[40] As such, the Australian government's stance that it will discontinue the practice of pursuing "investor–state dispute resolution procedures in trade agreements with *developing countries*" is surprising.[41]

One of the Australian government's key assumptions in specifying that domestic courts will resolve investment disputes in all future BITs is its insistence that Australian investors who invest abroad ought to take account of economic, political, and legal risks associated with such investments. Its advice to such Australians is to assess the likelihood of receiving less favorable treatment before foreign courts than they would before domestic Australian courts. If Australian investors abroad fail to do their homework in making investment choices, they ought to bear the consequences of their own actions. Defensively phrased, the Australian government ought not to be responsible for protecting Australian investors who assume foreign investment risks they ought to have avoided or mitigated.[42]

The Australian government's approach is nevertheless problematic. The expectation of Australian investors about the hazard of being subject to foreign courts abroad is likely to be informed, to varying degrees, by the conditions in BITs that are negotiated between the Australian government and its treaty partners. That conduct is likely to affirm the perception among Australian investors abroad that, if the Australian government is willing to conclude BITs with foreign governments, it is likely also to "trust" the courts of those partner countries to resolve investor–state disputes. If the Australian government has doubts, Australian investors could reasonably assume that it would not have concluded those treaties, or it would have provided economic infrastructure or other financial support to help investment partners deliver legal services judiciously to foreign investors from Australia. Alternatively, Australian investors could presuppose that the Australian government would have included appropriate conditions within its treaties to ensure that "national treatment" for Australian investors is both clearly articulated and implemented.[43] It is probable, too, that Australian investors might be more likely to submit an investor–state dispute to a court in a host state with whom Australia has a BIT relationship when compared to submitting such a dispute involving a host state that has no such BIT relationship.

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[40] *See* Trakman, *supra* note 6, at 39, 41–50, 79–81.

[41] Policy, *supra* note 4 (emphasis added).

[42] The government states in its Policy, *supra* note 4, at 16: "If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries."

[43] *See, e.g.*, Westcott, *supra* note 6; Trakman, *supra* note 6, at 39, 41–50, 79–81.

## VI. THE CASE FOR NOT RELYING ON ISA

Any alleged flaws in the APC's analysis notwithstanding, it can be readily accepted that ISA institutions are far from perfect. There are numerous principled objections to reliance on ISA.[44] In fairness, the APC identifies some of its reasons for such objections: the large size of investor claims, the latitude of investment tribunals in determining the amount of compensation, the lack of rigorous rules governing the conduct of ISA, the absence of an appeals process, and the threat of "institutional biases and conflicts of interest, inconsistency and matters of jurisdiction, a lack of transparency and the costs incurred by participants."[45] The Commission concludes that "experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions."[46]

### I. THE CASE FOR RELYING ON DOMESTIC COURTS

There are numerous reasons also for preferring resort to domestic courts over ISA.

First, on principled grounds, domestic investors ought to be subject to the territorial sovereignty of the state in which they invest.[47] National law ought to govern the rights of foreign investors, and the jurisdiction of domestic courts ought to exclude other options such as diplomatic channels that bypass the judicial system of the host state.[48]

Second, a domestic court of the state that is party to an investment treaty is the appropriate forum to resolve an investment dispute, in the same manner as it resolves other disputes between that state and other private or corporate claimants.[49]

Third, foreign investors should not receive investment benefits beyond those provided to domestic investors. Such treatment is conceivably unfair, as is evidenced

[44] Trakman, *supra* note 24, at 100 (for commentary on the principled objections to ISA).

[45] PC FR, *supra* note 8, at 272.

[46] *Id*. at 274.

[47] On the complexity of sovereignty in international investment law, see, for example, Wenhua Shan, Penelope Simons & Dalvinder Singh, Redefining Sovereignty in International Economic Law (2008) (see especially pt. 4 for commentary on the complexity of sovereignty in international investment law); Robert Stumberg, *Sovereignty by Subtraction: The Multilateral Agreement on Investment*, 31 Cornell Int'l L. J. 491 (1998), 503–04, 523–25. *See also* Robert H. Jackson, Quasi-States: Sovereignty, International Relations and the Third World (1990); John H. Jackson, The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations (2000); Michael Reisman, *International Arbitration and Sovereignty*, 18 Arb. Int'l (LCIA) 231 (2002); Oppenheim's International Law 927 (Robert Jennins & Arthur Watts eds., 1992).

[48] On the history and resurgence of the Calvo Doctrine, *see infra* note 76.

[49] On these arguments in relation to the Australia–United States Free Trade Agreement, see Trakman, *supra* note 6, at 48–53; Westcott, *supra* note 6.

historically by the privileges accorded by less-developed countries to multinational corporations at the expense of local subjects who were competitively disadvantaged.[50]

Fourth, domestic courts ought to decide cases involving foreign investors according to domestic law, including by incorporating international investment laws into that domestic law.[51]

Fifth, domestic courts are bound by established forum procedures and rules of evidence to protect the rights of foreign investor in accordance with domestic public policy that usually includes a right of appeal to a higher court.[52]

These arguments, for national courts to decide investor–state disputes, are buttressed by doubts about the legitimacy and sufficiency of ISA. In particular, ISA is not subject to comparable procedural and substantive constraints as are domestic courts. Investment arbitrators may decide in favor of foreign investors on grounds that undermine the public interest of home states. There are no appeals from ISA awards, except for an arbitrator's failure to exercise, or abuse of, jurisdiction, leading to a review by the ICSID Annulment Committee. Annulment proceedings are an extraordinary process and more limited in scope than an appeal to a domestic court.[53] In contrast,

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[50] On these arguments buttressing the dispute resolution mechanisms adopted under the Australia–United States Free Trade Agreements, see Trakman, *supra* note 6, at 48–49; Westcott, *supra* note 6.

[51] On the contentious constraints on the jurisdiction of state courts in the *Mondev* and *Loewen* Chapter 11 cases, see *infra* note 106.

[52] On this contest between individual rights and public policy in the development of the "margin of appreciation" doctrine in European Union law, see Onder Bakircioglu, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, 8 German L.J. 711 (2007); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 Eur. J. Int'l L. 907 (2005); Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. Int'l L. & Pol'y 843 (1999); R. St. J. Macdonald, *The Margin of Appreciation*, *in* The European System for the Protection of Human Rights 125 (R. St. J. Macdonald, F. Matscher & H. Petzold eds., 1993).

[53] On the absence of an appeal from ICSID arbitration, see Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 53(1), http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [hereinafter ICSID Convention]. Article 53 provides:

> The award . . . shall not be subject to any appeal or to any other remedy except those provided for in this Convention. The most significant remedy under the ICSID is the annulment of an award under Article 53. The ICSID provides instead for a review of an investment award by an Annulment Committee which is set up specifically for that purpose, with the power to modify or nullify an ICSID award on limited procedural grounds under Art 75 of the ICSID Convention. Either party can request that the award be annulled. However, the grounds for such a challenge are restricted and fall short of an appeal. They include that:
>
> 1) the ICSID tribunal was not properly constituted;
> 2) the tribunal manifestly exceeded its powers;
> 3) there was corruption on the part of a tribunal member;
> 4) there was a serious departure from a fundamental rule of procedure; or
> 5) the award failed to state the reasons on which it was based.

