CHOOSING DOMESTIC COURTS OVER INVESTOR–STATE ARBITRATION: AUSTRALIA'S REPUDIATION OF THE STATUS QUO

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I INTRODUCTION

Many countries have lately sought to reassess the efficacy of international investment agreements and investment arbitration in particular. Nicaragua and Venezuela have both signaled their intention to terminate existing Bilateral Investment Treaties ('BITs') including provisions for investment arbitration.[1] Ecuador has denounced the International Centre for Settlement of Investment Disputes ('ICSID'), the primary source of investment arbitration. Romania attempted to withdraw from the Swedish–Romanian BIT, only to then be subject to an investment arbitration award that purported to bind it 'irrevocably' to that agreement.[2] China traditionally restricted investor–state provisions in BITs until its more recent emergence as a leading capital exporter,[3] while the Philippines negotiated to exclude investment arbitration in its free trade treaty with Japan in

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1 For commentary on these events, as well as investment arbitration in Latin America generally, see Scott Appleton, *Latin American Arbitration: The Story Behind the Headlines* (April 2010) International Bar Association <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=78296258-3B37-4608-A5EE-3C92D5D0B979>.

2 See *Ioan Micula v Romania (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/05/20, 24 September 2008) [28]–[32]. The investor claim against Romania was brought under the Sweden–Romania BIT. It dealt with the cancellation and withdrawal of a favourable customs and tax regime by Romania relating to a food production enterprise. See further Jurisnet, *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania, ICSID Case No. ARB/05/20 (Sweden–Romania BIT), Decision on Jurisdiction and Admissibility* (2011) ArbitrationLaw.com <http://arbitrationlaw.com/library/ioan-micula-viorel-micula-sc-european-food-sa-sc-starmill-srl-and-sc-multipack-srl-v>.

3 On China's shifting position in regard to investment arbitration, see Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011).

2006.[4] One result is that bilateral investment agreements themselves are under attack, although countries like China have concluded a significant number in the last decade.[5] Another result is that investment arbitration is not assured as the pervasive medium through which investor–state disputes will be resolved in the future.

Doubts about BITs among developed countries are not limited to Australia. Recent model BITs, such as the US Model BIT adopted in 2012 and the Canadian Model BIT restrict the scope of earlier Model BITs, such as the US Model BIT of 2004 in relation to regulatory expropriation, the link between the fair and equitable treatment of foreign investors and the minimum standard of justice, and the equal treatment of domestic and foreign investors.[6] These recent Model BITs also include subjective national security provisions and exclude measures taken by governments to protect their public health and related public interests.[7] These developments, embodied in recent BITs such as the US–Peru Free Trade Agreement,[8] correspond with Australia's desire to retain greater regulatory space including over foreign investment. However, unlike Australia, they have not led to a total withdrawal from investor–state arbitration ('ISA') in either the United States or Canada. In fact, other than the Australia–United States Free Trade Agreement, there is no investment treaty between developed countries that does not provide for ISA.

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4 See Shotaro Hamamoto and Luke Nottage, 'Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor–State Dispute Resolution' (Sydney Law School Research Paper No 10/145, December 2010) 10, 26 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724999>; also later published in (2011) 8(5) *Transnational Dispute Management* 1.

5 China currently has 139 BITs (one less than Germany, which has the most of any country), although the EU is in the process of restricting its Member States from concluding BITs on the grounds that the EU represents EU States. On China's investment treaties, see Ministry of Commerce, People's Republic of China, *China FTA Network* (1 October 2012) <http://fta.mofcom.gov.cn/english/index.shtml>. On the EU's proposed restriction on investment treaties, see European Commission, *Proposal for a Regulation of the European Parliament and of the Council*, *Establishing a Framework for Managing Financial Responsibility Linked to Investor–State Dispute Settlement Tribunals Established by International Agreements to which the European Union is Party* (COD/2012/0163, 21 June 2012), <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf>. See also Nathalie Bernasconi-Osterwalder, 'Analysis of the European Commission's Draft Text on Investor–State Dispute Settlement for EU Agreements', *International Institute for Sustainable Development: Investment Treaty News* (online), 19 July 2012 <http://www.iisd.org/itn/2012/07/19/analysis-of-the-european-commissions-draft-text-on-investor-state-dispute-settlement-for-eu-agreements/>.

6 The United States Model Bilateral Investment Treaty (2012) <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>. See also Kenneth J Vandevelde, 'Model Bilateral Investment Treaties: The Way Forward' (2011) 18 *Southwestern Journal of International Law* 307. Cf United States Model Bilateral Investment Treaty (2004) <http://www.state.gov/documents/organization/117601.pdf>. On Canada's Model Investment Treaty, see Andrew Newcombe, *Canada's New Model Foreign Investment Protection Agreement* (August 2004) Investment Treaty Arbitration <http://ita.law.uvic.ca/documents/CanadianFIPA.pdf>.

7 Ibid.

8 See *Peru Trade Promotion Agreement*, US–Peru, signed 12 April 12 2006 (entered into force 1 February 2009) art 10.21; *US–Columbia Trade Promotion Agreement*, signed 22 November 2006 (entered into force 15 May 2012) art 10.21; *US–Korea Free Trade Agreement*, signed 30 June 2007 (entered into force 15 March 2012) art 11.21 ('*KORUS FTA*').

As a result, while the Australian Government's position towards the effects of ISA decisions is more moderate than the stance taken by South American states, Australia is the first developed state to openly indicate that it will no longer agree to the adoption of arbitration within its Bilateral and Regional Trade Agreements ('BRTAs'). The effect of this policy shift is that henceforth the Australian government may negotiate that investment disputes with foreign investors be heard by domestic courts of law, rather than be resolved by international investment arbitration.[9] In a trade policy statement released on 12 April 2011, hereinafter referred to as the 'Policy', the Australian Government confirmed that it would no longer negotiate treaty protections 'that would confer greater legal rights on foreign businesses than those available to domestic businesses' or that would 'constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses'.[10] This policy shift by Australia against ISA is not entirely unexpected. There is no provision for ISA in the Australia–United States Free Trade Agreement. In addition, some of Australia's free trade treaties preceding its 2011 Policy Statement against ISA defined protected investments narrowly.[11] As a result, the change in Australia's policy was not a bolt from the blue. What is distinctive about the Policy, however, is the fact that it is now Australia's official policy, as distinct from its preferred practice.

The Policy also enshrines Australia's view that domestic courts, not investment tribunals, are *the* appropriate bodies to resolve investment disputes between domestic states and foreign investors, in the same manner as domestic courts decide 'other' domestic disputes.[12] The inference arising from this Policy is that a domestic court can protect the rights of foreign investors, while preventing them from receiving investment benefits beyond those provided to domestic investors. It is also presumed that, if investment arbitration privileges foreign investors, it undermines the national interest; and if it detracts from the

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9 Department of Foreign Affairs and Trade, Australian Government, 'Trading Our Way to More Jobs and Prosperity' (Gillard Government Trade Policy Statement, April 2011) ('Policy') <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state>. For a comment on the Australian Government's Policy announced on 12 April 2011, see Luke Eric Peterson, 'Australia Rejects Investor–State Arbitration Provision in Trade Agreements' on *Don't Trade Our Lives Away* (19 April 2011) <http://donttradeourlivesaway.wordpress.com/2011/04/19/australia-rejects-investor-state-arbitration-provision-in-trade-agreements/>. See generally Leon E Trakman, 'Foreign Direct Investment: Hazard or Opportunity?' (2010) 41 *George Washington International Law Review* 1.

10 Department of Foreign Affairs and Trade, above n 9, 14.

11 On Australia's current and impending trade and investment agreements with Indonesia, Malaysia, Thailand, among other countries, see Department of Foreign Affairs and Trade, Australian Government, *Australia's Trade Agreements* <http://www.dfat.gov.au/fta/index.html>.

12 See Leon E Trakman, 'Foreign Direct Investment: An Australian Perspective' (2010) 13 *International Trade and Business Law Review* 31, 48–53; Thomas Westcott, 'Foreign Investment Issues in the Australia–United States Free Trade Agreement' (Summer 2004–05) *Economic Roundup* 69 <http://archive.treasury.gov.au/documents/958/PDF/06_Foreign_investment_policy_AUSFTA.pdf >.

national interest, local courts ought to replace it.[13] A third option is conceivable, that investors who feel that their rights have been violated can seek diplomatic intervention by their home states. However, that is not a practical mechanism for resolving all disputes and governments are generally loath to intervene on behalf of private investors which may be resource intensive and may undermine state-to-state relations. In addition, many foreign investors lack access to their home states due to the limited scale of their foreign investments and their lack of sophistication. A further option is for foreign investors to enter into contracts directly with states, including negotiating terms governing the settlement of investment disputes. However, that option is inaccessible to the vast majority of investors that lack the economic resources and political influence to negotiate such contracts with host states. The further proposal by the Australian Government is that '[i]f Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.'[14] This, too, is problematic because it leaves Australian investors to resolve investor–state disputes in the domestic courts of a myriad of host countries. A further risk, to Australia itself, is that Australian businesses will restructure their foreign investments through offshore entities that have more favourable BIT dispute resolution provisions, removing themselves from the regulatory and taxation regimes of Australia. However, it is arguable that outbound Australian investors that bring ISA claims against recalcitrant states benefit both Australia and its outbound Australian investors. In particular, outbound investors can bring ISA claims against states that have limited 'rule of law' traditions, by relying on BITs between between those states and intermediary states. This enables Australian investors to lodge claims against states whose courts those investors do not trust. An incidental benefit is that the Australian Government need not conclude BITs with ISA provisions with states that lack established rule of law traditions, given the resort by Australian outbound investors to intermediary states.

One can debate whether the Australian Government is unqualifiedly committed to this Policy. There has been no indication that it will seek to withdraw from existing BITs and Free Trade Agreements ('FTAs') that provide for ISA. However, in the interests of uniformity, it may conceivably insist on renegotiating some or even all existing BITs that provide for ISA. It may also insist on negotiating more protective dispute resolution provisions with countries whose domestic standards of legal protection are lower than Australia's, in effect capping protection for foreign investors at Australia's domestic standard of protection. These interventions by the Australian Government seem unlikely to eventuate given its comments that Australian businesses need to make their own assessment of the risks of investing in host countries abroad. It may also be that

13 On this view, see David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press, 2008) chs 2, 6.

14 See Department of Foreign Affairs and Trade, above n 9, 14.

the Australian Government has yet to arrive at firm responses to these issues. A successor Coalition Government, in turn, may retreat from this Policy, reverting to a widely accepted reliance on ISA, especially in concluding investment treaties with developing countries. A particular difficulty for the Australian Government is that it is currently negotiating a strategic Trans-Pacific Partnership Agreement in which the United States is a dominant party. An issue will be whether Australia realistically can negotiate to be included in this multilateral Partnership that is likely to endorse ISA, while still being able to opt out of investor–state arbitration.[15] The impact of Australia's policy should not, however, be overstated. Australia is seeking an exemption from the ISA process only, not from substantive provisions in the TPP, such as from a 'fair and equitable treatment' standard. Were Australia to deny this standard to a foreign investor, that investor presumably would be able to seek rederess in Australia's domestic courts for Australia's breach of its treaty obligations.

