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Umair Ghori
Bond University

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Keywords
disputes, foreign investors, host governments

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UMAIR GHORI*

Abstract

Investor-state dispute settlement (ISDS) has given rise to systemic issues of power and control that entails a possible new direction to be taken in its future development. This article explores three alternative solutions to the problems of ISDS. The first solution is to follow the EU proposal in the establishment of the Investment Court System (ICS) as a standing body, to settle disputes between foreign investors and host governments. The second possible solution is to consider the work done by the United Nations Commission on International Trade Law (UNCITRAL) in reforming the ISDS system through adoption of the Mauritius Convention approach. The third possible solution is to establish a regional bloc-based approach proposed by the Union of South American Nations (UNASUR) countries. This article argues that, as things stand today, the EU proposal is the most likely future direction for ISDS. This is because, in delineating the rights for investors and host states, the establishment of the ICS reflects the primary role that ISDS was designed to play. It is argued that the certainty and efficiency within the EU approach, when compared to the complexity inherent in the regional bloc-based approach and in the still nascent UNCITRAL's Mauritius Convention approach, makes for a better framework upon which future developments in ISDS can be based.

I Introduction

The investor–state dispute settlement ('ISDS') [1] system is often blamed for undercutting the economic interests of developing countries and may

* Assistant Professor, Faculty of Law, Bond University, Australia.

1 ISDS is a system enabling foreign investors to sue governments of the host countries for discriminatory regulatory practices that may affect the nature of foreign investment. The ISDS finds its basis in dispute settlement provisions that are incorporated in various Bilateral Investment Treaties ('BIT's) or Free Trade Agreements ('FTA's). Where a foreign investor invests in another country (also referred to as the 'host state') pursuant to a BIT/FTA with an agreed ISDS mechanism and the host state violates the agreed rights of the foreign investor under the treaty (typically exemplified by norms such as Most Favoured Nation ('MFN') and National Treatment ('NT') standards), the foreign investor may bring initiate an action against the host state in an arbitral tribunal. ISDS proceedings are often conducted under the rules of World Bank's International Centre for Settlement of Investment Disputes ('ICSID') but it can also be conducted under the auspices of international arbitral tribunals governed by different

potentially degenerate into an instrument of power, influence and control in the hands of capital exporting developed countries by suppressing the ability of governments of host states to pass laws on issues of public importance (for example, health, environmental protection and human rights).[2] ISDS is, however, the only currently available mechanism for impartially resolving investment disputes. The ISDS has been utilised as an instrument of consolidation of economic power by major capital-exporting countries. It has also been used as a mechanism to 'cure' the perceived deficiencies in the rule of law within the capital-importing countries. ISDS was originally intended to provide certainty in the area of foreign investment regulation by delineating the respective rights of investors and host states. Inadvertently, however, the ISDS system seems to have led to unintended consequences and many developing countries have issued statements expressing their displeasure with how the system operates. Following the global financial crisis ('GFC') and the post-GFC period, the institutionalised dispute settlement system operated by the International Centre for the Settlement of Investment Disputes ('ICSID') faced serious criticism and, in some instances, outright denunciation of the *ICSID Convention*.[3] For example, the largest economy in Latin America, Brazil, has refused to ratify the *ICSID Convention*; resource-rich developing economies in Latin America such as Bolivia, Ecuador and Venezuela withdrew from the *ICSID Convention*; and Argentina threatened to withdraw (but has not withdrawn) from the *ICSID Convention*.

Dissatisfaction with the ISDS is not just limited to developing countries. Recent high-profile disputes such as the Phillip Morris arbitration against Australian plain-packaging measures on tobacco products led the Australian government to issue statements expressing their reluctance in including ISDS provisions in future Bilateral Investment Treaties ('BITs') and Free Trade Agreements ('FTAs').[4]

BITs have played an important role in consolidating the principles of customary international law in the realm of foreign investment laws. BITs

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arbitral institutions (eg London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), the Hong Kong International Arbitration Centre (HKIAC) or the UNCITRAL Arbitration Rules).

2 See generally Louise Wells, 'Backlash to Investment Arbitration: Three Causes' in Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, Claire Balchin (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010) 341–52. See also 'Investor-state dispute settlement: The arbitration game' *The Economist* (London), 11 October 2014; Jeffrey Sachs, 'Why the TPP Is Too Flawed for a 'Yes' Vote in Congress' (11 November 2015) *Boston Globe* (online), 11 November 2015 <https://www.bostonglobe.com/opinion/2015/11/08/jeffrey-sachs-tpp-too-flawed-forsimple-yes-vote/sZd0nlnCr18RurX1n549GI/story.html>.

3 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature March 18 1965, 4 ILM 524 (entered in to force 14 October 1966).

4 Edwina Kwan, 'Australia's Conflicting Approach to ISDS: Where to From Here?', on Kluwer Law International, *Kluwer Arbitration Blog*, 4 June 2015 <http://arbitrationblog.kluwerarbitration.com/2015/06/04/australias-conflicting-approach-to-isds-where-to-from-here/. See also Albert Monichino and Alex Fawke, 'Australia and the Backlash Against Investment Arbitration' (2013) 19 *The ADR Reporter* 28>.

often contain comprehensive rules designed to protect the interests of the foreign investors. The host-state policymakers aim to use the 'comforting' effect of the protection in order to lure additional foreign investment. However, a developmental dichotomy is clearly noticeable in how BITs are structured within developed-to-developed and developed-to-developing economies. In the former scenario, BITs are structured differently than in the latter scenario, ostensibly endorsing the faith that developed countries repose in each other's legal systems. It is in this context that we note that the objections have arisen against the current ISDS model.

In addition to BITs, comprehensive FTAs and new economic partnership agreements — such as the *Australia–India Comprehensive Economic Cooperation Agreement* ('CECA') and the *Regional Comprehensive Economic Partnership* ('RECP') — contain ever-expanding sets of rules on foreign investment. BITs and FTAs often contain dispute resolution clauses that mandate arbitration as the preferred method of ISDS. Investment arbitration as a dispute-resolution method, in turn, depends on how BITs and FTAs extend 'fair and equitable' treatment given to foreign investors. The interpretation of what is 'fair' and 'equitable' affects the regulatory capacity of government bodies, which carries myriad economic and social consequences in developing economies. Furthermore, the question of interpreting 'fair and equitable' is not static but is rather dynamic. This dynamism springs from the fact that arbitration tribunals handling investment disputes have pushed the boundaries of interpretation into new territory, where no single interpretation of what is 'fair' and 'equitable' can easily be gleaned. This is evidenced by a high rate of disputes referred to ICSID where the foreign investors have either alleged some form of expropriation (direct or indirect) or breach of the fair and equitable standard of treatment.

These disputes and arbitral awards have led to disquiet in some developing countries, in which policymakers have come to realise that the initial rationale behind BITs and FTAs no longer exists, due mainly to the downward pressure created by arbitration tribunals on domestic regulatory powers. Originally, the developing countries viewed BITs and FTAs as a conduit for much needed foreign investment and technology transfers. Indeed, in many developing countries, concluding FTAs with developed countries is still considered a major foreign policy triumph worthy of re-election of politicians. Over the years, however, the overall perception of FTAs in these countries has shifted to a less positive one.

One of the major negative consequences of FTAs is that developing countries have to effectively surrender the interpretation and implementation of their public policies to arbitration panels. However, in the case of developed countries — particularly those in the European Union ('EU') — there is a clear effort to preserve exclusive domain over the interpretation of domestic law (on which more in Part V). One of the main arguments cited in favour of arbitration as a means of settling foreign

investment disputes involving developing countries is that it fills the deficiencies in the law of the capital-importing economies or the host countries.[5] Van Harten writes that such deficiencies can be observed in how law is applied in an impartial adjudication process.[6] The effect of the arbitral process is to replace any perceived deficiencies and unreliability in the court processes of developing countries.[7] Surya Subedi describes this as 'outsourcing' the settlement of investment disputes from domestic courts to investment tribunals.[8] Another noticeable consequence flowing from the increase in BITs and FTAs is the exponential increase in arbitral awards favouring the arguments of the foreign investors versus the host governments. In so doing, arbitral panels often utilise creative interpretation of rules of foreign investment in justifying their awards in favour of the claimants (usually the foreign investors).[9] The concern here is that the arbitration panels have become the arbiter of public policy imperatives such as health, environment and economic planning instead of the government of the host countries, and that the fair and equitable treatment standard essentially favours the foreign investors.

Following major arbitral decisions that resulted in high profile public and academic scrutiny, two trends are clearly observable. The first is the outright expression of no confidence in the system, exemplified by the withdrawal of certain countries from the *ICSID Convention* itself (Bolivia and Venezuela are prime examples) and by India's reluctance to include such dispute settlement clauses in its negotiations with the EU. The second, more nuanced approach is to draft BITs and FTAs in order to reserve space for public regulatory measures so that adoption by the government of such measures does not constitute indirect expropriation. Examples of the second approach include the proposed EU and Australia FTA, the recently concluded *Korea–Australia FTA*, the *China–Australia FTA* and the *Canada–Peru BIT*. However, even with a re-defining effort, there is no workable solution on the horizon that can displace the current, much criticised arbitration model in ISDS.

With this context in mind, the EU recently proposed establishment of the ICS, which aims to establish a standing body that will settle disputes between foreign investors and host governments. This article considers some of the features of the EU proposal and explores the option of a regional approach as the solution to ISDS problems. For the purposes of this article, the term 'regional' in reference to alternative ISDS approaches is used in a 'bloc' sense, rather than a trans-regional sense. The regional

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5 See, eg, discussions in Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2001) 74 *South California Law Review* 1307, 1318-1330; Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2 *Trade Law and Development* 19, 31-32; Thomas Schultz and Cedric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study' (2014) 25 (4) *The European Journal of International Law* 1147, 1160-1163.

6 Van Harten, ibid.

7 Schultz and Dupont, above n 5, 1160–63; ibid.

8 Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (2nd ed, Hart Publishing, 2012) 2.

9 Ibid.

approach is of some importance, given the recent undercurrents of economic nationalism in the EU, the after effects of Brexit and the election of Donald Trump as the US President (who withdrew the US from TPP and has also embarked upon a review of various FTAs involving the US such as *US – Korea FTA* and NAFTA). It is important to note that ambitious agreements like the Transatlantic Trade and Investment Partnership (TTIP) is not any less regional if an expansive meaning is adopted, however, for the purposes of this article, the Union of South American Nations ('UNASUR') is understood to be an example of a regional integration initiative, along the same lines as the Association of Southeast Asian Nations ('ASEAN').

The article proceeds as follows. Part II explores the background and salient features of the EU proposal. Part III examines some of the critique the EU proposal has encountered so far. Part IV of the article looks at the recent consideration of the question of transparency in ISDS process through the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* ('*Mauritius Convention*') and the work of United Nations Commission on International Trade Law (UNCITRAL) Working Group 3 on the establishment of a multilateral investment court to decide investment disputes. Part V explores the prospect of regionalism as a way forward and queries whether it is the 'right' solution to replace the traditional ISDS or counter the introduction of the ICS. Part V specifically considers the proposed UNASUR regional dispute settlement system under review by the Latin American countries as a possible regional dispute settlement system. At this stage, both the ICS and the UNASUR systems have not been fully implemented but are in their advanced stages. The importance of the competing models is that, if proven successful, they will likely be a template for future replication and proliferation in other regions or jurisdictions. Resultantly, the new generation of BITs and FTAs will likely incorporate these revised standards. Having examined the features of the EU ICS proposal, UNCITRAL's push towards a multilateral approach to ISDS and the UNASUR regional dispute settlement, the author concludes (in Part VI) that the ICS (despite its criticisms) will have the upper hand, since regional and multilateral solutions are too complex to conclude and execute in the short term. The primary reason for this is complication stemming from overlapping membership of FTAs or BITs. Therefore, even when the ICS system is damned by some critics as 'old medicine in a new bottle', the relative simplicity of execution on a bilateral plane makes the EU proposal the likely future direction of ISDS.