ICSID Annulment Committees traditionally have interpreted these grounds for a challenge liberally, permitting a series of challenges, although such challenges have dissipated in recent years. Resort to domestic courts is not an option under the ICSID. *See* ICSID Convention, art 75. For ICSID documents generally, see http://icsid.worldbank.org/ICSID/Index.jsp. *See also* James Crawford & Karen Lee, ICSID Reports Vol. 6 (2004). On the ICSID Additional Facility, see http://icsid.worldbank.org/

awards rendered by a tribunal established under the United Nations Commission on International Trade Law (UNCITRAL) Rules are subject to review by the national courts of the legal place of the arbitration.[54]

## II. THE LEGITIMACY CRISIS OF PUBLIC/PRIVATE INVESTMENT ARBITRATION

Investor–state arbitration also faces a legitimacy crisis arising out of its public and private attributes.[55] It is the product of a public process insofar as it stems from investment treaties between countries and engages public interests that transcend the commercial interests of private parties. As a result, public considerations, not least of all public reactions, influence how readily states endorse, participate in, and comply with ISA determinations.[56] The other side of the legitimacy crisis is that ISA is "private." In the tradition of "private" commercial arbitration, ISA ordinarily is conducted with the consent of both parties to an ISA.[57] Third parties such as public interest groups are not permitted to participate in ISA proceedings without the consent of the investor–state parties.[58] Nor can ISA awards be published without the support of the investor and

ICSID/ICSID/AdditionalFacilityRules.jsp. *See generally Analysis of Key Obligations and Emerging Issues in International Investment Treaties*, *Foreign Investment Review Board*, http://www.firb.gov.au/content/international_investment/current_issues.asp?NavID=60>.

[54] The UNCITRAL Rules are a general set of rules that can be applied flexibly to resolve any type of international dispute. Some of the 2010 amendments to the UNCITRAL rules were inspired by the rising use of the Rules in investor–state arbitrations. *See, e.g.*, United Nations Commission on International Trade Law, *2010 - UNCITRAL Arbitration Rules (as revised in 2010)*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

[55] On this legitimacy crisis, see Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham L. Rev. 1521, 1543–44 (2005).

[56] For a description of this tension between the law governing treaties and their impact on state–investor disputes, see Christoph Schreuer & Rudolf Dolzer, Principles of International Investment Law ch. 1 (2008); Christoph Schreuer, The ICSID Convention: A Commentary chs. 1– 2 (2001); Stephan W. Schill, The Multilateralization of International Investment Law, chs. 1–2 (2009).

[57] On similarities and differences between international commercial arbitration and investment arbitration, see Luke Nottage & Kate Miles, "Back to the Future" for Investor–State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests (University of Sydney Legal Research Paper No 08/62, 25 June 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1151167.

[58] *Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. the Republic of Argentina* (Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission) (ICSID Arbitral Tribunal, Case No ARB/03/19, 12 February 2007); (Order in Response to a Petition for Transparency and Participation as Amicus Curiae) (ICSID Arbitral Tribunal, Case No ARB/03/19, May 19, 2005). The petition challenged the decision by the government of Argentina to accede to the ICSID treaty, on grounds that it violates the constitutional guarantees of citizens of Argentina to participate in proceedings. Although the government of Argentina was willing to hear the petition, the complainant company was not. However, the attorney general of Argentina published on the Internet the information in his possession on the related cases. *See also* Carlos E. Alfaro & Pedro M. Lorenti, *The Growing Opposition of Argentina to ICSID Arbitral Tribunals: A Conflict between International and Domestic Law?*, 6 J. World Inv. & Trade 417 (2005).

state parties.[59] Typically, the Secretary General of the ICSID can publish reports of conciliation commissions or awards rendered by arbitral tribunals in ICSID proceedings, but only "with the consent of both disputing parties."[60] A related consequence is that investor and state parties to ISA proceedings can deny a public interest petition, amicus briefs, or other forms of participation by third parties in ISA proceedings. For example, in *Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Republic of Argentina,* the arbitration tribunal acknowledged that the case "potentially involved matters of public interest and human rights" and that the public access "would have the additional desirable consequence of increasing the transparency of ISA."[61] It nevertheless declined to permit public participation under the petition. The perceived result of such private proceedings was the loss of public attributes for an ISA process that derives from treaties between states.

The problem is not only that one or both parties may choose to exclude third parties from ISA proceedings. A further difficulty arises from a perceived lack of transparency in ISA proceedings in the absence of comprehensive public information about the nature, content, and results of the full range of ISA disputes.[62] It is also difficult to draw inferences about the public benefits attributes to ISA in the absence of comprehensive access to investment proceedings and awards.

## VII. THE CASE AGAINST RELIANCE ON DOMESTIC COURTS

That a case can be made against relying on ISA does not in itself imply that domestic courts ought to be preferred. What is required is a balancing exercise, including the ramifications of resorting to domestic courts. The intention in this section is to show

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[59] *See, e.g.*, *GEA Group Aktiengesellschaft v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/08/16, Mar. 31, 2011); *Talsud, S.A. v. United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No. ARB(AF)/04/4, June 16, 2010); *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No. ARB(AF)/04/3, June 16, 2010).

[60] *See, e.g.*, *GEA Group Aktiengesellschaft v. Ukraine* (Award) (ICSID Arbitral Tribunal, Case No. ARB(AF)/04/4, June 16, 2010); *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States* (Award) (ICSID Arbitral Tribunal, Case No. ARB(AF)/04/3, June 16, 2010); *Aguas del Tunari, S.A. v. Republic of Bolivia* (Order Taking Note of Discontinuance) (ICSID Case No ARB/02/3, March 28, 2006), *available at* http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf. These requirements, replicated on the ICSID Web site, are available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home. *See also* ICSID Procedural Order of February 2, 2011 inviting third parties to apply to submit *amici curiae* briefs under ICSID Arbitration Rule 37(2). *See further* Kenneth J. Vandevelde, Aguas del Tunari, S.A. v. Republic of Bolivia, 101 Am. J. Int'l L. 179 (2007) (providing an overview and analysis of the case); A. de Gramont, *After the Water War: The Battle for Jurisdiction in* Aguas Del Tunari, S.A. v. Republic of Bolivia, Transnat'l Dispute Mgmt. (Dec. 2006), http://www.crowell.com/documents/After-the-Water-War_The-Battle-for-Jurisdiction-in-Aguas-del-Tunari_v_Bolivia.pdf.

[61] (Order in Response to a Petition for Transparency and Participation as Amicus Curiae*)* (ICSID Case No ARB/03/19, May 19, 2005) [19], [22].