What is now known is that the Australian Government's Policy Statement is based less on unremitting faith in domestic courts to resolve investor–state disputes than in disdain for ISA in particular. That disdain stems from the draft research and final reports of the Australian Productivity Commission ('APC'), a public commission in Australia charged by the Federal Treasurer with the specific task of making recommendations on future trade and Trade Policy Statements.[16] However, the APC's Report did more than challenge investor–state arbitration.[17] It proposed more pervasively that Australia negotiate bilateral and regional trade and investment treaties in stages, that it first reach agreement on non-contentious issues; that it conclude treaties in order of their net benefit to Australia; that it cease to adopt ISA to resolve disputes in such treaties; and that it increase consultation with industry stakeholders and consumer representative groups.[18]

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15 See Department of Foreign Affairs and Trade, Australian Government, *Trans-Pacific Partnership Agreement Negotiations* <http://www.dfat.gov.au/fta/tpp/> (see the 'News' Tab). See also Public Knowledge, *TPP Recap: San Diego Negotiations* (13 July 2012) The Trans-Pacific Partnership Agreement <http://tppinfo.org/2012/07/13/tpp-recap-san-diego-negotiations/>. See also Organization of American States, *Trans Pacific Partnership Agreement (TPP) – Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the United States and Vietnam* (2012) SICE <http://www.sice.oas.org/TPD/TPP/TPP_e.asp>.

16 The APC identifies its mandate on its website as follows: 'The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed simply, is to help governments make better policies in the long term interest of the Australian community'. See Productivity Commission, Australian Government, *About Us* (20 July 2012) <http://www.pc.gov.au/about-us>.

17 Productivity Commission, Australian Government, *Bilateral and Regional Trade Agreements: Final Research Report* (13 December 2010) <http://www.pc.gov.au/projects/study/trade-agreements> ('*PC FR*'); Productivity Commission, Australian Government, *Bilateral and Regional Trade Agreements: Draft Research Report* (16 July 2010) ('*PC RR*') (on file with the author). On submissions invited by the Commission, see eg, Patricia Ranald and Harvey Purse, Submission on Behalf of the Australian Fair Trade and Investment Network ('AFTINET') to the Productivity Commission Review into Bilateral and Regional Trade Agreements, 10 March 2010 <http://www.pc.gov.au/__data/assets/pdf_file/0015/102525/subdr068.pdf>. See also Trakman, 'Foreign Direct Investment', above n 12.

18 Productivity Commission, *PC FR*, above n 17, pt D.

This article has several key objectives in relation to these matters. The first is to challenge the APC's contention that ISA should be rejected on grounds that it is objectively inferior to other mechanisms of dispute resolution. While other methods such as diplomatic intervention, political risk insurance, investor–state contracts, et cetera, remain open, the most practical alternative to ISA is domestic litigation. However, domestic litigation is as open to criticism as is ISA. The second key objective of the article is to evaluate the consequences of resorting to domestic courts, as distinct from ISA to resolve investment disputes. The conclusion is that poking metaphorical holes in ISA is offset by debilitating holes in domestic courts attempting to resolve investor–state disputes transparently, even-handedly and in particular, consistently and fairly. Indeed, ISA provisions in BITs provide a greater level of uniformity, predictability and security than resort to domestic courts. The article makes recommendations for changes to ISA that may reasonably accommodate some perceived deficiencies in ISA, redress some of Australia's concerns, and enable Australia to participate in investment treaties in which ISA is most likely to prevail. The article concludes by arguing against the Australian Government's summary rejection of ISA. The Government has also failed to provide a sustainable alternative, beyond open-ended reliance on domestic courts, once ISA is abandoned. The risk to Australia is in facing treaty isolation as a result of domesticating investment disputes before national courts in a manner that Australia's key partners in the region and elsewhere reject. A risk to Australian investors abroad is that they may be denied procedural justice before the courts of host states that lack the rule of law traditions imputed to the Australian judicial system.

This article does not examine the economic costs of subjecting investment disputes to domestic litigation given that insufficient time has elapsed since Australia's new Policy statements to allow for such an analysis. However, it does maintain that the alleged economic costs which the Productivity Commission imputes to ISA are insufficiently established to justify rejecting ISA out of hand. Even if there are susceptible economic grounds to hold that the costs of ISA undermine its viability, and fairness, these arguments need to be assessed on principled grounds. Doubts about ISA also need to take account of principled objections to its alternatives, notably to domestic courts, to resolve investor–state disputes. Such doubts are comparable in part to the preference shown for domestic institutions to resolve investor and other claims against Latin American countries under the Calvo Doctrine, devised decades ago by Argentina, which is now being resurrected.[19]

II BACKGROUND: THE APC REPORT

A primary consideration impelling the Australian Government's Policy stance is domestic public policy. Its central concern is that foreign investors,

19 On the Calvo Doctrine, see generally below n 96.

notably foreign drug companies, will invoke investment arbitration to challenge Australia's sovereignty, and public interest in regulating industrial relations, public health, safety and the environment. These concerns are understandable. Foreign drug companies are increasingly likely to challenge the Australian Government's restrictions on access to and the price of foreign manufactured drugs, such as under the Pharmaceutical Benefits Scheme ('PBS'). A related concern is the challenge to the Australian law requiring the plain packaging of tobacco products. Philip Morris has already initiated investment arbitration against the Republic of Uruguay under the Switzerland–Uruguay BIT and has since launched a challenge against Australia.[20] Despite rhetoric about the national interest, the political and economic subtext behind Australia's new Policy may be more complex in nature. There are growing doubts about the perceived economic merits of trade and investment arbitration. Reflecting these doubts are comments of the APC specifically making recommendations on future trade and investment policy. In essence, the Commission's report found no overwhelming economic rationale in support of ISA mechanisms in trade and investment agreements. Indeed, at its core the Commission found limited economic value in the BRTAs concluded to date. Craftily stated, the Commission noted that 'current processes for assessing and prioritising BRTAs lack transparency and tend to oversell the likely benefits'.[21] The APC's Report continued: 'the economic value of Australia's preferential BRTAs has been oversold'.[22] A recent analysis of the APC's report emphatically asserts that the APC's approach was based on a set of problematic assumptions and omissions, including a failure to fully understand the international legal and political

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20 See *Tobacco Plain Packaging Act 2011* (Cth). See generally Matthew C Porterfield and Christopher R Byrnes, 'Philip Morris v. Uruguay: Will Investor–State Arbitration Send Restrictions on Tobacco Marketing up in Smoke?', *International Institute for Sustainable Development: Investment Treaty News* (online), 12 July 2011 <http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/>; Andrew D Mitchell and Sebastian M Wurzberger, 'Boxed in? Australia's Plain Tobacco Packaging Initiative and International Investment Law' (2011) 27(4) *Arbitration International* 623; Simon Chapman and Becky Freeman, 'The Cancer Emperor's New Clothes: Australia's Historic Legislation for Plain Tobacco Packaging' (2010) 340 *British Medical Journal* 2436; Tania S Voon and Andrew D Mitchell, 'Implications of WTO Law for Plain Packaging of Tobacco Products' in Andrew D Mitchell, Tania S Voon and Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012); Philip Morris International, Submission to the Office of the US Trade Representative, *Request for Comments Concerning the Proposed Trans-Pacific Partnership Trade Agreement*, 25 January 2010 <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a81289>. On Philip Morris' initiation of an action against Australia in terms of the Australia–Hong Kong Free Trade Agreement, see Philip Morris International, *Philip Morris Asia Initiates Legal Action Against the Australian Government Over Plain Packaging* (27 June 2011) <http://www.pmi.com/eng/media_center/press_releases/pages/PM_Asia_plain_packaging.aspx>. On Philip Morris' unsuccessful litigation against the Prime Minister of Australia, see *Philip Morris Limited v Prime Minister* [2011] AATA 556.

21 Productivity Commission, *PC RR*, above n 17, xiv.

22 Ibid xxii.

implications of rejecting ISA, as well as a failure to take into account the effect of this rejection on outbound investment.[23]

The APC did propose that Australia should assist developing countries to build their judicial infrastructures, inter alia, to promote the rule of law in their domestic courts for the benefit of foreign investors.[24] How Australia could accomplish this goal, given resistance in some developing countries to perceived foreign intervention in their internal affairs, would be a challenge. In issue is whether the APC's assumptions that the costs of ISA outweigh any ancillary benefits are valid; whether declining to incorporate ISA into investment treaties will cause a 'regulatory chill' on public authorities; whether reliance on domestic courts to resolve investment disputes will undermine the democratic process of law making; and whether ISA will distort the efficient flow of investments.[25] Further in issue are institutional impediments associated with ISA raised by the APC, as identified in Part V below.

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

What, then, are the principled reasons in favour of domestic courts resolving investment disputes between host states and foreign investors? What are the principled arguments to the contrary? One answer is that the APC's concerns are defensible, at least in part.[26] Australia has a legitimate economic interest in reducing defensive costs that restrict its domestic policy space arising from entry into investment treaties. The problem is that the APC fails to balance these costs against the potential offensive gains to outbound Australian capital. For example, why would the Australian Government avoid investment arbitration in its BITs with developed states that are net foreign direct investment ('FDI') importers from Australia and that Australia perceives as having legal systems that are comparable to Australia's?

The macro-economic concern that dispute resolution mechanisms especially investment arbitration can be costly, is double-edged. ISA does expose states to the risk of costly, fractious and dysfunctional disputes with deep pocket foreign investors of the likes of Philip Morris.[27] Weighed against this is the unfairness of

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

24 See Productivity Commission, *PC FR*, above n 17, pt D.

25 Ibid 271–2.

26 See Jürgen Kurtz, 'The Australian Trade Policy Statement on Investor–State Dispute Settlement' (August 2011) 15(22) *American Society of International Law Insights* <http://www.asil.org/insights110802.cfm> (noting that the Productivity Commission's Report, while offering a rigorous quantitative analysis of the net economic benefits of BITs, fails to take into account the dynamism of international law: 'critical barriers to foreign investment do not usually take the form of simply border measures whose effects are easily quantifiable.')

