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Regulation and Reform: Entering a New Era of Investor-State Dispute Settlement

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It is usually said that public international law concerns itself almost exclusively with the actions of states.[2] On its surface, investor-state dispute settlement (ISDS), a creature of public international law, presents no challenge to this theory. Bilateral Investment Treaties (BITs), the most common source of agreements to submit to some form of ISDS, are concluded between states, impose obligations on states, and doubtless are seen to benefit states by encouraging and protecting foreign investments. However, the party which BITs, by their design, directly benefit and provide legal rights to is the private investor, upon whom it seldom imposes any positive obligation. Once the agreement is concluded, the only role left for the state to play is that of respondent in claims that will be brought against it.

As such, ISDS consists essentially in state-instituted state passivity, within the context of public international law — a legal system which is governed as much by public policy as it is by law. It is therefore no wonder that ISDS

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[2] Though this is no longer true to the exclusion of all other entities, such as private persons or corporations, the idea of states as the primary participants in public international law remains influential on the modern conception of public international law in general: Astrid Kjeldgaard-Pederson, *The International Legal Personality of the Individual* (Oxford University Press, 2018) 17–20.

has become so controversial, and has been subject to an avalanche of state-led proposals for reform.

This paper presents a survey of the current state of investment treaty arbitration as the predominant form of ISDS on the global stage. It begins by providing an account of the purpose of ISDS, and the benefit it was conceived of as contributing to the international lattice of investment treaties. The paper then considers the modern context of investor-state arbitration, including the role that is played by the International Centre for Settlement of Investment Disputes (ICSID). The body of this paper goes on to analyse the breadth of criticisms that have been made of the status quo of ISDS in investment treaties, analysing each of the most common in turn. The European Union, Australia and India are offered as examples of the unique reception and development of ISDS throughout the world, and presented to illustrate that global actors are largely beginning a dramatic shift away from traditional investment treaty arbitration towards new systems. The paper concludes by considering the likely future of ISDS within investment treaties — though reform is almost certain, so too is it almost certain that the status quo shall persist for some time yet.

Functions of Investor-State Dispute Settlement

The current ISDS framework has established the presence of international investors within the global political environment by facilitating direct claims against nation states. Previously, public international law had been reserved for contested interactions between sovereign nation states. This indicates how states are considered the focal point of the international legal order.[3] However, the establishment of the international investment treaty system recognises the expanding presence of international investors within foreign affairs. Ordinarily, the capacity of private contracting parties to

[3] Kiyotaka Morita, 'Development of Case Law in Investor-State Dispute Settlement (ISDS)' (2019) 47 *Hitotsubashi Journal of Law and Politics* 57, 58.

engage with international law is determined by the rights derived from a contractual agreement. Accordingly, the insertion of clauses facilitating arbitration within these BITs between nation states enables private parties to effectively engage in ISDS.[4] Provisions for investor-state arbitration empower home state investors to directly pursue claims against host states for any alleged interference with their investment or standards of investment protection secured under the BIT.[5] In exchange, successful ISDS claims compel the payment of compensatory damages from the host state to the private entity.[6] Thus, through the ISDS mechanism, investors have the capacity to take proceedings against nations and obtain binding awards from international arbitral tribunals.[7] This is often utilised by foreign private actors to remedy any misconduct by domestic courts and exercise their right of recourse to international arbitration.[8] Consequently, arbitrators and multinational companies are characterised as 'powerhouses of the current global investment regime', now cemented as key governance actors within the global political ecosystem.[9]

The incorporation of ISDS clauses within international investment agreements further attracts foreign direct investment (FDI) into domestic economies. Modern economies have prioritised the signing of BITs to stimulate foreign investment and promote economic welfare alongside maintaining international relations. These agreements facilitate an economy's liberalisation, entailing the removal of barriers to entry for

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[4] Ibid.

[5] Luke Nottage, 'Consumer Product Safety Regulation and Investor-State Arbitration Policy and Practice after *Philip Morris Asia v Australia*' in Leon E Trakman and Nicola W Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press, 2013) 452, 453.

[6] Kyle Dylan Dickson-Smith and Bryan Mercurio, 'Australia's Position on Investor-State Dispute Settlement: Fruit of a Poisonous Tree or a Few Rotten Apples' (2018) 40(2) *Sydney Law Review* 213, 214.

[7] Thomas Dietz, Marius Dotzauer and Edward S Cohen, 'The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System' (2019) 26(4) *Review of International Political Economy* 749, 749.

[8] Harisankar K Sathyapalan, 'Indian Judiciary and International Arbitration: A BIT of a Control?' (2017) 33(3) *Arbitration International* 503, 504.

[9] Dietz, Dotzauer and Cohen (n 7) 749.

foreign private entities into host nations, thereby creating greater access to a country's financial architecture.[10] Consequently, pursuing greater trade and investment liberalisation through BITs with specific nations is more convenient and politically advantageous than unilaterally relaxing government controls for foreign investment.[11] ISDS, as a key component of these agreements, further supports the inflow of FDI by guaranteeing procedural recourse for foreign investors to enforce substantive investor protections contained within individual BITs.[12] This underlines the benefit of ISDS in removing barriers of inefficient judicial or administrative decision-making within the host state for foreign investors, who may be concerned with safeguarding their investments and financial interests.[13] Indeed, much of the original justification behind the development of ISDS centred upon concerns regarding the independence and inefficiency of domestic courts, which were perceived as incapable of providing sufficient reliable protection for investors.[14] The subsequent benefits of FDI for domestic economies, including the injection of foreign capital for economic growth, job creation and productivity gains, has spurred the proliferation of BITs and cross-border foreign investment globally since the 1990s; this has generated numerous formal arbitration proceedings triggered under ISDS clauses to resolve investor-state disputes.[15]

[10] Dickson-Smith and Mercurio (n 6) 217.
[11] Ibid.
[12] Ibid.
[13] Ibid 218.
[14] See, eg, Ling Ling He and Razeen Sappideen, 'Dispute Resolution in Investment Treaties: Balancing the Rights of Investors and Host States' (2015) 49(1) *Journal of World Trade* 85, 85. Cf Szilárd Gáspár-Szilágyi, 'Let Us Not Forget about the Role of Domestic Courts in Settling Investor-State Disputes' (2019) 18 *Law and Practice of International Courts and Tribunals* 389, 391.
[15] Nottage (n 5) 454.

Context of Investor-State Dispute Settlement: A Recent Innovation

The recent establishment of the ISDS framework has catalysed a significant rise in claims for investor-state arbitration. The implementation of international investment agreements is considered a modern tool to encourage foreign investment within economies, with the first BIT, agreed between the Federal Republic of Germany and Pakistan, dating back to 1959.[16] However, the effectiveness of these agreements in securing investment protection for foreign investors through substantive treaty guarantees has prompted a widespread adoption of BITs, with over 3,200 international investment agreements extending across over 200 states and regions existing presently.[17] Nonetheless, the exercise of ISDS provisions by private actors against nation states is a relatively recent phenomenon, with the first ISDS case based upon an investment treaty recorded in 1987, entailing a British investor acting against the Sri Lankan government under the Sri Lanka – United Kingdom BIT.[18] Despite this, the past several decades have witnessed an exponential increase in arbitration filings, rising from just over 50 in 2011 to over 700 arbitral judgements being issued against nearly 100 states by 2016, typically against developing nation states.[19]

The present investment regime being utilised internationally has developed as a consequence of the perceived alignment of financial interests between capital-exporting and capital-importing nation states.[20] The lack of investor protections heightened pre-existing risks of engaging in foreign direct

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[16] Celine Yan Wang, 'Mine-Golia: Integrated Perspectives on the History and Prospects of International Investment Law and the Investor-State Dispute Settlement Regime' (2021) 53(2) *New York University Journal of International Law and Politics* 631, 634.
[17] Ibid 634–5.
[18] *Asian Agricultural Products Ltd v Republic of Sri Lanka (Final Award)* (ICSID Arbitral Tribunal, Case No ARB/87/3, 27 June 1990).
[19] Wang (n 16) 635.
[20] Ibid 639.

