CAVEAT INVESTOR - WHERE DO THINGS STAND NOW?

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In C L Lim, *Alternative Visions of The International Law on Foreign Investment* (Cambridge, 2016) Ch 3
[2018] *UNSWLRS* 13

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I. INTRODUCTION

This chapter focuses on a perceptible shift in international investment law from investor protections embodied in investment treaties. Professor Sornarajah has spoken at length on the future of investor-state arbitration (henceforth ISA). According to Sornarajah, ISA represents asymmetric protection of investment.[1] This system privileges powerful business interests and holds strong stay over the regulatory power of weaker states. Feeling the potential vicissitude of the system they had created, developed states are now retreating from the expansive protections that they had previously provided to outbound investors.[2] Citing examples of countries such as the US, Australia, Canada and the EU, Sornarajah argues that the legitimacy of ISA is seriously questioned. Envisioning a world where investors may devise their forms of dispute resolution subject to domestic constraints, Sornarajah further argues that ISA will be replaced by a more state centric system of investor-state dispute resolution.[3]

Indeed, investor-state arbitration has received critical coverage in the academic literature on the account of its potential to unduly favour investors over domestic public policies directed at public health, environmental protection and national security.[4] These concerns are covered at length in the other chapters of this volume and are only briefly examined in the third section of this chapter. More pertinent to the present discussion is the fact that a number of states have rejected ISA and require foreign investors to bring their grievances to the local courts of host states.

Initially, for example, ISA was rejected by Ecuador, Bolivia and Venezuela. However, recently a number of major market economies have pledged to abolish ISA. These states are Australia, India, Indonesia and South Africa. Some EU member states are also considering reforming their ISA granting agreements. Taking these recent developments into the consideration, where do things stand now with regards to ISA? This issue is the subject of the present discussion.

The actual or potential rejection of ISA by major developed free-market economies lends support to Sornarajah`s thesis. However, while discontent with ISA is certainly identifiable, this chapter does not envision a wholesale abolition of the system. As will be demonstrated below, the initial furore against ISA has subsided. In fact, even the states that have pledged to terminate ISA have either abandoned their initial position or have not taken concrete actions to articulate their desired investment regimes. Thus, while this paper agrees with Sornarajah that investment treaties are becoming more balanced, the author of the present volume predicts continuation of the existing ISA regime.

The goal of this chapter is to demonstrate how states struggle to uphold their rejection of ISA and analyse the types of regulatory regimes they have implemented in light of their disaffection with it. To this end, the second part of this chapter then proceeds with a general overview of states that chose to restrict ISA and the manner in which they chose to limit it. The third section examines some of the commonly cited reasons for excluding ISA, followed by a defence from the proponents of the system. The subsequent section examines the treaty making behaviour of states following the rejection of ISA. Finally, the fifth part of the paper explains the resilience of ISA.

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[1] M. Sornarajah, "Starting Anew in International Investment Law" (2012) 74 Yale Columbia Center on Sustainable International Investment FDI, p. 1, available at: http://ccsi.columbia.edu/files/2014/01/FDI_74.pdf.
[2] M. Sornarajah, "Mutations of Neo-Liberalism in International Investment" (2011) 3 (1) TRADE L. & DEV, p. 203.
[3] See above note 1.
[4] See below Section 3.

II. THE NEW WAVE OF DISCONTENT AGAINST ISA

Looking back to the years between 2007 and 2014, one would be hard-pressed not to consider the possibility of ISA falling out of favour among policy makers. Within a span of just a few years, a number of states had announced that they will no longer provide ISA in future agreements, while others vowed to terminate their existing treaties.

In order to accurately appreciate the significance of these events, it is important to view them in the broader ISA treaty making practice. Although ISA is now frequently provided in various investment facilitation agreements, the practice did not become standardized until the early 1990s. Furthermore, although ISA provisions are present in the vast majority of investment agreements, a number of states have continued to negotiate ISA selectively. For example, the FTA between Australia and the United States required foreign investors to rely on domestic courts of the host state to resolve their disputes.[5] Brazil never signed the ICSID Convention and has traditionally excluded ISA in its investment facilitation agreements. Finally, Japan has negotiated for ISA selectively, most recently excluding it in its FTA with Australia.[6]

More so, states have routinely qualified the way ISA is applied to them. This was particularly common during the first generation of BITs where states reserved extensive regulatory powers and accorded limited protections to inbound investors. For example, in acceding to the ICSID Convention in 1993, China adopted a number of reservations and restricted the scope of ISA under its early Model BITs, upon which its negotiated BITs were modelled.[7] In particular, China did not grant ISA tribunals the jurisdiction to determine whether an expropriation has occurred, in addition to declining to provide national treatment to foreign investors. It also restricted ISA to determining the nature and extent of compensation. China also stipulated that foreign investors had to resort to domestic administrative review before referring their cases to ISA and imposed a waiting period of three to nine months in order to provide parties with the opportunity to reach a settlement. Only after having exhausted local remedies and these waiting periods, could foreign investors initiate ISA proceedings against a host state.[8] It should be noted that although China's latest model treaty is still in the drafting stages, commentators believe that the model BIT will restrict investors' rights and access to ISA, comparatively to its previous model BIT which granted major protections to foreign investors.[9]

Similarly, the latest US Model BIT upon which the Chinese Model BIT may draw, has extended the scope of a state's right to engage in regulatory expropriation. It has restricted the

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[5] That Treaty provided for investors of either partner state to have access to the domestic courts of the other, based on the rationale that the courts in both countries adhered to a "rule of law" tradition. See, e.g., P. Drahos & D. Henry, "The Free Trade Agreement Between Australia and the United States" (2004) Brit Med J 1271; W. S. Dodge, "Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement" (2006) 39 Vand J Transnat'l L 1 (commenting on the exhaustion of local remedies).

[6] See Ministry of Foreign Affairs of Japan, *Japan-Philippines Economic Partnership Agreement* September 2006: http://www.mofa.go.jp/policy/economy/fta/philippines.html. See generally, S. Hamamoto & L. Nottage, "Foreign Investment in and out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution" (2011) 5 TDM.

[7] On the development of China's model investment agreements, see W. Shan and N. Gallagher, "China", in Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties* (Oxford, 2013), chapter 4.

[8] L. Trakman, "China and Investor-State Arbitration", in CHINA, TRADE AND INVESTMENT (Cambridge, 2014); L. Trakman, "China and Investor-State Arbitration" (2012) UNSW Law Research Paper No. 2012-48 available at: http://ssrn.com/abstract=2157387.

[9] See, e.g., W, Shan & S, Zhang, "An Inquiry on US 2012 Model BIT and Its Acceptability for China" (2013) 5 Modern Law Science; W. Shan, N. Gallagher, & S. Zhang, "National Treatment for Foreign Investment in China: A Changing Landscape," (2012) 27 ICSID Review, p. 120 at 229. But see the U.S.-China BIT, which subjects the admission of FDI to both MFN and national treatment clauses. See R. Dolzer & M. Stevens, *Bilateral Investment Treaties* (Martinus Nijuhoff Publishers, 1995), p. 49.

rights of foreign investors under standards of fair and equitable treatment, minimum standard of justice and national treatment and provided for a subjective national security test by which state parties to BITs define their own national interests, as distinct from being based on objective criteria.[10] In addition, the U.S. Model BIT reserves the rights of state parties to impose governmental measures to protect public health, environmental safety and related public interests. Reflecting the desire of American policy makers to restrict the rights of foreign investors, the US–Peru FTA subjects foreign investors to greater regulation by the host state.[11]

These examples demonstrate that ISA has been continuously evolving to accommodate the delicate balancing act of states wishing to attract foreign investment, while at the same time retaining regulatory control over national assets. Thus, access to ISA could be described as cyclical, with states qualifying it according to national priorities.

Due to its fluid nature, ISA has always been a controversial subject within international trade law, with volumes of academic works devoted to the study of its merits and pitfalls. However, the debate over the value of ISA has become particularly pronounced in recent years on the account of a number of states withdrawing from the forerunning investor-state arbitration centre, the International Centre for Settlement of Investment Disputes (ICSID).[12] Although ICSID is just one of arbitration centres available to investors, the vast majority of *known* investment related disputes have been submitted to the ICSID for arbitration.[13] Thus, the unprecedented withdrawals from the organization had pushed ISA into the mainstream news, with a number of media outlets announcing the end of investor-state arbitration.

