THE REPUDIATION OF INVESTOR–STATE ARBITRATION AND SUBSEQUENT TREATY PRACTICE: THE RESURGENCE OF QUALIFIED INVESTOR–STATE ARBITRATION

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ABSTRACT

This article contributes to the existing literature on investor-state arbitration (ISA) by analysing the subsequent treaty making practices of the States that pledged to restrict or abolish ISA. The article concludes that instead of rejecting ISA or withdrawing from the International Centre for Settlement of Investment Disputes (ICSID), these States are continuing to provide for ISA in their treaties. However, they are increasingly qualifying access to investor-state arbitration. Specifically, the study notes the increased presence of various provisions allowing state Parties to vary from their treaty obligations. Thus, the latest treaties examined in this study resemble the first generation of BITs in terms of their restrictiveness. While the first generation treaties construed investment and investor rights in a narrow language, the recent treaties of countries which initially rejected ISA have instead limited investor rights by emphasizing various exceptions to treaty obligations. However, of great significance, while all the agreements analysed qualify access to ISA, they differ significantly in their approaches to regulating arbitral proceedings. These divergent treaty practices presents challenges to various ISA reform proposals.

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I. INTRODUCTION

Looking back to the years between 2007 and 2014, one would be hard-pressed not to consider the possibility of investor-state arbitration (ISA) falling out of favour with policy makers. Within a span of just a few years, a number of States announced that they would no longer provide ISA in future investment agreements, while others vowed to terminate their existing bilateral investment treaties (BITs).

Much has been written about this dramatic change in the landscape of international investment regulation. Policy makers and scholars continue to engage in fierce conceptual and practical debates surrounding ISA. Uniting the participants in this discussion is the consensus that States have numerous grievances against investor-state arbitration.

This article contributes to the existing literature on investor-state arbitration by analysing the subsequent treaty making practices of the States that have pledged to restrict or abolish ISA, without considering changes to ISA adopted by other states. As such, this paper moves away from the theoretical debates surrounding ISA reforms and provides an up-to-date look at the pattern of treaty making behaviour of the countries that have repudiated the existing framework for the resolution of investor-state disputes. This approach focuses on actual treaty making practice, which often significantly varies from rhetoric directed at restricting or abolishing ISA. By focusing on the regulatory systems designed by the states that had abolished or restricted ISA, the article investigates the ways in which treaty makers have attempted to address the perceived deficiencies of investor-state arbitration.

As will be discussed further, multiple States have recommitted to ISA following their initial repudiation. Thus, rather that rejecting ISA as a whole or withdrawing from the 1965 Washington Convention establishing the International Centre for Settlement of Investment Disputes (ICSID),[1] these States are continuing to offer investor-state arbitration in their treaties. However, they are increasingly qualifying access to ISA. This is where the similarities among these States end. Rather than converging in their approaches to regulating arbitral proceedings, these States have followed divergent regulatory paths. Some have chosen to focus on excluding specific economic sectors from arbitration. Other States have emphasized a reform of arbitral proceedings and have made specific commitments to transparency by enhancing third-party participation and publishing documents related to such proceedings. Thus, while States are increasingly qualifying access to ISA, they differ significantly in their approaches to regulating arbitral proceedings.

To further explore these developments, Section II engages in a general overview of the States that have chosen to restrict ISA and the manner in which they have limited it. Section III examines the treaty-making behaviour of these States following their rejection of ISA. The analysis suggests that in many cases, States have either abandoned their initial repudiation of ISA, or have failed to articulate any concrete policies directed at restricting it. Section IV explains the resilience of ISA and analyses the challenges faced by States attempting to restrict it. Finally, Section V examines recent investment facilitation agreements of the States discussed in the previous sections. Noting the common trends among the Agreements, the article concludes that a resurgence of qualified investment treaties is on the rise. However, States have adopted dissimilar approaches to regulating ISA proceedings. The article concludes by examining the impact of these developments on future ISA reforms.

[1] 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) (ICSID Convention).

II. HISTORY OF ISA REPUDIATIONS

The recent backlash against ISA can be traced back to Latin America. In 2007, Bolivia withdrew from the ICSID Convention, gaining the dubious distinction of being the first state to repudiate the treaty.[2] Bolivia's actions gave rise to a host of procedural and legal issues in relation to the termination of the Convention and the status of ISA provisions in Bolivia's other agreements.[3] This is especially so, considering that a number of other regional economies - Cuba, Nicaragua, Ecuador and Venezuela pledged to follow suit and terminate their memberships in the ICSID.[4] However, by 2010 only Ecuador had issued its notice of termination.[5]

Not long after Ecuador's withdrawal from the ICSID Convention, the Australian Government issued its 2011 Policy Statement, stating that it would no longer agree to the adoption of international investment arbitration in its bilateral and regional trade agreements.[6] Unlike Bolivia and Ecuador, Australia did not choose to withdraw from the ICSID. Its Policy Statement only provided that Australia would no longer negotiate treaty protections 'that confer greater legal rights on foreign businesses than those available to domestic businesses' or rights that would 'constrain the ability of the Australian Government to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses'.[7]

Although Australia's successor Federal Government abandoned Australia's controversial position on ISA in favour of a pragmatic treaty-by-treaty approach,[8] the 2011 Policy Statement ignited fierce debate over the future of investment litigation beyond Latin America. After all, Bolivia and Ecuador did not have extensive investment networks. Increasingly inward-looking, these two States have initiated a number of nationalisation campaigns under the leadership of left-leaning governments advocating economic self-reliance in the face of the alleged exploitation of their domestic economies by inbound foreign investors. Comparatively, Australia had prospered from the increased FDI inflows and had dedicated major efforts towards expanding its trade and investment networks. Furthermore, it had a healthy market economy with a stable political system. Since Australia was a large developed state proposing to reject ISA, a major line of inquiry was

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[2] 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) <http://documents.worldbank.org/curated/en/2007/01/9467340/news-icsid-vol-24-no-2> accessed 10 March 2015.

[3] See generally, United Nations UNCTAD, 'Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims' (2009) <http://unctad.org/en/Docs/webdiaeia20106_en.pdf> accessed 10 March 2015.

[4] Investment Treaty News 'South American alternative to ICSID in the works as governments create an energy treaty' (6 August 2008) <https://www.iisd.org/itn/2008/08/06/south-american-alternative-to-icsid-in-the-works-as-governments-create-an-energy-treaty/> accessed 10 March 2015.

[5] 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 accessed 10 March 2015>; Karsten Nowrot, 'International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism' (2011) TDM 1, 5.

[6] Australian Government, Department of Foreign Affairs and Trade, 'Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity' (April 2011) achieved at <http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf> (Policy Statement). See generally, Jürgen Kurtz, 'Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication' (2012) 27 ICSID Rev 65.

[7] Policy Statement (n 6) 13.