27 See Philip Morris International, above n 20. On the prelude to this conflict, see Liv Casben, 'Tobacco Companies Rally Against Plain Packaging', *ABC News* (online), 29 April 2010 <http://www.abc.net.au/

denying foreign investors in general access to 'neutral' arbitration; the cost to them of having to submit their investor–state disputes to domestic courts of host states in which proceedings are potentially more adversarial than litigation; and the potential denial by domestic courts of natural justice on dubious national interest grounds. A further macro-political and economic cost to Australia is the prospect of being isolated from potentially lucrative investment treaties with leading trade partners that insist on the adoption of ISA. This concern is most likely to eventuate under the Trans-Pacific Partnership Agreement in which the vast majority of state parties are likely to prefer ISA over domestic litigation. Nor is Australia's rejoinder justified, that at least Australian courts are preferable institutions to dispense natural justice than ad hoc investment tribunals in the absence of further legitimation.[28] These competing arguments are considered in greater detail below.

III CHALLENGING ISA

An initial observation is that the Australian Government and the Productivity Commission are not alone in their doubts about the value of ISA. Related concerns were expressed in a 2010 report by the United Nations Conference on Trade and Development ('UNCTAD'):

> Moreover, the financial amounts at stake in investor–state disputes are often very high. Resulting from these unique attributes, the disadvantages of international investment arbitration are found to be the large costs involved, the increase in the time frame for claims to be settled, the fact that ISDS cases are increasingly difficult to manage, the fears about frivolous and vexatious claims, the general concerns about the legitimacy of the system of investment arbitration as it affects measures of a sovereign State, and the fact that arbitration is focused entirely on the payment of compensation and not on maintaining a working relationship between the parties.[29]

The Australian Government has asserted that it supports the principle of national treatment, that domestic and foreign businesses are to be treated equally under the law. An inference is that foreign investors ought not to benefit from

news/stories/2010/04/29/2885343.htm>. See also International Centre for Trade and Sustainable Development, *Tobacco Company Files Claim against Uruguay over Labeling Laws* (10 March 2010) <http://ictsd.org/i/news/bridgesweekly/71988/>. See also above nn 16, 20.

28 See also Department of Foreign Affairs, above n 9, 14.

29 United Nations Conference on Trade and Development, 'Investor–State Disputes: Prevention and Alternatives to Arbitration' (UNCTAD Series on International Investment Policies for Development, May 2010) xxiii <http://www.unctad.org/en/docs/diaeia200911_en.pdf>. Investor–State Dispute Settlement will hereinafter be referred to as 'ISDS'. See also United Nations Conference on Trade and Development, 'Investor–State Disputes: Prevention and Alternatives to Arbitration II' (Paper presented at the Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution, Lexington, Virginia, 29 March 2010) <http://www.unctad.org/en/docs/webdiaeia20108_en.pdf>. On the UNCTAD's most recent report on ISDS, see United Nations Conference on Trade and Development,'Latest Developments in Investor–State Dispute Settlement' (IIA Issues Note No 1, April 2012) <http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf>.

investment arbitration as a dispute resolution process that is not ordinarily available to domestic investors and that would place local investors at a comparative disadvantage. Thus, APC's research report noted: 'Dispute settlement processes should not afford foreign investors in Australia with access to litigation options not normally afforded to local investors'.[30] These localised considerations notwithstanding, relying on domestic courts to decide investment disputes carries its own risks. Can the Australian Government be reasonably assured that foreign trade and investment partner states will respect the rule of law in deciding foreign investor–state disputes abroad? At a functional level, what framework would domestic courts apply in resolving investment disputes? Would they apply local laws? How would any claim for breach of BIT protections be presented to a domestic court? When would a foreign investor be entitled to bring a claim for breach of the fair and equitable treatment standard against a host state? When, if ever, would a domestic court directly apply international investment law to an investor–state dispute? To what extent could national courts be relied upon to demonstrate their willingness and ability to exercise discretion in displaying fairness towards foreign investors, conceivably at the expense of the host state?

The APC presents an ambitious answer to the rule of law question in particular. Its answer is for Australia to provide developing country partners with infrastructure and related financial support to reform their economies, including presumably the redress of Australian concerns about access to justice in investor–state disputes before the courts of 'host' states.[31]

A further self-help remedy proposed is for Australian investors abroad to develop their own mechanisms to assess the risks of relying on foreign domestic courts to resolve investment disputes with foreign host states.[32] In this regard, political risk insurance is one conceivable, albeit underdeveloped, avenue of risk avoidance that is available to Australian investors abroad.[33]

Interestingly, the APC noted that it 'received no feedback from Australian businesses or industry associations indicating that ISDS provisions were of much value or importance to them'.[34] Nevertheless, the absence of feedback from the private sector does not necessarily infer acquiescence in the APC's inference that businesses do not value investor–state arbitration. The more likely inference is that they were not attuned to the Commission's project, did not appreciate its influence on government policy, or doubted their capacity to change the Commission's view.[35]

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30 Productivity Commission, *PC RR*, above n 17, [13.20].

31 Ibid [13.19] – [13.20].

32 Ibid.

33 See Kurtz, 'Australia's Rejection of Investor-State Arbitration', above n 23, 79–80; Department of Foreign Affairs and Trade, above n 9.

34 Productivity Commission, *PC FR*, above n 17, 270–1.

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

It is possible that Australia's rejection of ISA, along with other countries noted in the Introduction, will undermine the work of recognised investment arbitration institutions like the ICSID. A related hazard is that the Australian Government's rejection of ISA will encourage other states to adopt more nuanced dispute resolution mechanisms, not limited to domestic courts. These concerns are reflected in part in problematic dispute resolution mechanisms that are incorporated into the China–New Zealand Free Trade Agreement and the prospect that New Zealand will also opt for domestic courts over investor–state arbitration.[36] It is also noteworthy that, while the Australia–New Zealand–ASEAN Free Trade Agreement provides for ISA, it has permitted countries like the Philippines to reserve the protection of particular domestic sectors, denying full market access to foreign investors.[37]

Linked to these concerns is the apprehension that other developed states will follow Australia's lead, not least of all as a result of entering into BITs with Australia in which domestic courts are chosen over ISA, as is already the case in the Australia–US Free Trade Agreement.[38] At its most basic, this risk is about international investment arbitration centres losing their business to domestic courts, and not only about investor–state disputes being rendered parochial.

IV FURTHER ALTERNATIVES

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

The APC acknowledged these alternatives, but then discounted them in part. While it recognised that investors may negotiate investment contracts with host countries that include dispute resolution clauses, the APC appropriately conceded

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36 *Free Trade Agreement*, New Zealand–China, signed 7 April 2008 (entered into force 1 October 2008) <http://chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php>. On resistance to ISA in the Trans-Pacific Partnership Agreement particularly in Australia and New Zealand, see, eg, Kyla *Tienhaara, Investor–State Dispute Settlement in the Trans-Pacific Partnership Agreement* – Submission to the Department of Foreign Affairs and Trade, 19 May 2010 <http://www.pc.gov.au/__data/assets/pdf_file/0004/102487/subdr067-attachment1.pdf >. See also Meredith Kolsky Lewis, 'The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?' (2011) 34(1) *Boston College International and Comparative Law Review* 27.

37 *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Agreement,* signed on 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010) <http://www.aseansec.org/22260.pdf>.

38 *Australia–United States Free Trade Agreement*, signed on 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) <http://www.dfat.gov.au/fta/ausfta/index.html>.

that such a negotiated strategy 'is more feasible for large businesses'.[39] It identified the availability of political risks insurance against expropriation; however, it did not highlight the current short time frame, complexity and limited coverage of such insurance.[40] Nor does it consider whether to permit investors to choose between initiating an action before domestic courts or commencing investor–state arbitration – an option which Australia could have incorporated into future BITs and FTAs. By a process of elimination, the APC conceived that the most practical option was resort to domestic courts.

V IN PURSUIT OF EQUALITY

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

> Cases are generally not appealable and arbitration frequently operates without the benefit of precedents (an important component of legal certainty). Additionally, particular government actions that would otherwise be non-reviewable to domestic investors may be subject to ISDS actions by foreign investors.[41]

The APC's research report goes on to note that arbitration clauses in BRTAs often accord greater rights to foreign than domestic investors;[42] BRTAs diverge over the nature of arbitration mechanisms in agreements between developed and developing countries;[43] and they do not address potential conflicts arising from mixed regional agreements such as under the proposed Trans-Pacific Partnership Agreement.[44]

The APC's research report also challenges ISA clauses for restricting future governments from regulating foreign investment in the public interest.[45] It stresses, too, that the benefits arising from the econometric measurement of bilateral investment arbitration are likely to be scant.[46]

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

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

39 Productivity Commission, *PC FR*, above n 17, 270.
40 Ibid 320.
41 Ibid [13.20].
42 Ibid.
43 Ibid [19].
44 Ibid [13.20].
45 Ibid [9.11], [13.20].
46 Ibid [14.5].

than the Australian Government.[47] In addition, legislatures sometimes prefer domestic courts to arbitration in resolving trade and investment disputes, notably under the US *Trade Act of 2002*.[48] The Australian Government is also not alone in seeking to protect domestic investors from foreign investors. The Bipartisan Trade Promotion Authority Act 2002 in the United States and the consequent 2004 US Model BIT challenged trade-distorting barriers by which foreign investors acquired 'greater substantive rights with respect to investment protections' than domestic investors.[49] While the legislative intent in the US was to amend ISA in the interests of local investors, it fell markedly short of rejecting ISA out of hand.[50]

The Australian Government's position is nevertheless distinctive in its insistence on national treatment to investors in every investment treaty it concludes in order to ensure 'that foreign and domestic businesses are treated equally under the law'.[51] Whether domestic courts will accord equal treatment to domestic and foreign investors remains to be seen. Some scholars espouse the view that all countries engage in a measure of discrimination against foreign investors, however, much of the Australian Policy is based on equal treatment of foreign and domestic investors.[52]

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

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47 See generally Mark Kantor, 'The New Draft Model U.S. BIT: Noteworthy Developments' (2004) 21 *Journal of International Arbitration* 383; Trakman, above n 12, 79–81; Westcott, above n 12; Peter Drahos and David Henry, 'The Free Trade Agreement Between Australia and the United States' (2004) 328 *British Medical Journal* 1271; Philippa Dee, 'The Australia–US Free Trade Agreement: An Assessment' (Pacific Economic Papers No 345, 2005) <http://crawford.anu.edu.au/pdf/pep/pep-345.pdf>; Drusilla K Brown, Kozo Kiyota and Robert M Stern, 'Computational Analysis of the US FTAs with Central America, Australia and Morocco' (2005) 28(10) *World Economy* 1441. See also Office of the United States Trade Representative, *Free Trade Agreements Australia* <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta>.