investment for capital-exporting countries. However, the ISDS framework, a consent-based mechanism, has evolved to reflect the voluntary commitment of states towards widening capital flows.[21] This is rooted in a global paradigm shift following the Cold War, as countries became more accommodative of foreign investment after witnessing the struggles of nations heavily reliant upon state ownership.[22] Consequently, during the 1980s, emerging economies in Eastern Europe, Latin America, Africa and Asia actively pursued FDI inflows through BITs to fund and accelerate the pace of economic development, further contributing to the advancement of international investment agreements worldwide.[23]

The establishment of the International Centre for Settlement of Investment Disputes (ICSID) proved pivotal in the development of ISDS by providing a neutral forum for proceedings. Previously, investor-state arbitral claims were required to be initiated in the host state's domestic courts, with foreign investors subject to the host state's jurisdiction.[24] Private actors further had no alternative remedy in international law, as home states were hesitant to intervene on an investor's behalf to provide diplomatic protection, as this posed a risk towards the nation's international relations.[25] This gap was subsequently remedied through the establishment of ICSID in 1966, an independent institution providing a neutral international forum for arbitral proceedings, thereby removing political undertones from investment disputes. This framework ensured legal certainty surrounding the obligations of host states towards foreign investors.[26] This has facilitated a greater number of ISDS cases being

[21] Ibid 640.
[22] Ibid.
[23] Ibid.
[24] Meg Kinnear, 'Current Developments in Investor-State Dispute Settlement: An Overview of Substantive and Procedural Change in the Past Fifty Years' (2021) 17(2) *University of St Thomas Law Journal* 209, 212.
[25] Ibid.
[26] Wang (n 16) 641.

recorded for arbitration, with 53 cases registered to ICSID for arbitration in 2017 compared to 10 in 1997.[27]

Concerns surrounding Investor-State Dispute Settlement

The proliferation of investor-state arbitral claims is antithetical to the 'crisis of legitimacy' transpiring within international investment arbitration.[28] Fostering legitimacy, as a shared belief in the purpose of an international institution within a specific realm of international decision-making, is fundamental to ensuring institutions and mechanisms generate compliance.[29] However, the legitimacy of an institution may be jeopardised where the institution's performance is incongruous with general standards of appropriateness.[30] Within international investment, critics have argued the ISDS framework is no longer a viable and legitimate mechanism for dispute resolution, as it prioritises private interests over public objectives, hence conflicting with the general norm.[31] The provision of ISDS clauses within BITs ensures foreign investors could avoid presenting disputes to the host state's domestic courts due to perceptions of bias.[32] This has conversely created a competing imbalance, specifically the lack of any 'equality of arms' in arbitral proceedings between parties, reflecting investment treaty arbitration's characterisation as 'arbitration without privity'.[33] Consequently, the objective and mechanisms of investor-state

[27] Morita (n 3) 57. The other most notable institution in ISDS is the Permanent Court of Arbitration (PCA), which has administered over 200 ISDS cases, the majority of which employed the UNCITRAL Arbitration Rules: United Nations Conference on Trade and Development, *Investment Policy Hub*, 'Investment Dispute Settlement Navigator' (Web Page, 31 July 2022) <https://investmentpolicy.unctad.org/investment-dispute-settlement>. See further Borzu Sabahi, Noah D Rubins and Don Wallace Jr, *Investor-State Arbitration* (Oxford University Press, 2nd ed, 2019) 82–3.
[28] Paul E Trinel, 'Counterclaims and Legitimacy in Investment Treaty Arbitration' (2022) 38(1–2) *Arbitration International* 59, 59.
[29] Dietz, Dotzauer and Cohen (n 7) 751.
[30] Ibid 752.
[31] Trinel (n 28) 60.
[32] Ibid.
[33] Ibid 61.

arbitration have been thoroughly questioned in recent years, further perpetuating widespread ambivalence towards the ISDS framework.

Threats towards the Legitimacy of Investor-State Dispute Settlement

The infrastructure for settling investor-state disputes has been extensively criticised for perpetuating an asymmetric power balance between states and investors. Customary international law has ordinarily dictated private parties must prioritise and exhaust domestic remedies before pursuing an international claim against nation states, representing international tribunals as a supplementary avenue for relief instead of a substitute for domestic courts.[34] However, provisions for ISDS within BITs have allowed investors to circumvent a nation's judiciary and operate above laws governing citizens.[35] This outcome may be justified where domestic laws are unlikely to safeguard the interests of investors, but is deemed inappropriate within democratic nations with independent legal and judicial structures.[36] Investors have previously exploited this privilege by seeking international compensation orders against states, bypassing domestic limits on judicial compensation awards, whilst simultaneously pursuing remedies within domestic courts, such as declaring a law invalid.[37] International investment agreements were initially designed to mitigate this concern by requiring parties to use the contractually-agreed forum for resolving disputes.[38] However, ISDS arbitrators have frequently adopted an approach favouring the claimant and enabled investors to avoid this obligation, thereby creating a de facto policy benefitting parallel claims.[39]

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[34] Silvia D'Ascoli and Kathrin Maria Scherr, 'The Rule of Prior Exhaustion of Local Remedies in the Context of Human Rights Protection' (2006) 16(1) *Italian Yearbook of International Law* 117, 117–8.
[35] Gus Van Harten, Jane Kelsey and David Schneiderman, 'Phase 2 of the UNCITRAL ISDS Review: Why "Other Matters" Really Matter' (Working Paper, Osgoode Hall Law School, York University, 2019) 7.
[36] Dietz, Dotzauer and Cohen (n 7) 758.
[37] Van Harten, Kelsey and Schneiderman (n 35) 8.
[38] Ibid.
[39] Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press, 2013) 146–7.

This has produced concerns regarding the lack of independence and impartiality of adjudicators, with critics alleging private arbitrators may systematically advantage investors without consideration of public interests.[40]

These cumulative concerns have prompted academics to question this procedural imbalance between investor claimants and respondent States.[41] The current regime for investor-state arbitration is widely perceived to grant a 'privileged legal status' upon private actors who are exempt from the judicial systems of host states.[42] This has formed the 'heart of the societal contestation of ISDS', with ISDS broadly painted as an instrument unable to adequately balance investor rights with other rights.[43] This is exemplified through a recent review of international investment cases, demonstrating investors often utilise investment agreements to challenge legislation promoting environmental conservation within the host state, causing arbitral tribunals to frequently rule upon the legality of governmental measures.[44] Ultimately, the capacity of investors to harness ISDS provisions to unilaterally advance and impose their private interests irrespective of broader public objectives has fuelled perceptions of the instrument inducing an unequal balance of power.[45]

The Chilling Effects of Investor-State Dispute Settlement on Governments

The operation of ISDS provisions within BITs has inadvertently impeded the regulatory sovereignty of nation states. International investment agreements have been utilised as a conduit for investors to challenge policies implemented domestically within states disguised as claims, which

[40] Dietz, Dotzauer and Cohen (n 7) 756.
[41] Trinel (n 28) 63.
[42] Dietz, Dotzauer and Cohen (n 7) 758.
[43] Ibid 759.
[44] Trinel (n 28) 64; Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (Cambridge University Press, 2018) 154.
[45] Dietz, Dotzauer and Cohen (n 7) 760.

policies may contradict guarantees secured under the treaty, such as requirements for most-favoured-nation treatment.[46] Measures relating to environmental protection or public health have attracted strong opposition during ISDS proceedings.[47] This demonstrates how the ISDS framework has been used to submit treaty-based claims against countries, effectively constraining their sovereign right to enact public interest legislation.[48] Consequently, this restriction upon a state's autonomy has prompted concerns of 'regulatory chill' within domestic policy infrastructure. Direct regulatory chill creates a specific deterrence for nation states to forgo implementing a domestic policy measure to avoid a threatened investment dispute.[49] This chilling effect may alternatively occur indirectly, where other nations decide against adopting a specific measure since it is the subject of an investment dispute in another country.[50] This is exemplified through New Zealand's delay in introducing plain packaging legislation for tobacco products, following the infamous arbitral ISDS claim initiated by Philip Morrison against Australia in 2011 under the Australia-Hong Kong BIT. This catalyses a legitimacy crisis within individual countries, with governments unable to effectively deliver a policy response to address social, economic, or cultural needs without incurring significant political consequences from foreign private entities.[51]

The effects of regulatory chill upon a nation's capacity to exercise its sovereign authority is exemplified through the *Vattenfall* ICSID decision.[52] These proceedings entailed a Swedish multinational company proving