II Features of the Proposed ICS in the Light of Recent Treaties: the EU Proposal

The proposal for establishment of the ICS cannot be properly understood in isolation. The EU has been attempting to introduce a multilateral approach to investment dispute resolution for some time now. One example

of this is the ill-fated negotiations in 1995 to conclude Multilateral Agreement on Investment (MAI) by the Organisation for Economic Cooperation and Development (OECD)). The EU proposal has been incorporated into the Transatlantic Trade and Investment Partnership (TTIP) negotiations in November 2015 and has already found its way into FTAs such as the *EU–Vietnam FTA*[10] and *EU–Canada Comprehensive Economic and Trade Agreement* (CETA)[11]. Furthermore, the ICS system is featured in ongoing trade and investment negotiations with various countries such as China, Myanmar, Tunisia, Morocco, Japan, Australia, New Zealand and Chile.[12] However, the task is easier said than done. Even the EU realises the enormity of the changeover to the new system which is still in an experimental stage. Official European Commission documents acknowledge that the existing patchwork of investment agreements, the ad hoc nature of the ISDS tribunals and the lack of mechanisms for correcting legal and factual errors have led to inconsistent decision making in the arbitration awards even while the awards were rendered under the same investment agreements.[13]

The process of incorporating the ICS system in new FTAs or BITs and the proposed TTIP texts can be looked upon as a new rollout process. The effect of this rollout process is that eventually such a system may become the new alternative, if not the new norm, for replacing the ICSID-based ISDS system. This is further verified by the statement of the European Commission on 12 November 2015 to work together with other countries on setting up a 'permanent international investment court'.[14] The European Commission intends that the current ISDS mechanism found in the investment dispute resolution mechanisms in the EU agreements and EU member states agreement with third parties will eventually be replaced by the new ICS system.[15] The proposed system seeks to establish a permanent body (akin to the WTO Dispute Settlement Body) with greater transparency tempered with a defined mandate and a permanent panel of qualified judges. Additionally, the parties can avail an appeal mechanism against the decisions passed by the court.

Even before the initial introduction of the ICS proposal, academics were considering the possibility of a permanent adjudicating body. For example, Mann and von Moltke deemed the ICSID-based system unsuitable by design to address issues of public policy that are often contested before

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10 *Free Trade Agreement between the European Union and The Socialist Republic of Vietnam,* 2 December 2015 (not yet in force).

11 *Comprehensive Economic and Trade Agreement ('CETA') between Canada and the European Union and its Member States,* 21 September 2017 (provisional entry into force).

12 European Commission, *Inception Impact Assessment: Establishment of a Multilateral Investment Court for Investment Dispute Resolution* (1 August 2016) <http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf (01/08/2016)>.

13 Ibid 4.

14 Ibid 2-3.

15 Ibid 3.

ISDS panels.[16] Van Harten endorses the WTO DSB system as a template with its hybrid judicial and arbitral system,[17] while Subedi notes that the strict, timetable-bound approach of the WTO DSB process may appeal to investors and host states alike because the average time for a DSB process is two years whereas the ISDS process may take three years or more.[18] Subedi also highlights that the composite nature of the WTO DSB process, which blends diplomacy, negotiation, conciliation and arbitration, leads to a speedier resolution of trade disputes.[19] Moreover, a permanent body may carry greater legitimacy when passing decisions when compared to ad hoc tribunals constituted under ISDS system.[20] While some of the features of the WTO DSB may be quite appealing on paper, adaptation of a system originally designed for trade disputes is an entirely different matter altogether.

The EU proposal addresses one of the major drawbacks of the existing ISDS mechanism: the lack of appeal process. Accordingly, the EU proposal for *Trade in Services, Investment and E-Commerce*, suggests establishment of a 'Tribunal of First Instance' (TFI) that will hear claims under art 6 of the TTIP and an 'Appeal Tribunal' (AT) under art 10 that will hear appeals against the award issued by the TFI.[21] It is interesting to note that the EU has chosen not to dispense entirely with the existing ISDS options under ICSID, ICSID Additional Facility and/or UNCITRAL arbitration rules. This is stated in art 6 (2), which provides that the parties can submit disputes to the TFI under any one of the aforementioned rules of dispute settlement. The TFI and the AT shall be staffed by a permanent body composed of five EU nationals, five US nationals and five from other countries. These individuals will be experts in the field of international law and must be available at short notice to act as tribunal members. The members of the tribunal will also be eligible to receive stipendiary payments in consideration of the short notices to act as a member of a tribunal (art 9 (10)–(13)). Each dispute shall be heard by a three-member tribunal where there will be one member each from the US, the EU and a third country. The three-member tribunal shall be chaired by the member of a third country (art 9 (6)). The appeal proceedings, however, shall be conducted by a six-member tribunal whereby the numbers are doubled to two each from the US, the EU and third countries (art 10 (2)–(3)).

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16 See, eg, Howard Mann and Konrad von Moltke, *A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States* (International Institute for Sustainable Development, 2005) 17. See also Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) 180.

17 Van Harten, above n 16, 180.

18 Subedi, above n 8, 202.

19 Ibid.

20 Ibid.

21 See *Transatlantic Trade and Investment Partnership* (Resolution of Investment Disputes and Investment Court System) (not yet in force) ch II, s 3, art 9 ('*TTIP*') (subsequent references will be to arts in the same Chapter and Section, unless otherwise stated).

Similar to the WTO system, the dispute settlement process under the proposed system shall be preceded by a consultation stage where the parties can attempt to resolve the dispute through negotiations. Thereafter, if the dispute remains unresolved after six months, the investors (claimants) can file claim to the TFI (art 6 (1)). The EU proposal sets an ambitious target of issuance of a provisional award within 18 months of submission of the claim. The provisional award must be appealed within 90 days otherwise it will become final and binding on parties (art 28 (5)).

When compared with the *EU–Vietnam FTA* and the *EU–Canada CETA*, we find similarly-worded provisions with variations in the number of tribunal members. For example, in the *EU–Vietnam FTA* the Tribunal members adjudicating disputes will be three each from Vietnam and EU while three members will be drawn from third countries.[22] Under the *EU – Canada CETA* the numbers go up with five members each from Canada and the EU and five members drawn from third countries.[23] Another less obvious point in appointments to the tribunal, which may have far reaching consequences for developing countries in dispute settlement process (following the *EU–Vietnam* template), is that the affiliation of Tribunal members and that of the Appeals Tribunal is based on appointment and not nationality. This means that, in case of *EU–Vietnam FTA*, the members nominated by Vietnam need not be Vietnamese nationals.[24] The selection of members for the Tribunal and the Appellate Tribunal in the *EU–Vietnam FTA* and the *EU–Canada CETA* is done by special committees under the respective agreements, with the committees headed by the EU Trade Commissioner and the Ministers for Trade in Vietnam or Canada respectively.[25] The point of distinction between the two is that the Trade Committee under the *EU–Vietnam FTA* appoints members to the Tribunal and Appeals Tribunal following the recommendation of the Committee on Services, Investment and Government Procurement,[26] while the CETA Joint Committee alone performs this task and no allowance is made for a recommendation process.[27] In a bid to clean up the image of the current ISDS process as biased, the *EU–Vietnam FTA* and the *EU–Canada CETA* contains provisions that attempt to achieve some semblance of neutrality. This is reflected in the chair of the Tribunal panels being from a third country and the selection of panellists being the prerogative of the

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22 See *EU–Vietnam Free Trade Agreement*, ch II, s 3, art 12(2) ('*EU–Vietnam FTA*') (subsequent references will be to Articles in the same Chapter and Section, unless otherwise stated).

23 See *EU–Canada Comprehensive Economic and Trade Agreement*, ch 8, art 8.27(2) ('*EU–Canada CETA*') (subsequent references will be to art in the same Chapter, unless otherwise stated).

24 See *EU–Vietnam FTA* nn 25–6, cited in Hannes Lenk, *An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada* (2016) 1(2) *European Papers* 665, 668 <http://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2016_I_033_Hannes_Lenk.pdf>.

25 See *EU–Vietnam FTA* ch 17, art X(1). See also *EU–Canada CETA* ch 26, art 26(1).

26 See *EU–Vietnam FTA* art 34(2)(a).

27 See *EU–Canada CETA* art 8.44.

President of the Tribunal who is also selected from third country members.[28] The EU has also tailored the agreements with Vietnam and Canada in terms of the appellate mechanism. The *EU–Vietnam FTA* provides a clear number of appellate tribunal members: two each from Vietnam and the EU and two from third countries.[29] In contrast, the *EU–Canada CETA* provides for the random appointment of three members of the Appeals Tribunal to be decided by the CETA Joint Committee (which is comprised of the EU Trade Commissioner and the Canadian Minister for International Trade).[30]

Although disputes under the *TTIP, EU–Vietnam FTA* and the *EU–Canada CETA* have not yet been the subject of any ISDS, the fundamental objection and question remains the same: are neutral members the right people to decide questions of governance, public health, environment, domestic public policy or national interest in foreign investment regulation? Does the appointment of an adjudicating body nominated by government functionaries (typically trade ministers) remedy the inherent unfairness of government regulation being debated and adjudicated upon by an unelected body of, quite possibly, unrelated individuals? Essentially, the EU's move to establish ICS as an alternative to the arbitration-based ISDS system still demonstrates certain flaws that may undercut its effectiveness. The attempt by the EU is ostensibly to mitigate the rigours of external influence on the constitution of the adjudicating panel. Under the existing system, parties frequently forum-shop and appoint arbitrators with known 'expertise' and 'tendencies'. This is done in the hope of a favourable outcome. Pantaleo points out that the ICS system introduces an element of political influence in the ISDS system, something which the original ISDS system was designed to counter.[31] Pantaleo also opines that the composition of the ICS influences the recognition and enforcement of awards or decisions because the ICS assumes a more judicial role rather than an arbitral one.[32] This may carry significant consequences in terms of the recognition of foreign arbitral awards under the *New York Convention on the Recognition and Enforcement of Arbitral Awards* (the '*New York Convention*') because the ICS decision may fall outside its scope.[33]

An alternative view is that the ICS is not a court system but rather a system of arbitration, and that since the system is not truly 'independent' in the sense that the appointments are still made by representatives of the disputants, the fundamental safeguards that ensure an independent system

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28 See *EU–Vietnam FTA* art 12(6). See also *EU–Canada CETA* art 8.27(6).

29 See *EU–Vietnam FTA* art 13(2).

30 See *EU–Canada CETA* arts 8.28(5), (7).

31 See Luca Pantaleo, 'Lights and Shadows of the TTIP Investment Court System' in Luca Pantaleo, Wybe Douma and Tamara Takacs (eds), *Tiptoeing to TTIP: What Kind of Agreement for What Kind of Partnership?* (CLEER, 2016) 82.

32 Ibid.

33 Ibid.

are not present.[34] Therefore, according to some, the move towards a court-like mechanism for resolving investment disputes is still mired in mystery.