The recent backlash against ISA can be traced back to Latin America. In 2007, Bolivia withdrew from the ICSID, gaining the dubious distinction of being the first state to repudiate the Convention.[14] Bolivia's actions gave rise to a host of procedural and legal issues in relation to the termination of the Treaty and the status of ISA provisions in Bolivia's other agreements.[15] Naturally, the case received prominent coverage in media and academia. This is especially so, considering that a number of other regional economies - Cuba, Nicaragua, Ecuador and Venezuela have pledged to follow and terminate their membership in the ICSID.

However, by 2010 only Ecuador had issued its notice of termination.[16] Not long after Ecuador's withdraw from the ICSID Convention, the Australian Government issued its Policy Statement, stating that it will no longer agree to the adoption of international investment arbitration

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[10] See United States Model Bilateral Investment Treaty (2012), http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf. On the illustrative measure of "investment" in the U.S. Model BIT, see K. S. Gudgeon, "United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards," (2012) 4 Berkeley Journal of International Law, p. 105.

[11] See *Peru Trade Promotion Agreement*, US–Peru, 12 April 2006 (entered into force 1 Feb 2009) Article 10.21; *Free Trade Agreement*, US–Colombia, 22 November 2006 (entered into force 15 May 2012) Article 10.21; *Free Trade Agreement*, Korea–US, 30 June 2007 (approved by Congress, 12 October 2011) Article 11.21.

[12] See, e.g., ICSID, "List of Contracting States and Other Signatories of the Convention (as of April 18, 2012)," http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English

[13] International Centre for Settlement of Investment Disputes, "ICSID Caseload–Statistics (Issue 2012–2)," http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics

[14] On Bolivia's denunciation and withdrawal from the ICSID, see, ICSID News Release, *Bolivia Submits a Notice under Article 71 of the ICSID Convention* 16 May 2007.

[15] See generally, United Nations UNCTAD, "Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims" (2019) 2 IIA Issue Note.

[16] On Ecuador's withdrawal from the ICSID, see ICSID News Release, *Ecuador Submits a Notice under Article 71 of the ICSID Convention* 9 July 2009: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20; K. Nowrot, "International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism" (2011) 1 Transnational Dispute Management p. 5.

in its bilateral and regional trade agreements.[17] Unlike Bolivia and Ecuador, Australia did not choose to withdraw from the ICSID and would, presumably, retain its existing BITs. The 2011 Policy Statement had only provided that Australia would no longer negotiate treaty protections "that confer greater legal rights on foreign businesses than those available to domestic businesses" or rights that would "constrain the ability of the Australian Government to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses".[18]

Although Australia has abandoned its controversial position on ISA after the defeat of the Gillard Government in 2012, the 2011 Policy Statement has ignited fierce debate over the future of investment protections. After all, Bolivia and Ecuador did not have extensive investment networks. Increasingly inward looking, these two states have initiated a number of nationalization campaigns under the leadership of left leaning governments advocating economic self-reliance. Comparatively, Australia had prospered from the increased FDI inflows and had dedicated major efforts towards expanding its trade network. Furthermore, it has a healthy market economy with a stable political system. Thus, Australia's rejection of ISA came as a major shock to the legal community.

Since Australia was the only developed state to categorically reject ISA, a major line of inquiry was whether Australia would set a new trend in the regulation of FDI.[19] Would other developed countries follow in its rejection of ISA? Perhaps of greatest concern was a fear that ISA had lost its legitimacy even with the states that had previously benefited from the system. Was Australia just the precursor of regulatory revisionism that was to come?

Those hoping to see a global backlash against ISA were disappointed. In 2013, the repudiation of ISA appeared to be a Latin American project. Parallel to the events in Australia, in 2012 Venezuela and Argentina announced their plans to withdrawal from the ICSID Convention. The foreign ministry of Venezuela was quite vocal in its criticism of ISA, stating that "[acceding to ICSID was] a decision of a provisional and weak government, without popular legitimacy, and under the pressure of transnational economic sectors involved in the dismantling of Venezuela's national sovereignty".[20] Venezuela's withdrawal was finalized in July of 2012. Additionally, Venezuela terminated its BIT with the Netherlands.[21]

Although supporters of Australia's 2011 Policy Statement were anticipating more developed nations rejecting ISA, South Africa is the only other country with attributes of a developed state to reject ISA at the time of writing.[22] In formulating its foreign policy, South Africa has followed Australia's approach, stating that it would not provide for ISA in its future

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[17] C. Emerson, "Trading Our Way to More Jobs and Prosperity" (2011), available at: http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx (Hereinafter, Policy Statement); See J. Kurtz, "Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication" (2012) 27(1) ICSID Review pp. 65-86.

[18] Policy Statement, above note 17.

[19] L. Trakman, 'Investor State Arbitration or Local Courts: Will Australia Set a New Trend?' (2012) 46 (1) Journal of World Trade pp. 83-120.

[20] Ministry of Foreign Affairs Statement on ICSID Repudiation, available at: http://www.mre.gov.ve/index.php?option=com_content&view=article&id=18939:mppre&catid=3:comunicados&Itemid=108 (in Spanish).

[21] Netherlands - Venezuela, Bolivarian Republic of BIT (1991).

[22] L. E. Peterson, "South Africa Pushes Phase-out of Early Bilateral Investment Treaties After at Least Two Separate Brushes with Investor-State Arbitration" (September 23 2012), available at: http://www.iareporter.com/articles/20120924_1.

agreements, but without ending its membership in the ICSID. However, it terminated a number of its pre-existing BITs.[23]

In 2014 Indonesia indicated that it would seek to terminate its BIT with the Netherlands, which is set to expire on July 2015. The Netherlands embassy in Jakarta further noted that the Indonesian Government had further indicated that it intended to terminate all of its 67 BITs.[24] Finally, at around the same time, India announced that it intended to review its BIT system and is considering excluding ISA from its future agreements or, at the very least, would require investors to exhaust domestic remedies before submitting disputes to international arbitration.[25] At the time of writing, the exact policy position of these two countries remains unclear.

Based on the brief survey provided, a number of preliminary observations are in order. First, various media outlets often refer to the events between 2007 and 2014 as a major shift in global practice in which a large number of states are abandoning ISA.[26] As was indicated above, the evidence does not warrant this view. Although a minority of states have pledged to limit ISA, only three countries have terminated their obligations under the ICSID Convention. Other countries dissatisfied with investor-state arbitration will restrict ISA in their future agreements. How this will unfold remains to be seen. Notably, a small minority of states is attempting to terminate their existing BITs. The unilateral repudiation of investment agreements appears to be more common among the states that had terminated their ICSID membership. This varied approach to restricting access to ISA is summarized in the table below:

	Terminated Membership in the ICSID	Terminated BITs Containing ISA	Will Exclude ISA from Future Agreements
Australia	NO	NO	CASE BY CASE[27]
Bolivia	YES	YES (5)	YES
Ecuador	YES	YES (11)	YES
India	NO	NO	UNCLEAR
Indonesia	NO	YES (1)	UNCLEAR
South Africa	NO	YES (4)	YES
Venezuela	YES	YES (1)	YES

Table 1: Approaches to Restricting ISA

[27] See Section 4 below.

While each of these approaches carries with it unique legal questions and challenges, this section emphasizes that there has not been a unified movement against ISA.

Furthermore, the recent movement against ISA should be viewed against the broader context of current ISA treaty making practice. At the time of writing, no other states have expressed their desire to abandon ISA. Global trends suggest that ISA continues to grow in popularity, contrary to the recent backlash against it. For example, a major 2012 study conducted by OECD concluded that out of 1600 BITs analysed, only 6.8% do not provide for ISA.[28] Treaty statistics from 2013 further illustrate the resilience of ISA. Last year, 27 new investment agreements were concluded, the vast majority of which provide for ISA.[29] Furthermore, some 42 cases were initiated at the ICSID in 2014; close to half of these cases initiated against developed states.[30] This indicates that contracting parties from different economic backgrounds continue to have confidence in the system.

