

# *Resolving Investor-State Disputes: Australia's Dilemma and Choices*

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## **Abstract**

This article examines Australia's controversial 2011 Trade Policy Statement in which the Federal Government indicated that it will no longer provide for investor-state arbitration (ISA) in future bilateral and regional trade agreements (BRTAs), choosing instead to rely on domestic courts for the resolution of investment disputes. In analysing this policy shift, the paper discusses the nature of foreign direct investment (FDI) and its economic significance to host and home states, as well as to inbound and outbound foreign investors. Following this analysis, the paper outlines the reasons behind Australia's rejection of ISA and evaluates its perceived advantages and disadvantages in contrast with the reliance on domestic courts for the resolution of investment disputes. The paper expresses caution about a complete rejection of ISA and illustrates the challenges of implementing this Policy in light of the proposed Investment Chapter of the Trans-Pacific Partnership Agreement (TPPA) and Australia's trade interests in the wider Asia region. Instead, the article urges adoption of a Model BIT, which would include various dispute avoiding measures and provide parties with access to either domestic courts or ISA in a manner that is consistent with Australia's national interests and international good practice.

## **I Introduction**

In its 2011 Trade Policy Statement, the Federal Government stated that Australia would no longer agree to adopt ISA in its future bilateral and regional trade agreements. While the Trade Policy Statement did not expressly limit investment disputes to domestic courts, foreign investment disputes will be inevitably decided by the domestic courts of law due to the lack of viable dispute resolution alternatives available to foreign investors.

Although this policy shift was not entirely unexpected in Australia, it raised a number of concerns in the international investment community. One reason why the announcement has attracted such wide international coverage is due to the fact that ISA remains the preferred method of dispute resolution in cases involving investment claims against foreign governments. Furthermore, Australia is the only developed state to categorically reject ISA in its future BRTAs.

In order to evaluate the significance of this Policy, several questions require further consideration. For example, what consequences are likely to arise from this Policy? Will the Policy further the stated objectives of the Federal Government? Do the benefits of Australia rejecting ISA outweigh its advantages? Are domestic courts the ideal institution for the resolution of investment disputes? Finally, if the disadvantages of ISA outweigh its touted benefits, how might Australia modify its trade and investment position and adopt a more effective mechanism for resolving investment disputes? These questions are subject of the present inquiry.

In developing this analysis, the paper begins with a brief introduction of ISA and its enduring appeal to the international community. Part 2 of the paper provides a detailed analysis of the 2011 Trade Policy Statement and Part 3 considers alternative dispute resolution options that will be available to investors in the absence of ISA. Part 4 considers the reasoning behind the Trade Policy Statement and investigates whether domestic courts are the most suitable institutions to hear investment complaints lodged against host states. Part 5 examines whether Australia's rejection of ISA will achieve the policy goals advocated by the Federal Government in 2011. The paper argues that, while the concerns voiced by the Federal Government in 2011 are valid and paramount to the sustainable development of Australia, a complete rejection of ISA might not best serve Australia's

national interests. In response to this concern, Part 7 proposes the adoption of a model Australian BIT to provide for a mixture of dispute avoidance measures which include negotiations and conciliation, in addition to a choice between ISA and domestic courts, consistent with the Policy Statement of the Federal Government in 2011.

## II Prevalence Of Investor-State Arbitration

Domestic and international investment markets are becoming increasingly interdependent. A corollary to this development is that a healthy flow of FDI into and out of investment markets directly impacts on various economic sectors.<sup>1</sup> FDI is also a key means of sustaining economic growth; while an increase in FDI share ordinarily leads to “higher additional growth in financially developed economies.”<sup>2</sup> FDI has become even more significant following the Global Financial Crisis of 2008 and the perceived worldwide economic slowdown. Competition is growing among states to attract cross-border investment, including providing capital and infrastructure investments in order to promote the financial stability and liquidity of international investments. Australia is a case in point: it has developed a competitive, economically efficient and technologically advanced resource sector; it has also become a global supplier of agricultural goods and raw materials arising from inbound FDI flows. As a result, it has a material interest in promoting sustainable and stable FDI flows into and out of Australia.

By its nature, FDI flows that involve cross-border investment may lead to cross-border disputes. Historically, such disputes were resolved either through diplomatic intervention by which states would settle disputes on behalf of their outbound investors, or through the resolution of such dispute before the domestic courts in the country in which the foreign investor operated.<sup>3</sup> These avenues for resolving investment disputes had a number of significant shortcomings. In particular, they subjected investors to backdoor state-to-state diplomacy, and to the mercy of domestic courts in countries that had variable conceptions of law and justice.

In order to promote a healthy flow of FDI and provide investors with a viable and fair platform for dispute resolution, states have developed and refined a specialized international dispute resolution process known as investor-state arbitration. Under this system a foreign investor is able to lodge a claim against a host state to be resolved through a specialized international investment tribunal. This format for dispute resolution is now widely utilized by states due to its perceived advantages; it is also incorporated into various bilateral and regional trade agreements worldwide, including in the Asia region, which has traditionally resisted ISA due to various ideological and developmental considerations.<sup>4</sup>

Compared to other forms of dispute resolution, ISA has a number of advantages. For example, ISA provided for by treaty can insulate states from involvement in investment disputes, since it provides investors with an alternative pathway to resolve their grievances against host states. More significantly, ISA obviates the need to seek domestic law remedies which may be seen to be less impartial than international investment arbitration.<sup>5</sup> ISA can also confer substantive protections, such as most-favoured-nation (MFN) or national treatment on foreign investors under international investment law. In addition, ISA can limit the nuanced impact of different domestic legal systems and cultures on FDI, such as the different influence of civil, common and customary laws.<sup>6</sup> Furthermore, ISA can reduce reliance on competing domestic rules of evidence and procedure, such as adversarial evidentiary rules in common law systems and inquisitorial methods of adducing

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<sup>1</sup> See generally, Leon Trakman & Nick Ranieri (eds), *Regionalism in International Investment Law* (2013) 1, 24.

<sup>2</sup> Laura Alfaro, Areendam Chanda, Sebnem Kalemli-Ozcan and Selin Sayek, ‘Does Foreign Direct Investment Promote Growth? Exploring the Role of Financial Markets on Linkages’ (2010) 91(2) *J Dev Econ* 242.

<sup>3</sup> See Andreas F Lowenfeld, ‘Diplomatic Intervention in Investment Disputes’ (1967) 61 *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)*, 96-107.

<sup>4</sup> See Luke Nottage & J Romesh Weeramantry, ‘Investment Arbitration in Asia: Five Perspectives on Law and Practice’ (2012) 28(1) *Arb Int* 19.

<sup>5</sup> See Jurgen Kurtz, ‘Australia’s Rejection of Investor-State Arbitration: Causation, Omission and Implication’ (2012) 27(1) *ICSID Rev* 65; Leon Trakman, ‘Investor State Arbitration or Local Courts: Will Australia Set a New Trend?’ (2012) 46(1) *JWT* 83.

<sup>6</sup> On the significance of legal cultures, including regionally, in international investment law, see Colin B Picker, ‘International Investment Law: Some Legal Cultural Insights’ in Trakman & Ranieri, above n 1, 120.

evidence in civil law systems.<sup>7</sup> Finally, resort to ISA can limit the perceived social and political costs associated with domestic litigation, since it allows parties to control public access to proceedings. Due to these advantages, ISA serves as a “delocalized” process of resolving disputes between foreign investors and host states. Outbound investors can rely on ISA, not only in response to states’ providing for ISA in their BITs and FTAs, but also in response to home state investors trying to avoid the domestic courts and laws of particular host states.

However, despite its enduring popularity, in recent years a small number of states have become critical of ISA and rejected it in favour of alternative dispute resolution models.<sup>8</sup> For example, in response to negative perceptions of ISA, in 2007 the Philippines negotiated to exclude investment arbitration from its FTA with Japan.<sup>9</sup> In that same year, Bolivia withdrew from the forerunning investor-state arbitration centre, the International Centre for Settlement of Investment Disputes (ICSID).<sup>10</sup> Ecuador followed in 2009 and Venezuela did so in 2012.<sup>11</sup> The Republic of Argentina announced in 2012 that it will withdraw from the ICSID;<sup>12</sup> while South Africa has signalled that it will no longer include ISA in its future BITs.<sup>13</sup> Curiously, Romania also attempted to withdraw from the Swedish-Romanian BIT, only to be subjected to a 2013 ISA award that purported to bind it “irrevocably” to arbitration under that BIT.<sup>14</sup>

In addition to the limited number of states that have abandoned ISA, some have qualified how it applies to them, foregoing its complete rejection.<sup>15</sup> This was particularly common during the first generation of BITs where states reserved extensive regulatory powers and limited protections that were accorded to investors. For example, in acceding to the ICSID Convention in 1993, China adopted a number of reservations and restricted the scope of ISA under its early Model BITs, upon which its negotiated BITs were modelled.<sup>16</sup> In particular, China did not grant ISA tribunals the jurisdiction to determine whether an expropriation has occurred, in addition to declining to provide

<sup>7</sup> See Leon E Trakman, ‘Legal Traditions and International Commercial Arbitration’ (2006) 17 *Am Rev Int Arb* 1, 119–120, 126–128.

<sup>8</sup> For a general overview of this trend see M Waibel (ed), *The Backlash against Investment Arbitration: Perceptions and Reality* (2010).

<sup>9</sup> See Ministry of Foreign Affairs of Japan, *Japan-Philippines Economic Partnership Agreement* September 2006: <<http://www.mofa.go.jp/policy/economy/fta/philippines.html>>. See generally, Shotaro Hamamoto & Luke Nottage, ‘Foreign Investment in and out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution’ (2011) 5 *TDM*.

<sup>10</sup> On Bolivia’s denunciation and withdrawal from the ICSID, see, ICSID News Release, *Bolivia Submits a Notice under Article 71 of the ICSID Convention* 16 May 2007: <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>>.

<sup>11</sup> On Ecuador’s withdrawal from the ICSID, see ICSID News Release, *Ecuador Submits a Notice under Article 71 of the ICSID Convention* 9 July 2009: <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20>>; Karsten Nowrot, *International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism* (2010), 5.

<sup>12</sup> On Argentina’s proposed withdrawal from the ICSID, see Nicolas Boeglin, *ICSID and Latin America: Criticisms, Withdrawals and Regional Alternatives* 4 July 2013: <<http://cadtm.org/ICSID-and-Latin-America-criticisms>>.