Introduction of the appeal process can also be interpreted as a deliberate attempt to appear more 'court like', as evidenced in the TTIP, *EU–Vietnam FTA* and the *EU–Canada CETA*. This move seeks to cure the deficiency in the traditional ISDS system of an appeal mechanism to review arbitral awards. Under the current system, there is no appeal process that enables the aggrieved party to seek appellate review of an arbitral award. That said, a safety net does exist in the form of arts 52 and 53 of the ICSID Framework, which enables annulment of arbitral awards on grounds of lack of adherence to procedure, corruption or defects in the constitution of the arbitral panel. Domestic courts can also set aside arbitral awards on largely similar grounds; however, they are generally reluctant to do so. The EU ICS proposals in the *EU–Vietnam FTA* and the *EU–Canada CETA* build upon the existing ICSID framework, which enables annulment of awards. For example, in the *EU–Vietnam FTA* the grounds of appeal include error on part of the TFI in interpreting applicable law or manifest error in the appreciation of facts, which may include relevant domestic law.[35] On the face of it, this reads as something totally unremarkable. However, an interesting point of departure appears when the *EU–Vietnam FTA* is compared to the *EU–Canada CETA* and the TTIP. The *EU–Vietnam FTA* enables the appellate tribunals to modify or even reverse the findings of TFIs.[36] In contrast, the *EU–Canada CETA* adopts a similar approach but the appellate procedure is to be determined by the Joint Committee.[37] Under the TTIP, both the TFI and the Appellate Tribunal will determine their own working procedures.[38]

The TTIP proposal also adopts a more complex approach to appeals when compared to the *EU–Vietnam FTA* and the *EU–Canada CETA*. Article 28 (6) of the TTIP refers to the TFI having to modify or reverse its finding if, on appeal, the Appellate Tribunal modifies or reverses the provisional award issued by the TFI under art 28 (within the 90-day stipulated period). Thereafter, the TFI shall issue its arbitral award. Once the TFI has issued its arbitral award, it is final and binding on parties and it cannot be challenged on appeal to the Appellate Tribunal.[39] Therefore, the role of the Appellate Tribunal under TTIP is envisaged as an oversight forum at the provisional award stage and not beyond. This greatly differs from *EU–Vietnam FTA* and the *EU–Canada CETA* where no such

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34 Friends of the Earth Europe, *Investment Court System, ISDS in Disguise: 10 Reasons Why the EU's Proposal Doesn't Fix a Flawed System*, December 2015 <http://www.foeeurope.org/sites/default/files/eu_us_trade_deal/2016/investment_court_system_isds_in_disguise_10_reasons_why_the_eus_proposal_doesnt_fixed_a_flawed_system_english_version_0.pdf> (17 February 2016). See also Natacha Cingotti, Pia Eberhardt, 'Nelly Grotefendt, Cecilia Olivet and Scott Sinclair, 'Investment Court System Put to the Test' (Report, Friends of the Earth Europe, April 2016).

35 See *EU–Vietnam FTA* arts 28(1)(a)–(b).

36 See *EU–Vietnam FTA* arts 28(3), (4).

37 See *EU–Canada CETA* art 8.28(2); see also *EU–Canada CETA* art 8.28(7)(b).

38 See *TTIP* arts 9(10), 10(10).

39 See *TTIP* art 30(1).

provisions exist. The changes introduced in TTIP also envisage a continued role for the *New York Convention* in that the final awards are termed as 'arbitral awards' pertaining to commercial relationships or commercial transactions for the purposes of enforcement.[40]

The EU proposed system specifies that the appointment of the members of the TFI and Appellate Tribunal will be from a pre-selected pool of members (so chosen on the basis of their qualifications and experience). This is a noticeable departure from the current ISDS approach of letting the disputing parties select their arbitrators. At this stage, we can only speculate the future effectiveness of the approach to limit party autonomy in selecting the arbitrators. Both the *EU–Vietnam FTA* and the *EU–Canada CETA* specify several requirements that must be met by the individuals to be appointed to the TFI and the Appellate Tribunal. For example, individuals must demonstrate expertise 'in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements'[41] and must also either satisfy the requirements for appointment to judicial office in their respective jurisdictions or be jurists of recognized competence.[42]

Further requirements are imposed upon members of the TFI and the Appellate Tribunal by limiting the capacities in which they can act. For example, members cannot act in the capacity of counsel or become a witness in any matter once appointed.[43] This effectively excludes arbitrators from adjudicating simultaneous disputes, which might in turn require the appointment of a greater number of panellists to serve on the TFI and the Appellate Tribunal at any given time, so as to ensure that these bodies can accommodate a minimum number of disputes concurrently. Otherwise, there is a risk that dispute settlement process may grind to a halt or experience inordinate delays pending availability of suitably qualified members. The requirements also raise the question of adequacy of remuneration and incentives, since professional arbitrators may still have a stronger incentive to continue under the current ISDS model if the incentives/remuneration proves to be insufficient.[44] The TTIP draft, on the other hand, adopts a much clearer position. The TTIP Commission Draft Text, Chapter II, art 9.15 allows that the retainer fee and other expenses of a judge of may be transformed permanently into a regular salary with the judges required to serve on a full time basis. Doing so will also preclude the judges from acting in any other capacity and in any other profession unless an exemption is obtained from the President of the TFI. This

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40 Louise Woods, *Fit for Purpose? The EU's Investment Court System* on Kluwer Law International, *Kluwer Arbitration Blog*, 23 March 2016 <http://kluwerarbitrationblog.com/2016/03/23/to-be-decided/>.

41 See *EU–Canada CETA* art 8.27(4).

42 See *EU–Vietnam FTA* art 12(4); see also *EU–Canada CETA* arts 8.27(4), 8.28(4).

43 See *EU–Vietnam FTA* art 14; see also *EU–Canada CETA* art 8.30.

44 Lenk, above n 24, 672.

provision is replicated in respect of judges of the AT in art 10.14 of the TTIP Commission Draft Text, Chapter II.

The TTIP and the *EU–Canada CETA* envisage a much larger role for the EU in response to actions taken by US or Canadian claimants (investors). For example, in the TTIP Commission Draft Text, the EU has included a provision whereby the US claimant must request the EU to determine whether the respondent will be an individual EU state or the EU itself.[45] Following this, the claimant must modify and address the claim accordingly and the TFI and the AT will be bound by the determination so made by the EU. Louise Woods comments that this may cause difficulties in the future where there is compensation due, but where the TFI and AT are unable to award compensation or resolve the dispute because the respondent is not responsible for the loss caused.[46] Woods further notes that if the EU determines that it is the proper respondent (and not an individual member state) then the investor may encounter enforcement difficulties because the *ICSID Convention* will not be applicable.[47]

III Critique

One thing that is clear, even from a cursory reading of academic literature on ISDS, is a general sense of dissatisfaction. Countries, interest groups and stakeholders from all sides of the developmental divide criticise various aspects of the ISDS and the ICSID model for settling investment disputes. Indeed, the inclusion of ISDS in the TTIP was criticised by EU-based academics (along with over 100 other academics from around the globe),[48] even before the US voiced its opposition.[49] The US Trade Representative ('USTR') Michael Froman commented that, because of high standards and safeguards in US agreements, there were very few cases that have been lodged against the US and hence the US has never lost in such cases.[50] Froman endorsed the US baseline adopted in the Trans Pacific Partnership (TPP) negotiations and opined that it is not 'obvious to me why you would want to give companies a second bite of the apple.'[51] This statement succinctly sums up the US position. The US appears to be reluctant to allow multinational corporations a second go at obtaining a favourable remedy through domestic courts in cases lost through the ISDS process.[52] The position expressed by the USTR, above, is affected by US

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45 *TTIP*, Commission Draft Text, Chapter II, s 3(3), art 5. The equivalent provision in the *EU–Canada CETA* is art 8.21.

46 Woods, above n 40.

47 Ibid.

48 'Public consultation on investor-state arbitration in TTIP', Submission to the European Commission consultation on investor-state arbitration in TTIP, July 2013 <https://www.kent.ac.uk/law/downloads/ttip_isds_public_consultation_final.pdf>, cited in Cingotti et al, above n 34, 6.

49 See, eg, Krista Hughes and Philip Blenkinsop, 'US Wary of EU Proposal for Investment Court in Trade Pact', *Reuters* (online), 29 October 2015 <http://www.reuters.com/article/us-trade-ttip-idUSKCN0SN2LH20151029>.

50 Ibid.

51 Ibid.

52 Ibid.

President Trump signing executive orders withdrawing from the Trans-Pacific Partnership (TPP).[53] This decision signals the inward shift in US trade policy, which will likely carry serious implications for TTIP negotiations.

The converse view is that ISDS has become an instrument of blackmail and aggressive bargaining tactics by foreign corporations to challenge government regulations.[54] Critics espousing this view cite, among other arguments, the high-profile case of Phillip Morris actions against Uruguay and Australia concerning plain packaging for tobacco products.[55] Some of the critics cited in the Transnational Institute's report on the Investment Court System use strong hyperbole in their opposition to ISDS. For example, Alfred de Zayas claims that ISDS is incapable of reform and hence must be abolished,[56] and the EU trade commissioner Cecilia Malmstrom describes ISDS as the most toxic acronym in Europe.[57] In response to such criticism, the reformed ICS system was put forward as a solution to rectify perceived shortcomings in the ISDS system. However, even the ICS system was met with scepticism with some civil society groups labelling it as an attempt by the EU to put 'lipstick on a pig'[58] and a mere 'rebranding exercise'.[59] Looking deeper into the opposition's critique reveals the source of dissatisfaction behind the resistance to the ICS as the solution to the ISDS system. Firstly, the optics behind the ICS approach are of great importance. Business interests, governments and various stakeholders must see and perceive the new approach as being different from the previous approach. This means using a clever interplay of words by substituting the condemned terms of 'arbitral panels' and 'arbitration tribunals' with 'courts'. The ICS proposal by the EU differs

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53 See, eg, William Mauldin, 'Donald Trump Withdraws U.S. From Trans-Pacific Partnership', *The Wall Street Journal* (online), 23 January 2017 <https://www.wsj.com/articles/trump-withdraws-u-s-from-trans-pacific-partnership-1485191020>; David Smith, 'Trump withdraws from Trans-Pacific Partnership amid flurry of orders', *The Guardian* (online), 24 January 2017 <https://www.theguardian.com/us-news/2017/jan/23/donald-trump-first-orders-trans-pacific-partnership-tpp>; Conor Duffy, 'Donald Trump signs executive order withdrawing US from Trans-Pacific Partnership', *ABC News* (online), 24 January 2017 <http://www.abc.net.au/news/2017-01-24/trump-withdraws-from-tpp/8206356>.

54 Leon Trakman, 'The ICSID Under Siege' (2012) 45 *Cornell International Law Journal* 603, 611–20.

55 See, eg, Cingoti et al, above n 34, 7. See also Pia Eberhardt, The Seven Sins of the EU Investment Court, *EU Observer* (online), 1 March 2016 <https://euobserver.com/opinion/132504>; Nicolette Butler, 'The EU Investment Court Proposal in TTIP: ISDS 2.0' (Policy Briefing, April 2016) 3–4 <http://documents.manchester.ac.uk/display.aspx?DocID=28671>.

56 Cingotti et al, above n 34, 7.

57 Ibid.

58 Ibid 7, citing Global Justice Now, 'Commission Tries to "Put Lipstick on a Pig" with Alternative Corporate Court System' (Media Release, 16 September 2015) <http://disq.us/9i8qc7>.