Although Sornarajah views ISA as a tool of powerful capitalist states, developing countries invariably have opted for ISA in concluding BITs and FTAs. China is an illustrative example of ISA's lasting appeal.[31] As a developing country, China was initially cautious about adopting ISA and sought to limit recourse to it.[32] However, in recent years China has expanded the scope of ISA, particularly in its bilateral agreement with Canada and its trilateral agreement with Japan and Korea.[33] In addition to signing a myriad of BITs, China has also extended investor protections to protect its growing outbound investors from the regulatory defences of host states.[34]

Second, it is important to examine whether a new regulatory culture is emerging in Latin America. This view is advocated by Sornarajah but once again, there is limited evidence to support this idea.[35] Although three Latin American countries have recently rejected ISA, they do not reflect a regional trend. For example, while Argentina had initially supported Venezuela's initiative and in 2012 proposed a parliamentary bill to terminate ICSID, at the time of writing, no decision has

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[24] Netherlands Embassy in Jakarta, Indonesia, "Termination Bilateral Investment Treaty", available at: http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html.

[25] D. Sikarwar "Government to Draft Model Treaty on MNCs' Mediation Rush" (09 August 2013) The Economic Times, available at: http://articles.economictimes.indiatimes.com/2013-08-09/news/41240891_1_bipa-international-arbitration-white-industries-australia/; E. Jung, "India Plans to Abolish ICSID Clause in FTAs" (April 6, 2012) The Bilaterals, available at http://www.bilaterals.org/?india-plans-to-abolish-isd-clause.

[26] See e.g., The Economist, "The Arbitration Game" (October 11, 2014), available at: http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration; J. Eaton, "Multiple Countries Reject Investor-State (2013 Update)" (January 25, 2014) The Sierra Club of Canada, available at: http://www.sierraclub.ca/en/main-page/multiple-countries-reject-investor-state-2013-update, http://www.bilaterals.org/?india-plans-to-abolish-isd-clause.

[27] See Section 4 below.

[28] D. Gaukrodger & K. Gordon, "Investor-State dispute Settlement: a Scoping Paper for the Investment Policy Community" (2012) OECD Working Papers on International Investment p. 11.

[29] UNCTAD, *World Investment Report 2014* (Switzerland 2014), p. 115.

[30] Above note 29.

[31] An example of China's endorsement of Arbitration under the ICSID and UNCITRAL is contained in Articles 5 and 9 of the Germany-China BIT, which came into force on 11 December 2005. Article 10(2) includes an umbrella clause providing that each state party shall respect its treaty obligations relating to investors from the other state party.

[32] See W. Shan, "China and International Investment Law," in L. E. Trakman & N. W. Ranieri (eds.), *Regionalism in International Investment Law* (Oxford, 2013).

[33] China has over 130 BITs, becoming the state with the second largest number of BITS signed, after Germany that has signed the most BITs. For an overview of China's BITS, see generally, China FTA Network, *FTA News Release*: http://fta.mofcom.gov.cn/english/index.shtml.

[34] On China's shifting position in regard to investment arbitration, see generally V. Bath & L. Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (New York, 2011).

[35] M. Sornarajah, "Mutations of Neo-Liberalism in International Investment Law" (2011) 3 (1) Trade L. & Development, p. 210

been made with regard to its withdrawal.[36] It is reasonable to suggest that the recent decisions rendered in Argentina's favour and the ongoing negotiations with ICSID and the IMF mediated by the United States have encouraged Argentina to reconsider its policy.[37] Similarly, although Cuba and Nicaragua have proclaimed their intention to repudiate ICSID, at the time of writing, neither one has made formal arrangements to leave the treaty. Cuba has not terminated its investment agreements, while Nicaragua terminated only one of its agreements.

The foregoing analysis does not deny the possibility that a number of states are dissatisfied with ISA. As was noted above, states continuously balance their BITs to support national priorities. This balance is a moving target and it is expected that treaty drafters will re-evaluate their existing agreements.

III. ARGUMENTS FOR AND AGAINST ISA

A number of common themes run across all critical studies of ISA. Conceptually, criticisms of ISA fall into three categories: the potential of ISA to promote "regulatory chill", the inherent bias of ISA in favour of developed states and the quality of arbitral decisions.

Indeed, the commonly cited reason as to why states have become more critical of ISA is due to the conviction that it will produce a regulatory chill, meaning that the threat of an ISA claim by a foreign investor will discourage states from engaging in public interest regulation.[38] This has become a pressing issue for a number of developed countries attempting to institute better environmental and health related public policies. As will be discussed in the final section of this paper, disputes surrounding public policy have prompted some states to repudiate ISA.

Indeed, public policy litigation is a highly sensitive issue that stands at the forefront of investment facilitation. This concern is reinforced by the fact that grounds for annulling an ISA award, such as under the ICSID Convention, are limited to procedural issues and challenges to the impartiality of arbitrators, or on grounds of conflicts of interest. Due to the specificity of the grounds for annulment, ISA decisions are rarely set aside and awards are usually considered to be final and binding upon the parties. [39]

A further concern among some developing countries, not limited to Latin America, is that ISA awards will favour investors from developed states over developing countries and that various ISA conventions such as the ICSID, will perpetuate those disadvantages.[40] This is the argument posed by the Latin countries discussed in the previous section of this chapter.

Opponents of ISA argue that domestic courts are better suited to resolve disputes involving host states and foreign investors. On a broad level, domestic courts are aware of the unique challenges faced by the host state. The judicial system is often regarded as a key arm of government

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[36] The proposed bill is available at: http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=1311-D-2012 (in Spanish).

[37] Buenos Aires Herald, "US Sees Progress in Talk Between Argentina and IMF, ICSID" (April 30, 2014) http://www.buenosairesherald.com/article/158335/us-sees-progress-in-talks-between-argentina-and-imf-icsid.

[38] See K. Tienhaara, "Regulatory Chill and the Threat of Arbitration: A View from Political Science", in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge, 2012), pp. 606–628.

[39] See M. Bernardo & R. Cremades, B. Cremades y Asociados, 'The Use of Preliminary Objections in ICSID Annulment Proceedings' Kluwer Arbitration Blog http://kluwerarbitrationblog.com/blog/2013/09/04/the-use-of-preliminary-objections-in-icsid-annulment-proceedings-2/.

[40] These concerns are not entirely novel. They were reflected in the Calvo Doctrine enunciated decades ago by the Argentine Republic. That doctrine stipulated that domestic authorities, not limited to local courts, should resolve disputes, including matters arising over FDI that had previously been submitted to international tribunals. See generally, W. Shan, "From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law" (2007) 27 Nw J Int'l L & Bus; B. Cremades, "Resurgence of the Calvo Doctrine in Latin America" (2006) 7 BLI.

in a democracy; judges are appointed by the government or democratically elected. Thus, domestic courts possess the mandate and the sensitivity to domestic conditions surrounding disputes over public policy initiatives.

Furthermore, domestic proceedings are seen to be more conducive to a fair and just decision than an arbitral tribunal sitting in a foreign jurisdiction. Specifically, domestic trials are ordinarily open to the public; they provide for third-party submissions and verdicts are often reached by juries. Detailed judgments are usually published and freely available to ordinary citizens. Finally, to ensure that the process remains fair, the losing party is provided with a right to appeal a decision to a higher court. As a result, domestic courts are viewed as being most qualified to reach informed decisions, to take account of the legitimate interests of litigants, and to consider important public policy considerations involved in the issue.

When the quality of justice is measured against these criteria, ISA appears to be inadequate. ISA proceedings are generally confidential; third-party interventions in ISA proceedings are often restricted; and awards are sometimes unpublished, or published only in part.[41] While ISA parties generally have the option to modify ISA proceedings including opening them to the public, such decisions require the explicit consent of both sides, which is difficult to achieve by investor-state parties already engaged in a dispute.