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[46] Andrea K Bjorklund, 'Arbitration, the World Trade Organization, and the Creation of a Multilateral Investment Court' (2021) 37(2) *Arbitration International* 433, 439.
[47] Ibid.
[48] Prabhash Ranjan, 'Investor-State Dispute Settlement (ISDS) Cases and India: Affronting Regulatory Autonomy or Indicting Capricious State Behaviour?' (2022) 21(1) *Journal of International Trade Law and Policy* 42, 42.
[49] Van Harten, Kelsey and Schneiderman (n 35) 11.
[50] Ibid.
[51] Ibid 10.
[52] Jan Kleinheisterkamp, 'Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions' (2015) 78(5) *Modern Law Review* 793, 797.

successful in receiving compensation against Germany for the national government's political decision to transition away from nuclear energy. Despite Germany's extensive process in introducing a new era of energy policy by amending the Atomic Energy Act to abandon nuclear energy use by 2022, Vattenfall utilised the ISDS framework to circumvent national, EU and ECHR jurisdictions to receive compensatory damages.[53] This illustrates how the proposed threat of investors challenging the validity of domestic policy measures may create systemic chill in the future, where policy making includes a direct assessment of potential risks of triggering an investment dispute.[54] These consequences prompted the UN Secretary General to emphasise the need for the reform of international investment agreements to ensure treaties do not unintentionally restrict the regulatory autonomy of states.[55] Therefore, this underlines the threat posed by regulatory chill due to ISDS procedures eroding the capacity of states to advance the public interest.[56]

Counterclaims — Reclaiming Equality of Arms

The implicit pressure placed upon states by the ISDS mechanism to perpetually address the requirements of foreign investors reinforces the need for states to submit counterclaims. Counterclaims are a legal instrument involving the respondent submitting demands against the claimant in a trial.[57] Article 46 of the ICSID Convention states arbitral tribunals may only determine counterclaims if they are within the scope of the consent provided by both parties.[58] Therefore, counterclaims must

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[53] Ibid.
[54] Ibid.
[55] United Nations General Assembly, *International Financial System and Development: Report of the Secretary-General*, GA Res 72/203, 73rd sess, UN Doc A/73/280 (31 July 2018) 16 [62].
[56] Kleinheisterkamp (n 52) 797.
[57] Trinel (n 28) 61.
[58] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965 (entered into force 14 October 1966) art 46 ('ICSID Convention').

overcome the barrier of consent, express or otherwise, to be properly submitted during arbitral proceedings.[59] Furthermore, states must satisfy *ratione personae* jurisdiction, concerning the arbitrability of state counterclaims.[60] This involves ensuring the state is able to initiate arbitration proceedings, often referred to as the state's *locus standi*.[61] However, fulfilling the requirement of legal connexity remains the most significant barrier to states engaging in counterclaims, as there must be a close connexion between the counterclaim and primary claim.[62] Consequently, the reform of counterclaims is an avenue being discussed by the UNCITRAL Working Group;[63] with aspirations that empowering states to defend their public interests will guarantee equality of arms in investment arbitration and rectify the inherent asymmetry within contemporary ISDS and reinvigorate the international community's acceptance of the mechanism.[64]

Outcomes of Investor-State Dispute Settlement — A Distorted Reality

Conversely, the extensive claims detailing the inherent bias within the ISDS mechanism towards foreign investors conflict with recent statistics from UNCTAD. The structural advantages of the ISDS system towards investors is a common narrative being perpetuated across international investment arbitration.[65] However, out of 636 concluded original arbitration proceedings, UNCTAD reports 310 (36.4%) are decided in favour of states,

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[59] Shahrizal M Zin, 'Reappraising Access to Justice in ISDS: A Critical Review on State Recourse to Counterclaim' in Alan M Anderson and Ben Beaumont (eds), *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?* (Kluwer Law International, 2020) 225, 232–3.
[60] Trinel (n 28) 67.
[61] Ibid.
[62] *Saluka Investments BV v The Czech Republic (Decision on Jurisdiction over the Czech Republic's Counterclaim)* (Sir Arthur Watts, Professor Peter Behrens and L Yves Fortier, 7 May 2004) [76].
[63] United Nations Commission on International Trade Law, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-eighth Session (Vienna, 14–18 October 2019)*, UN Doc A/ CN.9/1004 (23 October 2019) 6 [24].
[64] Trinel (n 28) 75.
[65] Ranjan (n 48) 43.

in comparison to 240 for investors (28.2%).[66] This reflects broader sentiments within the international arbitral community, indicating the greater perceptions of the ISDS framework in creating one-sided outcomes have not materialised in reality.

Current State of Investor-State Dispute Settlement

ISDS has experienced a mixed reception in international legal regimes. While its advantages and disadvantages remain the subject of scrutiny and scholarly debate, its adoption (and rejection) throughout the world has been determined primarily by sudden, often haphazard reactions to specific events. This section of the article aims to illustrate this phenomenon by assessing the status of ISDS in three legal systems: those of the European Union (EU), Australia, and India.

European Union

The status of ISDS in the nations of the EU was turned on its head following two recent events:[67] the Court of Justice of the EU's (CJEU) 2018 decision in *Slovak Republic v Achmea BV* ('*Achmea*')[68] and the EU's decision to

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[66] United Nations Conference on Trade and Development, *Investment Policy Hub*, 'Investment Dispute Settlement Navigator' (Web Page, 31 July 2022) <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

[67] See generally Julian Scheu and Petyo Nikolov, 'The Setting Aside and Enforcement of Intra-EU Investment Arbitration Awards after Achmea' (2020) 36(2) *Arbitration International* 253, 254–5; Epaminontas Triantafilou and David Pusztai, 'Achmea, Investment Treaty Arbitration, Public International Law and EU Law: The Way Forward' in Ana Stanič and Crina Baltag (eds), *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court* (Kluwer Law International, 2020) 43, 43; James Hope and Therese Åkerlund, 'All Eyes on Sweden: Swedish Challenge Cases Post-Achmea' in Ana Stanič and Crina Baltag (eds), *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court* (Kluwer Law International, 2020) 105, 105.

[68] *Slovak Republic v Achmea BV* (Court of Justice of the European Union, C-284/16, 6 March 2018) ('*Achmea*').

terminate all intra-EU BITs.[69] Though these events form part of the same story, the challenges they pose are unique; whereas the former remains problematic on account of its uncertain and unclarified scope,[70] the latter has been criticised precisely for being overprescriptive and overreaching in its scope.

By way of background, the *Achmea* decision followed a period of uncertainty regarding the compatibility of ISDS provisions in BITs with EU law.[71] *Achmea* itself concerned a BIT, Article 8 of which provided for arbitration pursuant to, inter alia, the 'law in force of the Contracting Party concerned',[72] which included EU law.[73] The decision confirmed that tribunals constituted pursuant to such ISDS clauses are not tribunals competent to refer questions of EU law to the CJEU,[74] and that such tribunals therefore present a threat to the centralised and consistent legal order of the EU.[75]

Subsequent to *Achmea*, Member States of the EU made Declarations[76] that they would discontinue the practice of entering intra-EU BITs, and terminate all such BITs already in existence.[77] These Declarations are of no

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[69] *Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in* Achmea *and on Investment Protection in the European Union*, 17 January 2019 ('*Declaration*').
[70] See generally Nikos Lavranos, 'The Changing Ecosystem of Dutch BITs' (2020) 36(3) *Arbitration International* 441, 447.
[71] See generally Dietz, Dotzauer and Cohen (n 7) 750.
[72] *Achmea* (n 68) [4].
[73] Ibid [41]. See further Maria Fanou, '*Intra*-European Union Investor-State Arbitration Post-*Achmea*: RIP? An Assessment in the Aftermath of the Court of Justice of the European Union, Case C-284/16, *Achmea*, Judgment of 6 March 2018, EU:C:2018:158' (2019) 26(2) *Maastricht Journal of European and Comparative Law* 316, 324–5 ('*Intra*-European Union Investor-State Arbitration').
[74] *Achmea* (n 68) [46], [58].
[75] Ibid [37], [59]. See also Quentin Declève, '*Achmea*: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements' (2019) 4(1) *European Papers* 99, 100–1. On the importance of consistency in investor-state arbitration, see further Dietz, Dotzauer and Cohen (n 7) 757.
[76] *Declaration* (n 69).
[77] Lavranos (n 70) 448; Gustavo Guarín Duque, 'The Termination Agreement of Intra-EU Bilateral Investment Treaties: A Spaghetti-Bowl with Fewer Ingredients and More Questions' (2020) 37(6) *Journal of International Arbitration* 797, 806–8.