48 The Trade Act was passed on 6 August 2002. See *Trade Act of 2002*, 18 USC §§ 3803–5 (2002) ('*Trade Act*').

49 See *Trade Act* § 2102(b)(3).

50 See Kantor, above n 47, 383.

51 Department of Foreign Affairs and Trade, above n 9, 14.

52 Kurtz, 'Australia's Rejection of Investor–State Arbitration', above n 23, 75. Kurtz relies on the commentary of Joseph Stiglitz to assert that '"all countries engage in some discrimination" against foreign investors', and concedes that 'protectionism is a political temptation that is not confined to any political or legal tradition'.

disputes due to long-standing, and deeply engrained trade and investment relationships, similarities in legal traditions, and 'trust' that the others' courts will apply mutually affirmed rules of law and principles of natural justice. Despite the rhetoric, BITs that refer investment disputes to domestic courts, notably under the Australia–United States Free Trade Agreement ('AUSFTA') are the exception, not the norm. Of well over 3000 BITs in operation, the exclusion of ISA in the AUSTFTA stands out as a discrete exception, albeit between two closely aligned developed states.[53] As such, the Australian Government's Policy Statement in April 2011 that it will discontinue the practice of pursuing 'investor–state dispute resolution procedures in trade agreements with *developing countries*' is surprising.[54] However, Australia has already initiated its Policy, notably in its 2012 Free Trade Agreement with Malaysia that excludes ISA.[55]

One of the Australian Government's key assumptions in specifying that domestic courts will resolve investment disputes in all future BITs is its insistence that Australian investors who invest abroad ought to take account of economic, political and legal risks associated with such investments. Its advice to such Australian investors is to assess the likelihood of receiving less favourable treatment before foreign courts than they would before domestic Australian courts. If Australian investors abroad fail to do their homework in making investment choices, they ought to bear the consequences of their own action. Defensively phrased, the Australian Government ought not to be responsible to protect Australian investors who assume foreign investment risks they ought to have avoided or mitigated.[56]

The Australian Government's approach is nevertheless problematic. The expectation of Australian investors about the hazard of being subject to foreign courts abroad is likely to be informed, to varying degrees, by the conditions in BITs that are negotiated between the Australian Government and its treaty partners. That conduct is likely to affirm the perception among Australian investors abroad that, if the Australian Government is willing to conclude BITs with foreign governments, it is likely also to 'trust' the courts of those partner countries to resolve investor–state disputes. If the Australian Government has doubts, Australian investors could reasonably assume that it would not have concluded those treaties, or it would have provided economic infrastructure or other financial support to help investment partners deliver legal services judiciously to foreign investors from Australia. Alternatively, Australian investors could presuppose that the Australian Government would have included appropriate conditions within its treaties to ensure that 'national treatment' for

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53 On the Australia–US Free Trade Agreement, see above n 38. See also Trakman, 'Foreign Direct Investment: An Australian Perspective' above n 12, 39, 41–50, 79–81.

54 Department of Foreign Affairs and Trade, above n 9 (emphasis added).

55 See generally Department of Foreign Affairs and Trade, Australian Government, *About the Australia–Malaysia Free Trade Agreement* <http://www.dfat.gov.au/fta/mafta/>.

56 The Government states in its Trade Policy, above n 9, 16: 'If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries': Department of Foreign Affairs and Trade, above n 9, 16.

Australian investors is both clearly articulated and implemented.[57] It is probable, too, that Australian investors might be more likely to submit an investor–state dispute to a court in a host state with whom Australia has a BIT relationship when compared to submitting such a dispute involving a host state that has no such BIT relationship.

VI THE CASE FOR NOT RELYING ON ISA

Any alleged flaws in the APC's analysis notwithstanding, it can be readily accepted that ISA institutions are far from perfect. There are numerous principled objections to reliance on ISA.[58] In fairness, the APC identifies some of its reasons for such objections: the large size of investor claims, the latitude of investment tribunals in determining the amount of compensation, the lack of rigorous rules governing the conduct of ISA, the absence of an appeals process, and the threat of 'institutional biases and conflicts of interest, inconsistency and matters of jurisdiction, a lack of transparency and the costs incurred by participants'.[59] The Commission concludes that '[e]xperience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions'.[60]

A The Case for Relying on Domestic Courts

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

First, on principled grounds, domestic investors ought to be subject to the territorial sovereignty of the state in which they invest.[61] National law ought to govern the rights of foreign investors; and the jurisdiction of domestic courts ought to exclude other options such as diplomatic channels that bypass the judicial system of the host state.[62]

Secondly, a domestic court of the state that is party to an investment treaty is the appropriate forum to resolve an investment dispute, in the same manner as it

57 See, eg, Westcott, above n 12; Trakman, 'Foreign Direct Investment', above n 12, 39, 41–50, 79–81.

58 Trakman, 'Investor–-State Arbitration or Local Courts', above n 35, 100 (for commentary on the principled objections to ISA).

59 Productivity Commission, *PC FR*, above n 17, 272.

60 Ibid 274.

61 On the complexity of sovereignty in international investment law, see, eg, Wenhua Shan, Penelope Simons and Dalvinder Singh, *Redefining Sovereignty in International Economic Law* (Hart, 2008) (see especially Part Four for commentary); Robert Stumberg, 'Sovereignty by Subtraction: The Multilateral Agreement on Investment' (1998) 31 *Cornell International Law Journal* 491, 503–04, 523–25. See also Robert H Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge University Press, 1990); John H Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge University Press, 2000); Michael Reisman, 'International Arbitration and Sovereignty' (2002) 18 *Arbitration International* 231; Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Longman, 9th ed, 1992) 927.

62 On the history and resurgence of the Calvo Doctrine, see generally below n 96.

resolves other disputes between that state and other private or corporate claimants.[63]

Thirdly, foreign investors should not receive investment benefits beyond those provided to domestic investors. Such treatment is conceivably unfair, as is evidenced historically by the privileges accorded by less developed countries to multinational corporations at the expense of local subjects who were competitively disadvantaged.[64]

Fourthly, domestic courts ought to decide cases involving foreign investors according to domestic law, including by incorporating international investment laws into that domestic law.[65]

Fifthly, domestic courts are bound by established forum procedures and rules of evidence to protect the rights of foreign investors from regulatory measures grounded in unduly intrusive public policies.[66]

Sixthly, the unsuccessful party to investor–state litigation would generally have the right of appeal to a higher domestic court, although this right can protract disputes, undermining both certainty and finality.

These arguments, for national courts to decide investor–state disputes, are buttressed by doubts about the legitimacy and sufficiency of ISA. In particular, ISA is not subject to comparable procedural and substantive constraints as domestic courts. Investment arbitrators may decide in favour of foreign investors on grounds that undermine the public interest of home states. There are no appeals from ISA awards under the ICSID, except for an arbitrator's failure to exercise, or abuse of, jurisdiction, leading to a review by the ICSID

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63 On these arguments in relation to the Australia–United States Free Trade Agreement, see Trakman, 'Foreign Direct Investment', above n 12, 48–53; Westcott, above n 12.

64 On these arguments buttressing the dispute resolution mechanisms adopted under the Australia–United States Free Trade Agreements, see Trakman, 'Foreign Direct Investment', above n 12, 48–9; Westcott, above n 12.

65 On the contentious constraints on the jurisdiction of state courts in the *Mondev* and *Loewen* Chapter 11 cases, see below n 132.

66 On this contest between individual rights and public policy in the development of the 'margin of appreciation' doctrine in European Union law, see Onder Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) 8 *German Law Journal* 711; Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 *European Journal of International Law* 907; Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *New York University Journal of International Law and Politics* 843; Ronald St J Macdonald, 'The Margin of Appreciation' in Ronald St J Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993) 125.

Annulment Committee.[67] Annulment proceedings are an extraordinary process and more limited in scope than appeal to a domestic court.[68] In contrast, awards rendered by a tribunal established under the United Nations Commission on International Trade Law ('UNCITRAL') Rules are subject to review by the national courts of the legal place of the arbitration.[69] However, even under the UNCITRAL Rules the grounds for review of ISA arbitration awards are more limited in scope than an appeal to a domestic court, not unlike the limited scope of ICSID Annulment Proceedings under section 53 of the ICSID Rules.[70]

B The Legitimacy Crisis of Public/Private Investment Arbitration

ISA also faces a legitimacy crisis arising out of its public and private attributes.[71] ISA is the product of a public process insofar as it stems from investment treaties between countries and engages public interests which

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67 On the absence of an appeal from ICSID arbitration, see *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, opened for signature 18 March 1965, 575UNTS 159 (entered into force 14 October 1966) art 53(1) ('*ICSID Convention*'). Article 53 provides: 'The award … shall not be subject to any appeal or to any other remedy except those provided for in this Convention'. The most significant remedy under the ICSID is the annulment of an award under Article 53. The ICSID provides instead for a review of an investment award by an Annulment Committee which is set up specifically for that purpose, with the power to modify or nullify an ICSID award on limited procedural grounds under Art 75 of the ICSID Convention. Either party can request that the award be annulled. However, the grounds for such a challenge are restricted and fall short of an appeal. They include that:

1) the ICSID tribunal was not properly constituted;
2) the tribunal manifestly exceeded its powers;
3) there was corruption on the part of a tribunal member;
4) there was a serious departure from a fundamental rule of procedure; or
5) the award failed to state the reasons on which it was based.

ICSID Annulment Committees traditionally have interpreted these grounds for a challenge liberally, permitting a series of challenges, although such challenges have dissipated in recent years. Resort to domestic courts is not an option under the ICSID. See *ICSID Convention* art 75. For ICSID documents generally, see International Centre for Settlement of Investment Disputes, *Home Page* (2012) <http://icsid.worldbank.org/ICSID/Index.jsp>. See also James Crawford and Karen Lee, *ICSID Reports, Volume 6* (Cambridge University Press, 2004). See also, ICSID, *Additional Facility Rules* (2006) <http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp>.

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

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

70 Of note, the UNCITRAL Model Law is widely adopted globally, including in Australia. See, eg, *International Arbitration Act 1974* (Cth) s 16. For the text of the UNCITRAL Model Law and in particular, art 34, see United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: With Amendments as Adopted in 2006* < http://www.uncitral.org/pdf/english/texts/arbitration/ml- arb/07-86998_Ebook.pdf>.