59 Cingotti et al, above n 34, 7, citing Transport and Environment, '"New" Investment Court System Still Privileges Foreign Investors Under EU-US Trade Deal' (Media Release, 16 September 2015) <https://www.transportenvironment.org/press/%E2%80%98new%E2%80%99-investment-court-system-still-privileges-foreign-investors-under-eu-us-trade-deal>.

little from the appointment process in traditional ISDS. The ICS proposal describes a process which is still substantially similar to the traditional ISDS appointment procedures (see discussion with respect to appointment process in the preceding section). Additionally, the ICS proposal still refers to the ICSID rules and the *New York Convention*.[60] The Transnational Institute in its report further notes that foreign investors are still allowed to circumvent domestic courts and proceed directly with their claims in an international investment court, which is discriminatory against domestic investors.[61] The Transnational Institute also observes that governments will still have to defend measures taken in the public interest that may lead to claims of 'indirect expropriation' in line with legitimate business expectations of the foreign investors.[62]

Secondly, what the ICS proposal appears to do as a solution is to replace the ad hoc appointment of arbitrators with the appointment of judges from a pre-selected pool. Here again, optics become critical because the dispute is being heard by 'judges' in a 'court', rather than 'arbitrators' in a 'arbitration'. Therefore, the EU seems to be resolving the problem of the ad hoc appointment of arbitrators by the disputants through appointment of judges. In the case of TTIP, the pool of judges will be 15. Similar provisions exist for the *EU–Vietnam FTA* and the *EU–Canada CETA*. In order to maintain a semblance of neutrality, the judges in the pool of 15 will be split evenly between US-appointed, EU-appointed and those appointed by other jurisdictions. The appointment rules become problematic especially when the remuneration model is considered. Judges are prevented from pursuing any other case work while appointed on the panel of pre-selected judges. Therefore, the adequacy of money is the foremost issue. Nicolette Butler points out that, since the judges will be paid a monthly retainer fee while prohibited from pursuing other cases, they may be tempted to prolong the proceedings in order to maximise their income.[63] Butler also observes that, while awaiting appointment on a case, payment to judges amounts to a waste of tax payers' money and also that qualified professionals are able to earn much more while acting as counsel.[64]

Thirdly, the appeal mechanism put forward in TTIP, *EU–Vietnam FTA* and the *EU–Canada CETA* is less than perfect. While it is true that the appeal mechanism is a feature that is currently lacking in the ISDS mechanism and is, therefore, considered an improvement, a closer look at the appeal mechanism reveals further shortcomings. For example, the fairly wide grounds of appeal are based on issues of law, fact or procedure based on the existing standard of art 52 of the *ICSID Convention*.[65] Theoretically, if every dispute is appealed, it exponentially increases the cost of dispute

60 Butler, above n 55, 3–4.
61 Cingotti et al, above n 34, 6–7.
62 Ibid 7, 13–17.
63 Butler, above n 55, 5.
64 Ibid.
65 Ibid 6.

settlement and will further burden the ICS tribunals staffed by judges on retainers in terms of time, cost and management.

The ICS proposal also appears to ignore the central issue of enforcement of arbitral awards. Enforcement of foreign arbitral awards is a critical issue in foreign investment regulation because, in several instances, the party securing a favourable award has struggled to enforce the award against the judgment-debtor in the jurisdiction of enforcement. Regardless of the arbitration system adopted, the arbitral award has to pass through enforcement proceedings before domestic courts. Domestic courts in several jurisdictions reserve the right to refuse enforcement of arbitral awards under art V (2) (a) and (b) of the *New York Convention* on grounds of public policy, conflict with local mandatory laws or if there is any procedural irregularity.[66] Difficulty is also encountered where sovereign immunity (under art 55 of the *ICSID Convention*) is invoked by any state to resist or delay enforcement proceedings.[67] There are recorded instances where sovereign immunity was invoked to delay the enforcement of arbitral awards.[68] One illustration is the response by Hong Kong's Court of Final Appeal in the *Democratic Republic of the Congo and Others v FG Hemisphere Associates,* where it was held that stated no state could be sued in Hong Kong's courts unless there is a prior waiver of sovereign immunity. It was further held in that case that submitting to arbitral proceedings does not constitute such a waiver and that a favourable award only extends a right to apply for leave to enforce the award which is not the equivalent of an actual enforcement.[69] In other words, confirmation and recognition of arbitral awards are related to the issues of immunity from jurisdiction, whereas the issue of execution will relate to immunity from execution.[70] The concept of enforcement can be extended to both. However, the actual use of the term enforcement is dependent on how enforcement is expressed in the relevant BIT.[71] The standard position under the ICSID based ISDS process is that consent to arbitration constitutes a waiver of state immunity from jurisdiction but this is not extended to state immunity from execution.

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66 See *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 UNTS 3 art (entered into force 7 June 1959) art V2(a), (b).

67 See *Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States*, submitted 18 March 1965, ICSID (entered into force October 14, 1966), ch 4, 6, art 55.

68 See, eg, *Democratic Republic of the Congo and Others v FG Hemisphere Associates* [2011] HKCFA FACV No 5, 6 and 7 of 2010 ('*Congo v Hemisphere Associates*'). See also Allens Linklaters, 'Focus: Absolute State Immunity Prevents Enforcement In Hong Kong' on Allens Linklaters Arbitration (29 June 2011) <https://www.allens.com.au/pubs/arb/foarb29jun11.htm >. See also Giorgia Sangiulo, 'State Immunity As Bar to Execution of Awards in International Investment Arbitration' on Giorgia Sangiulo *KSLR Blogs* (20 January 2012) <https://blogs.kcl.ac.uk/kslrcommerciallawblog/2012/01/20/state-immunity-2/>

69 Umair Ghori, 'The WTO Solution for Investor State Disputes' in Sylvia Kierkegaard (ed), *Law, Governance and World Order* (IAITL, 2012) 75, 77–8.

70 Ben Juratowitch, 'Waiver of State Immunity and Enforcement of Arbitral Awards' (2016) 6 *Asian Journal of International Law* 199, 218–19.

71 Ibid 218.

In the context of the ICS, the question is whether or not submission to the ICS will constitute a waiver of state immunity from jurisdiction and eventually execution of the ICS decisions.

We can see that under the ICS system, foreign investors will still have to initiate enforcement proceedings in order to implement a favourable 'judgment'. None of the BITs considered in this paper discuss the enforcement aspect in detail, leaving the enforcement to be completed under the existing rules. Also, the EU ICS model makes no mention of the possibility that domestic courts might decline enforcement on the basis of sovereign immunity. If enforcement proceedings are undertaken at a neutral jurisdiction where the judgment-debtor state holds assets (as was the case in *Congo v Hemisphere Associates*) the courts may again refuse enforcement because of sovereign immunity. Enforcement can thus only proceed if a state waives its immunity through a pre-negotiated and duly incorporated provision in the dispute settlement clause of the applicable BIT or FTA. Note that this matter represents an instance where a state applies the doctrine of absolute immunity as opposed to restrictive immunity.[72]

The struggles of foreign investors in enforcing arbitral awards are well known. One particular case that demonstrates the vulnerability of the investor in the enforcement stage is the *Sedelmayer v the Russian Federation*.[73] Briefly, this dispute concerned Russia and a German national where Russia failed in its claim for sovereign immunity because of the *Germany–Russia BIT*.[74] Since Russia was a party to the BIT it was held that membership constituted an effective waiver of sovereign immunity as far as the arbitration was concerned.[75] However, following an award in favour of Sedelmayer the waiver could not be extended to the enforcement proceedings and this was where Sedelmayer's difficulties began. It took Sedelmayer ten years and multiple enforcement actions in various European jurisdictions against Russian commercial interests to finally effect recovery.[76] Interestingly, the enforcement process even included a claim in the European Court of Human Rights against Germany for failure to effectively enforce a remedy.[77]

Sedelmayer's difficulties in enforcement of the arbitral awards demonstrate the possible hardships that foreign investors may encounter when dealing with States that apply the doctrine of sovereign immunity.[78]

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72 See, eg, Peter Malanczuk, *Akehurst's Modern Introduction To International Law* (Routledge Publishers, 7th ed, 2002) 118–19. See also Earnest Bankas, *The State Immunity Controversy in International Law* (Springer, 1st ed, 2005).

73 See generally *Sedelmayer v the Russian Federation (Arbitration Award)* SCC Case No 106/1998 <https://www.italaw.com/sites/default/files/case-documents/ita0757.pdf >.

74 See generally Andrea Bjorklund, 'State Immunity and the Enforcement of Investor-State Arbitral Awards' in Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 302, 314–16.

75 Ibid.

76 Ibid 314–15.

77 Ibid, 315.

78 Ibid.

An obvious corollary from the aforementioned decision is that the winning party must have sufficient financial resources to first engage in a dispute resolution process, secure an award, and then proceed to the enforcement stage against a potentially recalcitrant state.

Moreover, in the enforcement stage, the foremost issue for the foreign investor is to prove that assets of the state located within the jurisdiction where the enforcement is to occur are commercial in nature and are not for the use of the sovereign.[79] The opposing state may resist these proceedings by adopting arguments of non-disclosure of state information, which complicates matters for the foreign investors.[80] Therefore, if the ICS is to be put forward as a solution to the ills of ISDS then the problem of enforcement needs to be considered and integrated within the investment courts. Unfortunately, this point appears to be ignored in the *EU–Canada CETA* and *EU–Vietnam FTA*.

If the ICS model is to be pursued and implemented at a global level along the same lines as the WTO DSB model then two alternative approaches can be considered. Without going into the minutiae, the first approach is a multilateral, treaty-based approach which can be used to establish an international investment court. Investment disputes can then be brought to the court which can hear and rule on the investment disputes. This approach offers a more comprehensive and longer-term solution to the investment dispute resolution problem. The EU has already expressed an interest in pursuing this model.[81] The work of UNCITRAL Working Group 3 and the entry into force (albeit at a much lower scale than anticipated) of the *Mauritius Convention*) is a step towards the implementation of this approach (on which more in Part IV). To its credit, this approach automatically resolves the issue of enforcement of foreign arbitral awards because countries will have signed a treaty, which, ideally, will incorporate an enforcement mechanism. Furthermore, centralising the foreign investment dispute settlement process will eliminate or reduce the likelihood of inconsistencies in arbitral awards on similar provisions across different investment agreement — which has, unfortunately, become one of the greatest criticisms of the ad hoc ISDS mechanism.[82] However, while this approach looks good on paper, the actual execution is an entirely different story altogether. The primary challenge in pursuing the treaty-based option is to achieve consensus among the developed, developing and least-developed countries on the scale and scope of the international investment court. Indeed, UNCITRALs work and the consideration of recommendations made in the submissions and the considered reports

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79 Ibid.

80 Ibid. See also Sangiulo, above n 68.

81 European Commission, above n 12, 3.

82 Stephen Schill, 'The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?' (2016) 20(9) *ASIL Insights* <https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping>.

show that efforts to adopt a multilateral treaty-based solution to the ISDS are still very much a work in progress.

Further difficulties lie in the fact that difficult questions of public welfare and government regulation will often be broached by a panel of judges that may not quite understand domestic policy compulsions. Also, in order to be effective, the treaty-based approach must consider the question of the restrictive and absolute sovereign immunity approach. Will acceding or ratifying the treaty be taken to amount to waiver of sovereign immunity? Nations that still apply the absolute sovereign immunity approach may feel reluctant in becoming part of such a treaty. Finally, there are ancillary and logistical issues such as funding, appointment and retention of judges and determination of recommended timelines of investment disputes. In other words, while a WTO DSB type approach may project an image of permanency and certainty, getting to that point is a road fraught with complications, competing interests and conflict.