[62] On criticism of the existence and sufficiency of international investment law, see M. Sornarajah, Chapter 16 in this book.

that the case for domestic courts, presented in Part VI, is based more on perception, preference, and semantic manipulation than objectively verified criteria. The author has noted elsewhere that, in the debate between ISA and domestic litigation, beauty lies in the eyes of the beholder.[63]

First, Australia's new investment policy raises a noteworthy complication. By insisting that Australian courts apply domestic law to foreign investors in Australia, the Australian government presumably accepts that foreign courts will apply their laws to Australian investors in those foreign countries, whatever those laws may be. In declining to agree to arbitration in investment treaties with both developed and developing countries, the Australian government also draws no distinction between countries that apply a "rule of law" jurisprudence that is comparable to the rules of law applied by Australian courts and those countries that do not subscribe to such a "rule."[64]

Attacking a plethora of domestic legal systems and courts is more doubtful than challenging a few ISA institutions such as the ICSID and UNCITRAL, especially where foreign investors may be subject to a multitude of domestic legal systems with divergent procedures and substantive investment jurisprudence. However, this multiplicity of domestic legal options is itself problematic, in forsaking uniformity among inevitably divergent legal systems. These deficiencies of domestic legal systems stand starkly in contrast to ISA institutions that seek to limit the proliferation of international investment law. As such, ISA serves as a unifying framework within which multiple bilateral investment treaties are subject to largely uniform ISA provisions that derive significantly from the global experience of foreign investors, host, and home states. Acting as a leveling force, ISA is founded on principles, standards, and rules of investment jurisprudence that are not ordinarily sublimated by domestic legal systems and rules of procedure. Investor–state arbitration is also conceived as more certain and stable than a myriad of different domestic laws and rules that might otherwise govern FDI.[65]

Whether ISA jurisprudence exists in a truly transcendental form is the subject of ongoing doubt.[66] Arguably, the failure of the community of states to reach a multilateral investment accord in the past demonstrates the difficulty of states finding common ground on the treatment of foreign investment, including on processes for

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[63] Trakman, *supra* note 24, at 114.

[64] Trakman, *supra* note 6, at 39–43; *see also* Westcott, *supra* note 6.

[65] Vandevelde writes that in 1969 there were only seventy-five BITs. During the 1970s, nine BITs were negotiated each year; that rate doubled in the 1980s and has been increasing geometrically until five years ago. *see* Kenneth Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. Davis J. Int'l L. & Pol'y 157, 172 (2005). *See also* World Investment Report 2010, *United Nations Conference on Trade and Development*, UNCTAD/WIR/2010 (July 22, 2010), at xxv, www.unctad.org/en/docs/wir2010_en.pdf.

[66] *See generally* Schill, *supra* note 56, chs. 1–2; Sharun W. Mukand, *Globalization and the "Confidence Game"*, 70 J. Int'l Econ. 406 (2006); Steffen Hindelang, *Bilateral Investment Treaties, Custom and a Healthy Investment Climate—The Question of Whether BITs Influence Customary International Law Revisited*, 5 J. World Inv. & Trade 789 (2004); Jeswald W. Salacuse, *The Treatification of International Investment Law*, 8 Studies Int'l Fin. Econ. & Tech. L. 241 (2007).

dispute resolution.[67] The counterargument is that ISA does respond to these concerns through standards of treatment that apply generally to foreign investors, even though ISA provisions vary among BITs and are sometimes construed differently by investment arbitrators.[68]

Notwithstanding the absence of a formalized system of judicial precedent in ISA as common lawyers conceive of it, ISA is still likely to be more coherent than a multiplicity of different state laws applied by local courts to foreign investment.[69] However difficult it is to identify cohesive ISA principles out of ad hoc and sometimes unpublished arbitration awards, and however arbitrators may fragment standards of treatment under different BITs, ICSID and UNCITRAL arbitrations have been used over a considerable period of time to resolve investment disputes in often complex cases.[70] That task of investment arbitration is accomplished notwithstanding the plethora of BITs in existence and their susceptibility to different kinds of interpretation.[71] Nor should institutions such as the ICSID be blamed for inconsistent reasoning that is sometimes adopted by ISA tribunals that, although guided by ICSID and UNCITRAL rules, exercise independent discretion in deciding investment disputes.[72]

The principled argument that the domestic courts of sovereign states ought to decide investment disputes based on domestic laws and judicial procedures is offset by the observation that international arbitrators are also subject to domestic laws that are encompassed within a BIT or investor–state agreement. Far from being insulated from domestic laws and procedures, ISA principles and standards of treatment accorded to foreign investors inhere not only in international jurisprudence, but both evolve from and are incorporated into domestic law as well. As a result, ISA arbitrators cannot summarily disregard domestic laws that are expressly or impliedly integrated into applicable BITs or investor–state agreements.[73]

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[67] *See MAI Negotiating Text*, Organisation for Economic Co-Operation and Development (Apr. 24, 1998), http://italaw.com/documents/MAIDraftText.pdf; Katia Tieleman, *The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network*, Global Public Policy Institute (2000), http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf.

[68] On such issues, *see generally OECD Investment Committee*, Foreign Investment Review Board, http://www.firb.gov.au/content/international_investment/current_issues.asp?NavID=60.

[69] On the development of international investment norms, see *OECD Investment Committee*, International Centre for Settlement of Investment Disputes, http://www.firb.gov.au/content/international_investment/current_issues.asp?NavID=60.

[70] This capacity of international investment law to withstand its own fragmentation is a central attribute of this book. But see contra Sornarajah, Chapter 16 of this book; Schreuer & Dolzer, *supra* note 56; Schill, *supra* note 56.

[71] *See, e.g.*, Aurélia Antonietti, *The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Rev.—For. Inv. L.J. 427 (2006); Edward Baldwin, Mark Kantor & Michael Nolan, *Limits to Enforcement of ICSID Awards*, 23 J. Int'l Arb. 1 (2006) (discussing "tactics" that may be employed in attempts to "delay" or "avoid" compliance with ICSID Awards).

[72] On the development of international investment norms, see *OECD Investment Committee*, International Centre for Settlement of Investment Disputes, http://www.firb.gov.au/content/international_investment/current_issues.asp?NavID=60.

[73] *See, e.g.*, Schreuer, *supra note* 56, at 357.