legal effect, but reflect the policy of the Member States of the EU,[78] which policy may bear relevance to the public policy grounds of refusing enforcement of arbitral awards.[79] A Termination Agreement[80] has since been signed by 23 Member States of the EU,[81] which makes provision for new, pending, and already settled arbitrations commenced pursuant to an intra-EU BIT.[82]

The extent of the consequences of this speedy recoil from certain BITs have not been fully explored. First, efforts must still be made to clarify the exact scope of *Achmea*'s effects on BITs at large. Whereas the CJEU's reasoning relied specifically on the fact that EU law formed part of the law applicable to the treaty in question,[83] the blanket termination of all intra-EU BITs by the EU, without reference to their applicable law, puts this discrimen into question.[84] Indeed, extra-EU BITs arguably also fall foul of *Achmea*, insofar as EU law explicitly or implicitly forms part of the applicable law of the ISDS agreement in question.[85] Of particular interest is whether *Achmea* will intrude into the dispute resolution provisions of the Energy Charter Treaty (ECT),[86] an intense debate which is beyond the scope of this article.[87]

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[78] Scheu and Nikolov (n 67) 274.
[79] Fanou, '*Intra*-European Union Investor-State Arbitration' (n 73) 332–3.
[80] *Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union* [2020] OJ L 169/1 ('Termination Agreement').
[81] European Council, *Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union*, 'Ratification Details' (Web Page, accessed 5 January 2023) <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en>.
[82] See generally Johannes Topper and August Reinisch, 'The 2020 Termination Agreement of Intra-EU BITs and Its Effect on Investment Arbitration in the EU: A Public Law Analysis of the Termination Agreement' (2022) 16 *Austrian Yearbook on International Arbitration* 301, 302–4.
[83] Declève (n 75) 103–4.
[84] Triantafilou and Pusztai (n 67) 45–6, 52; Ana Stanič, 'Enforcement of Awards and Other Implications of Achmea' in Ana Stanič and Crina Baltag (eds), *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court* (Kluwer Law International, 2020) 143, 147–8.
[85] See Declève (n 75) 105–7.
[86] See generally Lavranos (n 70) 448; Scheu and Nikolov (n 67) 257–8; Triantafilou and Pusztai (n 67) 56.
[87] Cf J Robert Basedow, 'The *Achmea* Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration' (2020) 23 *Journal of International Economic Law* 271, 272.

The Termination Agreement has faced criticism for different reasons, particularly for destroying the investor protections that BITs were in part designed to create.[88] Most notable are its unsatisfactory mechanisms for dealing with pending ISDS arbitrations,[89] by relying exclusively on a scheme of facilitatory negotiation,[90] and its circumvention of sunset clauses,[91] which are by their nature intended to limit the detrimental effects of sudden policy changes.[92] Insofar as this has been seen as a law of retroactive operation, it is clearly anomalous.[93] Moving forwards, intra-EU investors will instead need to rely on a much underutilised scheme of general protections under EU law.[94]

The final and potentially most destabilising issue raised by these recent events concerns the enforceability of already completed arbitral awards.[95] For example, seeing as it is clearly against the policy of the law of the EU to allow tribunals to decide questions of EU law, following *Achmea*, enforcement of such an award[96] within the EU may be refused on public

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[88] Dominik Moskvan, *Protection of Foreign Investments in an Intra-EU Context: Not One BIT?* (Edward Elgar, 2022) 3; Triantafilou and Pusztai (n 67) 56–8.
[89] Which includes those arbitrations which have concluded any and all hearing stages, and are merely awaiting a final award: Termination Agreement (n 80) art 1(5). See further Topper and Reinisch (n 82) 306–7.
[90] Termination Agreement (n 80) arts 8(1), 9. See further Lavranos (n 70) 449.
[91] Termination Agreement (n 80) art 3.
[92] Dimitry Vladimirovich Kochenov and Nikos Lavranos, '*Achmea* Versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union' (2022) 14 *Hague Journal on the Rule of Law* 195, 203; Triantafilou and Pusztai (n 67) 53.
[93] Duque (n 77) 809–10; Lavranos (n 70) 450; Stanič (n 84) 144–5.
[94] See particularly Kochenov and Lavranos (n 92) 201. See further Moskvan (n 88) 3–4; Duque (n 77) 822; Emilie Gonin and Ronan O'Reilly, 'Intra-EU Investment Protection and the Rule of Law' in Ana Stanič and Crina Baltag (eds), *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court* (Kluwer Law International, 2020) 63, 79–81, 83–5.
[95] Stanič (n 84) 144.
[96] As under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958 (entered into force 7 June 1959) ('New York Convention'). It may also be that the legal order of the EU could present a hurdle to awards, the enforcement of which is sought pursuant to the ICSID Convention (n 58): Scheu and Nikolov (n 67) 267–9; Stanič (n 84) 151–2.

policy grounds,[97] or even for lack of a valid arbitration clause.[98] Though the Termination Agreement does not apply to arbitrations that have already been resolved pursuant to intra-EU BITs,[99] it provides no guarantee of the enforcement of such awards.[100]

Australia

The position in Australia as regards ISDS has fluctuated. Since its first BIT with China in 1988,[101] Australia has entered 20 further BITs.[102] However, the trend more recently has been to modify or exclude the functioning of ISDS mechanisms in these BITs.[103] In November 2020, Australia entered the Regional Comprehensive Economic Partnership (RCEP), and opposed the inclusion of an ISDS mechanism.[104] In November 2022, it was announced that Australia would no longer enter treaties containing ISDS provisions, and would remove such provisions from existing trade and investment treaties.[105]

These fluctuations have rendered it difficult to discern a meaningful theory behind Australia's policy decisions in this regard.[106] For example, whereas ISDS has perceived advantages when negotiated between nations, the legal

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[97] New York Convention (n 96), art V(2)(b); Scheu and Nikolov (n 67) 270–1; Stanič (n 84) 149–51.
[98] New York Convention (n 96), art V(1)(a); Scheu and Nikolov (n 67) 269–70; Stanič (n 84) 148–9.
[99] Termination Agreement (n 80) art 6(1).
[100] Stanič (n 84) 146.
[101] *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, Australia–China, signed 11 July 1988, [1988] ATS 14 (entered into force 11 July 1988).
[102] Nottage (n 5) 453.
[103] Department of Foreign Affairs and Trade, *Review of Australia's Bilateral Investment Treaties* (Discussion Paper, August 2020). See further Dickson-Smith and Mercurio (n 6) 215.
[104] Henry Gao, 'The Investment Chapter in the Regional Comprehensive Economic Partnership: Enhanced Rules without Enforcement Mechanism' (Discussion Paper No 446, Economic Research Institute for ASEAN and East Asia, September 2022) 16–17.
[105] Don Farrell, Minister for Trade and Tourism, 'Trading Our Way to Greater Prosperity and Security' (Speech, The Australian APEC Study Centre, RMIT, 14 November 2022).
[106] Dickson-Smith and Mercurio (n 6) 214.

systems of which are of different standards, or the GDPs of which have a large discrepancy, Australia's policy decisions ostensibly reveal no pattern according to these metrics.[107] Rather, Australia's rejection of ISDS seems to be predicated upon scepticism of its effectiveness, a general preference for multilateralism over bilateralism, and a desire to avoid alienating domestic investors by granting special rights to foreign investors.[108]

Synonymous with ISDS in Australia is the PCA's 2015 award in *Philip Morris Asia Ltd v Commonwealth of Australia* ('*Philip Morris*'),[109] the first arbitration brought pursuant to a BIT in Australia's history.[110] The arbitration saw Philip Morris Asia Ltd ('Philip Morris') claiming against Australia for its 'expropriation' of the former's investments by legislating on the plain packaging of tobacco products.[111] The high profile nature of this dispute, alongside its suddenness and complexity, were such that it has been suggested to be a contributing cause to Australia's 'disillusionment' with ISDS.[112]