The second approach is a bilateral approach, and this is the approach that the EU seems to be adopting as things stand today. This approach basically requires a constitution of a standing body of judges comprising members from the bilateral treaty partners, along with third country members, which will provide both the primary dispute resolution forum and the appellate forum. The apparent advantage of this route is flexibility in terms of dispute resolution; however it faces two challenges that may undercut its usefulness. The first challenge is highlighted by Schill:

> [I]f permanent investment courts were to proliferate on a bilateral basis as a result of the Commission's approach, inconsistencies in the approaches of different investment courts to essentially identical issues and treaty provisions are likely to persist. Only the creation of a multilateral investment court would be able to ensure cross-treaty consistency and predictability in international investment law more generally.[83]

In addition to possible inconsistencies in 'judicial' approaches to questions of investment regulation across similarly worded treaties, the second challenge will be of a more domestic nature involving constitutional cover extended to the judgments of the investment courts. Since these courts are created through a bilateral treaty and not the constitution of the party states, the judgments issued by the investment courts (say, under the *EU–Vietnam FTA* or *EU–Canada CETA*) may encounter implementation and recognition difficulties unless a minimum constitutional cover is granted through legislative intervention. Simply describing investment courts are as 'courts' does not invest them with constitutional recognition. This raises the question of how the judgment of the investment courts will be enforced? Will the decision of the investment courts take precedence over domestic courts of a party state to a BIT? Or, will the BIT state automatically enforce the judgments of investment courts within their jurisdictions without any further action? What if the investment court and domestic courts arrive at different conclusions where

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[83] Ibid.

matters are subject to concurrent proceedings? Additionally, how will the requirement of exhaustion of local remedies be construed by the Claimant parties while pursuing a case in the investment court?

Unfortunately, these questions remain unanswered and further questions arise? as to the measures that will be required to make the investment court system work for foreign investment regulation. If the answer to the aforementioned queries is that the existing ICSID framework and *New York Convention* will be enough to enforce judgments issued by the investment court, then the critics of the investment court proposal win in their argument that the world investment court is merely a repackaged version of the ISDS system. The argument becomes particularly poignant because taking a macro view of the shift from arbitration to adjudication reveals that not enough change occurs except for adjudication by pre-appointed judges instead of ad hoc arbitrators. The only additional element is introduction of an appeal process into the system. The critical question of enforcement of awards and adoption of a consistent approach to dispute settlement remains largely unaddressed in the *EU–Vietnam FTA* and *EU–Canada CETA*.

In this context, the EU ICS has faced some internal challenges on its maintainability and execution, particularly in instances where the ICS becomes a mechanism to challenge EU's regulations by a foreign investor. The ICS would then be in the rather awkward position of having to interpreting EU law, effectively bypassing the European Court of Justice (ECJ). In *Achmea v Slovakia,* the EC argued that any arbitral tribunal hearing disputes involving interpretation of EU law must decline jurisdiction because ISDS proceedings may conflict with EU law on the exclusive competence of the EU court for claims involving EU law.[84] Therefore, the risk of altering the EU's current judicial structure because of the EU ICS is very much in the minds of EU policymakers.[85] One particular example highlighted by IISD is the potential violation of art 340 of the *Treaty on the Functioning of the European Union* ('TFEU') which basically provides that if the EU is to be sued for damages the competent jurisdiction is that of the ECJ only.[86] The ICS effectively allows the foreign investor to bypass the ECJ and lodge a damages claim against the regulators, which will likely result in 'regulatory chill'.[87] However, it does appear that any potential fallout of *Achmea v Slovakia* has been contained and the road paved for the adoption or implementation of the EU ICS proposal. The Award on Jurisdiction, Arbitrability and Suspension by the

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84 See *Achmea B v (formerly Eureko) v The Slovak Republic (Award on Jurisdiction, Arbitrability and Suspension)* (2010) UNCITRAL PCA Case No 2008-13, 54, [193].

85 International Institute for Sustainable Development (IISD), *Is ISDS in EU Trade Agreements Legal Under EU Law?*, (29 February 2016) Investment Treaty News <https://www.iisd.org/itn/es/2016/02/29/is-isds-in-eu-trade-agreements-legal-under-eu-law-laurens-ankersmit/#_ftnref7>.

86 Ibid.

87 Ibid.

tribunal in *Achmea v Slovakia* acknowledged that its jurisdiction is confined to alleged breaches of the BIT and that it does not have jurisdiction to rule on alleged breaches of EU law.[88] This means that the primacy of the ECJ in interpreting questions of EU law has not been undercut by a dispute under an intra-EU BIT. Thus, the tribunals are limited to the interpretation of the BIT and not questions of EU law in general.

In contrast to the EU's bilateral push to the question of reforming ISDS, UNCITRAL, has been active in formulating a concerted response on a more multilateral scale. The most recent efforts come in the form of work done by UNCITRAL's Working Group 3 on the adoption of the *Mauritius Convention*. Additionally, UNCITRAL Working Group 3 has also considered the question of reforming ISDS and the possible forms a new ISDS system might take. With EU's proposed approach on ICS and *EU–Vietnam FTA* and *EU–Canada CETA* providing the necessary background, it will be useful to see how a larger multilateral response is taking shape. This is examined in Part IV below.

IV The *Mauritius Convention* and Reform of ISDS

The *Mauritius Convention* aims to rectify one of the major critiques of ad hoc based ISDS process, namely transparency and procedural fairness.[89] Transparency is important because larger, well-endowed multinationals can often influence governments through pressure tactics and lobbying, which can undercut public interest regulation.[90] The *Mauritius Convention* enables the adoption by signatory states of the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (the '*Transparency Rules*') which came into effect on 1 April 2014.[91] The *Transparency Rules* provide for transparency and accessibility to the public during any treaty-based investor-State arbitral process.[92] Under art 1 of the *Transparency Rules*, any FTA or BIT concluded after 1 April 2014 that adopts the *UNCITRAL Model Rules* will automatically apply the *Transparency Rules*. Article 2 of the *Transparency Rules* states that any treaties between states that adopt other procedural rules, concluded after the effective date of 1 April 2014, can expressly decide to apply the rules

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88 See *Achmea B v (formerly Eureko) v The Slovak Republic (Award on Jurisdiction, Arbitrability and Suspension)* (2010) UNCITRAL PCA Case No 2008–13, 76, [290]; See also *Achmea B v (formerly Eureko) v Slovak Republic (Final Award)*, UNCITRAL PCA Case No 2008–13, 49, [152–54].

89 See, eg, discussion in UNCITRAL, *Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS) — Note by the Secretariat*, UN doc A/CN 9/917 (20 April 2017) [11], [18], [25], [31]; See also Gabriele Ruscalla, 'Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?' (2015) 3(1) *Goringen Journal of International Law* 1, 2–12

90 Layla Hughes, 'UNCITRAL Looks Narrowly at the Problems with Investor-State Dispute Settlement' on Layla Hughes, *Centre For International Environmental Law (CIEL)* (11 December 2017) <http://www.ciel.org/governments-look-narrowly-problems-undemocratic-investor-state-dispute-settlement/>; see also discussion in Ruscalla, above n 89, 8–10.

91 See generally *Convention on Transparency in Treaty-based Investor-State Arbitration*, opened for signature 17 March 2015 (entered into force 18 October 2017).

92 Ibid.

on transparency. For investment disputes arising from treaties concluded before the effective date, the disputing parties must expressly agree to apply the *Transparency Rules*. Since there were several thousand FTAs and BITs concluded before the effective date, any time a dispute arises the disputants would have to expressly agree to apply the *Transparency Rules*.[93] Obviously, this exercise is not just cumbersome — it may also lead to inconsistencies where certain parties were willing to opt for transparency in some instances while resisting the call for transparency in others. The dichotomy of approaches led to the adoption of the *Mauritius Convention* by UNCITRAL. The effect of the *Mauritius Convention* is that all signatory countries update their procedural rules to that of the *Transparency Rules* within FTAs or BITs concluded before the effective date. Most notably, the signatory countries are bound whether or not the ISDS process is conducted under the UNCITRAL Arbitration Rules. If the disputants are both from countries that have signed and ratified the *Mauritius Convention*, then the Transparency Rules will have mandatory application between the disputants. Thus, the approach adopted in the *Mauritius Convention* can be summarised as involving drafting of 'substantive' transparency rules, followed by a multilateral treaty that elaborates on extending those rules to existing FTAs/BITs.[94]

The *Mauritius Convention* entered into force on the 18 October 2017 for three countries that have signed and ratified the *Convention*, namely Congo, Switzerland and Mauritius. Currently, 22 countries have signed the *Convention*.[95] However, the practical application of the *Mauritius Convention* is extended between Switzerland and Mauritius only based on their BIT concluded in 2000. It is interesting to note that EU has not yet signed the *Mauritius Convention* as a trading and investment entity, but that 9 of its member countries are among the 22 signatory countries.[96] Hence, we can easily surmise that the impact of the *Mauritius Convention* is still emerging. Although, the EU has expressed its intention to ratify the *Mauritius Convention* in the past, we can see that it has incorporated the Transparency Rules in its newer FTAs and BITs containing ISDS clauses (for example with Singapore and Canada).[97] Erica Duffy observes that if

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93 Erica Duffy, 'The Mauritius Convention's Entry Into Force: High Hopes with Little Impact?' on Erica Duffy, *International Law Under Construction — Shaping Sustainable Societies* (18 May 2017) <https://grojil.org/2017/05/18/the-mauritius-conventions-entry-into-force-high-hopes-with-little-impact/>.

94 Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap' (CIDS Research Paper, Geneva Centre for International Dispute Settlement, 3 June 2016) , 27-30 [57]–[68], 94 [275] <http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf>.

95 See generally *Convention on Transparency in Treaty-based Investor-State Arbitration*, opened for signature 17 March 2015 (entered into force 18 October 2017).

96 Ibid.

97 European Commission, *The European Commission tables proposals to improve transparency in Investor-to-State Dispute Settlement (ISDS) based on existing investment treaties* (29

the current signatory countries were to ratify the *Mauritius Convention* its application would extend to 26 BITs.[98] According to Duffy's estimates, there are currently 2369 BITs in force globally, therefore, if signatories ratify the *Mauritius Convention*, it will carry compulsory application to 1.1% of BITs only.[99] The UNCITRAL is still laying the groundwork for possible reform of ISDS which actually leaves room for either an emergence of a bilateral alternative to ISDS (which the EU seems to be taking in the form of ICS provisions in *EU–Vietnam FTA* and *EU–Cananda CETA*) or a regional solution which is being explored by the Latin American countries (see discussion in Part V below). Nevertheless, any dispute settlement proceedings under the *EU–Vietnam FTA* or the *EU–Cananda CETA* will apply the UNCITRAL Transparency Rules by virtue of art 20 of the *EU–Vietnam FTA* and art 8.36 of the *EU–Canada CETA*. Therefore, the EUs push for a bilateral dispute settlement system in the aforementioned agreements already considers the transparency imperative by enabling the application of the UNCITRAL *Transparency Rules*.[100]

The *Mauritius Convention* continues to receive considerable attention from UNCITRAL, which commissioned two reports[101] to assess and explain the basis of the *Mauritius Convention* becoming the blue print for reforming the ISDS system. The first of these reports (the 'CIDS Report') broached the wider question of how the approach taken in the *Mauritius Convention* can resolve the difficult question of updating existing investment agreements and enabling resolution of disputes by recourse to dispute settlement processes agreed in FTAs and BITs.[102] The CIDS Report recommends the creation of a single International Tribunal on Investment ('ITI'), which will have the competence to resolve investment disputes between private parties and States that have opted into the compulsory application of the rules.[103] The ITI could also have an Appellate Mechanism ('AM') that is intended to serve as the apex appellate forum for ISDS across all states' FTAs and BITs.[104] Gabrielle Kaufmann-Kohler and Michele Potestà state that having a single appellate forum will also address the consistency criticism that has often been levelled against the present ISDS system whereby different arbitral awards have been rendered

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January 2015) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1246&title=The-European-Commission-tables-proposals-to-improve-transparency-in-Investor-to-State-Dispute-Settlement-%252528ISDS%252529-based-on-existing-investment-treaties> .