Furthermore, given that ISA disputes are often decided by commercially trained international arbitrators who often lack adequate appreciation of domestic conditions, ISA has the potential to produce over-extensive awards in favour of foreign investors at the expense of 'host' states. Illustrating the risks of ISA awards bankrupting a foreign investor is the frequently cited *Loewen* case in which an ISA tribunal upheld a punitive damage jury determination against a Canadian funeral home, under Chapter 11 of the North American Free Trade Agreement, leading to its insolvency.[42]

While supporters of ISA admit these deficiencies, they emphasize that many of the abovementioned criticisms also apply to domestic legal systems. For example, although ISA proceedings are resource intensive and can lead to unreasonable awards based on domestic public policy, litigation in domestic courts can be equally costly and may deliver devastating blows to foreign investors, including allegedly excessive damage awards. This is illustrated, somewhat ironically, by the ISA tribunal in the *Loewen* case which upheld a punitive damage jury award reached in a domestic U.S. court.[43]

In addition, prioritizing domestic courts over ISA on grounds that ISA tribunals diverge in applying standards of treatment, such as "fair and equitable" treatment to foreign investors, ignores the extent to which domestic courts apply a diverse range of domestic rules of evidence and procedure to resolve disputes against states.[44] Domestic courts also domesticate conceptions of

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[41] See L. Trakman, "The ICSID in Perspective" in Trakman & Ranieri, above note 32 at 253.

[42] On the Loewen case, see, for example, C. Brower & S. Lee, "NAFTA Chapter 11: Who then should Judge? Developing the International Rule of Law under NAFTA Chapter 11' (2001) 2 Chi J Int'l L, pp. 193-195; Jack J Coe Jr, 'Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel within NAFTA and the Proposed FTAA" (2002) 19 J Int'l Arb, p. 185; D. A. Gantz, "An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges" (2006) 39 Vand J Transnat'l L, p. 39. But see W. S. Dodge, "Case Report: Waste Management, Inc v Mexico" (2001) 95 AJIL (presenting the case for modelling Chapter 11 on the WTO appellate process). See also G. R. Saxonhouse, "Dispute Settlement at the WTO and the Dole Commission: USTR Resources and Success" in R. M. Stern (ed), *Issues and Options for U.S.-Japan Trade Policies* (Michigan, 2002), p. 363.

[43] On the *Loewen* case, see Brower & Steven, above note 42.

[44] For a debate on this issue, see L. E. Trakman & M. Sornarajah, "A Polemic: The Case For and Against Investment Liberalization" in Trakman & Ranieri, above note 32 at Appendix at 499.

public policy differently.[45] The argument is that ISA can limit the nuanced impact of different domestic legal systems and cultures on FDI, such as the different influence of civil, common and customary laws.[46] Furthermore, ISA can reduce reliance on competing domestic rules of evidence and procedure, such as adversarial evidentiary rules in common law systems and inquisitorial methods of adducing evidence in civil law systems.[47]

Similarly, even though ISA awards are sometimes difficult to challenge, ISA annulment proceedings are not necessarily under-inclusive because they are limited to procedural matters. Asserting that appeals from domestic courts are wider in scope than annulment proceedings also ignores the extent to which domestic judicial systems diverge over the grounds for allowing an appeal.

The debate over regulatory chill is more complex, often due to the sensitive nature of the claims that are submitted to arbitral courts. From the perspective of investors, ISA obviates the need to seek domestic law remedies which may be seen to be less impartial than international investment arbitration.[48] ISA can also confer substantive protections, such as most-favoured-nation (MFN) or national treatment on foreign investors under international investment law.

Host states may also benefit from ISA. Resort to ISA can limit the perceived social and political costs associated with domestic litigation, since it allows parties to control public access to proceedings. Due to these advantages, ISA serves as a "delocalized" process of resolving disputes between foreign investors and host states. Outbound investors can rely on ISA, not only in response to states' providing for ISA in their BITs and FTAs, but also in response to home state investors trying to avoid the domestic courts and laws of particular host states.

It is also difficult to argue that foreign arbitral tribunals are incapable of rendering a fair and accurate decision in cases involving public policy initiatives. On the contrary, ISA arbitrators may be more experienced than domestic court judges, since the majority of the cases they hear are related to investment matters. ISA tribunals are likely to have a firmer grasp of principles of investment law and public international law.[49] They are also likely to apply a more uniform system of international investment laws and procedures than domestic laws and procedures that diverge across different legal systems.

Thus, while a small number of ISA arbitrators are repeatedly appointed from a list of panellists nominated by member states, it is difficult to infer that domestic litigation is preferable on grounds that domestic judges are appointed by nation states.[50]In fact, from the perspective of institutional learning, this arrangement may be more favourable to norm assimilation because the same stakeholders make up the institution. These career arbitrators are not insulated from ideas and often respond to global trends and concerns of the international community. Reflecting this is the famous *US - Shrimp/Turtle* WTO case where a panel based its decision on the "evolving

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[45] On such issues, see generally, Foreign Investment Review Board, *Current International Investment Issues - OECD Investment Committee:*
<http://www.firb.gov.au/content/international_investment/current_issues.asp?NavID=60>.

[46] On the significance of legal cultures, including regionally, in international investment law, see C. B. Picker, "International Investment Law: Some Legal Cultural Insights" in Trakman & Ranieri, above note 32 at 120.

[47] See L. E. Trakman, "Legal Traditions and International Commercial Arbitration" (2006) 17 Am Rev Int Arb 1 pp. 119–120, 126–128.

[48] See J. Kurtz, "Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication" (2012) 27(1) ICSID Rev 65; L. Trakman, "Investor State Arbitration or Local Courts: Will Australia Set a New Trend?' (2012) 46(1) JWT 83.

[49] See, for example, S. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2004-5) 73 Fordham L R 1521 pp. 1543–44; G. A. Alvarez & W. W. Park, "The New Face of Investment Arbitration*:* NAFTA Chapter 11" (2003) 28 Yale J Int'l L 365.

[50] See L. E. Trakman, "A Plural Account of the Transnational Law Merchant" (2011) 2(3) TLT 309 p. 335.

interpretation" of WTO law.[51] It is important to note that ICSID and UNCTAD have continuously emphasized the need to accommodate developmental and sustainable policies of states and have undertaken significant organizational initiatives to uphold these priorities. Thus, it is difficult to argue that arbitrators are inherently pro-business without any awareness of global trends and issues.

Finally, although ISA arbitrators are not working under a multilateral investment treaty and are not bound by precedent, it has become a standard practice for arbitrators to routinely reference past decisions of various arbitral tribunals. In fact, over the thirty years of ICSID and UNCITRAL decision-making, ISA jurisprudence has acquired a sophisticated degree of coherence.[52] This is a significant accomplishment since ISA decisions are *ad hoc* and bind only the direct parties to the dispute, and even though ISA tribunals often diverge in applying international investment laws, such as the state defence of "necessity" to specific ISA disputes.[53]

Finally, concern over the lack of transparency of some ISA proceedings is directly relevant to the wishes of disputing parties. Confidentially in ISA proceedings was historically determined by disputing parties. An important reason why ISA is attractive to foreign investors, and sometimes state parties, is because it was traditionally closed to the public. This avoided media coverage often associated with the publicised decisions of domestic courts of law. However in recent years, the nature of ISA has changed to provide greater public awareness of and participation in ISA proceedings. ISA tribunals have repeatedly opened hearings to the public, with the support of the investor-state parties, given sensitivity about the need for transparency in redressing public-private disputes on matters of public interest. Consequently, there is now far greater public access to ISA proceedings and records than there was a decade ago.[54] For example, the ICSID now provides for third-party intervener status in ISA proceedings and for the publication of ISA awards.[55]

Regardless of whether ISA proceedings remain closed or open to the public, disputing parties are generally allowed to issue statements on their positions to the public, provided that these statements do not disclose information marked in proceedings as "confidential". Those statements may be sufficient to keep the public informed and focused on issues of national significance. Furthermore, these public releases may also provide incentives for both disputing parties to open ISA proceedings to the public in order to offset the impact of a statement by one disputing party in the absence of a public record.