The matter was notable for its application of the (predominantly civil law) doctrine of abuse of rights, as it was found that Philip Morris had deliberately undergone restructuring for the dominant purpose of gaining standing under a BIT between Hong Kong and Australia.[113] This underexplored concept is an increasingly utilised defence to the

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[107] Ibid 223–5.
[108] See, eg, Productivity Commission, *Trade and Assistance Review 2013–14* (Report, 24 June 2015) 80–2; Productivity Commission, *Bilateral and Regional Trade Agreements* (Research Report, November 2010) 269, 272, 274. See further Amokura Kawharu and Luke Nottage, 'Foreign Investment Regulation and Treaty Practice in New Zealand and Australia: Getting it Together in the Asia-Pacific?' in Luke Nottage and Julien Chaisse (eds), *International Investment Treaties and Arbitration Across Asia* (Brill, 2017) 445, 470–1; Dickson-Smith and Mercurio (n 6) 229–31, 233.
[109] *Philip Morris Asia Ltd v Commonwealth of Australia (Award on Jurisdiction and Admissibility)* (Permanent Court of Arbitration, Case No 2012-12, 17 December 2015) ('*Philip Morris*').
[110] Nottage (n 5) 452.
[111] Ibid 453.
[112] Gao (n 104) 16–17.
[113] *Philip Morris* (n 109) [585]–[588].

admissibility of claims under treaty, and *Philip Morris* is proof of its potential effectiveness.[114] Alternatively, it has been suggested that a similar result may be reached via a purposive reading of the BIT in question — since its stated purpose is to encourage investment between the two relevant nations, a corporation which changes its internal structure merely to fall within the ambit of the BIT ought not actually receive those protections and methods of recourse which it was never intended to receive.[115]

Also of note is the discussion the matter spurred on the phenomenon of 'regulatory chill'.[116] The Australia-Hong Kong BIT, by contrast to other BITs used around the world, did not expressly exclude from consideration as 'regulatory expropriations' legislation legitimately designed to protect public welfare, leaving the status even of well-supported reforms precarious.[117] Moving forwards, the *Trans-Pacific Partnership*'s[118] explicit scheme of excluding tobacco products from ISDS protections marks an important step forwards in delimiting the more detrimental potential consequences of 'regulatory chill'.[119] However, an essential component of the tribunal's reasoning in *Philip Morris* was that it was defined to be a 'specific foreseeable dispute', [120] with a 'reasonable prospect of materialising',[121] based on a government policy and legislation which Philip Morris ought to have anticipated. A government which moves too swiftly or

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[114] Ulf Linderfalk, '*Philip Morris Asia Ltd v Australia*: Abuse of Rights in Investor-State Arbitration' (2017) 86 *Nordic Journal of International Law* 403, 406; Iveta Alexovicová, 'The Tobacco Plain Packaging Legislation Before Investor-State Tribunals: Philip Morris Asia v Australia and Philip Morris et al v Uruguay' in Christopher Heath and Anselm Kamperman Sanders (eds), *Intellectual Property and International Dispute Resolution* (Wolters Kluwer, 2019) 187.
[115] Linderfalk (n 114) 416–7.
[116] See above: *The Chilling Effects of Investor-State Dispute Settlement on Governments*.
[117] Nottage (n 5) 454, 457.
[118] *Trans-Pacific Partnership Agreement*, signed 4 February 2016, as contained in *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018 (entered into force 30 December 2018).
[119] Matthew Rimmer, *The Trans-Pacific Partnership* (Edward Elgar, 2020) 236–9.
[120] *Philip Morris* (n 109) [539].
[121] Ibid [554].

suddenly in making laws may not be protected in the same manner as Australia was in that award.[122]

India

Just as ISDS in the EU and Australia has been riddled with a number of often conflicting challenges, so too is it fair to describe India's relationship with ISDS as a 'mixed experience'.[123]

On the one hand, the early stages of ISDS, and indeed international arbitration in general, resulted in substantial criticism being levelled towards the Indian judiciary. First, some early instances of curial intervention in commercial arbitrations were described as heavy-handed, and as detracting from India's viability as a legal system for arbitration.[124] Secondly, the judiciary's management of its caseload and consequential delays have been cited as inimical to the effective operation of arbitration,[125] including in the well-known award of *White Industries Australia Ltd v India*.[126] These setbacks led to serious reconsideration within the Indian government of the viability of such BITs.[127]

Part of this scrutiny derives from the nature of ISDS, which elevates what might otherwise be private, commercial disputes into the international legal order, a predominant element of which is the doctrine of state

[122] See further Matthew Rimmer, 'The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, the Plain Packaging of Tobacco Products, and the *Trans-Pacific Partnership*' (2017) 7(1) *Victoria University Law and Justice Journal* 77, 90–1.

[123] Angshuman Hazarika and Kirti Bhardwaj, 'Investor-State Arbitration is Dead: Long Live Investor-State Arbitration in India' (2020) 9(2) *Indian Journal of Arbitration Law* 91, 92.

[124] Promod Nair, 'Surveying a Decade of the "New" Law of Arbitration in India' (2007) 23(4) *Arbitration International* 699, 738.

[125] Sathyapalan (n 8) 512.

[126] *White Industries Australia Ltd v India (Final Award)* (Charles N Brower, Christopher Lau SC and J William Rowley QC, 30 November 2011) [11.3.2]. See further Ranjan (n 48) 44.

[127] Aditya Singh, 'Investor-State Dispute Settlement and India' in Dushyant Dave et al (eds), *Arbitration in India* (Kluwer Law International, 2021), 289, 291–2.

responsibility.[128] The consequent ability of investors to bring claims directly against the nation state in question can have the effect of forcing the nation to bring its judicial order in line with the norms and standards of customary international law.[129] Notwithstanding this, the level of influence that private individuals and tribunals may have over sovereign nations and their administration is something to be closely and regularly checked.[130]

On the other hand, India remains attractive to foreign investors, and continues to enter into BITs.[131] By way of response to its negative experience with ISDS, India drafted a Model BIT,[132] which provided, inter alia, for greater protections to its judicial sovereignty in matters in which arbitrations might be commenced pursuant to ISDS provisions.[133] The friendliness of India's judiciary towards arbitration has improved, following landmark decisions which affirm the decisional independence of tribunals in international arbitration.[134] Indeed, the position seems to have changed to such an extent as to lead some to criticise the judiciary of pursuing a 'pro-arbitration' policy in an overzealous and unprincipled manner.[135] Furthermore, despite the large amount of investor-state disputes that have

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[128] Sathyapalan (n 8) 503–4.
[129] See generally Jan Paulsson, 'Arbitration without Privity' (1995) 10(2) *ICSID Review* 232, 233; Ranjan (n 48) 47.
[130] See above: *The Chilling Effects of Investor-State Dispute Settlement on Governments*. See further PK Suresh Kumar, 'Globalisation and the Judicial Sovereignty of India' (2012) 47(49) *Economic and Political Weekly* 27, 27–8; Ranjan (n 48) 43.
[131] See Hazarika and Bhardwaj (n 123) 92. For a list of the 89 BITs entered by India, see Department of Economic Affairs, Ministry of Finance, Government of India 'BIT' (Web Page, 30 September 2021) <https://dea.gov.in/bipa>.
[132] Two agreements have since been entered into using the text of this Model BIT: Department of Economic Affairs, Ministry of Finance, Government of India 'BIT' (Web Page, 30 September 2021) <https://dea.gov.in/bipa>.
[133] Cf Grant Hanessian and Kabir Duggal, 'The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?' (2017) 32(1) *ICSID Review* 216, 222. See further Sathyapalan (n 8) 514; Hazarika and Bhardwaj (n 123) 99.
[134] See, eg, *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552; *Reliance Industries Ltd v Union of India*, Civil Appeal No 5765 of 2014 (28 May 2014). See further Sathyapalan (n 8) 515–6.
[135] Aditya Singh Chauhan and Aryan Yashpal, 'Change to Improve, Not to Unhinge: A Critique of the Indian Approach to International Arbitration' (2021) 10(2) *Indian Journal of Arbitration Law* 1, 2–3.

been brought before India,[136] its record of one loss and two wins suggest that its own culpability in the disputes should not be overstated.[137]

The Clouded Future of Investor-State Dispute Settlement

As has been shown,[138] the global regime of BITs and ISDS is in a state of flux, and the number of investor-state disputes has followed an alarming upward trend.[139] There is a recognised need for reform in this area, especially in ensuring that ISDS remains inclusive and consistent with sustainable development.[140] Reform projects vary from 'incremental' changes to the existing ISDS regime, such as the foundation of advisory committees and the implementation of conduct rules for arbitrators,[141] to more radical measures, such as the eschewal of conventional ISDS for a judicialized, hybrid multilateral investment court.[142]

The following section of the paper discusses the progress made in two ongoing reform processes: UNCITRAL's Working Group III and the EU's Multilateral Investment Court project.