71 On this legitimacy crisis, see Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521, 1543–44.

transcend the commercial interests of private parties. As a result, public considerations, not least of all public reactions, influence how readily states endorse, participate in and comply with ISA determinations.[72] The other side of the legitimacy crisis is that ISA is 'private'. In the tradition of 'private' commercial arbitration, ISA is initiated with the consent of both parties to an ISA.[73] Third parties such as public interest groups until recently were not permitted to participate in ISA proceedings without the consent of the investor–state parties.[74] SA awards ordinarily can only be published without the support of the investor and state parties.[75] Typically, the Secretary General of the ICSID can publish reports of conciliation commissions or awards rendered by arbitral tribunals in ICSID proceedings, but only with the consent of both disputing parties.[76] A related consequence is that investor and state parties to ISA

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72 This tension between the law governing treaties and investor–state disputes, see Christoph H Schreuer and Rudolf Dolzer, *Principles of International Investment Law* (Oxford University Press, 2008) ch 1; Christoph H Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) chs 1–2; Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009) chs 1–2.

73 On similarities and differences between international commercial arbitration and investment arbitration, see Luke Nottage and Kate Miles, '"Back to the Future" for Investor–State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests' (Legal Studies Research Paper No 08/62, June 2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1151167>.

74 *Suez v Argentine Republic (Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission)* (ICSID Arbitral Tribunal, Case No ARB/03/19, 12 February 2007); *(Order in Response to a Petition for Transparency and Participation as Amicus Curiae)* (ICSID Arbitral Tribunal, Case No ARB/03/19, 19 May 2005). The petition challenged the decision by the Government of Argentina to accede to the ICSID Treaty on grounds that it violates the constitutional guarantees of citizens of Argentina to participate in proceedings. While the Government of Argentina was willing to hear the petition, the complainant company was not. However, the Attorney-General of Argentina published on the internet the information in his possession on the related cases. See also Carlos E Alfaro and Pedro M Lorenti, 'The Growing Opposition of Argentina to ICSID Arbitral Tribunals: A Conflict Between International and Domestic Law?' (2005) 6 *Journal of World Investment and Trade* 417.

75 See, eg, *GEA Group Aktiengesellschaft v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/08/16, 31 March 2011); *Talsud, S.A. v. United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/4, 16 June 2010); *Gemplus v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/3, 16 June 2010).

76 See, eg, *GEA Group Aktiengesellschaft v. Ukraine (Award)* (ICSID Arbitral Tribunal, Case No. ARB(AF)/04/4, 16 June 2010); *Gemplus, SA, SLP, SA and Gemplus Industrial, SA de CV v United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/3, 16 June 2010); *Aguas del Tunari, SA v Republic of Bolivia (Order Taking Note of Discontinuance)* (ICSID Arbitral Tribunal Case No ARB/02/3, 28 March 2006) <http://ita.law.uvic.ca/documents/AguasdelTunari-jurisdiction-eng_000.pdf>. These requirements are replicated on the ICSID website: see International Centre for Settlement of Investment Disputes, *ICSID Cases* <http://icsid.worldbank.org/ICSID/FrontServlet?requestType= CasesRH&actionVal=ShowHome&pageName=Cases_Home>. See also ICSID Procedural Order of 2 February 2011 inviting third parties to apply to submit *amici curiae* briefs under ICSID Arbitration Rule 37(2): 'Procedural Order Regarding Amici Curiae', *International Centre for Settlement of Investment Disputes* (2 February 2011) <http://icsid.worldbank.org/ICSID/FrontServlet?requestType= CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&page Name=Announcement81>. See further Kenneth J Vandevelde, '*Aguas del Tunari, SA* v *Republic of Bolivia*' (2007) 101 *American Journal of International Law* 179 (providing an overview and analysis of the case); A de Gramont, 'After the Water War: The Battle for Jurisdiction in Aguas Del Tunari, SA v Republic of Bolivia' (2006) 3(5) *Transnational Dispute Management* <http://www.crowell.com/ documents/After-the-Water-War_The-Battle-for-Jurisdiction-in-Aguas-del-Tunari_v_Bolivia.pdf>.

proceedings historically denied public interest petition, amicus briefs or other forms of participation by third parties in ISA proceedings. For example, in *Suez v Argentine Republic,* the arbitration tribunal acknowledged that the case potentially involved 'matters of public interest' and 'human rights considerations' and that the public access 'would have the additional desirable consequence of increasing the transparency of investor–state arbitration'.[77] It nevertheless declined to permit public participation under the petition. The perceived result of such private proceedings was the loss of public attributes for an ISA process that derives from treaties between states.

The problem remains that, on being consulted by an ISA tribunal, one or both parties may argue for excluding third parties from ISA proceedings. A further difficulty arising from excluding or limiting the participation of third parties in ISA proceedings is a lack of transparency in proceedings. Sometimes a related problem is the lack of comprehensive public information about the nature, content and results of ISA disputes when ISA tribunals limit full public access on the grounds of confidentiality.[78] It is also difficult to draw inferences about the public benefits attributes of ISA in the absence of comprehensive access to investment awards.

As will be discussed later, these criticisms of ISA are less prevalent today than historically. The ICSID amended its rules in 2006 to provide for greater transparency, including greater access of third parties to ICSID proceedings and the publication of arbitration awards. The UNCITRAL Rules did so as well through various articles.[79] In addition, UNCITRAL Working Group II is currently engaged in the '[p]reparation of a legal standard on transparency in treaty-based investor–State arbitration'.[80] These developments do not fully redress criticisms about the transparency of ISA generally. However, they do allay concern that organisations like the ICSID and UNCITRAL have remained silent in the face of criticisms about ISA transparency.

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77 *Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Republic of Argentina (Order in Response to a Petition for Transparency and Participation as Amicus Curiae)* (ICSID Arbitral Tribunal Case No ARB/03/19, 19 May 2005) [19], [22].

78 On criticism of the existence and sufficiency of international investment law, see Muthucumaraswamy Sornarajah, 'The Case against a Regime on International Investment Law' in Leon Trakman and Nick Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press, 2013) (forthcoming) ch 16.

79 See, eg, *UNCITRAL Arbitration Rules*, GA Res 65/22 (2010) arts 28(3), 34(5); *UNCITRAL Arbitration Rules*, GA Res 31/98 (1976) arts 25(4) and 32(5).

80 See United Nations Commission on International Trade Law, *Working Group II* (2012) <http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html>; *Settlement of Commercial Disputes: Preparation of a Legal Standard on Transparency in Treaty-Based Investor–State Arbitration,* 46th sess, A/CN.9/WG.II/WP.169 (6–10 February 2012).

VII THE CASE AGAINST RELIANCE ON DOMESTIC COURTS

That a case can be made against relying on ISA also does not in itself infer that domestic courts ought to be preferred. What is required is a balancing exercise, including the ramifications of resorting to domestic courts. The intention in this Part is to show that the case for domestic courts, presented Part V, is based more on perception, preference and semantic manipulation than objectively verified criteria. I have noted elsewhere that, in the debate between ISA and domestic litigation, beauty lies in the eyes of the beholder.[81]

Firstly, Australia's new investment Policy raises a noteworthy complication. By insisting that Australian courts apply domestic law to foreign investors in Australia, the Australian Government presumably accepts that foreign courts will apply their laws to Australian investors in those foreign countries, whatever those laws may be. In declining to agree to arbitration in investment treaties with both developed and developing countries, the Australian Government also draws no distinction between countries that apply a 'rule of law' jurisprudence that is comparable to the rules of law applied by Australian courts and those countries that do not subscribe to such a 'rule'.[82]

Attacking a plethora of domestic legal systems and courts is more challenging than challenging a few ISA institutions like the ICSID or the Permanent Court of Arbitration administering the UNCITRAL Rules,[83] especially where foreign investors may be subject to a multitude of domestic legal systems with divergent procedures and substantive investment jurisprudence. However, this multiplicity of domestic legal options is itself problematic, in forsaking uniformity among inevitably divergent legal systems. These deficiencies of domestic legal systems stand starkly in contrast to ISA institutions that seek to limit the proliferation of international investment law. As such, ISA serves as a unifying framework within which multiple bilateral investment treaties are subject to largely uniform ISA provisions that derive significantly from the global experience of foreign investors, host and home states. Acting as a leveling force, ISA is founded on principles, standards and rules of investment jurisprudence that are not ordinarily sublimated by domestic legal systems and rules of procedure. ISA is also conceived as more certain and

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81 See Trakman, above n 35, 114.

82 Trakman, 'Foreign Direct Investment', above n 12, 39–43, 53. See also Westcott, above n 12.

83 While the ICSID administers ISA, the UNCITRAL is *not* an administering authority. The UNCITRAL website states: 'UNCITRAL does not administer arbitration or conciliation proceedings, nor does it provide services … in connection with dispute settlement proceedings'. See United Nations Commission on International Trade Law, *FAQ – UNCITRAL and Private Disputes / Litigation* (2012) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration_faq.html#dispute>. Other institutions, most notably the Permanent Court of Arbitration ('PCA'), administer investor–state disputes under the UNCITRAL Rules. A recent UNCTAD reports that '[b]y the end of 2011, the total number of ISDS cases administered by the PCA was 65, of which 32 are pending': UNCTAD, 'Latest Developments in Investor–State Dispute Settlement', above n 29, 2. For more recent PCA statistics, see Permanent Court of Arbitration, *Cases* (2009) <http://www.pca-cpa.org/showpage.asp?pag_id=1029>, referencing pending ISAs administered by the PCA.

stable than a myriad of different domestic laws and rules that might otherwise govern direct foreign investment.[84]

Whether ISA jurisprudence exists in a truly transcendental form is the subject of ongoing doubt.[85] Arguably, the failure of the community of states to reach a multilateral investment accord in the past demonstrates the difficulty of states to find common ground on the treatment of foreign investment, including on processes for dispute resolution.[86] The counter-argument is that ISA does respond to these concerns, through standards of treatment that apply generally to foreign investors, even though ISA provisions vary among BITs and are sometimes construed differently by investment arbitrators.[87]

Notwithstanding the absence of judicial precedent in ISA as common lawyers conceive of it, ISA is still likely to be more coherent than a multiplicity of different state laws applied by local courts to foreign investment.[88] However difficult it is to identify cohesive ISA principles out of *ad hoc* and sometimes unpublished arbitration awards, and however arbitrators may fragment standards of treatment under different BITs, ICSID and UNCITRAL arbitration they have been used over a considerable period of time to resolve investment disputes in often complex investment cases.[89] That task of investment arbitration is accomplished notwithstanding the plethora of BITs in existence and their susceptibility to different kinds of interpretation.[90] Nor should institutions like the ICSID be blamed for inconsistent reasoning that is sometimes adopted by

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84 Vandevelde writes that in 1969 there were only 75 BITs. During the 1970s, nine BITs were negotiated each year; that rate doubled in the 80s and has been increasingly geometrically ever since then: see Kenneth Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 *University of California Davis Journal of International Law & Policy* 157, 172. See also *World Investment Report 2010*, UNCTAD/WIR/2010 (22 July 2010) xxv <www.unctad.org/en/docs/wir2010_en.pdf>.