[8] Australian Government, Department of Foreign Affairs and Trade, 'Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)' <https://www.dfat.gov.au/fta/isds-faq.html> accessed 10 March 2015.

whether Australia would set a new trend in the regulation of FDI.[9] Would other developed countries follow suit in rejecting ISA? Perhaps of greatest concern was the fear that ISA had lost its legitimacy, even among States that had previously benefited from the system, arguably including Australia.

Following these events in Australia, in 2012 Venezuela and Argentina announced their plans to terminate the ICSID Convention. The foreign ministry of Venezuela was quite vocal in its criticism of ISA, stating that '[acceding to ICSID was] a decision of a provisional and weak government, without popular legitimacy, and under the pressure of transnational economic sectors involved in the dismantling of Venezuela's national sovereignty'.[10] Venezuela's withdrawal was finalised in July of 2012 while Argentina is yet to announce its future ISA policies.[11]

Although supporters of Australia's 2011 Policy Statement had anticipated that other developed States would reject ISA, South Africa is the only other country with attributes of a developed state to have rejected ISA at the time of writing.[12] In formulating its foreign policy, South Africa followed Australia's approach, stating that it would not provide for ISA in its future agreements. Furthermore, it terminated a number of its BITs with other States.[13]

More recently, in 2014, India and Indonesia indicated that they intended to restrict their ISA granting treaties. Indonesia announced that it would terminate its BIT with the Netherlands, which is set to expire in July 2015.[14] The Netherlands embassy in Jakarta further noted that the Indonesian Government indicated that it intended to terminate all 67 of its BITs.[15] India, similarly announced that it intended to review its BIT system and was considering excluding ISA from its future agreements or, at the very least, would require investors to exhaust domestic remedies before submitting disputes to international arbitration.[16]

Noteworthy too, the protracted discussions over an investment treaty between Pakistan and the United States culminated in the breakdown of negotiations when Pakistan rejected the US draft BIT. Among the security considerations cited for its action, Pakistan expressed reservations over

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[9] See generally, Leon Trakman, 'Investor State Arbitration or Local Courts: Will Australia Set a New Trend?' (2012) 46 Journal of World Trade 83.

[10] Bolivarian Republic of Venezuela Ministry of Popular Power for Foreign Affairs Press Release, 'Bolivarian Government Denounces ICSID Agreement' (25 January 2012) <http://www.mre.gov.ve/index.php?option=com_content&view=article&id=18939:mppre&catid=3:comunicados&Itemid=108> accessed 10 March 2015 (text in Spanish).

[11] See Section III below discussing Argentina.

[12] Investment Arbitration Reporter, 'South Africa Pushes Phase-out of Early Bilateral Investment Treaties after at Least Two Separate Brushes with Investor-State Arbitration' <http://www.iareporter.com/articles/20120924_1> accessed 10 March 2015.

[13] Lexology, 'South Africa Terminates its Bilateral Investment Treaty with Spain: Second BIT terminated, as Part of South Africa's Planned Review of its Investment Treaties' <http://hsfnotes.com/arbitration/2013/08/21/south-africa-terminates-its-bilateral-investment-treaty-with-spain-second-bit-terminated-as-part-of-south-africas-planned-review-of-its-investment-treaties/> accessed 10 March 2015; The list of active South African BITs is available at The UN Conference on Trade and Development's (UNCTAD) Investment Instruments Online Database: South Africa <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu> accessed 10 March 2015.

[14] Leon Trakman and Kunal Sharma, 'Indonesia's Termination of the Netherlands–Indonesia BIT: Broader Implications in the Asia-Pacific?' (Kluwer Arbitration Blog, 21 August 2014) <http://kluwerarbitrationblog.com/blog/2014/08/21/indonesias-termination-of-the-netherlands-indonesia-bit-broader-implications-in-the-asia-pacific/> accessed 10 March 2015.

[15] Kingdom of the Netherlands, Netherlands Embassy in Jakarta, 'Termination Bilateral Investment Treaty' <http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html> accessed 10 March 2015.

[16] Deepshikha Sikarwar, 'Government to Draft Model Treaty on MNCs' Mediation Rush' *The Economic Times* (09 August 2013) <http://articles.economictimes.indiatimes.com/2013-08-09/news/41240891_1_bipa-international-arbitration-white-industries-australia/> accessed 10 March 2015; Bilaterals.org, 'India Plans to Abolish ICSID Clause in FTAs' (6 April 2012) <http://www.bilaterals.org/?india-plans-to-abolish-isd-clause> accessed 10 March 2015.

ISA clauses provided in the US Model BIT.[17] Pakistan's Board of Investment also indicated that Pakistan was in the process of drafting its own Model BIT. It also proposed that its Model BIT would make alternative dispute resolution to arbitration mandatory, with the Government of Pakistan not held liable for disputes involving private investors.[18] Advisors to the Ministry further suggested that Pakistan would further terminate all of its BITs in order to renegotiate them under its new Model BIT.[19]

In addition to the countries identified above, a number of other States expressed reservations over the manner in which they would provide for ISA in the future. For example, the US has recently revised its Model BIT[20] to allow for greater state intervention based on various security and public policy considerations. The EU is also reviewing its BITs.[21] However, none of these States have repudiated investor-state arbitration as a matter of foreign policy, probably because there is still no consensus among the domestic policy makers on the value of ISA. This is most evident in the United States. For example, President Obama recently publicly defended ISA.[22] He faced strong opposition from Senator Elizabeth Warren who has sought to build a coalition to oppose the TPPA and to exclude ISA from the investment portion of that Agreement.[23]

In summary, while multiple States have expressed their concerns with ISA, they have not committed themselves to eliminating investor-state arbitration. For this reason, these countries are excluded from the present analysis. Instead, the study focuses on the subsequent treaty practices of the States that have officially proposed to withdraw from ISA.

III. SUBSEQUENT INVESTMENT TREATY PRACTICES

This section investigates the investment treaty making behaviour of the States that have indicated that they would reject ISA. For the purpose of convenience, we separate the countries identified in Section II into two groups: States that have repudiated the ICSID Convention and States that are pursuing alternative means to restrict or eliminate ISA.

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[17] Bilaterals.org, 'Pakistan Rejects US Draft of Investment Treaty' (13 March 2015) <http://www.bilaterals.org/?pakistan-rejects-us-draft-of> accessed 15 March 2015.

[18] Bilaterals.org, 'New Bilateral Investment Treaty Model' (2 March 2015) <http://www.bilaterals.org/?new-bilateral-investment-treaty> accessed 15 March 2015.

[19] ibid.