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[51] WT/DS58/AB/R (Oct. 12, 1998).

[52] On the variability of international investment treaty law, see S. W Schill, *The Multilateralization of International Investment Law* (Cambridge, 2009) p. 363; but compare M. Sornarajah, "The Case Against an International Investment Regime" in Trakman & Ranieri, above note 32 at 475.

[53] 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, 12 May 2005); *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/3, 22 May 2007); *Sempra Energy International v The Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/16, 28 September 2007). See further, A. 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*" (2007) 8 JWIT 191; S. 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*" (2007) 24 J Int'l Arb 265; M. Waibel, "Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E" (2007) 20 Leiden J Int'l L 637. See C Peinhardt & T Allee, "Devil in the Details? The Investment Effects of Dispute Settlement Variation in BITs", in Karl Sauvant (ed), *Yearbook on International Investment Law & Policy 2010-2011* (Oxford, 2011) pp. 833–854.

[54] See, for example, A. Antonietti, "The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules" (2006) 21 ICSID Rev — Foreign Invest L J 427; E. Baldwin, M. Kantor & M. Nolan, "Limits to Enforcement of ICSID Awards" (2006) 23 J Int'l Arb 1.

[55] On this amendment to the ICSID Rules, see Antonietti, above note 54. See also Statement by the OECD Investment Committee, *Transparency and Third-party Participation in Investor-State Dispute Settlement* June 2005: http://www.oecd.org/daf/inv/investment-policy/34786913.pdf.

In summary, both ISA and domestic courts have advantages and drawbacks. Both mechanisms for resolving investor-state disputes will have their supporters. At times, foreign investors will prefer the intimate setting of an arbitral tribunal and at other times, they will opt for the expediency of domestic courts due to their confidence in the local legal system.

Furthermore, whether ISA is more efficient or fairer than domestic litigation will depend on the normative values and risks that are ascribed to each. For example, if normative priority is given to legal coherence, the risk of ISA tribunals and domestic courts adopting narrow literal methods of treaty interpretation in order to arrive at coherent results by coherent means, apply to both. Similarly, the risk of domestic courts and ISA tribunals adopting purposive methods of interpretation will hinge on the purpose each ascribes to an applicable investment law. Both, domestic courts and ISA tribunals may construe treaties liberally but ascribe different purposes to those treaties. Domestic courts may highlight the need to protect domestic public policy values. On the other hand, ISA tribunals may highlight the need to protect the commercial interests of foreign investors.

If normative priority is given to investment expertise, ISA arbitrators are likely to have a greater comprehension of investment law than most domestic judges.[56] If emphasis is given to the transparency of legal procedures, ISA will once again prevail over the choice of domestic courts in jurisdictions that have low corruption transparency indexes and rule of law scores.[57] In issue is not only that domestic courts and ISA tribunals are likely to accord priority to different normative values. Domestic courts and ISA tribunals are also likely to differentiate among those values from one case to another. If priority is given to the binding force of precedents, as common lawyer conceive of it, ISA arbitrators who subscribe to precedent are also likely to treat past ISA awards as binding on them.[58]

As a result, it is difficult to conclude that domestic courts and ISA tribunals are likely to subscribe to one or another normative preference. Even the presupposition that ISA tribunals are more likely to prioritise the commercial interests of foreign investors while domestic courts are more likely to prioritise the public policy concerns of the 'host' state is not self-evident.[59]

The result is that it is easier to draw broad quantitative than qualitative distinctions between the normative proclivities of domestic courts and ISA tribunals. As a quantitative measure, ISA jurisprudence is likely to be more consistent in scope of application than a multiplicity of different domestic laws applied by local courts to govern foreign investment in light of localised laws and procedures.[60] However, if one takes into account qualitative measures, the extent of that consistency will depend on the value priorities that are ascribed to domestic courts and ISA tribunals in discrete cases.

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[56] On the expertise of investor-state arbitrators, among various other factors in support of ISA, see generally, C. Dugan, D. Wallace, Jr. & N, Rubins, *Investor-State Arbitration* (New York, 2008); P. Muchlinski, F. Ortino & C. Schreuer (eds), *Oxford Handbook of International Investment Law* (Oxford, 2008); C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford, 2008).

57 On Transparency International's Corruption Perceptions Index 2014, see Transparency International, Corruption Perceptions Index 2012: http://www.transparency.org/cpi2014/results. On doubts about the reliability of such indexes, see T. Thompson & S. Anwar, "Transparency International's Corruption Perceptions Index: Whose Perceptions Are They Anyway?" March 2005: http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/TransparencyInternationalCorruptionIndex.pdf.

[58] See, for example, C. Schreuer & R. Dolzer, *Principles of International Investment Law* (Oxford, 2008), p. 357.

[59] On the ICSID Panels of Arbitrators and Conciliations, see ICSID, *Search ICSID Panels:* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDataRH&reqFrom=Main&actionVal=PanelStates&range=A~B~C~D~E.

[60] On the development of international investment norms around conceptions of efficiency, see Foreign Investment Review Board, above note 45.

IV. INVESTMENT AGREEMENTS OF STATES DISSATISFIED WITH ISA

This section investigates investment treaty making behaviour of states following their repudiation of ISA. The analysis provides an up-to-date assessment of the policies currently pursued by countries dissatisfied with ISA. It aims to assess whether states have been consistent in their policy direction and analyse their subsequent investment agreements.

For organizational purposes, we divide the countries into two groups: states that repudiated the ICSID convention and states that have retained their membership in the ICSID but have chosen alternative avenues to restrict ISA.

A. States that Retained Their Membership in the ICSID

Countries in this category have been inconsistent in their foreign policy direction with regards to ISA. As will be discussed below, a number of states have reversed their initial rejection of ISA and continue to provide investor-state arbitration in their agreements.

1. Australia

Australia has undergone a major policy shift on investor-state arbitration. In 2012, it signed an FTA with Malaysia, choosing to exclude ISA from the investment chapter of the agreement. Instead, the agreement required both parties to resolve investor-state disputes in the local courts.[61] It is important to highlight that Malaysia is considered to be a developing country with an evolving legal system. However, the Australian Government did not draw distinctions between countries with strong and weak legal systems in formulating its post-ISA investment policy.[62] Thus, exclusion of ISA from the FTA with Malaysia served as credible demonstration of the government's commitment to move away from investor-state arbitration, regardless of whether it benefits or harms its own investors operating abroad.

The subsequent change in the government has resulted in a near U-turn in Australia's policy on ISA. Upon coming to power in September 2013, the Abbott Government announced that it will negotiate ISA selectively.[63] It is difficult to conclude with certainty whether this policy direction represents a mere face saving gesture to the old administration or a real commitment of the government to negotiate ISA on a case-by-case basis because the investment related agreements concluded by the Abbott Government do not reveal a underlying pattern in Australia's ISA negotiations.

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[61] The official website of *The Malaysia-Australia Free Trade Agreement* (Hereinafter, MAFTA) is http://www.dfat.gov.au/trade/agreements/mafta/Pages/malaysia-australia-fta.aspx.

[62] Policy Statement, above note 17.

[63] Australia Government, Department of Foreign Affairs and Trade, "Trade and Investment Topics – ICSID" http://www.dfat.gov.au/trade/topics/Pages/isds.aspx.

Specifically, Australia had completed FTA negotiations with China, Japan and Korea, each containing an investment chapter.[64] Agreements with China and Korea provide for ISA, while the agreement with Japan does not offer investor-state arbitration.[65]

On the surface, the lack of ISA in the agreement with Japan confirms Australia's selective approach to negotiating ISA. However, scholars believe that the lack of investor-state arbitration in the agreement with Japan is partly due to Japan's neutrality towards ISA on the account its legal culture.[66] Furthermore, according to Article 14.19 of the FTA, parties are required to conduct a review of the investment chapter on the fifth year of the agreement, or earlier if both sides agree. The Article further states that if Australia enters into any multilateral or bilateral international agreement providing for a mechanism for the settlement of an investment dispute between Australia and an investor of another or the other party to that agreement, both sides will be obliged to establishing an equivalent mechanism under the JAEPA and must begin their negotiations within three months following the date on which the other agreement enters into force.[67] Since Australia's FTA with China provides for ISA, the provision in the JAEPA will be triggered as soon as the FTA with China enters into force.[68] Thus, Australia will be obligated to negotiate a similar agreement with Japan.