The rationale that domestic courts are expert in law including investment law is counterbalanced by the contention that investment arbitrators are expert in international investment law in a manner that domestic judges, even courts of commercial jurisdiction, are not.[74] Even the rationale that domestic courts are subject to tried and tested rules of evidence and procedure is offset by the observation that investment arbitration is guided by ICSID or UNCITRAL rules that focus specifically on the complexities of investment law. Insofar as the decisions of domestic courts are subject to appeal, the awards of investment arbitrators are subject to extraordinary challenge or annulment proceedings for noncompliance.[75]

## VIII. THE ASSAULT ON ISA BY DEVELOPING COUNTRIES

As highlighted in the Introduction, the Australian government is not the only country to reject ISA. The Calvo Doctrine enunciated in Latin America was also intended to domesticate the resolution of investor–state disputes.[76] Some developing countries have also long resented ISA. This resentment is most vividly expressed by President Raphael Correa of Ecuador in his verbal onslaught in 2009 on the ICSID, the World Bank, and the American government.[77] Correa contended that investment arbitration under the ICSID is designed to protect capital exporter states and their investors at the expense of developing Latin American states. His subtext was that investment institutions such as the ICSID have disregarded the interests of capital importer states such as Ecuador that traditionally are economically and politically exploited by colonial powers and their investors.[78]

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[74] On the case for investor–state arbitration, see generally Christopher Dugan, Don Wallace, Jr. & Noah Rubins, Investor-State Arbitration (2008); Oxford Handbook of International Investment Law (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008) [hereinafter Oxford Handbook]; Campbell McLachlan, Lawrence Shore & Matthew Weiniger, International Investment Arbitration: Substantive Principles (2008); New Aspects of International Investment Law (Philippe Kahn & Thomas W. Walde eds., 2007); Gus van Harten, Investment Treaty Arbitration and Public Law (2007); R. Doak Bishop, James Crawford & W. Michael Reisman, Foreign Investment Disputes: Cases, Materials and Commentary (2005); International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law (Todd Weiler ed., 2005); Arbitrating Foreign Investment Disputes (Norbert Horn ed., 2004).

[75] On the ICSID, see *supra* note 54.

[76] On the history and resurgence of the Calvo Doctrine, see, for example, Wenhua Shan, *From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 Nw. J. Int'l L. & Bus. 631 (2007); Bernardo Cremades, *Resurgence of the Calvo Doctrine in Latin America*, 7 Bus. L. Int'l 53 (2006).

[77] On these statements, see *ICSID in Crisis: Straight-Jacket or Investment Protection?*, Bretton Woods Project (July 10, 2009), http://www.brettonwoodsproject.org/art-564878. *See also* Leon E. Trakman, "The ICSID and Investor–State Arbitration," Chapter 10 in this book.

[78] On the history of this division between capital exporter and importer states, see generally M. Sornarajah, The International Law on Foreign Investment 142, 177 (3rd ed. 2010).

A noteworthy difference is that Australia's new foreign investment policy represents a shift by a *developed* country against a political and economic tide when the opposite might have been expected, namely, for Australia to de-localize investment disputes. In prescribing that domestic courts decide investor–state disputes, Australia presumably was not motivated by the exploitative biases that some Latin American countries have ascribed to ISA. Australia is also unlikely to espouse these concerns of developing countries in making trade policy decisions that impact on its relations with both developing and developed BIT partners. Nevertheless, it is necessary to explore briefly the attack on ISA made by developing countries to detect the possibility of a more fundamental institutional objection to the ISA process.

A key cultural objection to ISA is that it is institutionally—and legally—biased against developing countries.[79] The concern is that "international" investment law, derived primarily from European civil law and Anglo-American common law traditions, favors parties and institutions from predominantly high and upper-middle income states.[80] The worry, too, is that ISA rules of evidence and procedure derive from the actions of developed countries and their multinational and international corporations, with significant European and American antecedents.[81]

These worries are accentuated by the virtually unlimited territorial reach exercised by courts in some developed countries. For example, American courts can invoke the U.S. Alien Tort Claims legislation to hold non-U.S. citizens abroad liable for harm to American interests there, so long as the non-U.S. citizen is in the United States to be served a subpoena (though admittedly cases suggest that there must be an international wrong amounting to a serious violation of international law).[82]

A related concern is that the beneficiaries of ISA are investors from developed countries who can afford to mount piecemeal claims against developing countries and

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[79] On the U.S.' alleged double standard in favoring resort to arbitration to restrain interference by foreign governments with private investment while disfavoring arbitration filed against the U.S. government, see Guillermo Alvarez & William Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 Yale J. Int'l L. 365, 368–69 (2003). *See also* Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 Va. J. Int'l L. 825, 826, 909–14 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1842164.

[80] On the dominance by developed states over trade and investment and challenges by developing states, see, for example, James O. Gump, *The West and the Third World: Trade, Colonialism, Dependence, and Development* (Review), 11 J. World Hist. 396 (2000); *The Theory of Capitalist Imperialism* (D.K. Fieldhouse ed., 1967); Free Trade and Other Fundamental Doctrines of the Manchester School (Francis Wrigley Hirst ed., [1902], 2009) (for a collection of speeches from the nineteenth century advocating the development of free trade); P.J. Cain, *J A Hobson, Cobdenism, and the Radical Theory of Economic Imperialism, 1898–1914*, 31 Econ. Hist. Rev. 565, 576–80 (1978); Michael Freeden, *J. A. Hobson as a New Liberal Theorist: Some Aspects of His Social Thought until 1914*, 34 J. Hist. Ideas 421 (1973).

[81] On limitations associated with traditional "international" principles of compensation for expropriation particularly in relation to developing countries, see M. Sornarajah, *The Clash of Globalizations and the International Law on Foreign Investment* (Norman Paterson School of International Affairs Simon Reisman Lecture in International Trade Policy, Ottawa, Sept. 12, 2002), *reprinted in* 10 Canadian Foreign Pol'y 1 (2003).

[82] 28 USC § 1350 (2010).

developed countries that can afford to defend ISA proceedings brought by investors from developing states. This concern is accentuated by the perceived cost and length of ISA proceedings, [83]

Reinforcing these concerns is the contention that investment arbitrators, often trained as commercial not public international lawyers, are less likely to pay regard to the broader public policy consequences of arbitration awards than to the literal texts of treaties that favor developed countries. ISA tribunals are also likely to marginalize broader state and multistate policies directed at remediating systemic and historical disadvantages among developing states and their investors. Added to this is concern about arbitration tribunals determining their own competence, and by the right of the chair of a tribunal to exercise a casting vote in awards on the merits.[84]

A perceived risk of ISA decision-making is that investment arbitrators, drawn primarily from developed states, will enshrine investment treaties that promote the national security, health, labor, environment, and market interests of developed countries. They will imbed the defense of necessity under customary international law that allegedly systemically disadvantages developing countries and their investors.[85] They will apply ISA rules that enable developed countries and their investors to immunize ISA from public scrutiny, for example by insisting on the confidentiality of both ISA proceedings and the ensuing awards.[86] Even if these attacks on ISA are overstated,[87]

[83] On the absence of binding precedents, at least in principle, in international investment law, see Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent? in* Oxford Handbook, *supra* note 74, at 1188. *See generally* OECD Investment Committee, Foreign Investment Review Board, http://www.firb.gov.au/content/international_investment/current_issues.asp?NavID=60.

[84] On the influence of commercial law, as distinct from public international law, on the development of investment law, see Van Harten, *supra* note 74, ch. 6. On procedural challenges to ISA proceedings, see, for example, Luke R. Nottage, *The Rise and Possible Fall of Investor–State Arbitration in Asia: A Skeptic's View of Australia's "Gillard Government Trade Policy Statement* 5, Transnat'l Dispute Mgmt. (2011), *available at* SSRN: http://ssrn.com/abstract=1860505.