<sup>13</sup> For commentary on these events, as well as investment arbitration in Latin America, see Argentina to Withdraw from the ICSID 24 Jan 2013: <<http://www.presstv.com/detail/2013/01/24/285299/argentina-to-withdraw-from-icsid/>>; Sergey Ripinski, Investment Treaty News: Venezuela Withdrawal from ICSID: What It Does and Does Not Achieve 13 April 2012: <<http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>>; Luke Eric Peterson, South Africa Pushes Phase-out of Early Bilateral Investment Treaties After at Least Two Separate Brushes with Investor-State Arbitration 23 Sept 2012: <[http://www.iareporter.com/articles/20120924\\_1](http://www.iareporter.com/articles/20120924_1)>. See generally, Scott Appleton, *Latin American Arbitration: The Story Behind the Headlines*: <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=78296258-3B37-4608-A5EE-3C92D5D0B979>>.

<sup>14</sup> See *Micula v Republic of Romania* (ICSID Arbitral Tribunal, Case No ARB/05/20). 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 also *Micula v Romania (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/05/20, 5 April 2013).

<sup>15</sup> On the EU’s proposal to restrict investment treaties being concluded by individual EU members, 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* 21 June 2012: <[http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc\\_149567.pdf](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* (2012): <<http://www.iisd.org/itn/2012/07/19/analysis-of-the-european-commissions-draft-text-on-investor-state-dispute-settlement-for-eu-agreements/>>.

<sup>16</sup> See International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules* (2006), 95–96: <[http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)>. On the recognition and enforcement of international commercial arbitration awards, 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* (2009);

national treatment to foreign investors and restricting ISA to determining the nature and extent of compensation. China also stipulated that foreign investors had to resort to domestic administrative review before referring their cases to ISA and imposed a waiting period of three to nine months in order to provide parties with the opportunity to reach a settlement. Only after having exhausted local remedies and these waiting periods, could foreign investors initiate ISA proceedings against a host state.<sup>17</sup>

While such reservations are now less common, recently the US Model BIT has extended the scope of a state's right to engage in regulatory expropriation.<sup>18</sup> It has also restricted the rights of foreign investors under standards of fair and equitable treatment, minimum standard of justice and national treatment and provided for a subjective national security test by which state parties to BITs define their own national interests, as distinct from being based on objective criteria.<sup>19</sup> In addition, the U.S. Model BIT reserves the rights of state parties to impose governmental measures to protect public health, environmental safety and related public interests.<sup>20</sup>

A commonly cited reason why states have become more critical of ISA is due to the conviction that ISA will produce a "regulatory chill", meaning that the threat of an ISA claim by a foreign investor will discourage states from engaging in public interest regulation.<sup>21</sup> ISA also fell out of favour in Latin America in particular as left-leaning Governments there emphasized national self-reliance over foreign investment protections. A further concern among some developing countries, not limited to Latin America, is that ISA awards will favour investors from developed states over developing countries and that various ISA conventions such as the ICSID, will perpetuate those disadvantages.<sup>22</sup>

Notwithstanding these criticisms, states have not withdrawn from ISA *en masse*. Statistics on the over 3,000 BITs negotiated to date demonstrate that the vast majority of BITs provide for ISA, and the rate of adoption has increased dramatically in recent years.<sup>23</sup> Developed countries invariably have opted for ISA in concluding BITs and FTAs (with the noticeable exception of the Australia–United States FTA that refers investor-state disputes to domestic courts).<sup>24</sup> China is an

<sup>17</sup> On China's evolving BIT policies, see Leon Trakman, 'China and Foreign Direct Investment' (2013) 2 *CJCL* (forthcoming); Leon Trakman, *China and Foreign Direct Investment: Looking Ahead* 2 April 2013: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2244634](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244634)>; Yang Shu-Dong, 'Investor Arbitration and China: Investor or Host State?' (2011) 2 *Opinio Juris in Comparatione* Paper No 6, 1 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1973744](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973744)>.

<sup>18</sup> 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 Vandeveld, 'Model Bilateral Investment Treaties: The Way Forward' (2011) 18 *Sw J L & Trade Americas* 307. Contrast American 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) <<http://ita.law.uvic.ca/documents/CanadianFIPA.pdf>>.

<sup>19</sup> Ibid. On the "self-judging" nature of "national security" under the 2012 US Model BIT, in contradistinction to the 2004 US Model BIT, see Lise Johnson, 'The 2012 US Model BIT: and What the Changes (or lack thereof) Suggest for Future Bilateral Investment Treaties', 2012(2), *Political Risk Insurance Newsletter*, 1-4 <[www.vcc.columbia.edu/Political\\_Risk\\_Insurance\\_Newsletter\\_-\\_The\\_2\\_](http://www.vcc.columbia.edu/Political_Risk_Insurance_Newsletter_-_The_2_)>

<sup>20</sup> It should be noted that even before the US adopted its 2012 Model BIT, it has begun to limit the scope of ISA in its FTAs. For example, the 2009 US–Peru Free Trade Agreement subjected foreign investors to significant regulation by the host state. See *Peru Trade Promotion Agreement*, US–Peru, signed 12 April 2006 (entered into force 1 Feb 2009) art 10.21; *Free Trade Agreement*, US–Colombia, signed 22 November 2006 (entered into force 15 May 2012) art 10.21; *Free Trade Agreement*, Korea–US, signed 30 June 2007 (approved by Congress, 12 October 2011) art 11.21.

<sup>21</sup> See Kyla Tienhaara, "Regulatory Chill and the Threat of Arbitration: A View from Political Science", in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (2012), 606–628.

<sup>22</sup> These concerns are not entirely novel. They were reflected in the Calvo Doctrine enunciated decades ago by the Argentine Republic. That doctrine stipulated that domestic authorities, not limited to local courts, should resolve disputes, including matters arising over FDI that had previously been submitted to international tribunals. See generally, 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 *Nw J Int'l L & Bus* 631; Bernardo Cremades, 'Resurgence of the Calvo Doctrine in Latin America' (2006) 7 *BLI* 53.

<sup>23</sup> On the UNCTAD's "country specific list of bilateral investment treaties", including links to each treaty, see UNCTAD. *Country-Specific Lists of Bilateral Investment Treaties*: <<http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/Country-specific-Lists-of-BITs.aspx>>.

<sup>24</sup> That Treaty provided for investors of either partner state to have access to the domestic courts of the other, based on the rationale that the courts in both countries adhered to a "rule of law" tradition. See Trakman, above n 27, 79–81; Peter Drahos & David Henry, 'The Free Trade Agreement between Australia and the United States' (29 May 2004) *Brit Med J* 1271. See generally, William S Dodge, 'Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vand J Transnat'l L* 1 (commenting on the exhaustion of local remedies); Thomas Westcott, *Foreign Investment Issues in the Australia-United States Free Trade Agreement*: <[http://archive.treasury.gov.au/documents/958/PDF/06\\_Foreign\\_investment\\_policy\\_AUSFTA.pdf](http://archive.treasury.gov.au/documents/958/PDF/06_Foreign_investment_policy_AUSFTA.pdf)>.

illustrative example of ISA's lasting appeal. As a developing country, China was initially cautious about adopting ISA and sought to limit recourse to it. However, in recent years China has expanded the scope of ISA, particularly in its bilateral agreement with Canada and its trilateral agreement with Japan and Korea.<sup>25</sup> In addition to signing a myriad of BITs, China has also extended investor protections to protect its growing outbound investors from the regulatory defences of host states.<sup>26</sup> Thus, despite the recent criticism of ISA, it is still the preferred mechanism for resolving FDI related disputes. In fact, at the time of writing, Australia is the only developed country in the world to completely reject ISA in its future BRTAs.

### III The 2011 Australia Policy Statement

In its Trade Policy Statement released in April 2011, the Australian Government declared that it will no longer agree to the adoption of international investment arbitration in its bilateral and regional trade agreements.<sup>27</sup> Specifically, the Policy Statement provides that Australia will no longer negotiate treaty protections "that confer greater legal rights on foreign businesses than those available to domestic businesses" or rights that would "constrain the ability of the Australian Government to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses."<sup>28</sup>

Australia's Policy Statement does not rely on the rhetoric of Ecuador, Bolivia and Venezuela that challenge the ICSID as a creature of the World Bank and as a supplicant of the United States.<sup>29</sup> Rather, a central consideration of the Australian Government is to impede foreign investors from invoking ISA to challenge Australian sovereignty over public safety, health and the environment.<sup>30</sup> Given that Australia is a resource rich country, it has a justiciable concern that foreign investors not invoke ISA to challenge state action directed at containing environmental damage in the mining, and oil and gas exploration - areas in which foreign entities are often significant investors.<sup>31</sup> Accordingly, a rationale behind the Government's Policy Statement is that, by avoiding ISA in its BRTAs, it is more likely to design sustainable measures to preserve its public interests and avoid succumbing to the "regulatory chill" arising from having to defend itself against costly and intrusive ISA claims.<sup>32</sup> These concerns are illustrated in part by Philip Morris's ISA claim against Australia under the Hong Kong-Australia Free Trade Agreement over Australia's decision to require the plain

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<sup>25</sup> China has over 130 BITs, becoming the state with the second largest number of BITS signed, after Germany that has signed the most BITs. For an overview of China's BITS, see generally, China FTA Network, *FTA News Release*: <<http://fta.mofcom.gov.cn/english/index.shtml>>.

<sup>26</sup> On China's shifting position in regard to investment arbitration, see generally Vivienne Bath & Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (2011); Nils Eliasson, "China's Investment Treaties: A Procedural Perspective" 90-111.

<sup>27</sup> Craig Emerson, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* (April 2011): <<http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state>> (hereafter "Policy"). For a comment on the Australian Government's Policy announced on 12 April 2011, see Luke Peterson, *Australia Rejects ISA Provision in Trade Agreements* (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 *Geo Wash Int'l L Rev* 1.

<sup>28</sup> See Policy, above n 28, 1-2.