To further demonstrate Australia's uncertainty over ISA, it is unclear how Australia considers the legal system of its trade partners in relation to ISA. For example, in the official press release, Australia noted that "[ISA] will enable Australians to invest in China with greater confidence".[69] Presumably this is so on the account of China's developing legal system. However, Korea has a sophistically legal system with strong legal capacity. Yet, ISA was provided for in both agreements, suggesting that Australia is relying on ISA essentially as a bargaining chip to negotiate for other favourable terms.

Having demonstrated Australia's evolving position on ISA, this paper examines its recently concluded agreements. The analysis of these agreements reveals a number of similarities, reflecting Australia's visions of ISA.

Summarizing the investment chapter of the soon-to-be released China-Australia FTA, the Australian Department of Foreign Affairs and Trade noted that the "the ICSID provisions contain strong safeguards to protect the Australian Government's ability to regulate in the public interest and pursue legitimate welfare objectives in areas such as health, safety and the environment".[70] This emphasis on rebalancing investor and state rights is also evident in Australia's with FTA with Malaysia, Korea and Japan. These agreements create a number of innovations in order to minimize these risks and exercise a certain degree of control over the vital sectors of the economy.

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[64] The official website of *The China-Australia Free Trade Agreement* (Hereinafter, ChAFTA) is http://www.dfat.gov.au/trade/agreements/chafta/Pages/australia-china-fta.aspx; The official website of *The Korea-Australia Free Trade Agreement* (Hereinafter, KAFTA) is http://www.dfat.gov.au/trade/agreements/kafta/Pages/korea-australia-fta.aspx.; The official website of The Japan-Australia Economic Partnership Agreement (hereinafter, JAEPA) is http://www.dfat.gov.au/trade/agreements/jaepa/Pages/japan-australia-economic-partnership-agreement.aspx; The official text of ChAFTA has not been released at the time of writing.

[65] KAFTA Article 11.16 para. 1 (a), (b), (c) and (d); JAEPA Article 14.6 paras. 1 and 2. The ChAFTA legal text has not been made public at the time of writing. However official press releases have confirmed that the agreement will provide for ISA. See, http://trademinister.gov.au/releases/Pages/2014/ar_mr_141117.aspx.

[66] This view is advocated by Luke Nottage. See, L. Nottage, "Why No Invest-State Arbitration in the FTA With Japan", (April 9, 2014) East Asian Forum, available at: http://www.eastasiaforum.org/2014/04/09/why-no-investor-state-arbitration-in-the-australia-japan-fta/.

[67] JAEPA Article 14.19 para. 2.

[68] Above note 67.

[69] Above note 65.

[70] Above note 65.

First, investment chapters in the agreements with Korea, Japan and Malaysia contain MFN clauses, however they explicitly provide that these clauses do not apply to dispute resolution.[71] The rationale for including this clarification is two-fold. First, specific to the FTA with Malaysia, the exclusion will block investors from both sides from arguing that ISA provisions should apply to them because other investment agreements signed by Australia and Malaysia provide for investor-state arbitration. Second, the exclusion of dispute resolution from MFN will allow Australia to qualify ISA without challenges from investors who will cite beneficial agreements and side step Australia's attempts to balance ISA provisions.[72] As such, these provisions indicate an important treaty modification on the part of Australia in order to effectively balance ISA protections.

Second, all three agreements provide extensive provisions on the minimal standard of treatment. These agreements state that the parties must provide that this standard is in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. However, all three agreements clarify this standard by providing definitions of the abovementioned terms. The agreements further note that such treatment shall not require treatment in addition to or beyond that which is required by that standard, and shall not create additional substantive rights.[73]

Third, in all three agreements, the state parties provide a list of non-conforming measures that may be maintained in perpetuity, provided they are outlined in the annexes. Specific sectors of the economy and a number of state owned entities are included in these exceptions.[74] In general, they may be maintained in perpetuity. Other exceptions may be adopted by the parties. In the case of JAEPA, it is explicitly noted that a party may even impose new and more restrictive exceptions.[75] However, nothing forbids the parties from adopting such restrictions in the other agreements.

The agreement with Korea creates an innovative provision further strengthening the exceptions outlined in the annexes. According to that agreement, if a party's defence is based on the annexes, the arbitral panel must suspend its proceedings and refer both parties to the Joint Committee in charge of the FTA for the final determination on the deference.[76] The decision of the Joint Committee would be final and binding on the arbitral panel.[77] This provision is probably included to ensure that the judicial activism of the panels would not force state parties to renegotiate their carve-outs.

In addition to these Annex-specific measures, parties all agreements may adopt or enforce measures for the protection of public morals and public order, necessary to protect human, animal or plant life, health or for the purpose of conservation of living or non-living exhaustible natural resources. Additional exceptions are possible in cases where a party must secure compliance with laws or regulations or for protection of national treasures of artistic, historic or archaeological value.

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[71] KAFTA Article 11.4 para. 2, footnote 35; JAEPA Article 14.4; MAFTA Article 12.5 footnote 20.
[72] See e.g., *Maffezini v. Spain* where an investor cited MFN provision in another treaty in order to avoid the mandatory period for consultations and negotiations before gaining a right to initiate arbitral proceedings. The panel agreed with the investor because the MFN in the BIT did not exclude arbitral proceedings.
[73] KAFTA Article 11.5 para. 2; JAEPA Article 14.5 note 1; MAFTA Article 12.7 para. 2 (c).
[74] JAEPA Article 14.10 para. 1 (a) (b) (c) and (d), Annex 6 (Non-Conforming Measures Relating to Paragraph 1 of Articles 9.7 and 14.10) and Annex 7 (Non-Conforming Measures Relating to Paragraph 2 of Articles 9.7 and 14.10).
[75] JAEPA Article 14.10 para. 4.
[76] KAFTA Article 11.23 para. 1.
[77] KAFTA Article 11.23 para. 2.

These GATT Article XX inspired measures are frequently found in investment agreements. Improving upon this well-established drafting practice, JAEPA clarifies when these measures are applicable and what they may include.[78] The implementation of these measures is likely to be costly. The parties must ensure that such measures are not applied in a manner which would produce arbitrary or unjustifiable discrimination between covered investments or investors of the other Party and other investments or investors, where like conditions prevail, or constitute a disguised restriction on investment.

With regards to the regulation of ISA, at the time of writing only Australia's FTA with Korea contains provisions regulating investor-state arbitration. As was indicated above, the FTA with China has not been made public, pending its ratification. Although only one agreement is available for analysis, the ISA provisions under the KAFTA serve as an excellent example of Australia's current approach to regulating ISA.

According to the latest UNCTAD study of investor-state arbitration, states have two options in drafting ISA clauses. They may employ a minimalist approach and participate in proceedings according to the rules of the forum selected by the disputing party. Alternatively, states may be more expansionist and provide detailed guidelines regulating the proceedings.[79]

Without a doubt, the FTA with Korea falls in the latter category. In general, the agreement employs a number of treaty innovations which seek to directly address common concerns voiced towards ISA. Some of these provisions are discussed below.

First, the agreement attempts to pre-empt the dispute before it reaches the stage of arbitration and to exclude frivolous claims. Parties are bound by a cooling off period of six months and investors are required to provide a state party with a written notice containing its intention to submit a claim to an arbitral tribunal.[80] This notice must be submitted 90 days before an arbitral filing.

Second, there is a significant effort on the part of the treaty makers to ensure that the proceedings are transparent. According to the agreement, all hearings are open to the public.[81] Furthermore, parties are obligated to release all relevant documents (the notice of intent, the notice of arbitration, pleadings, memorials and briefs submitted, minutes or transcripts of hearings of the tribunal, orders, awards and its decisions) to the general public.[82] This transparency rule is subject to the standard protections accorded to confidential information.[83]

With regard to *amicus curiae* briefs, the agreement is less explicit. According to the Article 11.20 para. 5 "after consulting the disputing parties, the tribunal may allow a party or entity that is not a disputing party to file a written amicus curiae submission with the tribunal". It not entirely clear if a tribunal may allow *amicus curiae* submissions on its own volition without a consent of the disputing parties due to the confusion surrounding "after consulting the" phrase.