[85] On the defense of necessity in investment arbitration including under customary investment law, see Alberto Alvarez-Jiménez, *Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law*, 27 J. Int'l Arb. 141 (2010); Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, in Oxford Handbook, *supra* note 74, at 459; Nicholas Song, *Between Scylla and Charydbis: Can a Plea of Necessity Offer Safe Passage to States in responding to an Economic Crisis without Incurring Liability to Foreign Investors?*, 19 Am. Rev. Int'l Arb. 235 (2008); *Panel Discussion: Is There a Need for the Necessity Defense for Investment Law?*, in *Investment Treaty Arbitration and International Law* 189 (T.J. Grierson Weiler ed., 2008).

[86] *See further* Howard Mann et al., "Comments on ICSID Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration" (International Institute for Sustainable Development, Dec. 2004), http://www.iisd.org/publications/publication.asp?pno=667.

[87] It is noteworthy that the ICSID amended its rules in 2006 to provide for greater transparency, including greater access of third parties to ICSID proceedings and the publication of arbitration awards. The UNCITRAL Rules did so as well through various articles. *See, e.g.*, *UNCITRAL Arbitration Rules*, GA Res 65/22 (2010) arts 28(3), 34(5); *UNCITRAL Arbitration Rules*, GA Res 31/98 (1976) arts 25(4) and 32(5). In addition, UNCITRAL Working Group II is currently engaged in the "[p]reparation of a legal standard on transparency in treaty-based investor-State arbitration." See United Nations Commission on International Trade Law, *Working Group II* (2012), http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html; *Settlement of Commercial Disputes: Preparation of a Legal Standard*

a residuary concern is that, in the absence of a uniform international investment convention or code, deciding international investment disputes will be fraught with conceptual and interpretative challenges for developing countries and their investors. In subscribing to textual methods of interpreting investment treaties, investment arbitrators will construe investment laws literally more than contextually. They will struggle to interpret complex property concepts,[88] and they will studiously avoid having their awards annulled for misconstruing such concepts.[89] Investment arbitrators will rely on their comprehension of the laws of developed countries in determining the "reasonable" or "legitimate" expectations of foreign investors,[90] in delineating the reach of the "margin of appreciation" doctrine,[91] and in providing investor and state parties with "fair and equitable" treatment.[92]

These concerns have some foundation. ISA tribunals that apply different methods of interpretation to investment treaties can lead to divergences in the treatment of foreign investors in comparable cases. The worry is that "plain word" methods of interpretation are likely to challenge even the most skilled, sophisticated, and erudite

*on Transparency in Treaty-Based Investor–State Arbitration,* 46th sess., A/CN.9/WG.II/WP.169 (Feb. 6–10, 2012).

[88] On such differences, see, for example, *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco* (Decision on Jurisdiction) (ICSID Arbitral Tribunal, Case No ARB/00/4, July 23, 2001); 42 ILM 609 (2003). *See also* Monique Sasson, Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law (2010) (see especially chapter 4 for a discussion of property in investment treaty context); Omar E. Garcia-Bolivar, *Protected Investments and Protected Investors: The Outer Limits of ICSID's Reach*, 2 Trade L. & Dev. 145 (2010) (discussing the requirements that must be met in order to invoke the ICSID's jurisdiction); Schreuer, supra note 56, 90–91 (discussing jurisdictional requirements under Article 25 of the ICSID Convention).

[89] For an articulation of this interpretative confusion in the trilogy of investment claims against the government of Argentina, see *infra* note 105 and associated discourse in text.

[90] On such "legitimate expectations," see *Saluka Investments BV (The Netherlands) v. The Czech Republic* (Partial Award) (Arbitration under the UNCITRAL Rules, Mar. 17, 2006) [304], http://italaw.com/documents/Saluka-PartialawardFinal.pdf; *Waste Management, Inc. v The United Mexican States* (Final Award) (ICSID Arbitral Tribunal, Case No ARB(AF)/00/3 (NAFTA), Apr. 30, 2004) [98], http://italaw.com/documents/laudo_ingles.pdf; *International Thunderbird Gaming Corporation v. The United Mexican States* (arbitration under the UNCITRAL Rules (NAFTA), Jan. 26, 2006) [147] ("*Thunderbird*"), http://italaw.com/documents/ThunderbirdAward.pdf; *GAMI Investments Inc v The Government of the United Mexican States* (Final Award) (Arbitration under the UNCITRAL Rules, Nov. 15, 2004) [100], http://www.state.gov/documents/organization/38789.pdf. *See also* Stephan W. Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law*, Transnat'l Dispute Mgmt. 16 (Dec. 2006).

[91] On the "margin of appreciation" doctrine, see, for example, Bakircioglu, *supra* note 52; Shany, *supra* note 52; Benvenisti, *supra* note 52; R. St. J. Macdonald, *Margin of Appreciation*, *supra* note 52, at 125.

[92] Illustrating these variable conceptions of "fair and equitable" treatment is a series of cases commencing with the ICSID award in *Maffezini v Kingdom of Spain* (Award on the merits) (ICSID Arbitral Tribunal, Case No ARB/97/7, Nov. 13, 2000) [64], http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC566_En&caseId=C163; *MTD Equity Sdn Bhd and MTD Chile S.A. v Republic of Chile* (ICSID Arbitral Tribunal, Case No ARB/01/7, May 25, 2004) [178]. *See too* Ian A. Laird, *MTD Equity Sdn Bhd and MTD Chile S.A. v Republic of Chile—Recent Developments in the Fair and Equitable Treatment Standard*, Transnat'l Dispute Mgmt. (Oct. 2004).

investment arbitrators in attempting to construe marginally different clauses in BITs.[93] Their efforts to distinguish the interpretation of one BIT from another will impede the evolution of uniform principles of customary and treaty investment law; [94] ISA will also fail to resolve disputes between states and foreign investors in a transparent and evenhanded manner.[95]

A final objection to ISA is that it will produce a fragmented body of international investment law that favors states and investors that are sufficiently resourced to take advantage of that fragmentation against states and investors that lack such advantages. Nor, ironically, would the growth of an ISA *ius cogens* assuage these concerns. Given the institutional roots of ISA in the Western legal tradition, the worry is that a uniform system of ISA justice would deny corrective justice to developing countries and their investors. The perceived harm, arguably, exceeds the denial of justice to developing countries under a fragmented system of ISA justice.

These objections to ISA do add to the flaws already identified with it. However, enumerating ISA's failings does not in itself provide support for the contemplated alternative, namely, for resort to domestic courts. The Australian government's rejection of ISA may encourage the reform of ISA to address these flaws, as is discussed in the penultimate section of this chapter.

However, the Australian government's preference for domestic litigation to resolve ISA disputes protracts more than it remedies deficiencies in the resolution of investor–state disputes. The perception among some developing states is that the courts of wealthy developed states will rely on common or civil law traditions that, historically, were insulated from the plight of developing countries, and remain so insulated today. The likely harm is that such courts will be perceived as applying "their" laws in a discriminatory manner, to the disadvantage of investors from developing countries. The problem of perceived discrimination is therefore unlikely to dissipate by adopting this new route.