<sup>29</sup> See Leon E Trakman, "The ICSID in Perspective" in Trakman & Ranieri, above n 1, 253 (discussing these withdrawals from the ICSID); Markus Burgstaller & Charles B Rosenberg, "Challenging International Arbitral Awards: To ICSID or not to ICSID?" (2011) 27 *Arb Int J*; R Zachary Torres-Fowler, "Undermining ICSID: How The Global Antibribery Regime Impairs Investor-State Arbitration" (2012) 52(4) *Va J Int'l L* 995; Antonios Tzanakopoulos, "Denunciation of the ICSID Convention under the General International Law of Treaties" in Rainer Hofmann & Christian J Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systematic Integration?* (2011); Michael Waibel, Asha Kaushal, Kro-Hwa Chung & Claire Balchin, *The Backlash against Investment Arbitration* (2010); Tor Krever, "The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model" (2011) 52 *Harv Int'l L J* 287; Ignacio A Vincentelli, "The Uncertain Future of ICSID in Latin America" (2010) 16 *Law & Bus Rev Am* 409; United Nations Conference on Trade and Development (UNCTAD), *Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims* 2 Dec 2010: <[http://unctad.org/en/Docs/webdiaeia20106\\_en.pdf](http://unctad.org/en/Docs/webdiaeia20106_en.pdf)>; Appleton, above n 13. See also, ICSID, *Venezuela Submits a Notice under Article 71 of the ICSID Convention*, Washington DC 26 Jan 2012: <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100>>.

<sup>30</sup> See Luke Nottage, "Investor-State Arbitration Policy and Practice after *Philip Morris Asia v Australia*", in Trakman & Ranieri, above n 1.

<sup>31</sup> Tienhaara, above n 21, 606-628.

<sup>32</sup> *Ibid.*

packaging of cigarettes on public health grounds,<sup>33</sup> and Ukraine's more recent WTO challenge against Australia over this issue.<sup>34</sup> Australia's further concern is that foreign drug companies may invoke ISA to contest restrictions on foreign manufactured drugs under Australia's Pharmaceutical Benefits Scheme (PBS), which restricts public access to some pharmaceuticals, while subsidizing others selectively.<sup>35</sup> Finally, Australia is also concerned about foreign investors securing controlling interests in the Australian media, and core domestic markets such as the stock market.<sup>36</sup>

The Government's announcement reflects a conviction that domestic courts and not investment tribunals are *the* appropriate bodies to resolve investment disputes between host states and foreign investors, although it does not explicitly identify domestic courts as *the* alternative to ISA.<sup>37</sup> The inference is that a domestic court can protect the rights of foreign investors, while preventing them from receiving investment benefits beyond those provided to domestic investors.

In addition to rejecting ISA in its future FTAs, the Trade Policy Statement proposed that outbound Australian investors should protect their own interests if they wish to submit disputes to the domestic courts of Australia's investment partners. The Policy Statement provided that "if Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether to commit to investing in those countries."<sup>38</sup> This suggests that Australia will not intervene diplomatically on behalf of such outbound investors.

While reliance on domestic courts may not be in issue in countries with well-developed legal systems, the Government does not distinguish between countries that do or do not subscribe to the "rule of law" as conceived by Australia. Rather, the Policy Statement adopts an all-encompassing position in rejecting ISA in its future BRTAs. Ergo, it does not stipulate that outbound investors resort to the courts of some host state to resolve investor-state dispute under some BRTAs, while adopting ISA in relation to other states under other BRTAs. In summary, Australia's position in favour of domestic litigation applies to all future BITs and FTAs that it may negotiate, regardless of the destination of Australian outbound investors and without differentiating between so called "rule of law" and other jurisdictions.<sup>39</sup>

Despite its controversial nature, Australia's official position against ISA has some support. In formulating its Trade Policy Statement, The Government relied significantly on a 2010 report issued by the Australian Productivity Commission (APC), a public commission charged by the Federal Treasurer with the specific task of advising on future trade policy directions. The APC attributed significant costs and limited benefits of including ISA in its BRTAs.<sup>40</sup> It contended that "current processes for assessing and prioritising BRTAs lack transparency and tend to oversell the

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<sup>33</sup> See generally, Nottage, in Trakman & Ranieri, above n 1, 452–474; Andrew D Mitchell & Sebastian M Wurzberger, "Boxed in? Australia's Plain Tobacco Packaging Initiative and International Investment Law" (2011) 27 *Arb Int* 623: <<http://ssrn.com/abstract=1896125>>; Tania Voon & Andrew Mitchell, "Implications of WTO Law for Plain Packaging of Tobacco Products" in Andrew Mitchell, Tania Voon & Jonathan Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (2011): <<http://ssrn.com/abstract=1874593>>. On Philip Morris: ongoing action against Australia under the Australia-Hong Kong Free Trade Agreement, see Phillip Morris International, *News Release: 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](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. On the earlier claim brought against the Republic of Uruguay under the Switzerland-Uruguay BIT, see Request for Arbitration, FTR Holdings S.A. (Switzerland) v Oriental Republic of Uruguay, (ICSID Arbitral Tribunal, Case No ARB/10/7, 19 February 2010): <[http://www.smoke-free.ca/eng\\_home/2010/PMIvsUruguay/PMI-Uruguay%20complaint0001.pdf](http://www.smoke-free.ca/eng_home/2010/PMIvsUruguay/PMI-Uruguay%20complaint0001.pdf)>. FTR Holding S.A. is a subsidiary of Philip Morris International Inc (PMI). PMI's Operation's Center is in Switzerland.

<sup>34</sup> See Dispute Settlement DS434, Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging 18 December 2012: <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds434\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm)>. See generally, T Voon & A Mitchell, 'TDM Special Issue on Legal Issues in Tobacco Control' (2012) 5 TDM: <<http://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=43>>.

<sup>35</sup> On the PBS, see Australian Government: Department of Health and Ageing, Pharmaceutical Benefits Scheme: PBS News Updates: <<http://www.pbs.gov.au/>>.

<sup>36</sup> See Leon E Trakman, 'National Good No Issue in ASX Deal' *The Australian* (2 Nov 2010): <<http://www.theaustralian.com.au/business/national-good-no-issue-in-asx-deal/story-e6frg8zx-1225946362212>>

<sup>37</sup> See Trakman, above n 30, 48–53; Westcott, above n 21 r Opportunity.o force,der contexxt.ome to broader idea of what is the role of equity -- link the debt (so they are BF above n 25.)

<sup>38</sup> *Ibid.*

<sup>39</sup> On Australia's Policy Statement generally, see Trakman, above n 5. See Leon Trakman, 'Foreign Direct Investment: An Australian Perspective' (2010) 13 *ITBL* 31, 48–53.

<sup>40</sup> See Australian Productivity Commission, *Bilateral and Regional Trade Agreements: Final Report* (Canberra: APC, 2012), 1, 271–272: <<http://www.pc.gov.au/projects/study/trade-agreements>>.

likely benefits.”<sup>41</sup> The Report added tersely: “At a minimum, the economic value of Australia’s preferential BRTAs has been oversold.”<sup>42</sup> As a result, the APC recommended that Australia should cease using ISA to resolve disputes in its BRTAs.

More recently, a group of influential judges, lawyers and academics from predominantly British Commonwealth jurisdictions supported Australia’s decision and took a very critical position on the proposed investment chapter of the Transpacific Partnership Agreement that provides for ISA.<sup>43</sup> In particular, they objected to the MFN provision that would enable investors “to avoid the deliberate decision of [TPPA negotiating Governments] that require investors to pursue remedies in the domestic courts of the host nation...” They further criticised the chapter, citing dissatisfaction with the rotating roles of arbitrators and advocates “in a manner that would be unethical for judges” They also expressed concern about the exclusion of “non-investor litigants and other affected parties” from participating in ISA proceedings as being contrary to basic principles of “transparency, consistency and due process”.<sup>44</sup>

It must be noted that, whether the 2011 Trade Policy Statement is an effective means of resolving investor-state disputes globally or a toothless tiger, the Australian Government has demonstrated a serious intention to implement it. This is evidence in the absence of ISA in Australia’s FTA with Malaysia, concluded in May 2012, and in the more recent amendment to the investment protocol in the Australia New Zealand Closer Economic Trade Relations Agreement (ANZC).<sup>45</sup> Thus, despite the controversial nature of the proposed Policy, it appears that the Labour Government was determined to proceed with its repudiation of ISA, something from which the recently appointed Liberal Government has not retreated.

#### **IV Dispute Resolution Options In The Absence Of ISA**

The first step in analysing the consequences of Australia’s rejection of ISA is to examine alternative dispute resolution platforms available to foreign investors in the absence of ISA. After all, Australia’s Trade Policy Statement does not expressly assign domestic courts to deciding investor claims against states. This raises the prospect of inbound and outbound investors considering other dispute resolution options, which are analysed below.

As one of its options, Australia may negotiate for resort to diplomatic channels to resolve investor-state disputes. The purpose would be to enable foreign investors to request diplomatic assistance from their home states in resolving investor-state disputes. As was noted in Part 1 of this paper, interstate diplomacy is not a novel method of resolving investment disputes and was commonly utilized in decades past.<sup>46</sup> However, this method of dispute resolution is far less widespread today, given that governments are increasingly reluctant to intervene, given the costs of state action, the potential damage to foreign relations and the lack of economic and political leverage of many outbound investors to mobilise their home states to intervene on their behalf.

As a further alternative, parties could be required to undertake formal negotiations and conciliation prior to a foreign investor initiating a domestic court case. However, negotiations often serve more as mandatory waiting periods, delaying investors from filing ISA claims, rather than as effective means of resolving an investor-state dispute. Thus, such dispute ameliorating options could be costly, dilatory and also ineffective. They could compound rather than reduce the scope of disputes subsequently heard by domestic courts or ISA tribunals.

As yet another alternative, Australia could rely on individual private investors to enter into contracts with foreign states providing for international commercial arbitration on a case by case basis. This option could be contained in a BIT or FTA, or in an investor-state agreement. While this approach gives Australia maximum flexibility in managing its relations with foreign investors, it has two major limitations. First, these contracts may be one-sided, favouring the host state, or a powerful investor. This is especially so when small and middle-sized investors from developing home states proceed against developed states, and when developing states defend against claims from better resourced foreign investors. Secondly, insofar as such investor-state contracts include

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<sup>41</sup> Australian Productivity Commission, *Research Report* (Canberra: APC, 2011), xiv (on file by author).

<sup>42</sup> Id, xxii.

<sup>43</sup> See TPP Legal, An Open Letter from Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement 8 May 2012: <<http://tpplegal.wordpress.com/open-letter/>>.