[20] On the new US Model BIT see generally, U.S. Department of State, 'Bilateral Investment Treaties and Related Agreements' <http://www.state.gov/e/eb/ifd/bit/> accessed 01 April 2015; Paolo Di Rosa, 'The New 2012 U.S. Model BIT: Staying the Course' (Kluwer Arbitration Blog, 01 June 2012) <http://kluwerarbitrationblog.com/blog/2012/06/01/the-new-2012-u-s-model-bit-staying-the-course/> accessed 10 March 2015.

[21] For a summary of EU's ISA reform proposals see generally, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Towards a Comprehensive European International Investment Policy* (7 July 2010) <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> accessed 10 March 2015.

[22] Angelo Young, 'TPP Trade Deal Divides Democrats: President Obama Dismisses Sen. Elizabeth Warren's 'Investor-State Dispute Settlement' Warning' *International Business Times* (09 May 2015) <http://www.ibtimes.com/tpp-trade-deal-divides-democrats-president-obama-dismisses-sen-elizabeth-warrens-1915550> accessed 01 June 2015. Also see the official blog of the US Trade Representative Office summarizing Obama Administration's position on the issue at The United States Trade Representative, Tradewinds (The Official Blog of the United States Trade Representative), 'The Facts on Investor-State Dispute Settlement' <https://ustr.gov/about-us/policy-offices/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors> accessed 10 May 2015.

[23] Elizabeth Warren, 'The Trans-Pacific Partnership Clause Everyone Should Oppose' *The Washington Post* (25 February 2015) <http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html> accessed 10 March 2015.

A. States That Have Repudiated the ICSID Convention

At the time of writing, only three States have terminated their obligations under the ICSID Convention. Following their repudiation of ICSID, Bolivia, Ecuador and Venezuela have been relatively consistent in their treaty making behaviour. Generally, these three States have not signed any new investment agreements. Furthermore, these countries have terminated at least some of their BITs. The decisions of these states are analysed in greater detail below.

At the time of writing, Bolivia has terminated six of its 23 BITs.[24] Specifically, in 2009 Bolivia unilaterally repudiated its Agreement with the Netherlands and in 2012, it terminated its BITs with The United States and Spain.[25] Finally, in 2013 it terminated agreements with Austria, Germany and Sweden. Bolivia has retained the BITs signed with other South American countries, such as Argentina, Cuba, Peru and Ecuador.[26] This is presumably because the risk of these countries filing arbitral claims against Bolivia is insignificant on account of political and economic costs associated with such action. Curiously, Bolivia has retained its BITs with China, South Korea and the United Kingdom.[27]

On the other hand, Ecuador appears to be more pragmatic in its treaty practice. In 2008 it terminated nine of its BITs. Most of these agreements were with Latin American countries.[28] In 2010, it terminated its BIT with Finland. At the time of writing, Ecuador has 16 active investment agreements.[29] Interestingly, the vast majority of these remaining BITS are with large capital exporting western economies. Ecuador's current BIT partners include Canada, China, Spain, Sweden, Switzerland, The United Kingdom and The United States.[30] Furthermore, in 2008 it signed the Economic Complementation Agreement with Chile.[31] While the agreement does not contain an investment chapter, it obliges the Parties to enter into negotiations within two years to conclude a chapter on investment protection and facilitation.[32] In summary, Ecuador has been selective in choosing which BITs to terminate. Rather than repudiating all of its Agreements, it has retained the Treaties it concluded with capital exporting States.

Finally, although Venezuela had launched a major public campaign against ISA, it has not sought to actively terminate its BITs. By 2015, it had only terminated its BIT with the Netherlands, retaining the other 27 agreements.[33] Thus, while it did not sign any new investment agreements, Venezuela has not taken measures to terminate its existing investment treaties.

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[24] The UN Conference on Trade and Development's (UNCTAD) Investment Instruments Online Database: Bolivia <http://investmentpolicyhub.unctad.org/IIA/CountryBits/24#iiaInnerMenu> accessed 10 March 2015.
[25] ibid.
[26] ibid.
[27] ibid.
[28] These States are: Cuba, Dominical Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay. See The UN Conference on Trade and Development's (UNCTAD) Investment Instruments Online Database: Ecuador <http://investmentpolicyhub.unctad.org/IIA/CountryBits/61#iiaInnerMenu> accessed 10 March 2015.
[29] ibid.
[30] ibid.
[31] Economic Complementation Agreement between Chile and Ecuador (signed 10 March 2008, entered into force 25 January 2012). The full text (in Spanish) is available at The UN Conference on Trade and Development's (UNCTAD) Investment Instruments Online Database: Ecuador <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3084> accessed 10 March 2015 (Ecuador-Chile Agreement).
[32] Ecuador-Chile Agreement (n 31) art 9.1 (in Spanish).
[33] The UN Conference on Trade and Development's (UNCTAD) Investment Instruments Online Database: Venezuela <http://investmentpolicyhub.unctad.org/IIA/CountryBits/228#iiaInnerMenu> accessed 10 March 2015.

B. States that have Retained their Membership in the ICSID

Countries that have retained their ICSID membership have been similarly inconsistent in their foreign policy approach to ISA. A number of these States have reversed their initial rejection of ISA and continue to provide investor-state arbitration to varying degrees in their investment agreements. Other countries in this group have not taken any action to restrict ISA and have failed to articulate concrete policy direction on investor-state arbitration.

For example, Australia has undergone a major policy shift on investor-state arbitration since its 2011 Policy Statement. Consistent with that Policy, in 2011 it signed the Australia-New Zealand Investment Protocol, which does not provide for third-party investor-state arbitration.[34] Furthermore, in 2012 it signed a free trade agreement with Malaysia, choosing to exclude ISA from the investment chapter of that Agreement. Instead, the Agreement requires both Parties to resolve investor-state disputes in domestic courts.[35] While Malaysia is considered to be a developing country with an evolving legal system, the Australian Government did not draw a distinction between countries with allegedly robust and less robust legal systems in formulating its post-ISA investment policy.[36] Thus, the exclusion of ISA from its FTA with Malaysia served as a credible demonstration to the electorate of the Australian Government's commitment to move away from ISA, even though doing so could conceivably harm its own outbound investors operating in Malaysia, a developing state.[37]

However, the subsequent change in the Government of Australia has promoted greater pragmatism in Australia's ISA policy. After it had assumed power in September 2013, the Abbott Government announced that it would consider negotiating ISA selectively.[38] It is difficult to conclude with certainty whether this shift in policy represented a mere face-saving gesture in light of the Policy adopted by the previous administration, or a real commitment to negotiate ISA on a case-by-case basis. This uncertainty is evident from the absence of a pre-determined pattern in the current Government's ISA negotiations, beyond its commitment not to decide a priori in favour of or against ISA and in light of the few treaties it has negotiated since assuming office.

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[34] New Zealand-Australia Closer Economic Relations Investment Protocol (signed 16 February 2011, entered into force 01 March 2013) (Australia-New Zealand Agreement).