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[93] *See, e.g.*, Luzius Wildhaber & Isabelle Wildhaber, *Recent Case Law on the Protection of Property in the European Convention on Human Rights*, *in* International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer 657 (Christina Binder et al. eds. 2009).

[94] *See* Franck, *supra* note 55. On the customary nature of international investment law and its contest with treaty-made law, see, for example, Campbell McLachlan, *Investment Treaties and General International Law*, 57 Int'l & Comp. L.Q. 361 (2008); Stephen Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, Transnat'l Dispute Mgmt. 1 (Nov. 2005); Patrick Dumberry, *Are BITs Representing the "New" Customary International Law in International Investment Law?*, 28 Penn. St. Int'l L. Rev. 675, 701 (2010) (for a rejection of the proposition that BITs represent customary law).

[95] On the varied and inconsistent interpretations of investment treaties, see Jurgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 Int'l & Comp. L.Q. 325 (2010) (Kurtz identifies three different methodologies of interpretation). *But see* William W Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 Va. J. Int'l L. 307 (2008) (considering the interpretive challenges posed by provisions for non-precluded measures, such as for maintenance of security and public order).

## IX. THE BALANCING EXERCISE

It is difficult convincingly to resolve the perceived contest between investment arbitration and domestic courts of law. There are only a limited number of past investment arbitration cases to review. There is also scant experience of domestic courts displacing arbitration in deciding investment disputes.[96] Preferring ISA over domestic litigation is suspect in the absence of material information about the investment treaty parties, the investors, and the dispute in issue. Emphatic support for either ISA or domestic litigation will often be rooted in policy preferences more than in principles grounded in state sovereignty and its surrender by treaty.

Nor is the choice solely between ISA and litigation to resolve investment disputes. Conflict-preventive and avoidance measures sometimes are preferable to both.[97] "Multitiered" dispute resolution agreements can allow parties to agree upon a tiered process, varying from negotiating in good faith to mediation, and failing both, to arbitration or litigation, or conceivably, to both.[98] Neither the Productivity Commission nor the Australian government paid much heed to conflict-preventive alternatives, perhaps because such measures usually operate informally and often "under the radar" of investment dispute resolution. However, the UNCTAD considered conflict prevention and avoidance sufficiently important to devote a detailed study to it.[99]

Even ignoring these conflict prevention and avoidance options, ISA and litigation each have their beauty spots and warts. Insisting that domestic litigation preserves the sovereignty of countries is hardly credible when those same countries repeatedly surrender their sovereignty to one another under customary international and treaty law. Overstated, too, is the assertion that multilateral, regional, or bilateral investment negotiations signify a sharing of sovereignty by signatory states. An investment "agreement" in which one state dominates may well lead to "sovereignty by subtraction," including the loss of sovereignty by the subservient state. The threat of "sovereignty by subtraction" is one key reason the community of nation states failed to reach multilateral investment accord historically.[100]

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[96] On international investment claims and decisions generally, see *Investment Claims* (run by Oxford University Press), http://www.investmentclaims.com.

[97] *Investor–State Disputes: Prevention and Alternatives to Arbitration*, UNCTAD Series on International Investment Policies for Development (May 2010), http://www.unctad.org/en/docs/diaeia200911_en.pdf. International investment claims and decisions are available at http://www.investmentclaims.com.

[98] *See* Klaus Peter Berger, Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration 74–78 [Vol. II: Handbook] (2006).

[99] *See* William S. Dodge, *Investor–State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 Vanderbilt J. Transnat'l L. 1 (2006) (commenting on the exhaustion of local remedies).

[100] *See, e.g.*, Robert Stumberg, *Sovereignty by Subtraction: The Multilateral Agreement on Investment*, 31 Cornell Int'l L.J. 491, 503–04, 523–25 (1998). *See further* Kevin Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?* 24 U. Penn. J. Int'l Econ. L. 77 (2003). On the

Nor is it persuasive to insist that ISA is inherently superior to litigation because arbitrators are investment specialists, whereas domestic judges operate as courts of general jurisdiction. Neither resort to ISA nor to litigation ensures equitable and transparent procedures or sound substantive determinations. Evidence of an unjust state expropriation is factually informed: it calls for good judgment, not only investment expertise. Full-time national court judges arguably often have as much claim to good judgment as do part-time and often academically focused arbitrators.

What can be said in defense of ISA is that, although it does not lead to judicial precedent as common lawyers conceive of it, ISA is likely to be more stable in nature than a plethora of different local laws and procedures that domestic courts apply to foreign investment.[101] However fragmentary may be the application of different standards of treatment to foreign investors, and however difficult it may be to identify cohesive principles out of ad hoc and sometimes unpublished arbitration awards, an international investment jurisprudence has evolved, inconsistencies notwithstanding.[102] Given the multitude of BITs currently in existence and their disparate clauses, ICSID and UNCITRAL arbitrations have promoted the successful resolution of investment disputes in a series of complex cases.[103] As such, ISA has helped to develop a more cohesive construction of BITs internationally than has the jurisprudence of divergent domestic legal systems and their courts.

Nor should investment arbitrators or institutions such as the ICSID Secretariat be blamed if ISA proceedings sometimes are not transparent and investment awards are not published. The rules governing investment arbitration derive, not from the action of arbitration institutions such as the ICSID, but from the collective action of member countries that are signatories to the ICSID Convention and state signatories to BITs. It remains within the power of the multilateral community of states to pursue institutional change in international investment jurisprudence. Likewise, institutions such as the ICSID should not be blamed for inconsistent reasoning and determinations reached by investment arbitrators who, although guided by the ICSID, exercise discretion in making awards. Not unlike the authority of judges on the International Court of Justice, the coherence of ISA reasoning and awards depends on the persuasive authority of the awards rendered by ISA arbitrators. The cogency of those awards, in turn,

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prospective impact of the Doha round of multilateral negotiations on Chapter 11 of the NAFTA, see Bryan Schwartz, *The Doha Round and Investment: Lessons from Chapter 11 of NAFTA* (2003) 3 Asper Rev. Int'l Bus. & Trade Law 1 (2003).

[101] On the development of international investment norms, see *OECD Investment Committee*, Foreign Investment Review Board, http://www.firb.gov.au/content/international_investment/current_issues.asp?NavID=60.

[102] For the argument that. whatever are the limitations of domestic investment decision-making, international investment law is inherently biased in favor of developed countries, see Sornarajah, Chapter 16 of this book; Schreuer & Dolzer *supra* note 56; Schill, *supra* note 56.