<sup>44</sup> Ibid.

<sup>45</sup> For the full text of the ANZCERTA, see <<http://www.dfat.gov.au/fta/anzcerta/>>.

<sup>46</sup> See Nottage & Weeramantry, above n 4.

choice of jurisdiction and choice of law clauses, these clauses are likely to refer disputes to domestic legal systems and their courts for resolution. The result may be resort to the domestic courts and laws of the ‘host’ state if the dominant contracting party is the ‘host’ state; or to the courts and laws of the ‘home’ or a third-party state if the foreign investor is the dominant party.

In summary, while options such as diplomatic intervention, political risk insurance and investor-state contracts remain available to foreign investors, they are often difficult for investors to access and utilize. Furthermore, investors may not have sufficient knowledge and financial resources to evaluate their legal options in resolving disputes with host states. Thus, in the absence of ISA, foreign investors will most likely rely on domestic litigation to resolve their disputes with ‘host’ states, foregoing other available methods of dispute resolution.

## V Incompatibility of ISA With Public Interest Litigation

In assessing the viability of the current Policy on ISA, it is important to examine whether domestic courts are a more appropriate institution to hear investment disputes than specialized ISA tribunals appointed under the ICSID Convention or guided by the UNCITRAL Rules. This inquiry becomes particularly relevant, given that domestic courts are the most likely means of resolving investment disputes lodged against states, should ISA be rejected.

### A. Support For Domestic Courts

An arguable benefit of relying on domestic courts to decide investor-state disputes is that domestic courts have a better understanding of domestic law, including important public policy considerations than ISA tribunals. Furthermore, domestic proceedings are ordinarily open to the public; they provide for third-party submissions on matters concerning the public interest; and verdicts are often reached by juries. This judicial system is often regarded as a key arm of government in a democracy; judges are appointed by the government, or in limited cases, are democratically elected. In addition, judgments are usually published and freely available to ordinary citizens. Finally, to ensure that the process remains fair, the losing party is provided with a right to appeal a decision to a higher court. As a result, domestic courts are viewed as being most qualified to reach informed decisions, to take account of the legitimate interests of litigants, and to consider important public policy considerations involved in the issue.

When the quality of justice is measured against these criteria, ISA appears to be inadequate. ISA proceedings are generally confidential; third-party interventions in ISA proceedings are often restricted; and awards are sometimes unpublished, or published only in part.<sup>47</sup> While ISA parties generally have the option to modify ISA proceedings including opening them to the public, such decisions require the explicit consent of both sides, which is difficult to achieve by investor-state parties already engaged in a dispute. Given that ISA disputes are decided by commercially trained international arbitrators who often lack adequate appreciation of domestic conditions, ISA has the potential to produce over-extensive awards in favour of foreign investors at the expense of ‘host’ states. Illustrating the risks of ISA awards bankrupting a foreign investor is the frequently cited *Loewen* case in which an ISA tribunal upheld a punitive damage jury determination against a Canadian funeral home, under Chapter 11 of the North American Free Trade Agreement, leading to the insolvency of the funeral home.<sup>48</sup>

Due to these characteristics of ISA, it is often criticized for leading to a ‘chill’ in domestic public interest legislation such as relate to public health, safety and environmental protection.<sup>49</sup> This concern is reinforced by the fact that grounds for annulling an ISA award, such as under the ICSID Convention, are limited to procedural issues and challenges to the impartiality of arbitrators, or on

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<sup>47</sup> See Trakman, “The ICSID in Perspective” in Trakman & Ranieri, above n 1, 253.

<sup>48</sup> On the *Loewen* case, see, for example, Charles Brower & Lee Steven, ‘NAFTA Chapter 11: Who then should Judge? Developing the International Rule of Law under NAFTA Chapter 11’ (2001) 2 *Chi J Int’l L* 193, 193-195; Jack J Coe Jr, ‘Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel within NAFTA and the Proposed FTAA’ (2002) 19 *J Int’l Arb* 185; David A Gantz, ‘An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges’ (2006) 39 *Vand J Transnat’l L* 39. But see William S Dodge, ‘Case Report: Waste Management, Inc v Mexico’ (2001) 95 *AJIL* 186 (presenting the case for modelling 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 U.S.-Japan Trade Policies* (2002), 363.

<sup>49</sup> See, for example, Kyla Tienhaara, ‘Regulatory Chill and the Threat of Arbitration: A View from Political Science’ in Chester Brown & Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (2011).

grounds of conflicts of interest. Due to the specificity of the grounds for annulment,<sup>50</sup> ISA decisions are rarely set aside and awards are usually considered to be final and binding upon the parties.

## ***B. Analysis Of Deficiencies In ISA***

While concerns with ISA are justifiable, it is important to emphasize that many of these criticisms apply to domestic legal systems. For example, although ISA proceedings are resource intensive and can lead to unreasonable awards based on domestic public policy, litigation in domestic courts can be equally costly and may deliver devastating blows to foreign investors, including allegedly excessive damage awards. This is illustrated, somewhat ironically, by the ISA tribunal in the *Loewen* case which upheld a punitive damage jury award reached in a domestic U.S. court.<sup>51</sup>

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

In addition, prioritizing domestic courts over ISA on grounds that ISA tribunals diverge in applying standards of treatment, such as “fair and equitable” treatment to foreign investors, ignores the extent to which domestic courts apply a diverse range of domestic rules of evidence and procedure to resolve disputes including against states.<sup>52</sup> Domestic courts also domesticate conceptions of public policy differently.<sup>53</sup>

Beyond these criticisms, it is also difficult to argue that ISA is inherently incompatible with public interest litigation. In fact, there are a number of structural and functional benefits of ISA over domestic courts that make it a more appropriate forum for the resolution of investor-state disputes. For example, while a small number of ISA arbitrators are repeatedly appointed from a list of panellists nominated by member states, it is difficult to infer that domestic litigation is preferable on grounds that domestic judges are appointed by nation states.<sup>54</sup> On the contrary, ISA arbitrators may be more experienced than domestic court judges, since the majority of the cases they hear are related to investment matters. In addition, ISA arbitrators are selected by the disputing parties, whereas domestic court judges are assigned randomly. Thus, a decision reached by arbitrators who are assigned by the parties is likely to be viewed to be more legitimate than a decision reached by a judge appointed by the state.

With regard to the choice of the applicable law, even though domestic laws may be attractive to states facing claims from foreign investors, reliance on disparate domestic laws and procedures may actually impede the resolution of FDI disputes. In contrast, international treaty law provides ISA tribunals with more consistent principles, standards and rules than the laws of a plethora of domestic legal systems.<sup>55</sup> Furthermore, ISA tribunals are likely to have a firmer grasp of principles of investment law and public international law.<sup>56</sup> They are also likely to apply a more uniform system of international investment laws and procedures than domestic laws and procedures that diverge across different legal systems. In fact, over the thirty years of ICSID and UNCITRAL decision-making, ISA jurisprudence has acquired a sophisticated degree of coherence.<sup>57</sup> This is a

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<sup>50</sup> See By Bernardo M. Cremades Román, B. Cremades y Asociados, ‘The Use of Preliminary Objections in ICSID Annulment Proceedings’ Kluwer Arbitration Blog < <http://kluwerarbitrationblog.com/blog/2013/09/04/the-use-of-preliminary-objections-in-icsid-annulment-proceedings-2/>>

<sup>51</sup> On the *Loewen* case, see Brower & Steven, above n 55.

<sup>52</sup> For a debate on this issue, see Leon E Trakman & M Sornarajah, “A Polemic: The Case For and Against Investment Liberalization” in Trakman & Ranieri, above n 1, Appendix, 499.

<sup>53</sup> On such issues, see generally, Foreign Investment Review Board, Current International Investment Issues - OECD Investment Committee: <[http://www.firb.gov.au/content/international\\_investment/current\\_issues.asp?NavID=60](http://www.firb.gov.au/content/international_investment/current_issues.asp?NavID=60)>.

<sup>54</sup> See Leon E Trakman, ‘A Plural Account of the Transnational Law Merchant’ (2011) 2(3) *TLT* 309, 335.

<sup>55</sup> On this public-private tension, see Alex Mills, “The Public-Private Dualities of International Investment Law and Arbitration”, in Chester Brown & Kate Miles (eds), *Evolution in International Investment Treaty Law and Arbitration* (2011); Catherine A Rogers, “International Arbitration’s Public Realm”, in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2010).

<sup>56</sup> See, for example, Susan Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2004-5) 73 *Fordham L R* 1521, 1543–44; G A Alvarez & W W Park, ‘The New Face of Investment Arbitration: NAFTA Chapter 11’ (2003) 28 *Yale J Int’l L* 365.

<sup>57</sup> On the variability of international investment treaty law, see Stephan W Schill, *The Multilateralization of International Investment Law* (2009), 363. ; but compare M Sornarajah, “The Case Against an International Investment Regime” in Trakman & Ranieri, above n 1, 475.

significant accomplishment since ISA decisions are *ad hoc* and bind only the direct parties to the dispute, and even though ISA tribunals often diverge in applying international investment laws, such as the state defence of “necessity” to specific ISA disputes.<sup>58</sup>

Noteworthy, too, are the institutional foundations of ISA. In particular, investor-state arbitration is administered by established international institutions, such as the ISCID, to which the vast majority of states are signatory parties. The rules of institutions such as those under the ISCID are derived from the collective action of signatory states and are interpreted and applied by ISA tribunals appointed by the disputing parties. Thus, ISA tribunals are subject to institutional rules and international oversight, such as under the ICSID Convention and the UNCITRAL Rules.