[35] Free Trade Agreement between Australia and Malaysia (signed 22 May 2012, entered into force 01 January 2013). The official website of The Malaysia-Australia Free Trade Agreement is <http://www.dfat.gov.au/trade/agreements/mafta/Pages/malaysia-australia-fta.aspx> accessed 02 November 2014 (Australia-Malaysia Agreement).

[36] Policy Statement (n 6).

[37] In practice, however, this exclusion of ISA was meaningless because ISA is still available under the ASEAN-Australia-New Zealand FTA. Malaysia is a Party to this agreement, thus a dispute involving Parties from both sides could be actioned according to the investment chapter of the Agreement. See the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (signed 27 February 2009, entered into force 01 January 2010) (ASEAN-Australia-New Zealand Agreement). The official website of the ASEAN-Australia-New Zealand Agreement is available at <http://www.fta.gov.sg/fta_C_aanzfta.asp?hl=47> accessed 02 November 2014.

[38] Australia Government, Department of Foreign Affairs and Trade, 'Trade and Investment Topics – ICSID' <http://www.dfat.gov.au/trade/topics/Pages/isds.aspx> accessed 10 March 2015.

The result is that Australia has completed FTA negotiations with China,[39] Japan[40] and Korea.[41] Agreements with Korea and China provide for ISA,[42] while the Agreement with Japan does not.[43] On the surface, the lack of ISA in the Agreement with Japan confirms Australia's selective approach to negotiating investor-state arbitration. However, scholars believe that the lack of investor-state arbitration in the Agreement with Japan is partly due to Japan's neutrality towards ISA on the account of its successful long-term investment relationships in Australia and perhaps aspects of its legal culture.[44] Furthermore, according to Article 14.19 of the Agreement, if Australia enters into any future multilateral or bilateral international agreement providing a mechanism for the settlement of an investment dispute between Australia and an investor of another or the other Party to that agreement, both sides will be obliged to conduct a review to determine whether to establish an equivalent mechanism for the resolution of investor-state disputes.[45] They are also obligated to begin that review within three months following the date on which another agreement enters into force.[46] Since Australia's FTA with China provides for ISA, the provision for such a review under the Australia-Japan Agreement will be triggered as soon as the FTA with China enters into force. Thus, Australia may negotiate a similar arrangement with Japan.

To further demonstrate Australia's uncertainty over whether or not to adopt ISA is a lack of clarity over how much weight it places on the legal system of its trade partners in deciding on ISA. For example, in the official press release following its negotiations with China, Australia noted that '[ISA] will enable Australians to invest in China with greater confidence'.[47] Presumably ISA was negotiated in the Agreement with China partially in response to Australia's concern that its outbound investors not be subject to China's developing legal system. Nonetheless, the ISA-backed protections added by the bilateral FTA are highly restricted, excluding for example fair and equitable treatment (and denial of justice) which is underpinned only by inter-state arbitration under an early BIT that will remain in force subject to a planned work program.[48] However, Korea has a sophisticated legal system with stronger legal capacity. Yet, ISA was provided for in both Agreements, conceivably suggesting that Australia is relying on ISA essentially as a bargaining chip to negotiate for other favourable terms.

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[39] China-Australia Free Trade Agreement (signed 17 June 2015, awaiting domestic ratification). The official text of the Agreement is available at <http://www.dfat.gov.au/trade/agreements/chafta/Pages/australia-china-fta.aspx> accessed 29 July 2015 (China-Australia Agreement).

[40] Agreement between Australia and Japan for an Economic Partnership (signed 08 July 2014, entered into force 15 January 2015). The official website of The Japan-Australia Economic Partnership Agreement available at <http://www.dfat.gov.au/trade/agreements/jaepa/Pages/japan-australia-economic-partnership-agreement.aspx> accessed 10 March 2015 (Australia-Japan Agreement).

[41] Free Trade Agreement between Australia and the Republic of Korea (signed 08 April 2014, entered into force 12 December 2014). The official website of The Korea-Australia Free Trade Agreement is <http://www.dfat.gov.au/trade/agreements/kafta/Pages/korea-australia-fta.aspx> accessed 10 March 2015 (Australia-Korea Agreement).

[42] Australia-Korea Agreement (n 41) art 11.16 paras 1 (a), (b), (c) and (d); China-Australia Agreement (n 39) art 9.12.

[43] Australia-Japan Agreement (n 40) Art 14.6 paras 1 and 2.

[44] See generally Luke Nottage, 'Investor-State Arbitration: Not in the Australia-Japan Free Trade Agreement, and Not Ever for Australia?' (2015) 38 Journal of Japanese Law 37.

[45] Australia-Japan Agreement (n 40) art 14.18 para 2.

[46] ibid.

[47] See Minister for Trade and Investment, 'Landmark China-Australia Free Trade Agreement' (17 November 2014) <http://trademinister.gov.au/releases/Pages/2014/ar_mr_141117.aspx> accessed 10 March 2015.

[48] See Luke Nottage, 'Submission to Parliamentary Inquiries, Proposed China Australia Free Trade Agreement' <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/China-Aust_Free_Trade> accessed 15 August 2015.

Investment treaty policies of India and Indonesia have been similarly inconsistent as neither country has articulated a clear policy approach to regulating investor-state arbitration. For example, although it appeared that India intended to repudiate ISA, the Modi Government has instead refocused its attention on drafting a new model BIT. Recently, the proposed Model BIT was released to the public for feedback and the discussion is available at the Government of India website.[49] Curiously, the draft model BIT provides that home as well as host States will be required to consent to ISA.[50] The controversial provision raises a number of concerns and is likely to be met with resistance by other states interested in investing in India. It remains to be seen whether this provision will make it into the final draft and be implemented in India's future investment agreements.

Indonesia has been similarly unclear on its future ISA policies. It allowed its BIT with the Netherlands to lapse and further announced that it intends to allow all of its existing agreements expire in order to renegotiate them under its new, yet to be released, model investment treatment treaty.[51]

Second, both States have largely retained their existing BITs and have not terminated their other investment related agreements. For example, at the time of writing, India has over 80 active investment facilitation agreements.[52] Indonesia has displayed similar behaviour and did not terminate any other treaties to which it is a Party.[53]

Despite their dissatisfaction with ISA, both India and Indonesia have recently become contracting Parties to the ASEAN-India Investment Agreement.[54] That Treaty provides for third-party investor-state arbitration with access to ICSID and other forums selected by a Party claiming breach of obligations under that Agreement.[55] Although the Agreement has yet to enter into force, it further highlights the fluctuating policy of these countries toward ISA.

Further supporting India's reintroduction of ISA is its recent BIT with the United Arab Emirates. Although that Agreement has not been released to the public, official media outlets confirm that it is largely a traditional BIT that provides for ISA without significant textual innovations.[56]

It should be noted that India and Indonesia are currently negotiating free trade agreements with Australia. It is likely that the Abbott Government in Australia has a strong motivation to

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49 Government of India, 'Draft Indian Model Bilateral Investment Treaty' <https://mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text/> accessed 03 June 2015.