[103] *See, e.g.*, Aurélia Antonietti, *The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Rev.—For. Inv. L.J. 427 (2006); Edward Baldwin, Mark Kantor & Michael Nolan, *Limits to Enforcement of ICSID Awards*, 23 J. Int'l Arb. 1 (2006) (discussing "tactics" that may be employed in attempts to "delay" or "avoid" compliance with ICSID Awards).

transcends the consent of the investor–state parties to disputes; it extends beyond the literal construction of conventions such as the ICSID; it surpasses the guidance of administrators of such conventions charged with overseeing ISA proceedings under disparate BITs.[104] It is also artificial to ground the authority of ISA tribunals solely in the mutual consent of state parties to BITs, given the discretion that is accorded to ISA arbitrators in both law and fact.[105]

Nor, too, is Australia's unwillingness to submit to investor–state arbitration necessarily a death knell for Australian outbound investors. Australian outbound investors have several choices. They can engage in foreign direct investment in states that have BITs with Australia, such as the United States, and in whose courts Australian investors are reasonably comfortable. They can invest in countries in whose courts they do not trust, relying instead on BITs between those and intermediary countries to bring ISA claims against countries with limited rule-of-law traditions. An incidental beneficiary of such investor resort to intermediary states is the Australian government itself, in not having to conclude BITs with ISA provisions with states that do not subscribe to the rule of law. The Australian government can also decline to intervene diplomatically on behalf of outbound Australian investors, on grounds that those investors have lodged their claims through intermediary states, not Australia. There is also no shortage of potential intermediary states to which outbound investors may resort. Notable among these states are the Netherlands Antilles or Mauritius that have stable financial systems and transparent and investor-friendly tax regimes.[106]

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[104] *See* Vandevelde, *supra* note 65 (discussing the exponential growth in BITs from 1969 to 2005). *See also Research Note: Recent Developments in International Investment Agreements*, United Nations Conference on Trade and Development (Aug. 30, 2005), http://www.unctad.org/sections/dite_dir/docs/webiteiit20051_en.pdf. Although the ICSID administers ISA, the UNCITRAL is *not* an administering authority. The UNCITRAL Web site states: "UNCITRAL does not administer arbitration or conciliation proceedings, nor does it provide services . . . in connection with dispute settlement proceedings." See United Nations Commission on International Trade Law, *FAQ - UNCITRAL and Private Disputes/Litigation* (2012), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html#dispute. Other institutions, most notably the Permanent Court of Arbitration (PCA), administer investor–state disputes under the UNCITRAL Rules. A recent UNCTAD report states that "[b]y the end of 2011, the total number of ISDS cases administered by the PCA was 65, of which 32 are pending." *See* United Nations Conference on Trade and Development, *Latest Developments in Investor–State Dispute Settlement* (IIA Issues Note No 1, Apr. 2012), http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf.

[105] On allegedly inconsistent ICSID decisions in a series of investment claims against Argentina, commencing with the *CMS, Enron*, and *Sempra* cases, see *CMS Gas Transmission Co. v. The Argentine Republic* (Award) (ICSID Arbitral Tribunal, Case No ARB/01/8, May 12, 2005); *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (Award) (ICSID Arbitral Tribunal, Case No ARB/01/3, May 22, 2007); *Sempra Energy International v. The Argentine Republic* (Award) (ICSID Arbitral Tribunal, Case No ARB/02/16, Sept. 28, 2007). *See further* August Reinisch, *Necessity in International Investment Arbitration—An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on* CMS v. Argentina *and* LG&E v. Argentina, 8 *J. World Inv. & Trade* 191 (2007); Stephan W. Schill, *International Investment Law and the Host State's Power to Handle Economic Crises: Comment on the ICSID Decision in* LG&E v. Argentina, 24 J. Int'l Arb. 265 (2007); Michael Waibel, *Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E*, 20 Leiden J. Int'l L. 637 (2007).

[106] On the tax and related protection accorded foreign investors in the Netherlands Antilles, see, for example, http://www.ibcformations.com/index.php?menu=jurisdiction_17&trusts_foundations=1.

Nor is the practice of foreign investors bringing ISA or other claims through intermediary states unprecedented. Brazil has effectively insulated itself from investor–state arbitration by declining to ratify any of its investor–state treaties; its investors abroad have transacted through "good governance" intermediary states. As a result, Brazilian companies have gained access to resource wealthy countries such as Venezuela through intermediary states without exposing Brazil to investor–state claims in respect of which Brazil has assumed no treaty obligations in fact.[107]

However, treaty shopping by investors, not limited to outbound Australian investors, for intermediary states from which to launch an ISA claim is not risk free. In particular, treaty-shopping investors risk losing ISA claims on jurisdictional grounds, that their business connection to the intermediary state is insufficiently substantial to justify their ISA claim. That risk is conceivably accentuated as more states strive for intermediary status, seeking to resource investors with ever-ready means of establishing business connections domestically. Coupled with these risks is the prospect of regulators, including ISA tribunals, establishing rules to regulate such treaty shopping.

The final observation is not that investor-treaty arbitration is capable of resolving these various problems in a manner that domestic courts cannot accomplish: ISA is not a panacea. Dominant states and their investors may well perpetuate their economic and political influence by using ICSID and UNCITRAL proceedings to their advantage, including by protracting ISA proceedings and adding to their costs. Yet even if ISA is not beyond reproach, it is capable of transformation and improvement.

## X. PROPOSALS FOR REGULATING ISA BY TREATY

The following are proposals to regulate the adoption of ISA by treaty. The purpose is to accommodate concerns about the unfairness and inefficiency of ISA. It is also to ensure that Australia is not excluded from participating in important multilateral treaties such as the strategic Trans-Pacific Partnership Agreement.

First, it is recommended that treaties expressly protect fundamental public interests such as those in natural resources, agriculture, and financial markets. This is consistent with the Australian government's legitimate interest in protecting the national identity, public health, and environment from erosion by foreign investors.

Second, investment chapters in treaties should stipulate for negotiation and conciliation between disputing parties prior to initiating investor–state arbitration. This is consistent with the recommendations of the UNCTAD.[108] It also reaffirms the importance in principle of encouraging cooperation between investor–state parties,

[107] *See, e.g.,* Ricardo Ortíz, *The Bilateral Investment Treaties and the Cases at ICSID* (FOCO 2006), *available at* http://fdcl-berlin.de/fileadmin/fdcl/Publikationen/FOCO-ICSID-engl-2006.pdf. Table 2 notes that Brazil had entered into fourteen BITs by 2006, but had not ratified any of them.

[108] See UNCTAD, *supra*, note 29.

especially because investor–state arbitration is potentially costly and time-consuming, and disputes can have devastating economic consequences for investors and a drastic social and economic impact on host states and their subjects.

Third, investment treaties should require that investor–state parties resort to alternative methods of dispute avoidance in good faith before embarking on ISA, such as by using mediation or conciliation. This is consistent with the recommendations of the UNCTAD.

Fourth, treaties should govern the standing of investors to bring claims against host states, in order to discourage premature, opportunistic, and pernicious claims by adventitious investors against vulnerable host states.