It must be noted that ISA awards are ordinarily enforceable domestically. As a formal matter, states that are signatories to ISA conventions such as the ICSID Convention ordinarily enforce ISA awards in accordance with their duties as signatories.<sup>59</sup> As a functional matter, domestic states, through their judicial systems, are also more likely to enforce ISA awards in order to avoid being seen as discouraging foreign direct investment through the non-enforcement of ISA awards that favour foreign investors. In contrast, the decisions of domestic judges are ordinarily more difficult to enforce in foreign jurisdictions than ISA awards, given the limited endorsement of the Hague Convention on the Recognition and Enforcement of Foreign Judgements and the Draft Hague Principles on Choice of Law,<sup>60</sup> compared to the plethora of state signatories to the ICSID Convention.<sup>61</sup>

Finally, concern over the lack of transparency of some ISA proceedings is more controversial, since the confidentiality of ISA proceedings and awards historically were determined by disputing investor-state parties. An important reason why ISA is attractive to foreign investors, and sometimes state parties, is because it was traditionally closed to the public. This avoided media coverage often associated with the publicised decisions of domestic courts of law. However in recent years, the nature of ISA has changed to provide greater public awareness of and participation in ISA proceedings. ISA tribunals have repeatedly opened hearings to the public, with the support of the investor-state parties, given sensitivity about the need for transparency in redressing public-private disputes on matters of public interest. Consequently, there is now far greater public access to ISA proceedings and records than there was a decade ago.<sup>62</sup> For example, the ICSID now provides for third-party intervener status in ISA proceedings and for the publication of ISA awards.<sup>63</sup>

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<sup>58</sup> On allegedly inconsistent ICSID decisions in a series of investment claims against Argentina, commencing with the *CMS, Enron* and *Sempra* cases, see *CMS Gas Transmission Co v The Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/8, 12 May 2005); *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/3, 22 May 2007); *Sempra Energy International v The Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/02/16, 28 September 2007). See further 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 *JWIT* 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 *J Int’l Arb* 265; Michael Waibel, ‘Two Worlds of Necessity in ICSID Arbitration: *CMS* and *LG&E*’ (2007) 20 *Leiden J Int’l L* 637. See C Peinhardt & T Allee, ‘Devil in the Details? The Investment Effects of Dispute Settlement Variation in BITs’, in Karl Sauvant (ed), *Yearbook on International Investment Law & Policy 2010-2011* (2011), 833–854.

<sup>59</sup> See Kenneth Vandeveld, ‘A Brief History of International Investment Agreements’ (2005) 12 *UC Davis J Int’l & Pol’y* 157, 172. See also UNCTAD, *World Investment Report 2010* 22 July 2010, xxv: <[www.unctad.org/en/docs/wir2010\\_en.pdf](http://www.unctad.org/en/docs/wir2010_en.pdf)>.

<sup>60</sup> On the draft Hague Principles on Choice of Law, see Hague Conference on Private International Law, *Draft Hague Principles on the Choice of Law in International Contracts*: <[http://www.hcch.net/upload/wop/contracts2012principles\\_e.pdf](http://www.hcch.net/upload/wop/contracts2012principles_e.pdf)>. See also, *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* 1 February 1971: <[http://www.hcch.net/index\\_en.php?act=conventions.text&cid=78](http://www.hcch.net/index_en.php?act=conventions.text&cid=78)>. See also, Stevens, above n 16. On the list of state and other signatories of the ISCID Convention, see ICSID, *List of Contracting States and Other Signatories of the Convention*: <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Contractingstates&ReqFrom=Main>>. See also, Hague Conference on Private International Law, *The Hague Convention of 30 June 2005 on Choice of Court Agreements* 30 June 2005: <<http://www.hcch.net/upload/conventions/txt137en.pdf>>.

<sup>61</sup> On the ICSID membership, see <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Contractingstates&ReqFrom=Main>>

<sup>62</sup> See, for example, Aurélia Antonietti, ‘The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules’ (2006) 21 *ICSID Rev – Foreign Invest LJ* 427; Edward Baldwin, Mark Kantor & Michael Nolan, ‘Limits to Enforcement of ICSID Awards’ (2006) 23 *J Int’l Arb* 1.

<sup>63</sup> On this amendment to the ICSID Rules, see Antonietti, above n 63. See also Statement by the OECD Investment Committee, *Transparency and Third-party Participation in Investor-State Dispute Settlement* June 2005: <<http://www.oecd.org/daf/inv/investment-policy/34786913.pdf>>.

Furthermore, regardless of whether ISA proceedings remain closed or open to the public, disputing parties are generally allowed to issue statement on their positions to the public, provided that these statements do not disclose information marked in proceedings as “confidential”. Those statements may be sufficient to keep the public informed and focused on issues of national significance. Furthermore, these public releases may also provide incentives for both disputing parties to open ISA proceedings to the public in order to offset the impact of a statement by one disputing party in the absence of a public record. Thus, while ISA has a number of drawbacks, it is not inherently incompatible with public interest litigation.

### ***C. Unifying Domestic And International Investment Laws?***

Under a perfected monist legal system the idealised result is a uniform body of investment laws, operating both domestically and internationally, to regulate investor-state dispute. That perfection includes the harmonization of pre-existing differences among domestic and international investment laws, obfuscating inconsistencies and contradictions between them.<sup>64</sup> However, realism suggests that such a perfected monist world is unlikely to materialize in practice. State sovereignty is simply too resilient to succumb to a unifying international jurisprudence, leading to the present dualism between domestic and international investment law.<sup>65</sup> If a blend of legal monism and dualism is to evolve, the result is likely to be a patchwork quilt of marginally to substantially different legal systems;<sup>66</sup> or even to an un-cohesive ‘spaghetti bowl’, of disparate domestic and international investment laws and procedures.<sup>67</sup> As a result, some priority is necessary between domestic and international investment law and between ISA tribunals and domestic courts in order to promote greater certainty and predictability in investor-state dispute resolution.

### ***D. Reconciling The Normative Value Of Isa Against Domestic Courts***

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

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

If normative priority is given to investment expertise, ISA arbitrators are likely to have a greater comprehension of investment law than most domestic judges.<sup>68</sup> If emphasis is given to the transparency of legal procedures, ISA will once again prevail over the choice of domestic courts in jurisdictions that have low corruption transparency indexes and rule of law scores.<sup>69</sup> In issue is not

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<sup>64</sup> For a comparative analysis of dualism and monism in international law, see Brindusa Marian, ‘The Dualist and Monist Theories: International Law’s Comprehension of these Theories’ (2007) 28-29 *The Juridical Current Journal* <[http://revcurentjur.ro/arhiva/attachments\\_200712/recjurid071\\_22F.pdf](http://revcurentjur.ro/arhiva/attachments_200712/recjurid071_22F.pdf)>.

<sup>65</sup> On a dualist conception of international law, see, for example, Hans Kelsen, *Principles of International Law* (2<sup>nd</sup> ed, 1966), 551–552.

<sup>66</sup> On the tension arising from this patchwork quilt of BITs and ISA awards, particularly in relation to developed and developing states and their investors, see Leon E Trakman & M Sornarajah, “International or National Investment Law? A Polemic” in Trakman and Ranieri, above n 1, Appendix, 499.

<sup>67</sup> On “swimming in the spaghetti bowl” to describe the economic effect of multiple “free” trade agreements, see Jagdish Bhagwati, *Free Trade Today* (2002).

<sup>68</sup> On the expertise of investor-state arbitrators, among various other factors in support of ISA, see generally, Christopher Dugan, Don Wallace, Jr & Noah Rubins, *Investor-State Arbitration* (2008); Peter Muchlinski, Federico Ortino & Christoph Schreuer (eds), *Oxford Handbook of International Investment Law* (2008); Campbell McLachlan, Lawrence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2008).

<sup>69</sup> On Transparency International’s Corruption Perceptions Index 2012, see Transparency International, Corruption Perceptions Index 2012: <<http://www.transparency.org/cpi2012/results>>. On doubts about the reliability of such indexes, see Theresa Thompson & Shah Anwar Transparency International’s Corruption Perceptions Index: Whose Perceptions Are They Anyway? March 2005:

only that domestic courts and ISA tribunals are likely to accord priority to different normative values. Domestic courts and ISA tribunals are also likely to differentiate among those values from one case to another. If priority is given to the binding force of precedents, as common lawyer conceive of it, ISA arbitrators who subscribe to precedent are also likely to treat past ISA awards as binding on them.<sup>70</sup>

As a result, it is difficult to conclude that domestic courts and ISA tribunals are likely to subscribe to one or another normative preference. Even the presupposition that ISA tribunals are more likely to prioritise the commercial interests of foreign investors while domestic courts are more likely to prioritise the public policy concerns of the 'host' state is not self-evident. Indeed, an examination of ISA panels demonstrates a growing balance between commercially trained and public international lawyers.<sup>71</sup>

The result is that it is easier to draw broad quantitative than qualitative distinctions between the normative proclivities of domestic courts and ISA tribunals. As a quantitative measure, ISA jurisprudence is likely to be more consistent in scope of application than a multiplicity of different domestic laws applied by local courts to govern foreign investment in light of localised laws and procedures.<sup>72</sup> However, if one takes into account qualitative measures, the extent of that consistency will depend on the value priorities that are ascribed to domestic courts and ISA tribunals in discrete cases.

In summary, it is difficult to reach a definitive conclusion about the perceived virtues or pitfalls of Australia's rejection of ISA in its 2011 Trade Policy Statement without examining the wider political and economic context in which that Policy is applied.

## VI Will Rejecting ISA Promote Australia's Public Interests?

One method of evaluating the merits of the 2010 Policy Statement is by analysing whether the Government's rejection of ISA is likely to accomplish its intended goals. Specifically, one must examine whether rejection of ISA will reduce the risk of ISA claims brought against Australia and alleviate regulatory 'chill'. Furthermore, it is important to inquire whether the Policy will promote economic, political and legal benefits that will outweigh the costs associated with its implementation.

As was previously noted, Australia's primary reasoning behind the rejection of ISA lies in the desire of the Government to limit incursion of foreign companies on Australia's sovereign right to manage sectors of the economy that are of national importance. Due to the resource intensive nature of such sectors and the size of the foreign entities involved in these markets, it is likely that Australia will be unable to inhibit foreign investors from lodging ISA claims against it, even if it repudiates ISA in its entirety.

More specifically, so long as Australia's 22 existing BITs and FTAs provide for ISA, influential investors, often backed by their Governments, will have an incentive to shift their places of residence or incorporation to foreign states in order to mount ISA actions against Australia and avoid the local courts. Philip Morris case against Australia is an illustrative example: in order to avoid Australian courts, the company shifted its operations from Australia to Hong Kong and filed a claim against Australia under the Hong Kong-Australia Free Trade Agreement,<sup>73</sup> thus bypassing Australia's domestic courts. Should Philip Morris lose its ISA claim against Australia on the jurisdictional ground that Hong Kong constitutes a mere forum of convenience, other inbound investors may be discouraged from forum shopping for ISA. However, ISA tribunals do not generally refuse to hear claims submitted to them.<sup>74</sup> Thus, it is likely that foreign investors will rely on forum shopping in mounting their challenges against Australia.