50 On the discussion surrounding this controversial provision see Luke Nottage 'The Limits of Legalisation in Asia-Pacific Investment Treaty Arbitration' in Julien Chaisse and Tsai-Yu Lin (eds), *Liber Americorum, Mitsuo Matsushita: A Critical Assessment of International Economic Law and Governance* (OUP 2016 forthcoming).

51 For the detailed analysis of Indonesia's recent policies on ISA see Antony Crockett, 'Indonesia's Bilateral Investment Treaties: Between Generations?' (2015) ICSID Rev-FILJ 437.

52 The UN Conference on Trade and Development's (UNCTAD) Investment Instruments Online Database: India <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu> accessed 10 March 2015.

53 The UN Conference on Trade and Development's (UNCTAD) Investment Instruments Online Database: Indonesia <http://investmentpolicyhub.unctad.org/IIA/CountryBits/97#iiaInnerMenu> accessed 10 March 2015.

54 Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India (signed 12 November 2014, awaiting ratification). The full text of the agreement is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3337> (India-ASEAN Agreement).

55 ibid art 20.

56 Centre for Research on Globalization, 'India-UAE Agreement, Why Such Desperate Haste' (6 January 2014) <http://www.globalresearch.ca/india-uae-investment-agreement-why-such-desperate-haste/5363937> accessed 10 March 2015; Kavaljit Singh, 'What Can India Learn from its Investment Treaty with the UAE?' (East Asia Forum blog, 04 December 2014) <http://www.eastasiaforum.org/2014/12/04/what-can-india-learn-from-its-investment-treaty-with-the-uae/> accessed 10 March 2015; Madhyam, 'Assessing India's Bilateral Investment Protection Agreement with UAE' (27 October 2014) <http://www.madhyam.org.in/assessing-indias-bilateral-investment-protection-agreement-uae/> accessed 10 March 2015.

negotiate for third-party ISA in these agreements. After all, one of the goals articulated by Australia is to conclude 'an FTA [with India that] could facilitate and encourage investment by reducing barriers, increase transparency and enhance investment protections'.[57] From the perspective of investors, concluding such agreements is essential because India's legal system is chronically under-resourced and is still transitional. Indonesia's legal system is also relatively weak, having suffered from many years of authoritarian rule and allegations of corruption at all levels of the government. In these particular cases, Australia may find itself in a paradoxical position. On the one hand, Australia negotiates ISA selectively and should sympathise with States like India and Indonesia as all claim to pursue similar regulatory policies. On the other hand, business interests in Australia will likely lobby the Australian Government for significant protections, especially considering possible scepticism over the effectiveness of domestic courts in these countries in resolving inbound investor claims.

Although it had intended to repudiate the ICSID Convention,[58] Nicaragua has not taken any specific steps to abandon the Convention; nor has it has terminated its BITs. Rather, in 2011 Nicaragua became a Party to the Central America-Mexico FTA.[59] That Agreement provides for investor-state arbitration and allows a disputing Party to file a claim under the ICSID Convention.[60]

At the time of writing, South Africa is the only state that has sought to comprehensively dismantle its BITs that provide for ISA. It has terminated six of its BITs and has only 17 active Agreements remaining.[61] In 2012, it terminated its Agreement with the Belgium-Luxembourg Economic Union. The following year, it unilaterally denounced its BITs with Spain, Switzerland and the Netherlands. In 2014, South Africa terminated its BITs with Austria and Germany.[62] It has not signed any new investment facilitation agreements. Thus, faithful to its policy against submitting disputes to ISA, South Africa has been steadily terminating its existing investment treaties and has not concluded any subsequent investment agreements that provide for ISA.

Finally, Argentina, Cuba and Pakistan did not identify any specific policy directions regarding ISA and have generally maintained the status quo in their approaches to investment regulation. For example, while Argentina had initially supported Venezuela's initiative and in 2012 proposed a parliamentary bill to terminate its ICSID membership,[63] at the time of writing, no decision has been made with regard to its withdrawal from ICSID. It is reasonable to suggest that the recent ISA decisions rendered in Argentina's favour and its ongoing negotiations with the ICSID and the International Monetary Fund (IMF), mediated by the United States, have

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[57] Status of the negotiations with India is available at <http://dfat.gov.au/trade/agreements/aifta/Pages/australia-india-comprehensive-economic-cooperation-agreement.aspx> accessed 13 March 2015; Status of the negotiations with Indonesia is available at <http://dfat.gov.au/trade/agreements/iacepa/Pages/indonesia-australia-comprehensive-economic-partnership-agreement.aspx> accessed 16 August 2015.

[58] See (n 4), above.

[59] Free Trade Agreement between Mexico and Central America (signed 22 November 2011, entered into force 01 September 2013). Full text of the investment chapter (in Spanish) is available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3082> accessed 14 March 2015 (Central America-Mexico Agreement).

[60] ibid art 11.20.

[61] The UN Conference on Trade and Development's (UNCTAD) Investment Instruments Online Database: South Africa <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu> accessed 10 March 2015.

[62] ibid.

[63] The proposed bill (in Spanish) is available at <http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=1311-D-2012> accessed 10 March 2015.

encouraged Argentina to reconsider its policy.[64] The country has 55 active BITs and has not terminated any of these treaties.[65]

Similarly, although Cuba proclaimed its intention to repudiate the ICSID Convention, at the time of writing, it has not made formal arrangements to withdraw from that Treaty. Cuba has not terminated its investment agreements and has 40 active BITs.[66]

In the case of Pakistan, it is difficult to draw any definitive conclusions regarding the country's ISA policy based on the official statements of the government. According to Pakistan's Board of Investment, the country will draft a new model BIT. All subsequent treaties will be negotiated based on this model template. Its model BIT will require the disputing Parties to rely on domestic courts, while a Board of Investment will organize arbitral tribunals to preside over inbound ISA disputes.[67]

This announcement does not necessarily mean that Pakistan will not provide for ISA in its future agreements. After all, countries *do* deviate from their model agreements. Furthermore, Pakistan's economic conditions will likely encourage it to create a beneficial investing environment to make itself more attractive to foreign investors. Pakistan continues to struggle from political instability, a lack of infrastructure and allegations of corruption. Commerce Secretary Penny Pritzke recently highlighted these alleged difficulties in doing business in Pakistan, citing unfair taxation measures and unclear bureaucratic practices.[68] Pakistan is also poorly ranked by various business and legal indexes such as The Ease of Doing Business and The Corruption Perception Index.[69] Thus, the Pakistan Government is likely to witness strong resistance by other states to its proposed model BIT.