The FTA with Korea includes another notable textual innovation that deserved a closer analysis. According to Article 11.20 para. 13

> [if] a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for the purposes of reviewing

[78] JAEPA 14.15 (a) (b) (c) and (d).
[79] UNCTAD, *Investor-State Dispute Settlement, UNCTAD Series on International Investment Agreements II* (Switzerland 2014) p. 170.
[80] KAFTA Article 11.16 para. 2.
[81] KAFTA Article 11.21 para. 2.
[82] KAFTA Article 11.21 para. 1 (a) (b) (c) (d) (e).
[83] KAFTA Article 11.21 para. 4 (a) (b) (c) (d).

> awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 11.26 in arbitrations commenced after the multilateral agreement enters into force between the Parties.[84]

According to this agreement, both sides are obligated to enter into good faith negotiations and attempt to establish an appellate mechanism. A strict interpretation of Article 11.20 suggests that the parties are not obligated to actually successfully create such mechanism. Regardless, the unique nature of this provision and its ambitious goals reflect the desire of the parties to contemplate such an appellate mechanism.

In summary, the analysis of Australia's recent investment agreements indicates its readiness to provide ISA. Having negotiated ISA in its agreements with China and Korea, Australia will have to provide a similar mechanism for the resolution of investment disputes between states and privates parties in its agreement with Japan.

Rather than rejecting ISA, Australia is increasingly qualifying the way ISA is applied. Reflecting its concerns with public policy litigation, Australia is attempting to balance its treaties to allow a moderate degree of state control over ISA on economic grounds by curtailing investor rights in certain sectors of the economy. Further attempting to improve ISA, Australian and Korea treaty drafters have taken an expansionist approach and added extensive provisions clarifying the conduct of arbitral proceedings. In all probability similar ISA provisions will be present in the FTA with China and with Japan.

2. India and Indonesia

The behaviour of India and Indonesia has been similarly inconsistent with regards to ISA. First, neither country has articulated its approach to regulating investor-state arbitration. Second, both states have maintained the status quo with regard to their existing investment treaties. Although Indonesia has allowed its BIT with the Netherlands to lapse, it has not terminated its other agreements. India has not terminated any of its agreements at the time of writing.

Second, although Indonesia has not concluded any investment agreements at the time of writing, India has recently signed investment facilitation agreement with ASEAN.[85] Broadly, the agreement does not create any significant innovations with regards to transparency or the conduct of arbitral proceedings and leaves the specifics to the relevant ISA tribunal. Thus, the treaty is largely minimalist in its regulation of arbitral proceedings. This treaty drafting approach differs significantly from Australia's FTA with Korea. The agreement is analysed below.

One major feature of the agreement lies in its endeavour to pre-empt arbitral proceedings and resolve all disputes at the early state. Specifically the agreement requires both parties to engage in negotiations. In fact, the parties are unable to proceed to arbitration without first submitting a notice requesting consultations.[86] This is somewhat different from Australia's FTA with Korea,

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[84] KAFTA Article 11.20 para. 13.

[85] Agreement for Trade in Services and Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India (India-ASEAN Agreement).Full text of the agreement on file with the author.

[86] India-ASEAN Agreement Article 20 para. 7.

which only suggests consultations during the cooling-off period, but does not oblige the contracting parties to engage in any particular ADR method.

Having exhausted the cooling-off period of 180 days, parties under the India-ASEAN Agreement have the option of proceeding to arbitration. A party intending to initiate arbitration must provide a written notice 90 days before the filing for arbitration.[87] The agreement provides the standard fork-in-road provision and excludes all other forums once a particular forum has been selected.[88] Finally, a substantive portion of the agreement is devoted to disposing of frivolous claims.[89] All other substantive issues in relation to the conduct of proceedings are left to the respective forum.

With regard to transparency, the Agreement is particularly conservative. According to the treaty, "the disputing party may make public the final awards and decisions of the tribunal".[90] A strict interpretation of this provision suggests that parties do not have an obligation to disclose these documents. Finally, nothing is stated with regard to *amicus curiae* submissions or the role of experts in arbitral proceedings.

In order to retain regulatory control over the economy, the agreement between India and ASEAN includes a list of reservations submitted by all sides. Once again these reservations may exist in perpetuity with the possibility of adding new exceptions to the annexes. Furthermore, the agreement contains the standard provision on general exceptions in nearly identical language as the found in the Australia-Korea FTA.[91] One notable addition to the list of exceptions is a provision on "safety".[92] No explanation or definitions are provided regarding this provision.

The agreement further clarifies that fair and equitable treatment does not include any additional obligations.[93] The approach to regulating this provision is identical to the drafting language utilized by Australia.

Curiously, the agreement does not contain MFN provisions in relation to ISA in a manner that was articulated in Australia's latest investment facilitation agreements. Rather than taking firm position on the issue, the agreement notes that "a party shall not be obliged to extend to the investors of another Party the benefits or privileges arising from customs union, free trade agreement or a similar bilateral, regional or international arrangement of which party is or may become a member."[94]

Aware of the judicial activism that is sometimes exercised by arbitral tribunals, the agreement creates a modest safeguard against expansive treaty interpretation. Specifically, according to Article 19, the arbitral tribunal or the responding party may request a joint interpretation of a provision that is the subject of a claim. The result of that interpretation is binding on the arbitral tribunal.[95] Somewhat similar to the clause found in the Australia-Korea FTA, this provision may be used by the responding state to promote a diplomatic resolution of the dispute in a manner that would be acceptable to the signatories. Finally, Annex 2 of the agreement provides that if an alleged measure falls under a category of security exceptions, the issue will have no standing at the arbitral tribunal.[96]

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[87] India-ASEAN Agreement Article 20 para. 8 (b).
[88] India-ASEAN Agreement Article 20 para. 7.
[89] India-ASEAN Agreement Article 20 paras. 12, 13, 14 and 15.
[90] India-ASEAN Agreement Article 20 para. 17.
[91] See e.g., India-ASEAN Agreement Article 4 paras. 1-6, India-ASEAN Agreement Article 21.
[92] India-ASEAN Agreement Article 21 para. 1 (c) (iii).
[93] India-ASEAN Agreement Article 3.
[94] India-ASEAN Agreement Article 3 para. 3.
[95] India-ASEAN Agreement Article 20 para. 19.
[96] India-ASEAN Agreement Annex 2.

In summary, the agreement between India and ASEAN could be classified as relatively modest in terms of its drafting language. Rather than enhancing the ISA regime, it appears that the parties have been more concerned with creating a list of exceptions and carve-outs, leaving the conduct of arbitration to the relevant arbitral rules. As an added layer of security, the parties are able to engage in interpretative exercise during arbitration. However, this process is not automatic. In other aspects, the agreement is representative of the existing ISA granting treaties.

The abovementioned analysis suggests that India and, to greater extent, the ASEAN have maintained status quo and have not significantly altered their ISA regulatory regimes. This is particularly evident in India's treaty making behaviour. India has neither refused ISA nor has requested foreign investors to rely on domestic remedies before arbitration. Further supporting its uncertain view of ISA, India has recently concluded a bilateral investment treaty with the United Arab Emirates. Although that agreement has not been released to the public, official media outlets suggest that it is largely an old generation agreement that provides for ISA without significant textual innovations.[97]

It should be noted that India is currently negotiating a major free trade agreement with Australia. This creates interesting negotiating dynamic between the two countries. Will Australia insist on including an investment chapter in this particular agreement? One of the goals articulated by Australia is "an FTA could facilitate and encourage investment by reducing barriers, increasing transparency and enhancing investment protections".[98] India is frequently subjected to ISA claims, most of which are related to taxation measures. Furthermore, India's legal system is notoriously underfunded and is still transitional. In this particular case, Australia may find itself in a paradoxical position. On the one hand, it negotiates ISA selectively and should sympathize with a state pursuing similar regulatory policies. On the other hand, business interests in Australia will likely lobby the Government for significant protections, especially considering their scepticism over the effectiveness of India's domestic courts in resolving claims.