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[136] Ranjan (n 48) 44.
[137] Hazarika and Bhardwaj (n 123) 96.
[138] See preceding section.
[139] Karl P Sauvant, 'An Advisory Centre on International Investment Law: Key Features' (2021) 17(2) *University of St Thomas Law Journal* 354, 355–6. Likewise, the number of arbitrator challenges within such disputes has risen: Maria Fanou, 'The Independence and Impartiality of the Hybrid CETA Investment Court System: Reflections in the Aftermath of Opinion 1/17' (2020) 4(1) *Europe and the World: A Law Review* 8:1–17, 5 ('Independence and Impartiality').
[140] See particularly *International Financial System and Development: Report of the Secretary-General* (n 55) 16 [62].
[141] Lavranos (n 70) 456. See further United Nations Commission on International Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Advisory Centre: Note by the Secretariat*, UN Doc A/CN.9/WG.III/WP.212 (3 December 2021); United Nations Commission on International Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Codes of Conduct and Commentary: Note by the Secretariat*, UN Doc A/CN.9/WG.III/WP.223 (23 November 2022) (advance).
[142] See, eg, *Comprehensive Economic and Trade Agreement (CETA)* [2017] OJ L 11/23, art 8.27 ('CETA').

UNCITRAL Working Group III

At the meeting of its 50th session in July 2017, UNCITRAL entrusted Working Group III (WGIII) with the task of investigating and making suggestions on reform to ISDS, granting it a 'broad mandate', and a 'broad discretion … in discharging its mandate'.[143] It aims to respond to a series of concerns that have been raised regarding ISDS, including its (il)legitimacy,[144] capacity to cause 'regulatory chill',[145] costs,[146] lack of transparency,[147] inconsistency, incorrect interpretations of law, and lack of independence or impartiality in decision-makers.[148] The Working Group has both met and published reports regularly since its inception.[149] For its upcoming 44th session,[150] WGIII has prepared working papers providing for a uniform code of conduct for arbitrators and judges involved in ISDS,[151] and investigating the role of an appellate tribunal in ISDS proceedings,[152] the latter of which bears particular relevance to the EU's proposed Multilateral Investment Court.[153]

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[143] *Report of the United Nations Commission on International Trade Law: Fiftieth Session: 3–21 July 2017*, UN GAOR, 72nd sess, Supp No 17, Un Doc A/72/17 (July 2017) 46–7 [264].
[144] See particularly United Nations Commission on International Trade Law, *Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS): Note by the Secretariat*, UN Doc A/CN.9/917 (20 April 2017) 4 [12].
[145] See particularly Van Harten, Kelsey and Schneiderman (n 35) 1.
[146] See particularly United Nations Commission on International Trade Law, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-fifth Session (New York, 23–27 April 2018)*, UN Doc A/CN.9/935 (14 May 2018) 8 [44].
[147] See particularly Friedrich Rosenfeld, 'The Multilateral Investment Court', in José R Mata Dona and Nikos Lavranos (eds), *International Arbitration and EU Law* (Edward Elgar, 2021) 449, 452.
[148] Velimir Živković, 'ISDS and Nazis or History without Context: A Reply to Gary Born' (2022) 39(4) *Journal of International Arbitration* 575, 590.
[149] For a full list of WGIII's publications on ISDS, see United Nations Commission on International Trade Law, *Working Group III: Investor-State Dispute Settlement Reform* (Web Page, accessed 5 January 2023) <https://uncitral.un.org/en/working_groups/3/investor-state>.
[150] Vienna, 23–27 January 2023.
[151] United Nations Commission on International Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Codes of Conduct and Commentary: Note by the Secretariat*, UN Doc A/CN.9/WG.III/WP.223 (23 November 2022) (advance).
[152] United Nations Commission on International Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Appellate Mechanism: Note by the Secretariat*, UN Doc A/CN.9/WG.III/WP.224 (17 November 2022).
[153] See the following section: *Multilateral Investment Court of the EU*.

Two particular reforms it has discussed warrant further commentary.

First, WGIII has expressed support for the establishment of an advisory centre to assist developing nations as they prepare to defend themselves against international arbitral claims.[154] Given the success of the advisory centre within the World Trade Organisation, it is likely that a similarly well-staffed and well-funded advisory centre within the context of ISDS would contribute to upholding certain standards of legitimacy and fairness throughout the world.[155] The most obvious and significant hurdle for such an advisory centre would be managing its costs, for which an innovative suggested solution has been that investors claiming under ISDS pay a percentage of their claims to the advisory centre,[156] a solution which may have the added benefit of encouraging more conservative claim estimates.[157]

Secondly, WGIII's position on counterclaims by States in ISDS has been left open.[158] Whereas ISDS has been regarded as an important means of protecting against governments' summary mistreatment of investors,[159] it has been criticised precisely for constraining governments in this manner.[160] As has been discussed above,[161] an increased acceptance of counterclaims may ameliorate concerns that investors disproportionately

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[154] See generally United Nations Commission on International Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Advisory Centre: Note by the Secretariat*, UN Doc A/CN.9/WG.III/WP.212 (3 December 2021) 2–3 [4].
[155] Sauvant (n 139) 360–1.
[156] Ibid 370.
[157] See Luke Nottage and Ana Ubilava, 'Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry' (Research Paper No 18/46, University of Sydney Law School, August 2018) 4, 13–14.
[158] United Nations Commission on International Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Multiple Proceedings and Counterclaims: Note by the Secretariat*, UN Doc A/CN.9/WG.III/WP.193 (22 January 2020) 7–8 [32].
[159] Živković (n 148) 577.
[160] Cf above on regulatory chill: *The Chilling Effects of Investor-State Dispute Settlement on Governments*.
[161] Cf above on counterclaims: *Counterclaims — Reclaiming Equality of Arms*.

benefit from ISDS,[162] and may even provide a means of holding corporations accountable for their actions where domestic remedies fail.[163] However, more pressing than the procedural difficulties which attend such counterclaims is the substantive problem that investor-state treaties seldom impose enforceable obligations upon investors.[164] Likewise, whether corporations possess the legal personality to be subjects of international law remains unclear.[165] WGIII has not made any further progress on this topic, which has led commentators to question whether it goes beyond WGIII's mandate to consider reforms of a substantive, rather than a procedural nature.[166]

This latter contention may be seen to fall within a broader discussion on the inaccessibility of recourse under ISDS to all parties but the investor. In particular, ISDS ordinarily precludes interested third parties from gaining legal standing in investor-State disputes, even in respect of decisions which will impact them.[167] For example, indigenous communities with close ties

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[162] United Nations Commission on International Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural Reform: Note by the Secretariat*, UN Doc A/CN.9/WG.III/WP.219 (11 July 2022) 10 [44]. See also Hege Elisabeth Veenstra-Kjos, 'Counter-claims by Host States in Investment Dispute Arbitration "without Privity"' in Philippe Kahn and Thomas W Wälde (eds), *Les aspects nouveaux du droit des investissements internationaux* (Martinus Nijhoff, 2007) 597, 628; Andre Nollkaemper, 'Forging the Public and Private Sector in the Legal International Order' (2004) 31(2) *Legal Issues of Economic Integration* 77, 77.

[163] Such as for their environmental impact: James Harrison, 'Environmental Counterclaims in Investor-State Arbitration: *Perenco Ecuador Ltd v Republic of Ecuador*, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015 (Peter Tomka, Neil Kaplan, J Christopher Thomas)' (2016) 17(3) *Journal of World Investment and Trade* 479, 485–8.