Curiously, until relatively recently, Pakistan appeared to be committed to ISA. For example, in 2012 it concluded BIT negotiations with Turkey.[70] Although excluded from this analysis, that BIT provides for ISA and allows investors to file claims under ICSID or any other forum of their choosing.[71] One could argue that its recent repudiation of ISA has a strong political dimension. Taken aback by the proposed US BIT which it found unacceptable, Pakistan may be attempting to make an unappealing and rigid counter-offer to the US. Thus, it remains to be seen whether Pakistan's repudiation of ISA is targeted specifically at the United States or reflects the country's future regulatory regime. Regardless, at the time of writing, its policy is rather unclear and Pakistan has not taken any action to terminate its existing BITs or repudiate the ICSID Convention.

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[64] Staff Reporter, 'US Sees Progress in Talk between Argentina and IMF, ICSID' *Buenos Aires Herald* (30 April 2014) <http://www.buenosairesherald.com/article/158335/us-sees-progress-in-talks-between-argentina-and-imf-icsid> accessed 10 March 2015.

[65] The UN Conference on Trade and Development's (UNCTAD) Investment Instruments Online Database: Argentina <http://investmentpolicyhub.unctad.org/IIA/CountryBits/8#iiaInnerMenu> accessed 10 March 2015.

[66] The UN Conference on Trade and Development's (UNCTAD) Investment Instruments Online Database: Cuba <http://investmentpolicyhub.unctad.org/IIA/CountryBits/52#iiaInnerMenu> accessed 10 March 2015.

[67] See (n 17), above.

[68] Bilaterals.org, 'Focus on private sector: Washington rules out trade agreement with Islamabad' (11 March 2015) <http://www.bilaterals.org/?focus-on-private-sector-washington> accessed 01 April 2015.

[69] See eg *Ease of Doing Business in Pakistan* <http://www.doingbusiness.org/data/exploreeconomies/pakistan/> accessed 10 March 2015; *Amnesty International Corruption Perception Index 2014 Report <https://www.transparency.org/cpi2014/results> accessed 10 March 2015*.

[70] Agreement between the Government of The Republic of Turkey and the Government of the Islamic Republic of Pakistan Concerning Reciprocal Promotion and Protection of Investments (signed 22 May 2012, awaiting ratification). Full text of the treaty available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2134> accessed 10 March 2015 (Pakistan-Turkey BIT).

[71] ibid art 10.2 (a), (b).The agreement is excluded from this analysis because the Treaty was signed before Pakistan announced its plans to exclude ISA in future treaties. Furthermore, the Treaty was likely abandoned by the signatories. At the time of writing, there is no indication that the treaty will be ratified.

IV. EXPLAINING TRENDS IN CURRENT INVESTMENT TREATY PRACTICES

According to the survey conducted in the previous sections of this paper, it is possible to draw a number of preliminary observations on current investment treaty practices of the identified states.

First, various media outlets often refer to the events between 2007 and 2014 as a major shift in global practice in which a large number of States abandoned ISA.[72] As was indicated above, the evidence does not warrant this view. Although some States have pledged to limit ISA, only three countries, Bolivia, Ecuador and Venezuela, have terminated their obligations under the ICSID Convention. Other countries dissatisfied with investor-state arbitration have retained their membership in the ICSID. Furthermore, multiple countries have concluded new investment agreements, all of which provide for ISA. Thus, while some States continue to resist ISA, a large number of countries have reintroduced investor-state arbitration in their subsequent investment agreements.

These findings appear to be consistent with global trends. At the time of writing, no other States have officially repudiated ISA. In fact, ISA continues to grow in popularity, contrary to the recent backlash against it. For example, a major study conducted in 2012 by the OECD concluded that, out of the 1600 BITs analysed, only 6.8% did not provide for ISA.[73] The latest treaty statistics further illustrate the resilience of ISA. In 2014, 27 new investment agreements were concluded, the majority of which provide for ISA.[74]

Second, the unilateral repudiation of investment agreements appears to be more common among the States that terminated their ICSID membership. The pattern of behaviour exhibited by Bolivia, Ecuador and Venezuela may be explained by examining the political context in which these countries have articulated their dissatisfaction with ISA. Since these States publicly equated ISA with capitalist attacks on their independence, they tried to ensure that they would be insulated from further ISA claims after terminating the ICSID Convention. However, their repudiation of the ICSID Convention alone could not block future ISA claims. A Party could conceivably still lodge a claim under the ICSID Additional Facility Rules if one of the Parties to the dispute were either not a contracting member state or a national of a contracting member state.[75] A Party could also bring an ISA claim if a pre-existing BIT provided for alternative ISA proceedings, such as under the UNCITRAL Rules, or provided for international commercial arbitration.[76] As a result, the States that terminated their ICSID membership needed to withdraw from their investment agreements as well, if they were to limit their exposure to ISA. In reality, Venezuela has been

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[72] See eg The Economist, 'The Arbitration Game' (October 11, 2014) <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration> accessed 10 March 2015; The Sierra Club of Canada, 'Multiple Countries Reject Investor-State (2013 Update)' (25 January 2014) <http://www.sierraclub.ca/en/main-page/multiple-countries-reject-investor-State-2013-update> accessed 10 March 2015.

[73] David Gaukrodger and Kathryn Gordon, 'Investor-State dispute Settlement: a Scoping Paper for the Investment Policy Community' (2012) OECD Working Papers on International Investment 11.

[74] *United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2014* (2014) 117. The report is available at <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=937> accessed 10 March 2015.

[75] The ICISID Additional Facility Rules are available at <https://icsid.worldbank.org/ICSID/StaticFiles/facility/partA-article.htm> accessed 01 June 2015. See especially, art 2(a), art 2 (b).

[76] The United Nations Commission on International Trade Law Arbitration Rules are available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> accessed 10 March 2015 (UNCITRAL Arbitration Rules).

rather recalcitrant in terminating its investment treaties, while Ecuador has retained its investment treaties with key global investing powers.

In summary, although a number of other States have repudiated their BITs, their repudiations have not led to their absolute rejection of ISA. This is notably the case in regard to Australia, India, Pakistan and Indonesia, as is summarized in Table I below:

	Terminated ICSID Membership	Terminated BITs Containing ISA	Will Exclude ISA from Future Agreements	Concluded Agreements Providing for ISA
Australia	NO	NO	CASE BY CASE	YES
Bolivia	YES	YES (6)	YES	NO
Cuba	NO	NO	UNCLEAR	NO
Ecuador	YES	YES (10)	YES	NO
India	N/A	NO	UNCLEAR	YES
Indonesia	NO	YES (1)	UNCLEAR	YES
Nicaragua	NO	NO	UNCLEAR	YES
Pakistan	NO	NO	UNCLEAR	NO
South Africa	NO	YES (6)	YES	NO
Venezuela	YES	YES (1)	YES	NO

Table 1: Approaches to Restricting ISA

The foregoing analysis is important in demonstrating that a number of States that were previously committed to abandoning ISA have reversed their policy direction. What can account for such change?