98 Duffy, above n 93.

99 Ibid.

100 Kaufmann-Kohler and Potestà, above n 94, 24–5 [48]–[50].

101 Ibid. See also Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' (CIDS Supplemental Report, Geneva Centre for International Dispute Settlement, 15 November 2017). <http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf>.

102 Kaufmann-Kohler and Potestà, above n 94, 93–4 [274]–[275].

103 Ibid, 94 [276].

104 The language uses rather uncertain 'and/or' term to link the AM with the establishment of the ITI. We can imply that this is an option generation exercise; see Kaufmann-Kohler and Potestà, above n 94, 94 [276].

on similar questions of law in different arbitration proceedings.[105] The approach adopted focuses precisely on ISDS provisions within FTAs and BITs and, thus, it aims to circumvent potential disputes over reform of substantive protection standards for which consensus may be more difficult to achieve.[106] Furthermore, the opt-in approach eases the burden on States from the complexities of amending procedures in the several thousands of existing FTAs and BITs.[107]

The CIDS Report also considers practical challenges that will be encountered in establishing the ITI or a standalone AM on top of the existing ISDS model. For example, will the proceedings in the ITI continue to be referred to as arbitration or will it be an international 'court' of investment? The correct characterisation is important because it directly affects recognition and enforcement of 'arbitral' awards and, further, because a defence of *res judicata* or *lis alibi pendens* can be claimed in domestic courts or the ITI and vice versa.[108] One of the practical instances of tension between the 'court' or 'arbitration' characterisation appears in the ICS approach taken by the EU in the *EU–Vietnam FTA* and *EU–Canada CETA* where the dispute settlement bodies exhibit characteristics of both the courts and arbitral tribunals (discussed in Part III).[109]

The CIDS Report also explored the issues of award and appeal by assuming that the current ISDS model will be retained but an appeal forum added on top of it.[110] The CIDS Report observes that formation of a standalone AM is less radical than the ITI in that there is no shift from arbitration to a 'court' system. In other words, parties still appoint their arbitrators and follow rules under their agreement (ICSID, ICSID Additional Facility or UNCITRAL Rules).[111] The constitution of the appeal proceedings can be based on annulment proceedings under the ICSID Rules, where the discretion to appoint ad hoc arbitrators to hear annulment of the arbitral award rests with the Chairman of the Administrative Council of ICSID.[112] The CIDS Report suggests that the AM be constituted on an institutional structure with a secretariat modelled on the WTO Appellate Body.[113] The enforcement of awards of the appellate forum for non-ICSID contracting parties with respect to an ICSID award would be in accordance with the *New York Convention*. Alternatively, parties from non-ICSID countries might regard the decision as a product of ICSID and apply art 54 of the *ICSID Convention* by analogy.[114]

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105 Kaufmann-Kohler and Potestà, above n 94, 94 [276].
106 Ibid.
107 Ibid.
108 Ibid, 34 [81]–[82].
109 Ibid, 34 [83].
110 Ibid, 96 [283]–[284].
111 Ibid, 70–1 [190]–[192], 96 [283].
112 Ibid 70–1 [192].
113 Ibid 73–4 [203]–[206].
114 Ibid 72 [199]–[200].

According to the CIDS Report, if the ITI and/or the AM are to be implemented as a reform of the ISDS, the Opt-in Convention[115] will be the conduit whereby countries with existing FTAs or BITs consent to submit their investment disputes to the newly established dispute resolution bodies.[116] The Opt-in Convention will be both backward and forward looking in that it will cover existing FTAs and BITs but would also be able to accommodate future FTAs and BITs if other countries accede to it.[117] The Opt-In Convention that will enable adjudication of investment disputes at a multilateral level will obviously raise law of treaties issues alongside the links between the Opt-in Convention and the *ICSID Convention* where the Opt-in Convention extends the AM to ICSID awards).[118] Any application of the new dispute resolution system depends on mutual agreement to participate in the Opt-In Convention between the investor's State and the host State.[119] The CIDS Report considered the prospect of a "unilateral offer of application" of the new dispute resolution system by the host State as a step towards reform coupled with possible mechanisms for ensuring flexibility allowing States to adjust their level of commitment in the new reforms. This means that declarations could be allowed under the Opt-in Convention thereby allowing States to determine exclusive application of the dispute settlement framework through ITI and/or AM or if it will be an additional alternative to the existing ISDS options.[120]

Following the CIDS Report, UNCITRAL also considered the CIDS Supplemental Report in November 2017, which specifically considered the composition of the ITI and the AM for investment awards.[121] This report debates the specific issues on staffing the arbitral panel and the larger shift from the *ad hoc* model to a more permanent model for settling international investment disputes. The report examines the shift of the composition of panels from a system based 'on disputing party appointments to a framework based on treaty party appointment' and identifying the main effects flowing from this shift.[122] Similar to the experience of the WTO DSB, important theoretical, policy, technical and procedural challenges in the selection of adjudicators will likely be encountered when transitioning to a permanent body. The CIDS Supplemental Report looks at important international courts and tribunals that adjudicate State-to-State and individual-to-State disputes in order to glean important lessons in implementing the reforms (examples include the WTO, Court of Arbitration in Sports, and the European Court of Human Rights among others).

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115 The Opt-in Convention has been described by Kaufmann-Kohler and Potestà as a multilateral instrument to extend the new dispute resolution options to existing international investment agreements. Pursuing the opt-in approach relieves the states from amending long and complex investment treaties (Ibid 4).

116 Ibid 97 [285].

117 Ibid 97 [286].

118 Ibid.

119 Ibid 97 [287].

120 Ibid 97 [287]–[288].

121 See generally Gabrielle Kaufmann-Kohler and Michele Potestà, above n 94.

122 Ibid 74 [208].

The CIDS Supplemental Report emphasized that the ITI and AM should be composed of members with suitable qualifications and competence and should reflect high standards of diversity.[123] Diversity is termed as 'essential' on the basis that it ensures judicial thinking is not dominated by a single perspective and also because it enhances legitimacy when the composition reflects the parties for whom the justice is rendered.[124] Additionally, the CIDS Supplemental Report considered mechanisms to ensure judicial impartiality and to shield judges from external influence. This includes recommendations on factors such as remuneration, term of office and rules on incompatibilities. The latter point is particularly important given the fact that the structure of the ITI (ad hoc versus permanent or semi-permanent) will determine if the adjudicators are permitted to pursue external activities.[125]

Regarding the selection of adjudicators, the CIDS Supplemental Report explores multi-layered, transparent and open processes while acknowledging the asymmetrical nature of ISDS. The CIDS Supplemental Report recommends minimizing risks of political considerations in the appointment by ensuring that the selection of adjudicators can be made from a large pool of highly qualified candidates.[126] The CIDS Supplemental Report hopes that the use of consultations and expert screening by 'independent supra-national bodies' will lead to a rigorous, transparent and meritocratic selection of adjudicators.[127] Another recommendation made in the CIDS Supplemental Report is assignment of disputes to individual sub-divisions or chambers once the case is filed in order to ensure structural independence.[128]

Considering the two aforementioned reports in the light of the *Mauritius Convention* approach, we can surmise that there will be some resistance and hesitation to change. Indeed, the *Mauritius Convention* does what is obviously the need of the hour — it enhances the transparency and credibility of the embattled ISDS process — but so far it has only attracted limited interest from countries. In some instances, FTA partners (such as China and Australia, and Korea and Australia) have even gone to the length of issuing side letters, assuring each other that the *Transparency Rules* do not apply to the investment dispute settlement proceedings unless the parties have agreed otherwise.[129] In the meantime, parties have undertaken

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123 Ibid 21-30 [40]–[67], 74–5 [210].
124 Ibid 74–5 [210].
125 Ibid 35–40 [86]–[97].
126 Ibid 75 [211].
127 Ibid.
128 Ibid 75 [212].
129 See Department of Foreign Affairs and Trade (DFAT), *Side Letter UNCITRAL Transparency Rules — Korea* (8 April 2014) <http://dfat.gov.au/trade/agreements/in-force/kafta/official-documents/Documents/side-letter-UNCITRAL-transparency-rules-korea.pdf>; Department of Foreign Affairs and Trade (DFAT), *Side Letter UNCITRAL Transparency Rules — China* (17 June 2015) <http://dfat.gov.au/trade/agreements/in-force/chafta/official-

to enter into consultations on the future application of *Transparency Rules* within 12 months of entry into force of the FTA.[130] At the time of writing, China and Korea have neither signed nor ratified the *Mauritius Convention* and Australia has signed the *Convention* but not ratified it.[131]

While the *Mauritius Convention* focusses on transparency, it also provides a blueprint for a technical mechanism that can be used to lay the foundations of a new, multilateral and trans-jurisdictional dispute resolution system for investment disputes. On both grounds we see that the work is in the initial stages especially when compared to the EU's ICS (which has already been translated into treaty) and UNASUR (which, as discussed in Part V, is in advanced stages). Here we must bear in mind that UNCITRAL does not create anything supranational. It can only provide recommendations and standards that will then have to be consolidated through the treaty-making process to become binding. The Opt-In Convention is a prime example. Therefore, when we are comparing the *Mauritius Convention* and the recommendations of the CIDS Report and the CIDS Supplemental Report with the EU ICS and the UNASUR alternatives, we must consider that UNCITRAL's work requires formal approvals and ratifications before it can be effective. It is exactly this vulnerability that is likely leading to a lukewarm response and the lack of commitment from the global investment community and the states in general (as evidenced by the 'side letters' discussed immediately above). Resultantly, States feel less pressure to bind themselves to the *Mauritius Convention*, preferring to wait and see before signing and ratifying the treaty.

V So Does Regionalism Help?

The ISDS receives negative attention not only because of commonly known factors such as the ad hoc nature of arbitration or the rendering by tribunals of inconsistent awards on similar issues; it also receives negative attention due to the inherent nature of the process, which often aims to resolve disputes between a sovereign country and the owner of the invested capital. Such a proposition invariably means that upholding interests of one group automatically prejudices the interests of the other.

It is this perception that drives the call for reforms. The proposal under consideration in this article is a manifestation of the search for a suitable alternative. This search will be a long and a hard one. If the ICS proposal is considered an alternative we would have to see whether it resolves the fundamental defects associated with the current ISDS regimes.

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documents/Documents/chafta-side-letter-on-transparency-rules-applicable-to-investor-state-dispute-settlement.pdf>.

130 DFAT, above n 129; DFAT above n 129.

131 See UNCITRAL, *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (Entry into Force 18 October 2017)* <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html>.