3. South Africa

At the time of writing South Africa is the only state has consistently resisted ISA. It has terminated four of its BITs. It has not signed any new investment facilitation agreements.

B. States that Repudiated ISCID

States in this category have been much consistent in their treaty making behaviour. Since repudiating ISA, they have undertaken to terminate their existing BITS. Equator and Bolivia have been most active in this regard. These two states have terminated most of their investment facilitation agreements. Comparatively, despite its passionate rhetoric, Venezuela has only terminated one of its BITS at the time of writing. Neither state has concluded any subsequent investment facilitation agreements. This inaction could be explained by the ongoing financial instability in these countries. The economic woes have become more pronounced with the fall in

[97] K. Singh, "India-UAE Agreement, Why Such Desperate Haste" (January 6, 2014) Global Research, available at: http://www.globalresearch.ca/india-uae-investment-agreement-why-such-desperate-haste/5363937; K. Singh, "What Can India Learn from its Investment Treaty with the UAE?" (December 4, 2014) East Asian Forum, available at: http://www.eastasiaforum.org/2014/12/04/what-can-india-learn-from-its-investment-treaty-with-the-uae/

[98] Status of the negotiations is available at: http://dfat.gov.au/trade/agreements/aifta/Pages/australia-india-comprehensive-economic-cooperation-agreement.aspx.

the oil prices in the last quarter of 2014. Regardless, the inactivity of these states is disappointing. It is worth considering what types of investment facilitation agreements these states will draft in the future. Unfortunately, at the time of writing such agreements are not available.

V. WHY ISA HAS RETAINED ITS RESILIENCE

The foregoing analysis demonstrates that a number of states that were previously committed to abandoning ISA have reversed their policy directions. At the time of writing, only Bolivia, Equator, South Africa and Venezuela remain committed to repudiating ISA. Therefore, one may ask, why has ISA retained its resilience?

First, it is important to note that all of the countries summarized in Table 1 have been subject to politically charged ISA claims. Thus, politics and economics have been inherently related to the sudden disaffection of ISA. Political considerations preclude states from being inactive when they face multibillion dollar claims over what is popularly perceived to be "good policy initiatives". By repudiating ISA, these states send a signal to their domestic constituents and the international community expressing their displeasure with the state of affairs. This in turn may tame foreign investors who will attempt to resolve disputes with the host states through consultations, thus avoiding public scrutiny.

The downside to this strategy lies in the fact that it is inconsistent with the broader interests of states to attract FDI on the account of its reactionary nature. This explains why the subsequent Abbott Administration has reserved its policy direction on ISA. Priding itself for being focused on prosperity, the government did not face the political pressures of the previous administration. Thus, it had far less to lose in reverting back to the status quo and endorsing ISA, albeit on a case by case basis. India and Indonesia face similar dilemmas. India remains subject to a very large number of ICSID claims. While the previous administration there had attempted to respond to this by publicly repudiating ISA, the recent Modi Government has not articulated any specific policy direction. Nevertheless, one reason why ISA remains resilient is due to the fact that the disaffection with investor-state arbitration is often politically motivated.

Second, critics of ISA often equate it with the ICSID and misunderstand the manner in which ISA operates in different agreements. The doubtful argument is that repudiating ICSID will shield states from claims by investors. However, the ICSID is only one forum for the resolution of investor-state disputes. Although a party repudiating the ICSID Convention will not be subjected to its obligations, investors are frequently provided with multiple fora for filings claims against host states. The ICSID is somewhat unique in that it provides very limited avenues for appeals, usually only on procedural grounds. Other arbitral fora are subject to the New York Convention, which allows domestic courts to set aside an award on various grounds. A state that has relatively high control over its local judiciary will feel confident in its ability to nullify a foreign judgement. However, independent judiciaries may enforce a foreign judgement based on its merits.

This fact explains why states that repudiated ICSID began terminating their investment treaties. This was the only way in which those states could ensure that no arbitral proceedings would be initiated against them in different fora. Once again this strategy has limited benefits. As is discussed in other articles, most BITs now include survival clauses, meaning that the treaty will remain in force for a number of years following its termination. Although short-term political considerations may encourage states to terminate their treaties as a show of action, such a policy is likely to have minimal impact in practice due to such survival clauses. Thus, one reason why ISA remains popular is due to a very extensive infrastructure that was created by states with

extensive pre-existing agreements that provided ford ISA. With the limited number of states repudiating the system, it is unlikely that there will be any significant shift in the treaty practice.

Related to the abovementioned argument, ISA remains highly popular. Although Sornarajah views ISA as inherently biased against developing states, his view overlooks imbalances in power among states. First, developing states come in all sizes and are often able to bargain with developed states for favourable treaty provisions. This is particularly true in the case of China. Unofficial reports of negotiators suggest that China was insistent in including ISA in its agreement with Australia. A similar position was taken by Korea. Both of these countries are resource reliant and employ various powerful state owned entities, or SOEs and conglomerates in their search for investment opportunities abroad. These entities are viewed with suspicion by host states, which explains why China and Korea wish to arbitrate in a neutral third party forum and further shows why states falter in formulating investment facilitation agreements that exclude ISA.

Notably, even small economies may formulate a powerful negotiating platform. For example, although ASEAN economies are small, when united together they represent a powerful regional force. Increasingly, the organisation negotiates as a regional block and such strategy may allow it to conclude more balanced agreements.

Finally, ISA has retained its popularity because there is still no conclusive evidence that its deficiencies cannot be addressed through treaty modification. Rather than excluding ISA, states are now increasingly relying on treaty modification to create space for public policy. This trend is evident in Australia's recent trade agreements, particularly its FTA with Korea. India has similarly undertaken this approach, though to a lesser extent. Remarkably, the behaviour of Australia and India replicate global trends, with a number of states qualifying access to ISA in their latest agreements to ensure greater transparency and fairness. This ability to tweak the existing ISA governance eliminates the need to undertake radical reforms.

VI. CONCLUSION

This paper set out to explore the current state of play in international investment law by analysing the behaviour of states that rejected ISA. As this paper demonstrates, the movement against ISA has subsided. Rather than repudiating the existing system, states are relying on various treaty revisions to balance their investment facilitation agreements. Thus, there is very limited movement against abolishing ISA as a whole.

Analysis of the recently concluded treaties acknowledges Sornarajah's views concerning the involvement of states in arbitral proceedings. Indeed, it appears that states are more willing to engage in the arbitral process. However, state intervention in arbitral proceedings is highly limited. First, the ability of state parties to "hijack" the arbitral proceedings will transform an arbitral process into essentially an interstate dispute resolution forum. This is likely to result in a number of legal issues. Beyond these issues, states may find themselves in difficult negotiating positions. After all, states have devised ISA in order to disengage from investment disputes and focus on high-politics. If the trend persists, states will find themselves increasingly involved in disputes surrounding investors and host states. Power politics may once again come into play. Furthermore, spats over investment may strain political alliances and long term relations. Thus, it is likely that these "hijack provisions" will be used very rarely by nation states.

Furthermore, states conceptualize their role in arbitral proceedings differently. For example, Australia appears to be particularly concerned with transparency and is attempting to introduce greater openness in the arbitral process. Comparatively, India and ASEAN are mostly concerned

with preserving the list of security exceptions and do not prioritize the actual arbitral process as part of their ISA reforms.

In summary, rather than witnessing a decline of ISA, investors are likely to be subjected to treaties that list a number of high priority areas that may be subjected to intervention of host states. However, due to the problematic nature of these provisions, the role of states in ISA proceedings is likely to be limited. For these reasons, it is likely that the future ISA regime will likely see gradual evolution towards more transparent arbitral regime. There is broad consensus that arbitral proceedings could, and should, be more open to the general public. Such changes are easier to institute than a formal court of appeals or an international investment treaty. Whatever the future ISA regime may evolve into, it will not appear to be too different from the present regulatory order.