85 See generally Schill, 'The Multilateralization of International Investment Law', above n 72, chs 1–2; Sharun W Mukand, 'Globalization and the "Confidence Game"' (2006) 70 *Journal of International Economics* 406; Steffen Hindelang, 'Bilateral Investment Treaties, Custom and a Healthy Investment Climate: The Question of Whether BITs Influence Customary International Law Revisited' (2004) 5 *Journal of World Investment and Trade* 789; Jeswald W Salacuse, 'The Treatification of International Investment Law' (2007) 13 *Law and Business Review of the Americas* 155.

86 See Organisation for Economic Cooperation and Development, *MAI Negotiating Text* (24 April 1998) <http://italaw.com/documents/MAIDraftText.pdf>; Katia Tieleman, 'The Failure of the Multilateral Agreement on Investment ('MAI') and the Absence of a Global Public Policy Network' (Case Study, Global Public Policy Institute, 2000) <http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf>.

87 On such issues, see above n 68.

88 On the development of international investment norms, see above n 68.

89 On such authorities, see, eg, Trakman and Ranieri, above n 72; Sornarajah, above n 78; Schreuer and Dolzer, above n 72; Schill, 'The Multilateralization of International Investment Law', above n 72.

90 See, eg, Aurélia Antonietti, 'The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21 *ICSID Review—Foreign Investment Law Journal* 427; Edward Baldwin, Mark Kantor and Michael Nolan, 'Limits to Enforcement of ICSID Awards' (2006) 23 *Journal of International Arbitration* 1 (discussing 'tactics' that may be employed in attempts to 'delay' or 'avoid' compliance with ICSID Awards).

ISA tribunals that, while guided by ICSID and UNCITRAL rules, exercise independent discretion in deciding investment disputes.[91]

The principled argument that the domestic courts of sovereign states ought to decide investment disputes based on domestic laws and judicial procedures is offset by the observation that international arbitrators are also subject to domestic laws that are encompassed within a BIT or investor–state agreement. Far from being insulated from domestic laws and procedures, ISA principles and standards of treatment accorded to foreign investors inhere not only in international jurisprudence, but both evolve from and are incorporated into domestic law as well. As a result, ISA arbitrators cannot summarily disregard domestic laws that are expressly or impliedly integrated into applicable BITs or investor–state agreements.[92]

The rationale that domestic courts are experts in law including investment law is counter balanced by the contention that investment arbitrators are experts in international investment law in a manner that domestic judges, even courts of commercial jurisdiction, are not.[93] Even the rationale that domestic courts are subject to tried and tested rules of evidence and procedure is offset by the observation that investment arbitration is guided by ICSID or UNCITRAL rules that focus specifically on providing flexible procedures to resolve complex commercial disputes, including between investors and states. Insofar as the decisions of domestic courts are subject to appeal, the awards of investment arbitrators are subject to extraordinary challenge or annulment proceedings for non-compliance.[94]

Certainly, these criticisms of domestic courts deciding investor–state arbitration cases are not self-evident. Nor are court decisions inherently inferior to ISA awards. It is entirely doubtful to argue that the High Court of Australia's

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91 On inconsistent ISA decisions in the CME/Lauder cases against the Czech Republic, see *Lauder v Czech Republic (Final Award, Ad Hoc)* (UNCITRAL Arbitration Rules, IIC 205, 3 September 2001); *CME Czech Republic BV v Czech Republic (Partial Award and Separate Opinion, Ad Hoc)* (UNCITRAL Arbitration Rules, IIC 61, 13 September 2001); *CME Czech Republic BV v Czech Republic (Final Award and Separate Opinion, Ad Hoc)* (UNCITRAL Arbitration Rules, IIC 62, 14 March 2003). See also Frank Spoorenberg, 'Conflicting Decisions in International Arbitration' (2009) 8(1) *The Law and Practice of International Courts and Tribunals* 91. On the development of international investment norms, see above n 68.

92 See, eg, Schreuer, *The ICSID Convention: A Commentary*, above n 72, 357.

93 On the case for investor–state arbitration, see generally Christopher Dugan, Noah D Rubins, Don Wallace and Borzu Sabahi, *Investor–State Arbitration* (Oxford University Press, 2008); Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008); Campbell McLachlan, Lawrence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2008); Philippe Kahn and Thomas W Walde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff, 2007); Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007); Raymond Doak Bishop, James Crawford and William Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer, 2005); Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005); Norbert Horn (ed), *Arbitrating Foreign Investment Disputes* (Kluwer, 2004).

94 On the ICSID, see above n 67. On the UNCITRAL, see above nn 69–70. On the flexibility of UNCITRAL proceedings, see above n 69.

majority decision in the recent constitutional challenge brought by Philip Morris and other tobacco companies against Australia over legislation over the constitutionality of plain packaging of cigarettes is tainted by national bias because the High Court is 'Australian'.[95] However, one can argue more generally that domestic courts in host states are more likely than ISA tribunals to uphold public interest defences of host states over the commercial claims of foreign investors. However many courts in some states, not limited to developing states, may lack a rule of law tradition as common lawyers conceive of it – the categorical rejection of domestic courts in regulating investor–state disputes is not entirely defensible.

VIII THE ASSAULT ON ISA BY DEVELOPING COUNTRIES

As highlighted in the Introduction, the Australian Government is not alone among countries that reject ISA. The Calvo Doctrine enunciated in Latin America also attempted to domesticate the resolution of investor–state disputes.[96] Some developing countries have also long resented ISA. This resentment is most vividly expressed by President Raphael Correa of Ecuador in his verbal onslaught in 2009 on the ICSID, the World Bank and the American Government.[97] Correa contended that investment arbitration under the ICSID is designed to protect capital exporter states and their investors at the expense of developing Latin American states. His sub-text was that investment institutions like the ICSID have disregarded the interests of capital importer states such as Ecuador that are traditionally economically and politically exploited by colonial powers and their investors.[98]

A noteworthy difference is that Australia's new foreign investment Policy represents a shift by a *developed* country against a political and economic tide when the opposite might have been expected, namely, for Australia to de-localise investment disputes. In prescribing that domestic courts decide investor–state disputes, Australia presumably was not motivated by the exploitative biases that

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95 On the High Court case, see above nn 20, 27. See also *British American Tobacco Australasia Limited v Commonwealth* (High Court of Australia, Case S389/2411, 2012) <http://www.hcourt.gov.au/cases/case-s389/2011>. On Philip Morris' indication that it will appeal the decision before the World Trade Organisation ('WTO'), see Reuters, 'Anti-Tobacco Marketing Laws Survive Court Challenge in Australia, *Financial Post* (online), 15 August 2012 <http://business.financialpost.com/2012/08/15/anti-tobacco-marketing-law-survives-court-challenge-in-australia/>.

96 On the history and resurgence of the Calvo Doctrine, see, eg, Wenhua Shan, 'From "North–South Divide" to "Private–Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law' (2007) 27 *Northwestern Journal International Law and Business* 631; Bernardo Cremades, 'Resurgence of the Calvo Doctrine in Latin America' (2006) 7 *Business Law International* 53.

97 On these statements, see *ICSID in Crisis: Straight-Jacket or Investment Protection?*, Bretton Woods Project (10 July 2009) <http://www.brettonwoodsproject.org/art-564878>. See also Leon E Trakman, 'The ICSID in Perspective' in Trakman and Ranieri, above n 78, ch 10.

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

some Latin American countries have ascribed to ISA. Australia is also unlikely to espouse these concerns of developing countries in making trade policy decisions that impact on its relations with both developing and developed BIT partners. Nevertheless, it is necessary to explore briefly the attack on ISA made by developing countries to detect the possibility of a more fundamental institutional objection to the ISA process.

A key cultural objection to ISA is that it is institutionally – and legally – biased against developing countries.[99] The concern is that 'international' investment law, derived primarily from European civil law and Anglo–American common law traditions, favours parties and institutions from predominantly high and upper-middle income states.[100] The worry, too, is that ISA rules of evidence and procedure derive from the actions of developed countries and their multinational and international corporations, with significant European and American antecedents.[101]

These worries are accentuated by the extra-territorial reach exercised by courts in some developed countries. For example, American courts can invoke the US's *Alien Tort Claims Act* to hold non-US citizens abroad liable for harm to US interests there, so long as the non-US citizen is in the US to be served a subpoena (though admittedly cases suggest that there must be an international wrong amounting to a serious violation of international law).[102]

A related concern is that the beneficiaries of ISA are investors from developed countries who can afford to mount piecemeal claims against developing countries and developed countries that can afford to defend ISA proceedings brought by investors from developing states. This concern is accentuated by the perceived cost and length of ISA proceedings.[103]

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99 On the United States' alleged double standard in favouring resort to arbitration to restrain interference by foreign governments with private investment while disfavouring arbitration filed against United States Governments, see Guillermo Aguilar Alvarez and William W Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28 *Yale Journal of International Law* 365, 368–69. See also Susan D Franck, 'The ICSID Effect? Considering Potential Variations in Arbitration Awards' (2011) 51 *Virginia Journal of International Law* 825, 826, 909–14.

100 On the dominance by developed states over trade and investment and challenges by developing states, see, eg, James Oliver Gump, 'The West and the Third World: Trade, Colonialism, Dependence, and Development (Review)' (2000) 11(2) *Journal of World History* 396; D K Fieldhouse (ed), *The Theory of Capitalist Imperialism* (Longman, 1967); Francis Wrigley Hirst (ed), *Free Trade and Other Fundamental Doctrines of the Manchester School* (General Books, 2009) (for a collection of speeches from the nineteenth century advocating the development of free trade); P J Cain, 'J. A. Hobson, Cobdenism, and the Radical Theory of Economic Imperialism, 1898–1914' (1978) 31(4) *The Economic History Review* 565, 576–80; Michael Freeden, 'J. A. Hobson as a New Liberal Theorist: Some Aspects of His Social Thought Until 1914' (1973) 34 *Journal of the History of Ideas* 421.

101 On limitations associated with traditional 'international' principles of compensation for expropriation particularly in relation to developing countries, see M Sornarajah, 'The Clash of Globalizations and the International Law on Foreign Investment: The Simon Reisman Lecture in International Trade Policy' (2003) 10(2) *Canadian Foreign Policy* 1.

102 28 USC § 1350 (2010).

103 On the absence of binding precedents, at least in principle, in international investment law, see Christoph Schreuer and Matthew Weiniger, 'A Doctrine of Precedent?' in Muchlinski, Ortino and Schreuer, above n 93, 1188. See generally above n 68.