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<<http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/TransparencyInternationalCorruptionIndex.pdf>>.

<sup>70</sup> See, for example, Christoph Schreuer & Rudolf Dolzer, *Principles of International Investment Law* (2008), 357.

<sup>71</sup> On the ICSID Panels of Arbitrators and Conciliations, see ICSID, *Search ICSID Panels*: <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDataRH&reqFrom=Main&actionVal=PanelStates&range=A~B~C~D~E>>.

<sup>72</sup> On the development of international investment norms around conceptions of efficiency, see Foreign Investment Review Board, above n 54.

<sup>73</sup> On proceedings in *Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL, PCA Case No. 2012-12) see: <<http://www.italaw.com/cases/851>>.

<sup>74</sup> On the ICSID Caseload Statistics, see: <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>>

Furthermore, such investor claims against Australia are likely to lead to a regulatory ‘chill’, not only in Australia, but in other states contemplating such action. The underlying concern is for such states to avoid being exposed to the risks of spiraling ISA claims brought by claimants with significant experience in lodging ISA claims and sufficiently deep pockets to sustain them. As an illustration of recurrent claims on comparable grounds is Philip Morris early ISA claim against Uruguay under the Switzerland-Uruguay Free Trade Agreement.<sup>75</sup> It is likely, should other states enact plain packaging legislation before Philip Morris’ ISA claim against Australia is determined, Philip Morris and/or other international tobacco companies will lodge claims against those other states as well.

While Australia intends to limit investor-state litigation, it still wishes to maintain its attractiveness as a destination for FDI to promote national development and collect various regulatory taxes. However, it is unlikely that rejecting ISA will be conducive to this mandate. As was noted above, foreign investors are likely to relocate their investments to foreign entities or intermediary states, such as the Netherlands Antilles and Mauritius<sup>76</sup> in order to gain greater ISA protections. A consequence of such development is that Australia could lose taxes and related revenues to those jurisdictions in which outbound investors relocate,<sup>77</sup> in addition to dampening the overall attractiveness of Australia as an inbound investment destination.

In summary, it is doubtful that the rejection of ISA will achieve the regulatory goals of initiated by Australia’s 2011 Policy Statement. Should Australia persist in rejecting ISA and require that domestic courts resolve investor-state disputes in its future BITs and FTAs, it may increase, rather than reduce, its exposure to investor claims arising before domestic courts or ISA. Should other states replicate Australia’s reliance on domestic courts to resolve investor-state disputes, either through BITs or FTAs with Australia, or more expansively through their own BIT programs, investor-state claims will mushroom in multiple domestic judicial systems and will have to be resolved through disparate judicial procedures and domestic laws, creating further confusion in the global investment regulatory regime.

## VII Geopolitical Challenges In Implementing The Policy

As was demonstrated in the previous sections of this paper, it is difficult to argue that domestic courts are the most appropriate institution to decide FDI related disputes lodged against host states. It is also questionable whether the Australian Government will be able to achieve its stated goals by repudiating ISA. In addition to these issues, there are two additional barriers to implementing ISA that will require the Government to re-evaluate the Policy Statement in light of Australia’s trading and investment environment. These challenges are illustrated by Australia’s ongoing negotiations over the Trans Pacific Partnership Agreement (TPPA) and the state of Australia’s geopolitical neighbourhood.

### A. *Trans-Pacific Partnership Negotiations And ISA*

Implementing the 2011 Trade Policy Statement will be particularly challenging in the context of Australia’s ongoing TPPA negotiations. The contest between Australia’s 2011 Policy Statement favouring domestic courts over ISA and TPPA member countries favouring ISA is apparent.<sup>78</sup> Officially Australia is negotiating the TPPA with the intent to seek exemption from ISA. In support of Australia’s exemption is the recognition that reservations and exceptions to the TPPA that are part and parcel of this multilateral negotiating process. Furthermore, negotiating parties have

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<sup>75</sup> See *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (ICSID Arbitral Tribunal, Case No. ARB/10/7): <<http://www.italaw.com/cases/460>>.

<sup>76</sup> On the tax and related protection accorded to foreign investors in tax havens such as the Netherlands Antilles, see <[www.receita.fazenda.gov.br/Publico/.../Textos/AloisioTaxHavens.pdf](http://www.receita.fazenda.gov.br/Publico/.../Textos/AloisioTaxHavens.pdf)>

<sup>77</sup> On such intermediary states, see UNCTAD, *World Investment Report 2012* 5 July 2012: <[unctad.org/en/PublicationsLibrary/wir2012\\_embargoed\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf)>.

<sup>78</sup> See Meredith K Lewis, ‘The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep’s Clothing?’ (2011) 34 *B C Int’l & Comp L Rev* 27, 34; Patricia Ranald, ‘The Trans-Pacific Partnership Agreement: Contradictions in Australia and in the Asia Pacific Region’ (2011) 22(1) *Econ Lab Relat Rev* 81: <<http://search.informit.com.au/documentSummary;dn=013448300672307;res=IELBUS>>. On the US negotiating position generally, see David Gantz, *Trans-Pacific Partnership Negotiations: Progress, But No End in Sight* 22 June 2012: <<http://kluwerarbitrationblog.com/blog/2012/06/22/trans-pacific-partnership-negotiations-progress-but-no-end-in-sight/>>.

announced their rejection of a one-size-fits-all TPPA due to their unique domestic circumstances.<sup>79</sup> Thus, on the surface, Australia's request to be exempted from ISA is justifiable according to this negotiating platform. However, the costs of such a negotiating platform may ultimately outweigh its anticipated benefits.<sup>80</sup>

First, the extent of reservations and exemptions granted to participating countries is likely to depend on the perceived benefit of uniformity among the TPPA membership at large, weighed against the cost of exempting another TPPA party from specific aspects of the Agreement, such as from intellectual property, export compliance requirements and in the case of Australia, ISA. Granting Australia an exemption from ISA could also lead to a slippery slope of exceptions, with other parties following suit through country-specific reservations. The potential result is a two, or a multi-tier, system of dispute resolution that could undermine the stature of the TPPA as the umbrella agreement.

Furthermore, if Australia is to secure an exemption from ISA under the TPPA, its courts are likely to decide ISA cases inconsistently with the TPPA, unless the substance of the TPPA is incorporated directly and fully into Australian law. This is due in part to Australia's dualist tradition of according primacy to domestic law over international law, unless the latter is expressly incorporated into domestic law. Thus, the likely outcome, if Australia concludes side-agreements with other states that subscribe to a blend of legal monism and dualism domestically, is the accentuation of inconsistencies both between domestic and international investment law and among domestic legal systems of TPPA member states.<sup>81</sup>

For many observers, the TPPA signifies an attempt to revive the Doha Round of trade negotiations and promote greater harmonization of various standards that were created in the spaghetti bowl of BRTAs. Investment is one of these disparate areas. While a WTO style investment agreement is currently beyond reach, the TPPA has a chance to create greater harmony among various investment treaties and improve the dispute resolution process by including key states in the decision-making process. By rejecting ISA in the TPPA, Australia risks isolating itself from other negotiating parties who want to maintain ISA in treaties with their most significant trade and investment partners and may also lose its voice in the negotiating process over the future investment regime.

## ***B. ISA And Australia's Neighbours***

Australia is fortunate to have developed a sophisticated legal system that emphasizes the separation of powers and rule of law. Unfortunately, many of Australia's neighbours are developing nations that do not possess comparable legal systems.<sup>82</sup> Despite the lack of solid regulatory frameworks in the region, Asia is becoming increasingly appealing to Australian investors and it is reasonable to argue that the region will become essential to Australia's future economic development.

Statistics on Australia's outward investment flows illustrate economic importance of the region to Australia. According to 2011 Federal Government Statistics, Australia's combined investment in Asia stood at AUD 150 billion, making up 13% of its total FDI.<sup>83</sup> While this number does not appear to be significant, the rate of investment into the Asia region has doubled since 2001.<sup>84</sup> When one examines Australia's trade in goods, the statistics are much more staggering: two-third of Australian trade flows into the Asian region.<sup>85</sup> Similarly, investment from Asia into Australia has grown to AUD 300 billion in 2011, which is double from what it was 10 years earlier.<sup>86</sup>

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<sup>79</sup> State-by-state negotiations notwithstanding, each "round" of TPPA negotiations includes all participating countries. The 18th Round of TPP Negotiations will take place in Kota Kinabalu, Malaysia on July 15-24, 2013.

<sup>80</sup> For arguments in support of Australia opting out of Investor-State arbitration, see, for example, Kyla Tienhaara, *Submission to the Department of Foreign Affairs and Trade: Investor-State Dispute Settlement in the Trans-Pacific Partnership Agreement* 19 May 2010: <[http://www.dfat.gov.au/fta/tpp/subs/tpp\\_sub\\_tienhaara\\_100519.pdf](http://www.dfat.gov.au/fta/tpp/subs/tpp_sub_tienhaara_100519.pdf)>.

<sup>81</sup> See Leon Trakman, "International Investment Law and the Transpacific Partnership Agreement", in Tania Voon (ed), *The Transpacific Partnership Agreement* (2013, Forthcoming).

<sup>82</sup> On the prospect of foreign investors resorting to intermediary states to bring claims against host states, see above n 77.

<sup>83</sup> See Business Council of Australia, *Assessing Australia's Trade and Investment with Asia* 16 Dec 2011: <[www.bca.com.au/DisplayFile.aspx?FileID=789](http://www.bca.com.au/DisplayFile.aspx?FileID=789)>.

<sup>84</sup> *Ibid.*

<sup>85</sup> See Australian Government Department of Foreign Affairs and Trade, *Australia's Trade in Goods and Services 2012* <[www.dfat.gov.au/publications/tgs/](http://www.dfat.gov.au/publications/tgs/)>.

<sup>91</sup> See Australian Government, *Australia in the Asian Century Foreign Direct Investment Fact Sheet. Oct 2012:* <[asiancentury.dpmc.gov.au/sites/default/files/fact-sheets/20.-Foreign-investment-in-Australia.pdf](http://asiancentury.dpmc.gov.au/sites/default/files/fact-sheets/20.-Foreign-investment-in-Australia.pdf)>.

Although different inferences may be drawn from this data, it is clear that Asia is of immense importance to the economic wellbeing of Australia and is likely to become the primary channel for its future trade flows.