[164] Andrea K Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17(2) *Lewis & Clark Law Review* 461, 479; Trinel (n 28) 70–1. See also United Nations Commission on International Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural Reform: Note by the Secretariat*, UN Doc A/CN.9/WG.III/WP.219 (11 July 2022) 2 [4].

[165] Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (n 164) 479. Cf José E Alvarez, 'Are Corporations Subjects of International Law' (2011) 9(1) *Santa Clara Journal of International Law* 1, 31.

[166] Trinel (n 28) 71; Sauvant (n 139) 358. Cf Van Harten, Kelsey and Schneiderman (n 35) 2, criticising the excessive focus on 'procedural reforms' in light of the broad mandate granted to WGIII.

[167] Gus Van Harten, Kelsey and Schneiderman (n 35) 4–5. See further P Wieland, 'Why the Amicus Curia Institution is Ill-suited to Address Indigenous Peoples' Rights before

to land which is the subject of an investment dispute may be denied the opportunity to provide submissions, let alone appear as a party.[168] WGIII has been criticised for failing adequately to address this apparent injustice.[169]

WGIII was also criticised for anomalously failing to recommend or provide commentary on the requirement otherwise ubiquitous in international law that all local remedies must first be exhausted.[170] The absence of such a requirement means that investor parties are essentially encouraged to commence parallel proceedings within the country in question as well as under an ISDS provision,[171] an outcome which is at odds with ISDS reform's interest in minimising its cost and inefficiency.[172]

Multilateral Investment Court of the EU

Among the more radical reforms that have enjoyed the sustained interest of WGIII is the foundation of a State-appointed, centralised Multilateral Investment Court (MIC) to replace ad hoc ISDS arbitrations.[173] The

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Investor-State Arbitration Tribunals: *Glamis Gold* and the Right of Intervention' (2011) 3 *Trade, Law and Development* 334, 344–5, 359–60; Nigel Blackaby and Caroline Richard, 'Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?' in Michael Waibel et al (eds), *The Backlash against Investment Arbitration* (Kluwer Law International, 2010) 253, 266–70.

[168] Cf *Bernhard von Pezold v Republic of Zimbabwe (Procedural Order No 2)* (ICSID Arbitral Tribunal, Case No ARB/10/15, 26 June 2012) [61]–[63]. The tribunal would later describe this dispute as, 'at its heart, a land dispute': *Bernhard von Pezold v Republic of Zimbabwe (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/15, 28 July 2015) [2].

[169] Van Harten, Kelsey and Schneiderman (n 35) 4–6.

[170] D'Ascoli and Scherr (n 34) 117–18. On the scope of domestic courts' role in ISDS, see further Marco Bronckers, 'Is Investor-State Dispute Resolution (ISDS) Superior to Litigation before Domestic Courts? An EU View on Bilateral Trade Agreements' (2015) 18(3) *Journal of International Economic Law* 655, 672–3.

[171] Van Harten (n 39) 146–7. Cf the EU's proposal for a multilateral investment court, which explicitly requires investors to withdraw any parallel proceedings before bringing a claim before it: Rosenfeld (n 147) 463 [19.46].

[172] Sauvant (n 139) 357–8.

[173] See, eg, United Nations Commission on International Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Multilateral Instrument on ISDS Reform: Note by the Secretariat*, UN Doc A/CN.9/WG.III/WP.194 (16 January 2020); United Nations Commission on International Trade Law, *Possible Reform of Investor-State*

movement for a MIC in the EU began in 2015, with the publication of a concept paper introducing the idea,[174] which proposal was endorsed by the European Parliament later that year.[175] The European Commission has since published 'negotiating directives' to clarify the purpose and aims of the MIC,[176] including its implementation by way of an opt-in scheme, enabling easy adaptation to any BITs still in force.[177]

Once ready, the EU's MIC will subsume or replace those 'investment courts' already in operation, such as that of CETA.[178] It will consist of permanent tribunals of first instance and appeal, with judges selected by Member States of the EU.[179] Due to its mixed arbitral-judicial character, it has sensibly been described by the CJEU as a 'hybrid' system,[180] in that while it issues 'awards', the permanent tenure of its judges and the final and binding nature of its awards allude to a kind of judicial power.[181]

The development of a State-appointed, centralised MIC to replace ad hoc ISDS arbitrations would appear to follow naturally from many of the same

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Dispute Settlement (ISDS): Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters: Note by the Secretariat, UN Doc A/CN.9/WG.III/WP.213 (8 December 2021); United Nations Commission on International Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Multilateral Instrument on ISDS Reform: Note by the Secretariat*, UN Doc A/CN.9/WG.III/WP.221 (22 July 2022).

[174] European Commission, 'Investment in TTIP and Beyond: The Path for Reform' (Concept Paper, 5 May 2015).

[175] European Union, European Parliament, *Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)* Doc No P8_TA(2015)0252 (8 July 2015).

[176] European Commission, *Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes*, Doc No 12981/17 Add 1 (20 March 2018).

[177] Colin M Brown, 'The EU's Approach to Multilateral Reform of Investment Dispute Settlement' in Ana Stanič and Crina Baltag (eds), *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court* (Kluwer Law International, 2020) 219, 225.

[178] CETA (n 142) art 8.27. See further Bjorklund, 'Arbitration, the World Trade Organization, and the Creation of a Multilateral Investment Court' (n 46) 441.

[179] Rosenfeld (n 147) 456.

[180] *Opinion 1/17 of the Court* (Court of Justice of the European Union, O-1/17, ECLI:EU:C:2019:341, 30 April 2019) [90], [193] ('*Opinion 1/17*').

[181] Fanou, 'Independence and Impartiality' (n 139) 9–10.

problems identified by WGIII,[182] including a lack of consistency and accountability, disproportionate benefit to investors, and intrusion into state sovereignty.[183]

However, certain key features of the EU's proposal have attracted international commentary.

First, the EU has proposed selection criteria for judges to an MIC in response to increasing scepticism towards the impartiality of arbitrators chosen via ordinary mechanisms.[184] Among the criteria for selection are various ethical tests, such as the requirement of no affiliation with any government of the Member States.[185] More controversial is the requirement of 'demonstrated expertise in public international law',[186] which requirement is largely without parallel in other important supranational courts.[187] It seems that this criterion reflects the desire, predominantly of States, for judges to pay increasing attention to public economic interests as well as private commercial interests,[188] even if this happens at the expense of limiting the potential for a truly diverse tribunal.[189]

[182] See generally Kriton Dionysiou, *CETA's Investment Chapter: A Rule of Law Perspective* (Springer, 2021) 25.
[183] Bjorklund, 'Arbitration, the World Trade Organization, and the Creation of a Multilateral Investment Court' (n 46) 439–41.
[184] Fanou, 'Independence and Impartiality' (n 139) 4–5.
[185] Ibid 7.
[186] European Commission, *Textual Proposal: Investment*, 'Transatlantic Trade and Investment Partnership: Trade in Investment, Services and E-commerce: Chapter II — Investment' (12 November 2015) arts 9(4), 10(7) <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/8c193123-2084-4231-9e71-bed0d034bb9c/details?download=true>. WGIII recommended that the selection criteria for ISDS arbitrators prescribe that they merely be 'cognizant' of international law: United Nations Commission on International Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters: Note by the Secretariat*, UN Doc A/CN.9/WG.III/WP.213 (8 December 2021) 6 [19], [22].
[187] Stephen M Schwebel, 'The Outlook for the Continued Vitality, or Lack Thereof, of Investor-State Arbitration' (2016) 32(1) *Arbitration International* 1, 11.
[188] Dietz, Dotzauer and Cohen (n 7) 763–4.
[189] Schwebel (n 187) 12.