Reinforcing these concerns is the contention that investment arbitrators, usually trained as commercial not public international lawyers, are less likely to pay regard to the broader public policy consequences of arbitration awards than to the literal texts of treaties that favour developed countries. ISA tribunals are also likely to marginalise broader state and multistate policies directed at remediating systemic and historical disadvantages among developing states and their investors. Added to this is concern about arbitration tribunals determining their own competence, and by the right of the chair of a tribunal to exercise a casting vote in awards on the merits.[104]

A perceived risk of ISA decision-making is that investment arbitrators, drawn primarily from developed states, will reach decisions that promote the national security, health, labor, environment and market interests of developed countries. They will imbed the defense of necessity under customary international law that allegedly systemically disadvantages developing countries and their investors.[105] They will apply ISA rules that enable developed countries and their investors to immunise ISA from public scrutiny, for example by insisting on the confidentiality of both ISA proceedings and the ensuing awards.[106] Even if these attacks on ISA are overstated, a residuary concern is that, in the absence of a uniform international investment convention or code, deciding international investment disputes will be fraught with conceptual and interpretative challenges for developing countries and their investors.[107] In subscribing to textual methods of interpreting investment treaties, investment arbitrators will construe investment laws literally more than contextually. They will struggle to interpret

104 On the influence of commercial law, as distinct from public international law, on the development of investment law, see Van Harten, above n 93, ch 6. On procedural challenges to ISA proceedings, see, eg, Luke R Nottage, 'The Rise and Possible Fall of Investor–State Arbitration in Asia: A Skeptic's View of Australia's "Gillard Government Trade Policy Statement"' (2011) 5 *Transnational Dispute Management*.

105 On the defence of necessity in investment arbitration including under customary investment law, see Alberto Alvarez-Jiménez, 'Foreign Investment Protection and Regulatory Failures as States' Contribution to the State of Necessity under Customary International Law' (2010) 27(2) *Journal of International Arbitration* 141; Andrea K Bjorklund, 'Emergency Exceptions: State of Necessity and "Force Majeure"' in Muchlinski, Ortino and Schreuer, above n 93, 459; Nicholas Song, 'Between Scylla and Charydbis: Can a Plea of Necessity Offer Safe Passage to States in Responding to an Economic Crisis without Incurring Liability to Foreign Investors?' (2008) 19(2) *American Review of International Arbitration* 235; Gabriel Bottini et al, 'Panel Discussion: Is There a Need for the Necessity Defense for Investment Law?' in T J Grierson Weiler (ed), *Investment Treaty Arbitration and International Law* (JurisNet, 2008) 189; Jürgen Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59(2) *International and Comparative Law Quarterly* 325.

106 See further Howard Mann et al, 'Comments on ICSID Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration"' (International Institute For Sustainable Development, December 2004) <http://www.iisd.org/publications/publication.asp?pno=667>.

107 On the customary nature of international investment law and its contest with treaty made law, see, eg, Campbell McLachlan, 'Investment Treaties and General International Law' (2008) 57(2) *International and Comparative Law Quarterly* 361; Stephen Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2005) 5 *Transnational Dispute Management*; Patrick Dumberry, 'Are BITs Representing The "New" Customary International Law in International Investment Law?' (2010) 28(4) *Penn State International Law Review* 675, 701 (for a rejection of the proposition that BITs represent customary law).

complex property concepts;[108] and they will studiously avoid having their awards annulled for misconstruing such concepts.[109] Investment arbitrators will rely on their comprehension of the laws of developed countries in determining the 'reasonable' or 'legitimate' expectations of foreign investors;[110] in delineating the reach of the 'margin of appreciation' doctrine;[111] and in providing investor and state parties with 'fair and equitable' treatment.[112]

These concerns have some foundation. ISA tribunals that apply different methods of interpretation to investment treaties can lead to the divergent treatment of foreign investors in comparable cases. The worry is that plain meaning methods of interpretation are likely to challenge even the most skilled, sophisticated and erudite investment arbitrators in attempting to construe marginally different clauses in BITs.[113] Their efforts to distinguish the interpretation of one BIT from another may impede the evolution of uniform

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108 On such differences, see, eg, *Salini Costruttori SpA v Kingdom of Morocco (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/00/4, 23 July 2001); 42 ILM 609 (2003), 6 ICSID Rep 400 (2004). See also Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International and Municipal Law* (Kluwer Law International, 2010) (see especially Chapter Four for a discussion of property in investment treaty context); Omar E Garcia-Bolivar, 'Protected Investments and Protected Investors: The Outer Limits of ICSID's Reach' (2010) 2(1) *Trade Law and Development* 145 (discussing the requirements that must be met in order to invoke the ICSID's jurisdiction); Schreuer, *The ICSID Convention: A Commentary,* above n 72, 90–1 (discussing jurisdictional requirements under Article 25 of the ICSID Convention).

109 For an articulation of this interpretative confusion in the trilogy of investment claims against the Government of Argentina, see below n 129 and associated discourse in text.

110 On such 'legitimate expectations', see *Saluka Investments BV (The Netherlands) v The Czech Republic (Partial Award, PCA)* (UNCITRAL Arbitration Rules, IIC 2010, 17 March 2006) [304] <http://italaw.com/documents/Saluka-PartialawardFinal.pdf>; *Waste Management, Inc v The United Mexican States (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/00/3 (NAFTA), 30 April 2004) [98] <http://italaw.com/documents/laudo_ingles.pdf>; *International Thunderbird Gaming Corporation v The United Mexican States* (UNCITRAL Arbitration Rules (NAFTA), 26 January 2006) [147] ('*Thunderbird*') <http://italaw.com/documents/ThunderbirdAward.pdf>; *GAMI Investments Inc v The Government of the United Mexican States (Final Award)* (UNCITRAL Arbitration Rules, 15 November 2004) [100] <http://www.state.gov/documents/organization/38789.pdf>. See also Stephan W Schill, 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law' (2006) 5 *Transnational Dispute Management*; Stephan W Schill, 'The Relation of the EU and Member States in Investor–State Arbitration' in Trakman and Ranieri, above n 78, ch 13.

111 On the 'margin of appreciation' doctrine, see above 66; Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *New York University Journal of International Law and Politics* 843; Ronald St J Macdonald, 'The Margin of Appreciation' in Macdonald, Matscher and Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993) 83.

112 Illustrating these variable conceptions of 'fair and equitable' treatment is a series of cases commencing with the ICSID award in *Emilio Agustín Maffezini v Kingdom of Spain (Award)* (ICSID Arbitral Tribunal, Case No ARB/97/7, 13 Nov 2000) [64] <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC566_En&caseId=C163>; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/7, 25 May 2004) [178]; Ian A Laird, 'MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile – Recent Developments in the Fair and Equitable Treatment Standard' (2004) 4 *Transnational Dispute Management.*

113 See, eg, Luzius Wildhaber and Isabelle Wildhaber, 'Recent Case Law on the Protection of Property in the European Convention on Human Rights' in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 657.

principles of customary and treaty investment law;[114] ISA may also be challenged, however over-zealously, for failing to resolve investor–state disputes in a consistent manner.[115]

A final objection to ISA is that, in an effort to avoid a fragmented body of international investment law, an ISA *ius cogens* will emerge that accentuates the advantages enjoyed by wealthy investors from developed countries over developing countries and their investors. Given the institutional roots of ISA in textual methods of interpreting BITs, there is a real risk of some ISA tribunals discounting the corrective justice claims made by developing countries. Their assumption will be that, unless the text of a BIT or FTA expressly allows a developing state to restrict market access to foreign investors, an ISA tribunal ought not to impute a 'contextualised' meaning based on historical disadvantage into that text. One response is that developing countries will either decline to conclude BITs or FTAs with developed countries, or more probably, they will conclude such treaties hoping to avoid investor–state disputes. Serious problems inevitably arise when their hopes are disappointed.

These objections relate less to irredeemable flaws in ISA proceedings than to limitations in the treaty making powers of developing countries. Even if treaty literalism sometimes impedes ISA proceedings, that does not in itself provide support for the contemplated alternative, namely, resort to domestic courts. Indeed, the rejection of ISA by countries like Australia may encourage other countries to reform ISA to address its flaws, and not reject it. These reforms will be discussed in the penultimate section of this article.

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

114 See Franck, above n 71.

115 On the varied and inconsistent interpretations of investment treaties, see Kurtz, 'Adjudging the Exceptional at International Investment Law', above n 105, 325 (Kurtz identifies three different methodologies of interpretation). But see William W Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 *Virginia Journal of International Law* 307 (considering the interpretive challenges posed by provisions for non-precluded measures, such as for maintenance of security and public order).

IX THE BALANCING EXERCISE

It is difficult to convincingly resolve the perceived contest between investment arbitration and domestic courts of law. There are few past investment arbitration cases to review. However, there is scant experience of domestic courts displacing arbitration in deciding investment disputes, beyond a few isolated cases such as Philip Morris' constitutional challenge before the High Court of Australia.[116] Preferring ISA over domestic litigation is suspect in the absence of material information about the investment treaty parties, the investors and the dispute in issue. Emphatic support for either ISA or domestic litigation will often be rooted in policy preferences more than in principles grounded in state sovereignty and its surrender by treaty.

Nor is the choice solely between ISA and litigation to resolve investment disputes. Conflict preventive and avoidance measures are sometimes preferable to both.[117] 'Multi-tiered' dispute resolution agreements can allow parties to agree upon a tiered process, varying from negotiating in good faith, to mediation, and failing both to arbitration or litigation, or conceivably, to both.[118] Neither the Productivity Commission nor the Australian Government paid much heed to conflict preventive alternatives, perhaps because such measures usually operate informally and often 'under the radar' of investment dispute resolution. However, the UNCTAD considered conflict prevention and avoidance sufficiently important to devote a detailed study to it.[119]

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

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116 On international investment claims and decisions generally, see Oxford University Press, *Investment Claims*, <http://www.investmentclaims.com>. On the Philip Morris case, see above nn 20, 27, 95.

117 UNCTAD, above n 29. International investment claims and decisions are available at <http://www.investmentclaims.com>.