China is a particularly noteworthy example. It is a major investor in Australia and is heavily involved in the local natural resources industry. While Australia's investment in China still lags behind other states in the region, in 2010 the country's FDI directed to China reached AUD 17 billion.<sup>87</sup> Although China only invested some AUD 19 billion in Australia, this rate is three times higher to what it was in 2007.<sup>88</sup> To put it in perspective, China's FDI into Australia is growing exponentially and has made a major contribution to Australia's recent high economic growth, commonly referred to as the natural resources boom. Considering China's demand for natural resources, it is unlikely that this trend will be reversed in the near future.

While the region has immense economic opportunities, investment in Asia is not without risks. According to the 2012 Transparency International Corruption Perceptions Index, the majority of countries in Asia scored between 10 and 50 points, out of possible 100.<sup>89</sup> Other studies conducted by the World Justice Project provide similarly troubling assessment.<sup>90</sup> World Bank's Ease of Doing Business rankings of East Asia and the Pacific paint an even bleaker picture: only four countries in the region managed to score in the top 20, with other key regional economic partners of Australia falling behind by a significant margin.<sup>91</sup> While the methodology of these rankings is not without controversy,<sup>92</sup> these surveys portray a similar story - Asia is still lagging behind the rest of the world in terms of its legal institutions and protections accorded to individuals.

In the absence of ISA, Australia's outbound investors located in Asia may have difficulties seeking relief against host states. While some investors may move their businesses to intermediary states to avoid the courts of partner states, many smaller Australian investors lack such mobility and will have to resolve their disputes in the local courts of their host states.<sup>93</sup> Thus, one of the practical challenges that Australia faces in its determination to retire ISA lies in Australia's regional economic interests.

Of further importance, while that many states in Asia do not have a strong rule of law tradition as is understood by Australia, these countries place greater emphasis on ISA in their trade relations with other states. China is an illustrative example of this development; according to unconfirmed reports, Australia is under pressure from China to include access to ISA in the current free trade agreement under negotiations.<sup>94</sup> China's position on the matter is understandable. Realizing some 'rule of law' limitations in its domestic legal system, China wants to make sure that it remains an attractive FDI destination. Furthermore, Chinese investors have made a number of high profile investments in Australia and it is reasonable to surmise that China lacks confidence in the impartiality of Australian courts, especially in sensitive matters concerning public health and the environment which are closely related to investment in natural resources.

China may also want to reserve other dispute resolution options, beyond both ISA and domestic courts, including diplomatic state-to-state measures. As an illustration, China initiated diplomatic measures in response to Australia's exclusion of the Chinese Company, Huawei, from Australia's broadband program on Australia's allegation that Huawei had engaged in cyber-espionage.<sup>95</sup> Highlighting the significance of such diplomatic measures is the sequel by which the U.S. and EU blacklisted Huawei and to U.K. to reconsider its extensive investment relationships

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<sup>87</sup> See Australian Government, *Australia in the Asian Century Australian Investment Abroad Fact Sheet. Oct 2011*: <<http://asiancentury.dpmc.gov.au/sites/default/files/fact-sheets/19.-Australian-investment-abroad.pdf>>.

<sup>88</sup> See above n 91.

<sup>89</sup> See Transparency International, *2012 Corruption Perception Index Results* <<http://cpi.transparency.org/cpi2012/results/>> (20 Sept 2013).

<sup>90</sup> See The World Justice Project, *2012-2013 Rule of Law Index Scores and Rankings* <<http://worldjusticeproject.org/rule-of-law-index-data>> (20 Sept 2013).

<sup>91</sup> See The World Bank, *Ease of Doing Business 2012 Rankings* <<http://www.doingbusiness.org/rankings>> (20 Sept 2013).

<sup>92</sup> See, for example, Theresa Thompson & Anwar Shah "Transparency International's Corruption Perceptions Index: Whose Perceptions Are They Anyway?", World Bank Discussion Draft 2005.

<sup>93</sup> Investors may base these decisions on various grounds, including but not limited to corruption transparency and rule of law indices. See above nn 69 and 89.

<sup>94</sup> See Rick Wallace, 'Free-trade Push May Open Door to China' *The Australian* (18 July 2013): <<http://www.theaustralian.com.au/national-affairs/foreign-affairs/free-trade-push-may-open-door-to-china/story-fn59nm2j-1226681027576>>.

<sup>95</sup> Mike Hibberd, 'Huawei Blocked from Australia NBN Bid' *telecoms.com* (26 March 2012): <<http://www.telecoms.com/41633/huawei-blocked-from-australian-nbn-bid/>>

with Huawei.<sup>96</sup> Whatever the legal significance of reliance on ISA or domestic courts, providing for diplomatic measures is a necessary component in BIT reform, not only as a dispute avoidance option, but also in relation to dispute resolution.

In summary, while foreign investors from Asia might feel comfortable relying on Australian courts for the resolution of disputes, Australian investors located in Asia may be in vulnerable position due to the developmental nature of the region and a lack of sophisticated regulatory regimes. Furthermore, looking at the issue of ISA from interstate perspective, many states in the region are interested to negotiate BRTAs with Australia and accelerate their economic integration. Due to the relatively protectionist nature of their economies<sup>97</sup> negotiations between these states and Australia are likely to be protracted, as illustrated by the failure of Australia to conclude an FTA with China and Korea. Australia's seemingly inflexible stance on ISA may further aggravate these negotiations, since many of these states view ISA not just as a means to an end but as a wider symbolic commitment to the protection of FDI. Thus, rejecting ISA will prove to be a complex undertaking in light of a need to protect Australian investors located in Asia and Australia's long term trade interests in the region.

## VIII Proposals For A Modified ISA

This paper has demonstrated that ISA is not inherently incompatible with public interest litigation. Furthermore, rejection of ISA may create a number of challenges for the Federal Government and hurt the long-term economic interests of Australia. Thus, in rejecting ISA, a key issue for Australia will be to weigh the 'national interest' benefits underlying the 2011 Policy Statement against the benefits of utilizing ISA.

What are Australia's options in designing ISA regulatory regime that will meet the expectations of the Government and avoid the pitfalls identified in this paper? The options examined below may be identified across a spectrum, ranging with a rejection of ISA on the one end and its reinstatement on the other. In the middle, are a variety of ISA configurations that contracting states can negotiate.

As one of its options, Australia may forego its rejection of ISA. An economic driver to it doing so is to secure treaty concessions from negotiating partner states with whom Australia values investment relationships, such as to gain access to profitable U.S. markets under the TPPA, or to Chinese markets under a China-Australia trade and investment agreement.<sup>98</sup> However, it appears that the Australian Government is determined to proceed with its repudiation of ISA, at least in the foreseeable future. Due to the political climate surrounding the issue and a number of legitimate concerns voiced by the Government, a wholesale re-adoption of ISA may not be viable. On the other hand, upholding the status quo and maintaining its rejection of ISA may come at a high cost and could undermine Australia's national interests.

Alternatively, Australia could reaffirm ISA on a country-by-country basis, according to the nature of trade and investment relationships, perceived rule of law standards in its partner states and the quality of protections accorded to foreign investors. However, employing this approach could damage relations between Australia and the states it deems to lack 'rule of law' traditions. Additionally, as was demonstrated in Part 3 of the paper, such contract-based approach to dispute resolution is cumbersome, resource intensive and one-sided since it ordinarily favours the stronger negotiating parties.

A more advantageous approach available to Australia is to modify its Policy Statement to provide for a multi-tiered, qualified access to ISA, enshrined in an Australian Model BIT that serves as a template for subsequent FTAs and BITs. After all, since ISA is a party driven process of dispute resolution, treaty signatories are free to design arbitration rules to apply during formal dispute resolution proceedings. Among the available modifications to ISA, parties may: set limits on the

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<sup>96</sup> See, for example, Jill Stark, 'US Follows Australia in Naming Huawei as a Possible Security Threat' *Sydney Morning Herald* (9 Oct 2012): <<http://www.smh.com.au/it-pro/security-it/us-follows-australia-in-naming-huawei-as-a-possible-security-threat-20121008-277ad.html>>; Christopher Joye, 'Hauwei Spies for China, Says ex-CIA Chief' *Financial Review* (19 July 2013): <[http://www.afr.com/p/national/huawei\\_spies\\_for\\_china\\_says\\_ex\\_cia\\_QoPS9JWsvg6bMYqmPbtqLK](http://www.afr.com/p/national/huawei_spies_for_china_says_ex_cia_QoPS9JWsvg6bMYqmPbtqLK)>.

<sup>97</sup> On the topic, see generally, Christopher Dent, 'Free Trade Agreements in the Asia Pacific a Decade On: Evaluating the Past, Looking to the Future' (2009) 10(2) *Int Relat Asia Pac* 201.

<sup>98</sup> On the TPPA, see above Part VI (A) and n 79; on the extent of inbound investment from and outbound to China, see above Part VI (B).

standing of foreign investors to bring ISA claims; require public notice of ISA complaints; provide for public participation in ISA proceedings, and require publication of ISA awards. Australia may also design its ISA treaties in a manner that would provide for interim measures, and create budgetary limits on the cost of ISA in order to avoid cost overruns.

In addition to modification of the procedural rules regulating ISA, Australia may provide for the stay of ISA proceedings to allow for investor-state settlement. Such multi-tiered dispute resolution may include negotiations between states, including possible resort to the International Court of Justice, should such negotiations fail. The Model BIT may also encourage dispute prevention and avoidance, such as by requiring investor-state parties to undertake negotiations and/or mediation prior to resorting to either domestic litigation or ISA. Moreover, to ensure that ISA proceedings do not produce absurd or unjust decisions that go against legitimate regulatory goals of the Government, Australia's Model BIT could provide for bilateral challenge committees to hear challenges to ISA decisions.<sup>99</sup>

The approach is advantageous as it will allow the Australian Government to achieve its regulatory goals, in addition to avoiding the challenges associated with a complete rejection of ISA. For example, one of the broader benefits of a Model BIT is a greater commitment to transparency, not only for foreign states and their foreign investors, but also for Australian investors abroad. A publicly available Model BIT may also serve as a signal to both states and investors that Australia has a balanced position on BITs, including support for stable trade and investment relations which it shares with other states and impacted investors.