Fifth, investors should be required to initiate mediation or conciliation proceedings within specified time limits prior to initiating ISA and without which ISA should not be available, unless state parties decline to submit to mediation or conciliation, or mediation fails. Mediation or conciliation proceedings should be circumscribed by time lines and good faith requirements so as to avoid protracting and raising the costs of disputes. Although such requirements are ideally embodied in bilateral and regional investment agreements, insofar as they are not so embodied, it may be necessary to rely on the ICSID/ICSID Additional Facility or UNCITRAL to do so instead.

Sixth, and as a qualification to the first recommendation above, rules of procedure are needed to inhibit host states from expropriating foreign investment on overbroad grounds such as in relation to the protection of natural resources, agriculture, and financial markets. States should also be discouraged from discriminating against foreign investors on grounds of protection that extend beyond essential security, national identity, public health, and environmental safety.

Seventh, consistent with ICSID Rule 37 adopted in 2006, which provides for submissions by non-disputing parties,[109] further provision is needed to ensure that arbitration proceedings are transparent, while preserving confidential information of one or both direct parties to an ISA dispute. In particular, provision is needed for the publication of investor claims, for public access to ISA proceedings in the ordinary course, and for the publication of ISA proceedings and awards, including reasons for granting or denying third-party intervener status in whole or in part. Provision should be made for the submission of *amici curiae* briefs and the participation of third-party interveners in proceedings. Social, economic, and environmental impact reports adduced into evidence should also be publicly available. These publications should be subject to requirements of confidentiality, as identified above.

Eighth, interim measures are needed to inhibit host states from imposing regulations that unreasonably interfere with investor claims. Such measures are appropriate, for example, to inhibit Australia from implementing fast track tobacco legislation to circumvent arbitration initiated against it by Philip Morris. Conversely, interim measures are appropriate to discourage Philip Morris from protracting investor–state

[109] On Rule 37 of the ICSID Regulations and Rules, see *supra*, note 76. *See further* Leon E Trakman, *The ICSID under Siege*, Cornell Int'l L.J., Part V (forthcoming 2012).

arbitration in order to delay the implementation of public health regulations by Australia.

Ninth, rules are needed to streamline the mechanics of investor–state arbitration. In particular, challenges to an arbitrator should be decided by a challenge committee, not by arbitrators sitting on the same panel as the challenged arbitrator.

Tenth, rules are needed to monitor legal costs, including but not limited to: the use of contingency fees, capping the fees of arbitrators, and allocating costs between investor–state parties and conceivably, third parties. Related concerns about monitoring costs are expressed in the 2010 UNCITRAL Rules.

Eleventh, guidelines are needed for the stay of arbitration proceedings to allow investor–state parties to settle their disputes during the course of such proceedings.

Finally, standing panels are needed to interpret the ICSID Rules in order to redress the inconsistent construction and application of those Rules in tribunal decisions.

These recommendations, among others, are sustainable only if they are subject to ongoing scrutiny and refinement. In particular, signatories to investment treaties that adopt them need to monitor their interpretation and application to ensure that they are properly implemented.

## XI. CONCLUSION

What can be said about a state-orchestrated movement away from ISA toward domestic courts in resolving investment disputes is that the choice is not entirely about the quality of decision making, or even about the operational virtues of judicial decisions over arbitral awards or vice versa. The choice of domestic courts over ISA is also about states exercising normative preferences based on macroeconomic and political assumptions. It is about states calculating that their foreign investors are more likely to succeed before a foreign court than an investment tribunal. Such a "win" is not grounded in objective economic rationality or dispassionate altruism, but in perceptible attempts by states to secure a strategic advantage for their subjects who invest abroad.[110] Nor should one expect countries to disregard their self-interest in electing among dispute resolution options. Indeed, countries are likely to adopt double standards in exercising those elections. A government that favors ISA to restrain "interference" by foreign

[110] These observations are exemplified in Chapter 11 jurisprudence under the NAFTA, notably under the *Mondev* and *Loewen* cases. *See Mondev International Ltd v United States of America* (Award) (ICSID Arbitral Tribunal, Case No. ARB (AF)/99/2, Oct. 11, 2002) ("*Mondev*"). *See also* Dana Krueger, *The Combat Zone:* Mondev International, Ltd v. United States *and the Backlash against NAFTA Chapter 11*, 21 B.U. Int'l L.J. 399 (2003) (arguing that, but for a technical time bar, two tribunal decisions—*Mondev* and *Loewen*—might have prevailed over U.S. judicial decisions). On the Loewen arbitration, see *Loewen Group, Inc v United States of America* (Award) (ICSID Arbitral Tribunal, Case No. ARB(AF)/98/3, June 26, 2003) ("*Loewen*"); William Dodge, Loewen v. United States: *Trials and Errors under NAFTA Chapter 11*, 52 DePaul L. Rev. 563 (2002). On the judicial review of the *Loewen* Chapter 11 decision, see Bradford K. Gathright, *A Step in the Wrong Direction: The* Loewen *Finality Requirement and the Local Remedies Rule in NAFTA Chapter Eleven*, 54 Emory L.J. 1093 (2005); Trakman, *supra* note 6, at 52.

governments with private investment may well disfavor ISA proceedings that are filed against it.[111]

However, it is precisely the risk to Australia's self-interest that throws doubt on the persuasiveness of the APC's blanket assertion that there are no truly cogent economic reasons for countries such as Australia to agree to ISA. More often than not states favor institutions for dispute resolution based on their capacity to deliver results that treat their subjects abroad "fairly," and according to "home" rather than "host" state standards.[112]

Australia's policy shift toward domestic courts resolving investor–state disputes is significantly driven by the APC's recommendations that espouse particular policy preferences without paying adequate regard to their practical ramifications. This chapter recommends that the government further examine the economic, political, and practical implications of rejecting ISA and look at the viability of alternative methods of resolving international investment disputes. A failure to do so could jeopardize Australia's participation in multilateral investment treaties such as the Trans-Pacific Partnership Agreement in which it has a strong economic incentive to be a party.

[111] On the U.S. alleged double standard in favoring resort to arbitration to restrain interference by foreign governments with private investment while disfavoring arbitration filed against the U.S. governments, see Alvarez & Park, *supra* note 79, at 368–69. *See also* Franck, *supra* note 55.

[112] *See, e.g.*, Charles Brower & Lee Steven, *NAFTA Chapter 11: Who Then Should Judge? Developing the International Rule of Law under NAFTA Chapter 11*, 2 Chi. J. Int'l L. 193, 193–95 (2001); Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel within NAFTA and the Proposed FTAA*, 19 J. Int'l Arb. 185 (2002); David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor–State Disputes: Prospects and Challenges,* 39 Vanderbilt J. Transnat'l L. 39 (2006). *But see* William S. Dodge, *Case Report:* Waste Management, Inc v Mexico, 95 Am. J. Int'l L. 186 (2001) (presenting the case for modeling Chapter 11 on the WTO appellate process). See also Gary R. Saxonhouse, *Dispute Settlement at the WTO and the Dole Commission: USTR Resources and Success*, *in* Issues and Options for U.S.–Japan Trade Policies 363 (Robert M. Stern ed., 2002).