118 See Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration, Volume 2* (Kluwer, 2006) 74–8.

119 See William S Dodge, 'Investor–State Dispute Settlement Between Developed Countries: Reflections on the Australia–United States Free Trade Agreement' (2006) 39(1) *Vanderbilt Journal of Transnational Law* 1 (commenting on the exhaustion of local remedies).

why the community of nation states failed to reach multilateral investment accord historically.[120]

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

What can be said in defense of ISA is that, while it does not lead to judicial precedent as common lawyers conceive of it, ISA is likely to be more stable in nature than a plethora of different local laws and procedures that domestic courts apply to foreign investment.[121] However fragmentary may be the application of different standards of treatment to foreign investors and however difficult it may be to identify cohesive principles out of ad hoc and sometimes unpublished arbitration awards, an international investment jurisprudence has evolved, inconsistencies notwithstanding.[122] Given the multitude of BITs currently in existence and their disparate clauses there are a number of ISA claims brought against states.[123] In addition, investor–state disputes are sometimes settled though negotiation or mediation before or during ICSID or UNCITRAL arbitration.[124] Inasmuch as ISA awards are reported and analysed, they have also helped to develop a more cohesive body of international investment law than has the jurisprudence of divergent domestic legal systems and their courts.

In fulfilling these functions, ISA tribunals have some distinct virtues over domestic courts. Both parties to ISA disputes have autonomy in selecting arbitrators, while domestic judges are appointed by national bodies, or elected in national, provincial, or state elections.[125] As a result, investor–state arbitration is considered more neutral than resort to domestic courts of host states; ISA proceedings are considered more flexible than domestic court proceedings; ISA awards are more final than the decision of courts which are open to appeal; and

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120 See, eg, Robert Stumberg, 'Sovereignty by Subtraction', above n 61, 491, 503–04, 523–5. See also Kevin Kennedy, 'A WTO Agreement on Investment: A Solution in Search of a Problem?' (2003) 24(1) *University of Pennsylvania Journal of International Economic Law* 77. On the prospective impact of the Doha round of multilateral negotiations on Chapter 11 of the NAFTA, see Bryan Schwartz, 'The Doha Round and Investment: Lessons from Chapter 11 of NAFTA' (2003) 3 *Asper Review of International Business & Trade Law* 1.

121 On the development of international investment norms, see above n 68.

122 On such authorities, see, eg, Trakman and Ranieri, above n 78; Sornarajah, above n 78; Schreuer and Dolzer, above n 72; Schill, 'The Multilateralization of International Investment Law', above n 72.

123 See International Centre for the Settlement of Investment Disputes, *The ICSID Caseload – Statistics* <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>; see also above nn 69, 70.

124 See, eg, Antonietti, above n 90; Baldwin, Kantor and Nolan, above n 90 (discussing 'tactics' that may be employed in attempts to 'delay' or 'avoid' compliance with ICSID Awards).

125 See Leon E Trakman, 'A Plural Account of the Transnational Law Merchant' (2011) 2(3) *Transnational Legal Theory* 309, 335.

arbitral awards are enforceable in multiple jurisdictions by the courts of signatory countries to the ICSID or New York Convention.[126] Nevertheless, the enforcement of investor–state arbitration awards still depends on the willingness of domestic courts to enforce them in particular cases.[127]

Nor should investment arbitrators or institutions like the ICSID Secretariat, be blamed if ISA proceedings sometimes are not transparent and investment awards are not published. The rules governing investment arbitration derive, not from the action of arbitration institutions like the ICSID, but from the collective action of member countries that are signatories to the ICSID Convention and state signatories to BITs. It remains within the power of the multilateral community of states to pursue institutional change in international investment jurisprudence. Likewise, institutions like the ICSID should not be blamed for inconsistent reasoning and determinations reached by investment arbitrators who, while guided by the ICSID, exercise discretion in making awards. Not unlike the authority of judges on the International Court of Justice, the cogency of ISA reasoning and awards depends on the persuasive authority of the awards rendered by ISA arbitrators. The cogency of those awards, in turn, transcends the consent of the investor–state parties to disputes; it extends beyond the literal construction of conventions like the ICSID; it surpasses the guidance of administrators of such conventions charged with overseeing ISA proceedings under disparate BITs.[128] It is also artificial to ground the authority of ISA tribunals solely in the mutual consent of state parties to BITs, given that arbitrators are required to decide in accordance with investment law.[129]

The contention is not that investment arbitration is beyond reproach. Dominant states and their investors may well perpetuate their economic and political influence by using ICSID and UNCITRAL proceedings to their advantage, including by protracting ISA proceedings and adding to their costs.

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126 On the recognition and enforcement of transnational arbitration, see Margrete Stevens, 'The ICSID Convention and the Origins of Investment Treaty Arbitration' in Albert Van Den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer, 2009); International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules* (2006) 95–6 <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf>.

127 See Stevens, above n 126.

128 See Vandevelde, above n 84 (discussing the exponential growth in BITs since 1969). See also UNCTAD, *Research Note: Recent Developments in International Investment Agreements* (30 August 2005) <http://archive.unctad.org/sections/dite_dir/docs//webiteiit20051_en.pdf>.

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

ISA is not beyond reproach. However, it is capable of transformation and improvement.

X PROPOSALS FOR REGULATING ISA BY TREATY

The following are some proposals to regulate the adoption of ISA by treaty. The purpose is to accommodate concerns about the unfairness and inefficiency of ISA, while ensuring that Australia is not excluded from participating in important multilateral treaties such as the strategic Trans-Pacific Partnership Agreement. It would be more prudent for Australia to negotiate for some or all of these proposals in treaties than renouncing ISA altogether.

First, it is recommended that treaties expressly provide for the protection of fundamental public interests of signatory states, such as in natural resources, agriculture and financial markets. This is consistent with the Australian Government's legitimate interest in protecting the national identity, public health and the environment from erosion by foreign investors. This would enable Australia to secure exemptions or exclusions in treaties to accommodate its national interest without having to reject ISA entirely.

Secondly, investment chapters in treaties should stipulate for negotiation and conciliation between disputing parties, prior to initiating investor–state arbitration. This is consistent with the recommendations of the UNCTAD.[130] It also reaffirms the importance in principle of encouraging cooperation between investor–state parties, especially since investor–state arbitration is potentially costly and time consuming; and disputes can have devastating economic consequences for investors and drastic social and economic impact on host states and their subjects.

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

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

Fifthly, and as a qualification to the first recommendation above, rules of procedure are needed to inhibit host states from expropriating foreign investment on overbroad grounds such as in relation to the protection of natural resources, agriculture and financial markets. States should also be discouraged from

130 See UNCTAD, above n 29.

discriminating against foreign investors on grounds of protection that extend beyond essential security, national identity, public health and environmental safety.

Sixthly, consistent with ICSID Rule 37 adopted in 2006 which provides for submissions by non-disputing parties,[131] further provision is needed to ensure that arbitration proceedings are transparent, while preserving confidential information of one or both direct parties to an ISA dispute. In particular, provision is needed for the publication of investor claims, for public access to ISA proceedings in the ordinary course; and for the publication of ISA proceedings and awards including reasons for granting or denying third party intervener status in whole or in part. Provision should be made for the submission of *amici curiae* briefs and the participation of third party interveners in proceedings. Social, economic and environmental impact reports adduced into evidence should also be publicly available. These publications should be subject to requirements of confidentiality as identified above.

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

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

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

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

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

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

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131 On Rule 37 of the ICSID Regulations and Rules, see above n 76. See further Leon E Trakman, 'The ICSID under Siege' (2012) (forthcoming) *Cornell International Law Journal,* Part V.

XI CONCLUSION

What can be said about a state-orchestrated movement away from ISA towards domestic courts in resolving investment disputes is that the choice is not entirely about the quality of decision-making, or even about the operational virtues of judicial decisions over arbitral awards or vice versa. The choice of domestic courts over ISA is also about states exercising normative preferences based on macro-economic and political assumptions. It is about states calculating that their foreign investors are more likely to succeed before a foreign court than an investment tribunal. Such a 'win' is not grounded in objective economic rationality or dispassionate altruism, but in perceptible attempts to secure a strategic advantage for one's subjects who invest abroad.[132] Nor should one expect countries to disregard their self-interest in electing among dispute resolution options. Indeed, countries are likely to adopt double standards in exercising those elections. A government that favours ISA to restrain 'interference' by foreign governments with private investment may well disfavour ISA proceedings that are filed against it.[133]

However, it is precisely the risk to Australia's self-interest which throws doubt on the persuasiveness of the APC's blanket assertion that there are no truly cogent economic reasons for countries like Australia to agree to ISA. More often than not, states favour institutions for dispute resolution based on their capacity to deliver results that treat their subjects abroad 'fairly,' and according to 'home' rather than 'host' state standards.[134]

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132 These observations are exemplified in Chapter 11 jurisprudence under the NAFTA, notably under the *Mondev* and *Loewen* cases. See *Mondev International Ltd v United States of America (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/99/2, 11 October 2002) ('*Mondev*'). See also Dana Krueger, 'The Combat Zone: Mondev International, Ltd v United States and the Backlash against NAFTA Chapter 11' (2003) 21(2) *Boston University International Law Journal* 399 (arguing that, but for a technical time bar, two tribunal decisions – *Mondev* and *Loewen* – might have prevailed over American judicial decisions). On the *Loewen* arbitration, see *The Loewen Group, Inc v United States of America (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/98/3, 26 June 2003) ('*Loewen*'); William Dodge, 'Loewen v. United States: Trials and Errors under NAFTA Chapter Eleven' (2002) 52 *DePaul Law Review* 563. On the judicial review of the *Loewen* Chapter 11 decision, see Bradford K Gathright, 'A Step in the Wrong Direction: The Loewen Finality Requirement and the Local Remedies Rule in NAFTA Chapter Eleven' (2005) 54(1) *Emory Law Journal* 1093; Trakman, 'Foreign Direct Investment', above n 12, 52.

133 On the United States' alleged double standard in favouring resort to arbitration to restrain interference by foreign governments with private investment while disfavouring arbitration filed against United States Government, see Alvarez and Park, above n 99, 368–69. See also Franck, above n 71.

134 See, eg, Charles N Brower and Lee A Steven, 'NAFTA Chapter 11: Who Then Should Judge? Developing the International Rule of Law under NAFTA Chapter 11' (2001) 2 *Chicago Journal of International Law* 193, 193–5; Jack J Coe Jr, 'Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel within NAFTA and the Proposed FTAA' (2002) 19(3) *Journal of International Arbitration* 185; David A Gantz, 'An Appellate Mechanism for Review of Arbitral Decisions in Investor–State Disputes: Prospects and Challenges' (2006) 39 *Vanderbilt Journal of Transnational Law* 39. But see William S Dodge, 'International Decision: Waste Management, Inc v Mexico' (2001) 95 *American Journal of International Law* 186 (presenting the case for modeling Chapter 11 on the WTO appellate process). See also Gary R Saxonhouse, 'Dispute Settlement at the WTO and the Dole Commission: USTR Resources and Success' in Robert M Stern (ed), *Issues and Options for US–Japan Trade Policies* (University of Michigan Press, 2002) 363.

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