Critiques of the EU's proposal have pointed out a certain hypocrisy in its reasoning — if the appointment of arbitrators in ad hoc tribunals by investors is liable to cause bias in favour of those investors, the selection of judges by States would surely produce a comparable bias in the States' favour.[190] Notwithstanding this inconsistency, it is true that randomly selecting from a limited pool of permanent judges removes scope for parties consistently to appoint an arbitrator whom it knows will be favourable to its side.[191] In any case, despite its novelty in the context of ISDS, supranational courts with state-appointed judges are, of course, no new phenomenon.[192]

Secondly, the foundation of an appellate jurisdiction for investor-state disputes contemplates the formulation of a more sophisticated and centralised legal order. However, the extent to which such a system would *actually* lead to greater consistency has been questioned, as the MIC's task would still consist largely in different judges interpreting wholly unique treaties.[193] Whereas the building of a body of precedent through appellate decisions might assist in maintaining consistency,[194] no suggestion has been made that the MIC's decisions would be binding on subsequent awards,[195] especially in light of the CJEU's view that CETA's appellate investment court can only bind the parties in dispute.[196] In its investigation into the role that appellate mechanisms might apply in ISDS,[197] WGIII left

[190] Ibid 10.
[191] Dietz, Dotzauer and Cohen (n 7) 763; Fanou, 'Independence and Impartiality' (n 139) 4–5.
[192] See Živković (n 148) 585–6, discussing the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and People's Rights.
[193] Bjorklund, 'Arbitration, the World Trade Organization, and the Creation of a Multilateral Investment Court' (n 46) 442.
[194] Rosenfeld (n 147) 454 [19.14].
[195] Bjorklund, 'Arbitration, the World Trade Organization, and the Creation of a Multilateral Investment Court' (n 46) 444.
[196] *Opinion 1/17* (n 180) [73], [90].
[197] United Nations Commission on International Trade Law, *Possible Reform of Investor-State Dispute Settlement (ISDS): Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters: Note by the Secretariat*, UN Doc A/CN.9/WG.III/WP.213 (8 December 2021).

undecided whether appellate decisions ought to have precedential value.[198] This said, the foundation of a common 'legal culture' through a system of permanent judges may organically lead to more consistent decisions, without the need to rely on formal rules of precedent.[199]

Thirdly, there is need for a more detailed consideration of a MIC's interaction with the existing international investment law regime. For example, it is unclear whether the MIC should (or could) only assume jurisdiction over disputes within the EU, or also where only the respondent is a Member State.[200] It is likewise unclear what ought to happen to investors who might suddenly lose the opportunity to arbitrate where their host State and State of investment both join the MIC.[201] Further, the suggestion that ICSID's arbitration rules might be adapted without amendment for use by a MIC seems ambitious, not least due to the widely different means of constituting ICSID ad hoc tribunals.[202] This is of critical importance to the issue of enforceability of a MIC's awards — it is unclear how the MIC could simultaneously distance itself from the identity of international arbitration, but also seek recognition for the purposes of enforcement in extra-EU states which do not form part of the MIC.[203]

A notable outstanding question is how (and whether) a MIC might fit within the EU's legal regime,[204] especially in light of *Achmea* and the CJEU's opinion on the status of CETA's investment court.[205] The latter decision

[198] Ibid 12 [36] (Note to the Working Group).
[199] Brown (n 177) 228.
[200] Rosenfeld (n 147) 458 [19.28].
[201] Ibid 459 [19.31].
[202] Schwebel (n 187) 10.
[203] Rosenfeld (n 147) 460–1. Cf August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' (2016) 19(4) *Journal of International Economic Law* 761, 767, suggesting that enforceability may be easier to argue as under the New York Convention.
[204] See generally Francisco de Abreu Duarte, '"But the Last Word Is Ours": The Monopoly of Jurisdiction of the Court of Justice of the European Union in Light of the Investment Court System' (2020) 30(4) *European Journal of International Law* 1187, 1188.
[205] *Opinion 1/17* (n 180).

drew attention to particular 'judicializing' features of the CETA investment court, such as its appeal mechanism, which features may be key to ensuring that a MIC is deemed legitimate by the CJEU.[206] However, should the MIC find itself in the not unlikely scenario of having to decide questions of EU law, the CJEU's monopoly over EU law may threaten its legitimacy and, indeed, existence.[207]

Conclusion

It is no doubt true that the traditional ISDS model — that is, the use of ISDS provisions (predominantly arbitration clauses) within BITs — is attracting, and will continue to attract, increasing controversy and dissatisfaction. Importantly, though efforts are clearly being made to reform this model from within, such as by seeking to regulate the conduct of tribunals and provide for centralised administrative and assistive institutions, the challenges made to ISDS extend beyond its implementation in practice; the so-called 'legitimacy crisis'[208] inheres in the very model itself, and any internal reform is unlikely completely to satisfy those who criticise ISDS' legitimacy.

It is perhaps surprising, therefore, that the use of conventional forms of ISDS, such as arbitral tribunals constituted pursuant to BITs, shows no sign of slowing. Though the latest issue of the biannual *ICSID Caseload: Statistics*[209] suggests a slight lull in registered ICSID cases for the first half of 2022, the overall trend is clearly one of rapid growth, with 2021 seeing

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[206] Fanou, 'Independence and Impartiality' (n 139) 14.
[207] Andrea K Bjorklund and Lukas Vanhonnaeker, 'Applicable Law in International Investment Arbitration' in CL Lim (ed), *The Cambridge Companion to International Arbitration* (Cambridge University Press, 2021) 225, 241.
[208] See, eg, Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73(4) *Fordham Law Review* 1521, 1584; Dietz, Dotzauer and Cohen (n 7) 750; Trinel (n 28) 60.
[209] International Centre for Settlement of Investment Disputes, *ICSID Caseload: Statistics* (Issue 2022-2, 4 August 2022).

the greatest number of registered cases in ICSID's history.[210] In like fashion, the number of non-ICSID cases which were nonetheless administered by the ICSID secretariat has increased,[211] a trend which perhaps reflects the growing desire within the international community for more consistent and centralised forms of administering investor-state disputes.[212] Of those cases registered by ICSID, the predominant basis of consent invoked to establish ICSID's jurisdiction remains ISDS provisions in BITs, accounting for 60% of all ICSID cases;[213] and though the ISDS zeitgeist has shifted significantly over the past few years, this statistic has remained relatively stable.[214]

Accordingly, though recent developments suggest that the days of conventional BITs with their ISDS provisions may be numbered, it seems likely that disputes (particularly arbitrations) will continue increasingly to be brought pursuant to such provisions. The uptick of cases is, indeed, likely to accelerate, insofar as it is proportional to the global rate of FDI,[215] which is currently rebounding from its 2020 lows.[216] It must further be remembered that phenomena such as the *Achmea* decision, which have triggered increasing scepticism in the status quo, are very recent, and there remain over 2200 BITs in force around the world.[217] Furthermore, a

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[210] 66 cases were registered with ICSID in 2021: ibid 7. Note also the role of the Permanent Court of Arbitration, which administered 115 investor-state arbitrations in 2021: Permanent Court of Arbitration, *Annual Report 2021* (121st Annual Report, 11 April 2022) 10.
[211] See ibid 9–10.
[212] See, eg, Brown (n 177) 228.
[213] *ICSID Caseload: Statistics* (n 209) 11.
[214] For example, cf the similar statistic in International Centre for Settlement of Investment Disputes, *ICSID Caseload: Statistics* (Issue 2010-1, 10 February 2010) 10.
[215] Scott Miller and Gregory N Hicks, *Investor-State Dispute Settlement: A Reality Check* (Report, Centre for Strategic and International Studies, January 2015) 6.
[216] See United Nations Conference on Trade and Development, *World Investment Report 2022: International Tax Reforms and Sustainable Investment* (Report, UNCTAD/WIR/2022, 9 June 2022) 2. The rate of increase has, however, been slowed by the war in Ukraine: Organisation for Economic Co-operation and Development, *FDI in Figures* (Report, 28 October 2022) 1–2.
[217] See United Nations Conference on Trade and Development, *Investment Policy Hub*, 'International Investment Agreements Navigator' (Web Page, accessed 8 January 2023) <https://investmentpolicy.unctad.org/international-investment-agreements>.

common approach among BITs of the 2000s and 2010s was to “double down” on the system of ISDS provisions by expanding them to become more comprehensive and all-encompassing, with a view to providing stronger protections for the negotiating states.[218] As these agreements have broader scopes and cover more issues, they are more likely to bear relevance to investment disputes.

Therefore, even as the ongoing debate concerning the legitimacy of ISDS rages in the background, the number of disputes and dispute resolution mechanisms initiated pursuant to BITs will continue to rise before it falls.

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[218] Joachim Pohl, Kekeletso Mashigo and Alexis Nohen, ‘Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey’ (Working Paper on International Investment 2012/02, Organisation for Economic Cooperation and Development, 14 December 2012) 40–3.

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