When looked at in greater depth, the ICS proposal, as constructed presently, actually raises more questions than it resolves. For example, if the ICS is supposed to operate like a court will it have a precedent-like system? This would surely enable the TFIs and the Appeals Tribunal to pass consistent decisions in disputes involving similar questions of law. In so doing, a standing body of rules and jurisprudence would be developed that later tribunals under the ICS could access. Another advantage of a standing body of rules is that it can act as a benchmark for countries when designing their foreign investment policies.

The challenge in following this approach is its distinct common law flavour. While the EU may adopt a precedent-based approach, it will have to consider the legal polities of its member states as well as the unsavoury fact that the only common law jurisdiction in the EU has recently voted to leave the bloc. This development will surely affect the adoption of a more consolidated and consistent approach to ISDS. Alternatively, if one posits that the ICS need not follow any precedent-like model and that decisions will be taken by TFI and the Appeals Tribunal on a case-by-case basis, then it is quite apparent that there is not much difference between the proposed ICS system and the current ISDS-based arbitration system. The risk of not following a precedent-like system is that inconsistent corpus of awards will emerge similar to the current ISDS awards.

Furthermore, problems for the foreign investor and the host country often stem from the underlying BITs and FTAs, which in the longer run are usually drafted to be pro-investor rather than pro-state. Resultantly, several developing countries in Asia and Latin America countries have had difficult experiences in implementing local regulations or public policy decisions without attracting millions of dollars in claims and compensation. For instance, in 1998, Patuha Power Ltd ('Patuha') and Humpurna California Energy Ltd ('Humpurna') initiated arbitration proceedings against Persero Perusahaan Listruik Negara ('PLN') and the Republic of Indonesia.[132] After an economic crisis in Indonesia, in breach of power project contracts, PLN refused to purchase electricity. The Tribunal found PLN in breach, and awarded (USD) 154,907,976 in damages to Patuha and (USD) 273,757,306 to Himpurna.[133] Similar difficulties were occurred in Pakistan in 1998 when the Hub Power Company ('HubCo') entered into a power purchase agreement with the governmental body (Water and Power Development Authority) ('WAPDA'), worth (USD) 1.6 billion.[134] Sponsors of the project were accused of fraud, corruption and illegality,

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[132] *Patuha Power Ltd. (Bermuda) v PT (Persero) Perusahaan Listruik Negara (Indonesia) (Final Award)*, (1999) 14 Meale's International Arbitration Reports B-1.

[133] PLN successfully filed lawsuits in the Jakarta District Court seeking injunctions against continuation of the arbitration proceedings, but the Tribunal ignored the injunction by scheduling an additional hearing in the Netherlands. Indonesia also filed an application with ICSID for removal of the Tribunal, which was rejected.

[134] See generally Fahd Ali and Fatima Beg, 'The History of Private Power in Pakistan' (Working Paper Series No 106, Sustainable Development Policy Institute, 4 April 2007).

which caused HubCo to bring arbitration proceedings enjoined by the Supreme Court of Pakistan. The public policy grounds relied on by the Supreme Court brought the validity of the power agreement into question. Pakistan believed that arbitration proceedings were not the appropriate dispute settlement mechanism to resolve the issue of corruption. The difficulties brought forth by public policy in this case drew the attraction of foreign political intervention.

Similarly, on public policy grounds, a Russian commercial court rejected a case in 2002, for the reason that the claimant's case was publicly funded.[135] The public nature of the dispute took the case outside the jurisdiction of the arbitration tribunal. A final notable case concerns *FG Hemisphere Associates*, a Delware company, and its action against the Democratic Republic of Congo (DRC). In attempt to enforce a (USD) 151 million judgment against DRC, FG Hemisphere Associates is facing a "multi-year, multi-jurisdiction" process.[136]

The claims by foreign investors in response to policy decisions and/or regulatory actions resulted in harsh critique and the consequent branding of the aforementioned countries as hostile to investors.

The case of certain Latin American countries is particularly interesting in this regard. We can see that several countries expressed dissatisfaction with the ICSID based arbitration system through various measures. For example, in a clear manifestation of the Calvo doctrine[137], art 366 of the Bolivian Constitution provides that every foreign investor that conducts activities or invests in the hydrocarbons production chain will do so by submitting to the sovereignty of the state and in doing so no foreign jurisdiction is recognised.[138] Furthermore, foreign investors cannot invoke any exceptional circumstances in calling for an international arbitration or lodge diplomatic claims.[139] Bolivia withdrew from ICSID in November

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135 Dominic Pellew, *Recognition and Enforcement of Foreign Arbitral Awards in Russia*, Mondaq Business Briefing (8 January 2002) <http://www.mondaq.com/russianfederation/x/15098/Recognition+And+Enforcement+Of+Foreign+Arbitral+Awards+In+Russia>.

136 *FG Hemisphere Associates LLC v Democratic of the Congo & Ors* [2009] 1 HKLRD 410 (Court of First Instance, [2010] 2 HKLRD 66 (Court of Appeal) and FACV 5-7/2010 (Court of Final Appeal).

137 Calvo Doctrine is named after the Argentine diplomat and academic Carlos Calvo. The doctrine defines international rules regulating the jurisdiction of governments over foreign investors and property owned by foreigners. The doctrine further defines the scope of protection afforded to the foreign investors by their home states and the use of force in collection of indemnities in event of seizure and confiscation. The doctrine seeks to apply uniform rules to all nations regardless of their developmental status and it further holds foreigners with claims against the governments of such states should apply to the local courts for redress instead of diplomatic intervention (see 'Calvo Doctrine', *Encyclopaedia Britannica*) https://www.britannica.com/topic/Calvo-Doctrine. Subedi succinctly summarises the doctrine as 'no state should be required to offer more protection to foreign investors than that accorded to its own nationals'. (Subedi, above n 8, 13–15).

138 Silvia Karina Fiezzoni, 'The Challenge of UNASUR Member Countries to Replace ICSID Arbitration' (2011) 2 *Beijing Law Review* 134, 138; See also Bureau of Economic and Business Affairs, *2012 Investment Climate Statement — Bolivia* (June 2012) US Department of State <https://www.state.gov/e/eb/rls/othr/ics/2012/191112.htm>.

139 Bureau of Economic and Business Affairs, above n 138.

2007 followed by Ecuador in January 2010. Prior to its withdrawal from ICSID, Ecuador followed a similar constitutional path to Bolivia. Article 422 of the Ecuadorian Constitution places a prohibition on the state from ceding any jurisdiction to ISDS tribunals in new international treaties.[140] However, specific exceptions have been made to the effect of art 422, whereby citizens of Latin American countries can pursue arbitral proceedings against Ecuador provided disputes are heard by regional arbitration bodies within Latin America.[141] Therefore, a clear preference emerges for a regional approach to dispute resolution through arbitration from this policy behaviour. Additionally, although speculative, this action does seem to indicate that the policymakers in Latin American countries seem to prefer investment originating from within the region rather than other parts of the world (especially Europe). In the event that investment does originate from Europe, ISDS under ICSID rules seems to be off the table.

In addition to Bolivian and Ecuadorian measures against ISDS, Venezuela's experience is also illustrative of the compulsion felt by the Latin American countries to adopt an inward-looking, regional approach to investment dispute settlement. Venezuela took cue from Bolivia's withdrawal from ICSID and announced its withdrawal in January 2012.[142] Prior to this decision, Venezuela embarked upon a systematic process of renegotiating contracts awarded to foreign oil and gas exploration companies. Under a decree issued in February 2007, four strategic associations were to convert to joint ventures in which the state oil firm, Petroleos de Venezuela, was to hold a 60% share. Foreign oil companies were given a deadline of 30 April 2007. Two companies (ConocoPhillips and ExxonMobil) refused to follow through with this directive. Resultantly, the Venezuelan government assumed control of their investments. The aggrieved companies lodged an international arbitration claim and eventually received a favourable ruling from the arbitral tribunal in 2013.[143] Venezuela continued to pursue the matter in an ICSID tribunal, with the specific aim of having the earlier ruling overturned or revised due to material misrepresentation by ConocoPhillips. In February 2016, the ICSID panel announced its decision and rejected Venezuela's arguments. The decision was based on the proposition that the *ICSID Convention* and

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140 Fiezzoni, above n 138, 138-9.

141 Ibid 139.

142 Sergey Ripinsky, *Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve* (13 April 2012) Investment Treaty News <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>.

143 Bureau of Economic and Business Affairs, *2014 Investment Climate Statement — Venezuela* (June 2014) US Department of State<https://www.state.gov/e/eb/rls/othr/ics/2014/229093.htm#2>.

Arbitration Rules do not afford countries the power to apply for reconsideration of tribunal awards.[144]

In hindsight, the experiences of Latin American countries provide two important outcomes. Firstly, it provides the basis for the withdrawal from ICSID by several Latin American countries. Secondly, it provides the basis for the insistence that in ISDS there must be an appeal mechanism. While the first outcome can arguably be dismissed as resource nationalism or pandering to the masses, the second outcome cannot be so easily ignored. We can see that following withdrawals from the ICSID, Ecuador took the lead in proposing a regional solution to the ISDS problem. The proposal was issued under the auspices of the UNASUR and sought to provide a regionally focussed Latin American ISDS mechanism.

The original proposal by Ecuador (tabled in 2010) called for the creation of an arbitration centre to resolve investment disputes and also included a code of conduct for the arbitrators of the UNASUR and called for establishment of a Counselling Centre of Investment Disputes.[145] The proposal has since been heavily modified. Subsequently, a high-level working group considered a Draft Constitutive Agreement ('DCA') developed in 2014 based on an earlier draft forwarded in 2012.[146] The current text of the DCA has been translated into English by Maria Gabriela Sarmiento and is used as a reference in this article. The DCA specifically requires exhaustion of local remedies before dispute settlement proceedings can be initiated (art 5.11). The DCA also defines in art 3 the definition of 'Parties', which covers states and nationals of non-UNASUR states. Interestingly, the nationality of legal persons that may become 'Parties' to a dispute is left to the individual UNASUR member states, presumably to give regulatory flexibility in the dispute (art 3.2).[147] However, this is more of an indication of the different approaches adopted by UNASUR states, whereby each state has kept their economic and regulatory interest foremost. Accordingly, UNASUR states have adopted different legal approaches for ISDS without a rigidly-framed common

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144 See, eg, Christine Powell, ICSID Won't Revisit Ruling In Venezuela-Conoco Oil Dispute' on *Law 360* (10 February 2016) <https://www.law360.com/articles/757586/icsid-won-t-revisit-ruling-in-venezuela-conoco-oil-dispute>.

145 The source documents are unofficially translated. See generally Maria Gabriela Sarmiento, The 2012 Draft Constitutive Agreement of the Centre for the Settlement of Investment Disputes of the UNASUR (S C Sarmiento Nunez Consulting, 20 November 2015) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2698574>. See also discussion in Katia Fach Gómez and Catharine Titi, 'UNASUR Centre for the Settlement of Investment Disputes: Comments on the Draft Constitutive Agreement'(Investment Treaty News, International Institute for Sustainable Development, 10 August 2016) <https://www.iisd.org/itn/2016/08/10/unasur-centre-for-the-settlement-of-investment-disputes-comments-on-the-draft-constitutive-agreement-katia-fach-gomez-catharine titi/#_edn2>. See further Fiezzoni, above n 139, 140.