First, it is significant that all of the countries summarised in Table 1 have been subject to politically and economically charged ISA claims.[77] Thus, politics and economics are material factors in identifying those states that have displayed the most intense disaffection with ISA. Specifically, political considerations have encouraged target States to become active when they face multibillion dollar investor claims over what are popularly perceived to be good state policy initiatives. By repudiating ISA, these States send a signal to their domestic constituencies and the international community, expressing their displeasure with perceived investor threats to domestic State policy. This in turn may tame foreign investors who will attempt to resolve disputes with host States through consultations, thus avoiding public scrutiny and the cost of dispute resolution.

The downside to this strategy lies in the fact that it is inconsistent with the broader interests of States to attract FDI on account of the reactionary nature of that policy. This explains in part

[77]For example, Australia is facing a major claim by Phillip Morris over its plain tobacco packaging initiative. See *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia*, UNCITRAL PCA Case No. 2012-12; Ecuador famously lost a USD 2.3 Billion claim to Occidental Oil Company. *See Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (17 August 2007) 326. Indonesia has similarly faced a number of high profile cases. See *Churchill Mining PLC and Planet Mining Pty Ltd v Indonesia (Procedural Order No 12)* (ICSID Case No ARB/12/14 and 12/40, 27 October 2014). At the time of writing Pakistan is subject to three claims: *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/13/1), *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1), *Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/11/8).

why the new Australian administration elected in 2013 revised the 2011 Policy on ISA. Priding itself on being focused on economic prosperity, the new Government did not face the political pressures of the previous administration which focused more centrally on social policy issues. Thus, it had far less to lose in reverting to the status quo and endorsing ISA, albeit on a case-by-case basis.

India and Indonesia face similar political dilemmas. Following the controversial *White Industries Australia Limited v. The Republic of India*,[78] influential political interests in India voiced strong dissatisfaction with ISA. While the previous administration there had attempted to respond to this by publicly repudiating ISA, the recent Modi Government has not articulated any specific policy direction and focused its attention on designing a new model BIT. Nevertheless, one reason why ISA remains resilient worldwide is due to the fact that the disaffection with investor-state arbitration is often politically motivated.

Second, critics of ISA often equate it with the ICSID and misunderstand the manner in which ISA operates under different trade and investment agreements. The doubtful argument is that repudiating ICSID will shield States from claims by investors. However, while the ICSID is the most prominent institution for resolving investor-state disputes, it is only one forum for the resolution of investor-state disputes. As a result, even though a state repudiating the ICSID Convention will not be subject to ICSID obligations, foreign investors are frequently provided with multiple fora for filing claims against host States. ISA, such as under the ICSID, is also ordinarily distinctive in providing limited avenues for the annulment of an award, which is usually only for procedural errors.[79] Other arbitral proceedings that are subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, allow domestic courts to set aside arbitration awards on wider grounds.[80]

Furthermore, most BITs now include survival clauses, meaning that the treaty will remain in force for a number of years following its termination.[81] Although short-term political considerations may encourage States to terminate their investment treaties as a formal display of action, such a policy is likely to have a minimal impact on treaty practice due to such survival clauses. Thus, one reason why ISA remains popular is due to a very extensive infrastructure created by States with significant pre-existing agreements that provide for ISA. With the limited number of States repudiating ISA in new treaties, it is unlikely that there will be any significant shift in this treaty practice.

Related to the abovementioned argument, ISA remains popular among both developing and developed States. First, developing States come in all sizes and are often able to bargain with developed States for favourable treaty provisions. This is particularly true in the case of China. Unofficial reports of negotiators suggest that China insisted on including ISA in its agreement with Australia.[82] An even stronger position was taken by Korea, resulting in far more extensive ISA-

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[78] *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (30 November 2011).

[79] ICSID Convention (n 1) ch 7 <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap07.htm> accessed 10 March 2015.

[80] New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards (opened for signature 10 June 1958, entered into force 7 June 1959). For a discussion on the enforcement of foreign arbitral judgements see Luke Nottage, Chester Brown, 'Recognition and Enforcement of Foreign Arbitral Awards: Application of the New York Convention by National Courts' in George Bermann (ed), *National Report for Australia* (Springer forthcoming 2015).

[81] See generally Federico M. Lavopa, Lucas E. Barreiros, and M. Victoria Bruno, 'How to Kill a Bit and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties' (2013) J Int Economic Law 869.

[82] Jürgen Kurtz, 'The Australian Trade Policy Statement on Investor-State Dispute Settlement' (2011) 15 ASIL Insights <http://www.asil.org/insights/volume/15/issue/22/australian-trade-policy-statement-investor-state-dispute-settlement> accessed 10 March 2015.

backed commitments.[83] Both of these countries are resource-reliant and employ various powerful state owned entities in their search for investment opportunities abroad. These entities are viewed with suspicion by host States, which explains why China and Korea wish to arbitrate in a neutral third-Party forum, notably through ISA, and why States falter in formulating investment facilitation agreements that exclude ISA.

Notably too, even small economies may formulate powerful treaty negotiating platforms. For example, although ASEAN economies are small, when united they represent a powerful regional force. Increasingly, the resulting regional block, such as ASEAN, is able to conclude agreements that at least some of its member States (such as Singapore) consider more favourable, such as in providing for ISA.[84]

Finally, ISA has retained its popularity because there is still no conclusive evidence that its deficiencies cannot be addressed through treaty modification. Rather than excluding ISA, States are now increasingly relying on treaty modification to create space for public policy. This trend is evident in Australia's recent trade agreements, particularly its FTA with Korea.[85] Significantly, this behaviour replicates global trends, with a number of States qualifying access to ISA in their latest agreements to ensure greater transparency and fairness.[86] This ability to tweak the existing governance of ISA eliminates the need to undertake radical reforms such as by seeking to eliminate ISA from treaties.

The final Section of this paper examines the approaches taken by States that have articulated their dissatisfaction with ISA, in concluding more recent investment facilitation agreements.