Furthermore, Australia's adoption of a proposed Model BIT may help it to protect its predominately resource-based economy from foreign investor incursions. The Model BIT could include inducements for foreign investment in the domestic Australian economy, such as by adopting a market based definition of 'investment' and by adopting an investor-sensitive conception of a 'direct or indirect expropriation'.

This multidimensional dispute resolution option may further encourage dispute parties to evaluate their dispute resolution options in light of costs, duration and effectiveness of the different options. It can also help home and host states, as well as disputing investor-state parties to identify their differences and to find common positions. Thus, when given a wide menu of dispute resolution options that do not lock them into a particular option, affected parties may opt for negotiations, mediation and, where appropriate, diplomatic intervention by a 'home' state on behalf of an outbound investor from a 'host' partner state. In doing so, they can avoid protracted litigation, which is costly to all parties involved in a dispute.<sup>100</sup>

On a more macroeconomic level, the proposed model BIT will encourage economic integration between Australia and its key economic allies. The fact that China has adopted a similar multi-faceted process for the resolution of investor-state disputes could help both sides to reach a consensus on a trade and investment treaty, which continues to be elusive at the time of writing. It is reasonable to anticipate that negotiations with other Asian allies will also eventuate. Furthermore, it will make it easier for Australia to engage in the TPP negotiations where the majority of members prefer ISA based format for the resolution of investor-state disputes.

In considering substantive provisions of this Model BIT, the paper makes 12 recommendations which accommodate international "good practice" in support of ISA, while reflecting Australia's desire to provide for a greater involvement of domestic courts in the resolution of FDI related disputes. The purpose of a proposed Model treaty would be to identify Australia's preferred position in negotiating BITs, including the scope for variation in meeting specific domestic and/or foreign party requirements, not unlike the U.S. Model BIT. It would also assist Australian negotiators in framing BIT provisions; and provide domestic courts and ISA tribunals with a template in negotiating specific treaties. In addition, it would enable Australia to negotiate dispute avoidance provisions in concluding BITs with other states. These 12 recommendations are outlined below:

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<sup>99</sup> On such a challenge process, see UNCTAD IIA: Issues Note, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* 26 June 2013, 4: <[http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf)>.

<sup>100</sup> See above Part III.

1. The spirit of proposed Model Australian BIT would reflect the desire of the Government to protect fundamental public policy interests necessary to Australia's national security, public health, environmental wellbeing and related public interest requirements.
2. The proposed Model BIT would provide for MFN treatment, national treatment, fair and equitable standards of treatment that take account of national and partner state interests.
3. The proposed Model BIT would provide for the exhaustion of local remedies, notably in relation to the interests identified in recommendations above.<sup>101</sup> It would provide for the stay of ISA proceedings for the purpose of encouraging a settlement by creating a waiting period of six months, during which neither party may initiate proceedings either in domestic courts or through ISA. The proposed Model BIT would include provision for negotiations, in addition to mediation. This resort to dispute avoidance is consistent with the proposals for dispute avoidance developed by the UNCTAD.<sup>102</sup>
4. The draft Model BIT would compromise between the current Policy rejecting ISA and international investment practice in favour of ISA by providing for state-investor parties to choose between having their disputes resolved by domestic courts of a 'host' state or through ISA.
5. The proposed Model BIT would provide for foreign investors to bring claims against host states under the rules of established arbitration institutions, such as under the ICSID Convention, the UNCITRAL Rules, or the rules of one or more international commercial arbitration centres.
6. The proposed Model BIT would also provide for variations from the Rules identified in point 6 by expressly stipulating for alternative rules, such as in regulating ISA or other arbitration proceedings BIT by BIT.
7. The proposed Model BIT would provide for the standing of foreign investors to bring claims, while denying standing to discourage premature, opportunistic and pernicious claims against host states.
8. The proposed Model BIT would provide that arbitration proceedings and awards are public, while preserving commercial in confidence and sensitive information of parties to a dispute. The proposed Model BIT would provide for the submission of amici curiae briefs and the participation of third-party interveners. This is consistent with ICSID Rule 37 adopted in 2006 which sanctions submissions of non-disputing parties to ISA disputes.<sup>103</sup>
9. The proposed Model BIT would provide for the admission into proceedings of social, economic and environmental impact reports. These reports would be publicly available, subject to the requirements of confidentiality, as identified in the Proposal 8.
10. The proposed Model BIT would stipulate for interim measures, to expedite proceedings and ensure fairness between the parties, such as to impede claimants and host states from engaging in duplicitous, disruptive or otherwise wrongful conduct. Such measures would inhibit 'host' states from implementing fast track legislation directed at circumventing ISA initiated against it. These measures would also discourage investor claimants from protracting ISA proceedings in order to delay the implementation of Government measures. For example, interim measures would redress fast-track legislative directed at circumventing the claims of tobacco companies like Philip Morris' and conversely, regulating efforts by such companies to delay the implementation of public health regulations. The proposed Model BIT would provide that challenges to an investor-state arbitrator are decided by a challenge committee; and not by arbitrators sitting on the same panel as the arbitrator who is the subject of the challenge.

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<sup>101</sup> See Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (2006) vol II: Handbook, 74-78.

<sup>102</sup> See UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* May 2010: <[http://www.unctad.org/en/docs/diaeia200911\\_en.pdf](http://www.unctad.org/en/docs/diaeia200911_en.pdf)>. International investment claims and decisions are available at <<http://www.investmentclaims.com>>.

<sup>103</sup> International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules* April 2006, Rule 37, 117: <[https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)>. See also, Leon E Trakman, 'The ICSID under Siege' (2012) 45(3) *Cornell Int'l L J* 603, 663-65; Antonietti, above n 63, 427; Baldwin, Kantor & Nolan, above n 63, 1 (discussing "tactics" that may be employed in attempts to "delay" or "avoid" compliance with ICSID Awards).

11. The proposed Model BIT would provide for costs, including monitoring of legal costs, including but not limited to: the use of contingency fees, the capping of arbitrators fees, and the allocation of costs between investor-state parties, consistent with the rules regulating monitoring of costs under the 2010 UNCITRAL Rules.<sup>104</sup>
12. Finally, the proposed Model BIT would provide for a bilateral interpretative committee to interpret BIT treaty language, including inconsistent wording and constructions of such treaties.

While this paper encourages Australia to adopt a Model BIT, the BIT should be neither inflexible nor mechanically applied to all of its ensuing treaties. Some states like the U.S. utilize a Model BIT as a dominant template in negotiating BITS with partner states. Other states, like China, vary from their Model BIT some extensively in negotiating individual BITs, especially most recently. The suggestion is that Australia should take a middle course in utilizing its Model BIT, given it would be its first Model BIT, its status as a middle power and the likelihood that it will conclude negotiations with different kinds of BIT partners in the immediate future. Thus, Australia's Model BIT need not be drafted as a manifesto upon which Australia's national identity is inextricable determined.

Furthermore, these recommendations are sustainable only if they are subject to ongoing scrutiny and refinement. In particular, the proposed Model BIT would be monitored on an ongoing basis in light of its adoption in particular BITS, and its interpretation by domestic courts and ISA tribunals, to ensure that it is properly adopted and implemented.

## IX Conclusion

Notwithstanding the Government's apparent resolve to implement the 2011 Policy Statement, it is uncertain whether the Policy will survive as Australia's long term approach to the resolution of investor-state disputes. For example, Australia has not stated that it will seek to withdraw from existing BITs and FTAs that provide for ISA and some of its existing BITs may not have ready mechanisms for displacing ISA.<sup>105</sup> Even though Australia may unilaterally withdraw from ISA, such action would carry serious political implications and could tarnish its reputation. Furthermore, with the recent Federal elections, the new Liberal Government may retreat from Australia's 2011 Trade Policy Statement adopted by the recently defeated Labour Government, leading to Australia reverting back to the widely accepted reliance on ISA.

Assuming the Government intends to proceed with its rejection of ISA, this paper has suggested a further analysis of the economic, political and legal implications associated with its rejection. The assertion is not that ISA is necessarily more efficient or fairer than a resort to domestic courts to resolve investor-state disputes. The claim is rather that macro-economic and social arguments favouring the localisation of investment disputes before domestic courts, on balance, are less optimal than the risks to Australia's outbound investors whose investor-state disputes are heard by domestic courts in jurisdictions that score low on the corruption transparency and rule of law indices.<sup>106</sup> The potential problem is that, in erecting barriers to inbound investors who threaten to attack "home" state values, institutions and processes, such barriers may fail to protect outbound investors who are left to fend for themselves in hostile foreign legal environments.

The paper argues that ISA has some systematic eco-political and legal advantages over investor-state disputes before domestic courts. This does not infer that ISA decisions are necessarily coherent in nature, such as in the standards of treatment accorded to foreign investors. Nevertheless, these limitations in ISA do not constitute a material bar in resorting to ISA. However difficult it may be to identify cohesive principles arising out of *ad hoc* and sometimes unpublished arbitration awards, it is arguable that a sustainable body of international investment jurisprudence has evolved.<sup>107</sup> While ISA does not lead to judicial precedent as common lawyers conceive of it, it is likely to be more stable than a plethora of different local laws and procedures that domestic courts apply to foreign investment.

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<sup>104</sup> UNCITRAL, *UNCITRAL Arbitration Rules* 2 July 2010: <[http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2010Arbitration_rules.html)>.

<sup>105</sup> This is subject to the provision in a BIT for a state to withdraw its consent as signatory to a BIT.

<sup>106</sup> See Transparency International, above n 73.

<sup>107</sup> See Franck, above n 57, 1521, 1543–1544.

The paper does not assert that Australia is oblivious to countervailing risks of its investors abroad being treated “unfairly” by foreign courts. What is contended is that a state-orchestrated movement away from ISA towards domestic courts to resolve international investment disputes may have materially negative economic, social and legal consequences for Australia and its outbound investors. The exodus of investors to so-called ‘investor-friendly’ intermediary states is one consequence which the 2011 Policy Statement can have on international investor practice.

If ISA is to prevail while also responding to Australia’s public policy and economic concerns, ISA provisions in BITs and FTAs should protect essential national security and other public interests. It should also provide sufficient investor protections to attract foreign investors to Australia. Finding a finely tuned balance between public interests and the commercial needs of foreign investors is likely to be elusive, whether or not Australia subscribes to ISA. However, that impediment ought not to discourage Australia from considering that balance in light of a constantly changing international investment landscape.