146 Gómez & Titi, above n 145.

147 Ibid.

position in establishing the Centre for the Settlement of Investment Disputes of the UNASUR (the "UNASUR Centre").[148]

The different approaches adopted are further reflected through disagreements among the UNASUR members on various provisions of the DCA, which has delayed the establishment of the UNASUR Centre.[149] For example, Venezuela, Argentina and Bolivia are insisting on the inclusion of additional criteria in art 3 (2) of the DCA (a provision that discusses the criteria for determining the "national of another member-State"). The alternative suggested by these three countries states that when a legal entity is controlled by nationals of other states or does not perform economic activity in the country of its incorporation or has its headquarters based in another state, then 'the legal entity will not be taken as a national of the State under whose legislation was incorporated.'[150]

With reference to art 3(2), Argentina, Venezuela, Paraguay and Ecuador further suggest limiting the powers of a national of 'a State other than the State receiving the investment' that is a shareholder of a company, to file a complaint with the UNASUR Centre for 'rights owned by the company' or to 'file a complaint for the damages suffered by the company.' The language is somewhat unclear here on what is meant by 'rights owned'. However, the suggestion is ostensibly designed to limit or restrict claims by foreign investors on the basis of rights and equitable interests in a foreign investment company that is incorporated outside the UNASUR jurisdictions. Most likely, this provision is designed to counter the scenario encountered by Argentina in the 2012 expropriation of Repsol, a company incorporated in Spain and a majority shareholder in the Argentine oil and gas giant YPF.

Furthermore, Brazil, Ecuador, Peru, Bolivia and Colombia envision a much more open definition of the term 'dispute'. These countries suggest that the term 'dispute' should have a much wider scope and that the UNASUR Centre should hear disputes of the states that have consented to submit to its jurisdiction.[151] The wider definition can potentially act as a stepping stone for possible projection of the UNASUR Centre as a global alternative to the ICSID and ICC arbitration mechanisms.

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148 See, eg, discussion in Maria Gabriela Sarmiento, 'The UNASUR Centre for the Settlement of Investment Disputes and Venezuela: Will Both Ever See the Light at the End of the Tunnel?' (2016) 17(4) *Journal of World Investment and Trade* 658, 660-62.

149 See, eg, Investment Treaty News, *UNASUR Arbitration Centre one step closer to being established* (29 February 2016) International Institute for Sustainable Development <https://www.iisd.org/itn/2016/02/29/unasur-arbitration-centre-one-step-closer-to-being-established/>.

150 See Maria Sarmiento, 'Unofficial translation of the 2014 Draft Constitutive Agreement of the Centre for the Settlement of Investment Disputes of the UNASUR' (S C Sarmiento Nunez Consulting, 14 December 2015), art 3 (2) <https://poseidon01.ssrn.com/delivery.php?ID=585094117064087105070065030024114006057009006016027026022114116010088066024100117087011017111035041046097083007027082121014002024090078032077003101083023123098074064069042064068070113096005116115008091064106088105084093023013121006031119083001112121087&EXT=pdf>.

151 Ibid art 3(4).

Another point of contention is the annulment procedure which is enshrined in art 30 of the DCA. Article 30 states that annulment is possible on grounds of improper constitution of the tribunal, exceeding of powers by the tribunal, corruption of any member or members of the tribunal, serious offence of a fundamental rule of procedure, or if the arbitrators have not fully expressed the reasons forming the basis of the award.[152] To the extent of the grounds of annulment, the participants agree. However, differences emerge on what to do if the grounds of annulment are present. Venezuela, Paraguay and Ecuador provide a broad and a simple solution to the problem — reference to the Permanent Court — whereas Brazil, Colombia and Peru suggest 'immediate constitution of an ad-hoc Commission' comprising three members on the list of arbitrators. Members of the ad-hoc Commission must not have been part of the original panel that passed the impugned decision, or be of similar nationality or the nationality of the investor or the disputant state. Thereafter, the Commission so constituted will suspend execution of the award pending resolution of the matter. Here again, there are differences among the UNASUR members. Argentina, Venezuela, Ecuador, Bolivia and Paraguay prefer to keep the door slightly open by suggesting that the ad hoc Commission can suspend the original award unless there are exceptional circumstances that make suspension impossible. The DCA is silent on the question of exceptional circumstances. The countries cited immediately above have not made any particular efforts in determining what those exceptional circumstances might be. If the members envision a subjective interpretation of exceptional circumstances then this may create more obstacles than it solves, simply because each state may cite their internal environment as amounting to exceptional circumstances and then proceed to stonewall the execution of any award deemed prejudicial to their interests.

Peru, Brazil, Colombia and Chile take a much 'safer' approach by suggesting an alternative — namely, that the Commission may suspend the execution of the award, pending the decision on the annulment of the award 'if required under the circumstances'.[153] If the petitioner requests the suspension of the enforcement of the award in the petition, the enforcement is provisionally suspended until the Commission issues its decision.[154] Therefore, what we see from the position on the issue of annulment is that UNASUR countries are still not quite sure on the challenge dimension of the arbitration mechanism.

The lack of agreement and coherence is also apparent from a reading of art 31 of the DCA, which refers to the appeal of the award. Brazil and Peru consider that the grounds of appeal should be based on 'error in the application or interpretation of the law applicable to the dispute', whereas Venezuela, Argentina and Paraguay suggest insertion of words that include the terms 'manifest error in the appreciation of facts' that would otherwise

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152 Ibid art 30(1).
153 Ibid art 30(5).
154 Ibid.

change the award.[155] Also noticeable is the preference of some UNASUR countries desirous of a permanent appeals forum versus an ad-hoc Appeals Commission (constituted on a needs-basis). The former approach is favoured by Argentina, Venezuela, Ecuador and Paraguay while the latter is advocated by Brazil, Peru and Colombia.[156]

In summary, Brazil, Peru and Colombia clearly favour the constitution of ad hoc appeals commissions on a needs basis, whereas Argentina, Paraguay, Venezuela and Ecuador would prefer a more permanent appeals commission. There are obvious advantages associated with having a permanent appeals body in terms of time and costs savings. However, the upshot of the regional approach is that a regional system is not a perfect solution to the ISDS problem. Even when countries are united in their distrust and disdain for the ISDS system, countries will find it difficult to arrive at consensus on various aspects of an alternative dispute settlement system. The fact that more countries are involved or that a solution is being forwarded as a regional solution further complicates matters, especially when juxtaposed with domestic economic compulsions and conflicting commitments under BITs and FTAs concluded in the past.

VI Concluding Thoughts

When compared to the EU ICS system, the UNASUR proposed regional approach may find short term traction difficult due to internal conflicts between countries and industrial stakeholders. In the long term, countries with mutual trade and investment interests will always find a workable solution (provided there is a will and commitment to find a solution). However, at this stage, the EU is set to roll out the ICS as the preferred replacement for the current ISDS model. To achieve this objective, the EU has attempted to test the waters by including a court-like model in two of its FTAs — the *EU–Vietnam FTA* and the *EU–Canada CETA*. While the long-term goal is the eventual establishment of a more permanent court-like body for settling international investment disputes, lessons learnt from bilateral investment courts can serve to fine-tune the eventual outcome. However, before the ICS model can be considered the dominant paradigm after the gradual phase out of the ISDS system, it may have to deal with the dominance of the ICSID based dispute settlement methods or a move by some countries to empower UNCITRAL as a well-resourced, well-funded body with enhanced scope of reviews and appeals of arbitral awards.

As a variation to the ICS system, some newer FTAs have included a mechanism based on pre-selection of arbitrators in the form of standing bodies or standby panels. For example, in the *China–Australia FTA*, art 9.15.6 provides that each party to the FTA will select at least five individuals to serve as arbitrators and also jointly select at least 10

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155 Ibid art 31(1) (a) & (b).

156 Ibid art 31(2).

individuals who are not nationals of either Party to act as chairperson of the tribunals. Furthermore, under art 9.7.3 (a) the FTA Joint Committee is tasked with establishing and maintaining a list of arbitrators. Nowhere in the Chapter on Investment (Chapter 9) or Chapter on Dispute Settlement (Chapter 15) is the establishment of a court-like system foreshadowed. While not being a comparator with the EU ICS or the UNASUR system for new model of ISDS, the *China–Australia FTA* can, at best, be considered a variation of the ad hoc arbitral system in settlement of investment disputes.

Any emergence of a competing institutional competition from other regions of the world (such as UNASUR) may be constrained by what Bjorklund and Druzin identify as the 'network effect' leading to institutional lock in of the status quo.[157] Applied here, this effectively means that the ICSID-based ISDS model will have a definite advantage in resisting any emerging norms of dispute settlement, whether such emerging norms are bilateral (such as the *EU—Vietnam FTA*), regional (UNASUR) or multilateral (UNCITRAL). In fact, we can already see the network effect of ICSID on trade and investment instruments that are attempting to introduce an alternative dispute settlement mechanism. In this regard, Bjorklund and Druzin highlight that the EU has proposed either the Permanent Court of Arbitration (PCA) or ICSID as administrators in TTIP and in the *EU–Vietnam FTA*, but only ICSID has been selected as the administering institution in the *EU–Canada CETA*.[158]

The dominance of ICSID and, by implication, the arbitration-based ISDS model will likely continue until a critical mass is achieved by an emerging alternative. Therefore, if the UNASUR-based regional alternative is to emerge as an alternative then it must achieve a critical mass of adherence and application for it to be considered a regional norm of investor state dispute resolution. On a similar note, the EU will likely try to adapt the bilateral dispute settlement formula incorporated in *EU–Canada CETA* and *EU–Vietnam FTA*. Once a sufficient number of bilateral trade and investment partners are on board, the EU can consider converting the regime into a plurilateral instrument.

Until then, the difficult experience of the Latin American countries in settling complicated questions on the annulment, review and appeal of the arbitral award will continue to keep the competition away from the EU-led ICS alternative. Owing to internal disagreements, the final stage of the UNASUR regional dispute settlement system has been delayed. While we can acknowledge that the Latin American countries have made considerable and commendable progress in coming up with a regional solution, the replication of a similar approach in other regional trading blocs is by no means certain. Compared to a regional system, the ICS is a much simpler, 'quick fix' solution, especially where the originating economy is developed and the host economy is developing, as this allows

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157 See, eg, discussion in Andrea K Bjorklund and Bryan H Druzin, 'Institutional Lock-In Within the Field of Investment Arbitration' (Paper presented at 6th Biennial Conference, Asian Society of International Law, Seoul, 25-26 August 2017) 2-5.

158 Ibid 4.

the developed economy to leverage some of its economic influence. In the context of the EU, it simply adopts a tougher, 'take it or leave it approach' in its BITs and FTAs and developing countries will have little choice but to agree to the system. Another factor which favours the EU's approach is that multilateral agreements take longer to conclude and have a plethora of competing and conflicting interests, which often delay its implementation. The adoption of a bilateral approach in trade and investment might be simpler.

The ICS system contains a number of much criticised provisions. However, we must carefully scrutinise possible alternatives. The current ISDS is rightly criticised for its high costs, inconsistent awards on similar issues of law and other associated complications, but a regional approach is difficult to develop and implement. In the shorter-term, therefore, the EU-led ICS is more likely to become the next ISDS norm (provided it achieves the critical mass necessary to establish a new institutional norm) while nations build consensus on adopting a multilateral framework for adjudicating and settling investment disputes. The work of UNCITRAL Working Group 3 on adoption of the Opt-In Convention designed on the *Mauritius Convention* is still in the initial stages with majority of developing countries (and some developed countries) still undecided on whether to become part of the move towards the UNCITRAL solution.