V. CURRENT APPROACHES TO REGULATING ISA

This Section addresses new generation investment treaties of the States that had previously repudiated ISA. For the purpose of this study, we examine the Australia-Korea Agreement, the Australia-Japan Agreement,[87] the India-ASEAN Investment Agreement, the Central America-Mexico Agreement and the China-Australia Agreement. We have excluded other investment related agreements because they are not yet public, or because they do not provide for ISA and, thus, fall outside of the scope of this study. Specifically, the India-UAE BIT has not been made public at the time of writing.[88] Also excluded is the Australia-New Zealand Investment Protocol, concluded under the previous Gillard Administration. As was noted above, that Agreement does

[83] For more on Australia-Korea FTA negotiations and Korea's preference for strong ICSID protections see Luke Nottage, 'Investment Treaty Arbitration Policy in Australia, New Zealand – and Korea?' Journal of Arbitration Studies (forthcoming 2015).
[84] For example, during the FTA negotiations with China, ASEAN countries negotiated as a block. This strategy allowed them to extract favourable concessions from China. On ASEAN Agreements see generally Vivienne Bath, Luke Nottage, (2015) 'The ASEAN Comprehensive Investment Agreement and "ASEAN Plus" - The Australia-New Zealand Free Trade Area (AANZFTA) and the PRC-ASEAN Investment Agreement' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook*, (Nomos Verlagsgellschaft 2015) 283; Vivienne Bath, 'ASEAN: The Liberalization of Investment Through Regional Agreements' in Leon Trakman and Nicola Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press 2013) 182.
[85] See Section V, below.
[86] See (n 74), above.
[87] Although Australia-Japan Agreement does not provide for ISA at the time of writing, Parties to this treaty may negotiate an ISA clause in the near future. Thus, this agreement is included in the analysis. See (n 40), above.
[88] See (n 56), above.

not provide for ISA.[89] Similarly, although Nicaragua is a Party to the EU-Central America FTA signed in 2012, the Agreement does not offer investor-state arbitration.[90]

At the outset, we stress that treaty drafters are provided with significant flexibility in customizing ISA provisions to satisfy their national priorities. According to a major study conducted by the UNCTAD, states may employ minimalist drafting practices by requiring the disputing Parties to rely on the arbitral rules of a forum they select. States may also adopt an expansionist approach in which they specify clear rules that supersede the rules mandated by various arbitral tribunals.[91]

In the sub-sections below, we divide provisions regulating ISA into pre-arbitration requirements and rules for arbitration proceedings. Even though these rules often intersect, we adopt them for analytical purposes, while highlighting their intersection in the ensuing analysis.

A. Pre-Arbitration Requirements

In general, state practice is relatively consistent when it comes to pre-arbitration requirements. All the countries identified in this study employ extensive exceptions which allow them to vary from their treaty obligations and exclude their policies from arbitration. These exceptions generally assume the form of sectoral exclusions and security exceptions. Furthermore, all of the agreements encourage investors to rely on alternative dispute resolution (ADR) methods before submitting claims to arbitral tribunals.

First, investment chapters in the Australia-Korea, Australia-Japan and Australia-China Agreements contain Most Favoured Nation (MFN) treatment provisions. These rules state that MFN provisions do not apply to dispute resolution.[92] Similar language is used in the Central America-Mexico Agreement and the China-Australia Agreement.[93]

These MFN exclusions are used to ensure that various qualified ISA provisions will not be challenged by foreign investors on the ground that more beneficial ISA rules are provided for in other agreements. For example, specific to Australia's FTA with Japan, the exclusion of dispute resolution from MFN treatment seeks to prevent investors from arguing that ISA provisions should apply to them because other investment Agreements signed by Australia and other states offer ISA. Thus, the exclusion of dispute resolution from MFN enables Australia to limit the scope of ISA, impeding foreign investors from citing beneficial agreements with third-Party countries in order to sidestep Australia's attempts to limit the ambit of ISA.[94] As such, these exceptions to MFN treatment operate as important treaty modifications to effectively circumscribe the scope of ISA.

Despite the similar usage of MFN in relation to ISA, some minor variations must be noted. Specifically, the India-ASEAN Agreement does not contain a MFN clause on dispute resolution. It only notes that 'a Party shall not be obliged to extend to the investors of another Party the benefits or privileges arising from a customs union, free trade agreement or a similar bilateral, regional or international arrangement […] of which Party is or may become a member … '.[95] A strict

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[89] Australia-New Zealand Agreement (n 34).
[90] EU-Central America Association Agreement (signed 29 June 2012, awaiting domestic ratification). The official website of the Agreement is <http://trade.ec.europa.eu/doclib/press/index.cfm?id=689> accessed 10 March 2015.
[91] UNCTAD, *Investor-State Dispute Settlement, UNCTAD Series on International Investment Agreements II* (UNCTAD 2014) 170.
[92] Australia-Korea Agreement (n 41) art 11.4 para 2, footnote 35; Australia-Japan Agreement (n 40) art 14.4.
[93] Central America-Mexico Agreement (n 59) art 11.5 (B) (in Spanish); China-Australia Agreement (n 39) art 9.4 para 2.
[94] See eg *Emilio Augustin Maffezini v. The Kingdom of Spain*, (ICSID Case No. ARB/97/7) where an investor cited MFN provision in another treaty in order to avoid the mandatory period for consultations and negotiations before gaining a right to initiate arbitral proceedings. The panel agreed with the investor because the MFN in the BIT did not exclude arbitral proceedings.
[95] India-ASEAN Agreement (n 54) art 3 para 3.

interpretation of this provision suggests that a state Party may, in fact, extend such a privilege to the investors of another Party in relation to dispute resolution, if it wishes to do so. While this provision adds a layer of unpredictability to the resolution of investor-state disputes under the Agreement, it is unlikely to be used due to the potential political fallout arising from doing so.

Second, with the exception of China-Australia FTA,[96] all of the Treaties provide extensive rules for the minimal standard of treatment that must be accorded to foreign investors.[97] The Agreements provide that state Parties must ensure that this minimal standard is in accordance with the customary international law minimum standard of treatment accorded to aliens. However, all the Agreements clarify this standard by providing definitions of such treatment. The treaties note further that such protection accorded to investors shall not require treatment in addition to or beyond that which is required by the defined standard, and shall not create additional substantive rights.[98] These clarifications are commonly used to discourage arbitral tribunals from creating additional rights to foreign investors and are frequently found in other investment agreements.

Third, all the Agreements contain a list of non-conforming measures that may be maintained in perpetuity, so long as they are outlined in the annexes to each Agreement. Specific sectors of the economy and a number of state-owned entities are included in these exceptions.[99] In the case of the Australia-Japan Agreement, it is explicitly noted that a state may even impose new and more restrictive exceptions.[100]

Similar language is found in the Agreement between India and ASEAN. In order to retain regulatory control over the economy, that Agreement includes a list of reservations submitted by all sides. Once again, these reservations may continue in perpetuity, with the possibility of adding new exceptions to the Annexes. Furthermore, the Agreement contains standard provision on general exceptions in nearly identical language as is found in the Australia-Korea Agreement.[101]

Comparatively, the China-Australia agreement endeavours to limit the list of non-conforming measures. It provides that Parties may amend or modify any existing non-conforming measure, provided this does not increase the non-conformity as it existed before the amendment.[102] However, in practice this rule is difficult to enforce because the degree of 'non-conformity' lies in the eyes of the beholder.

In addition to these annex-specific measures, the Agreements allow governments to adopt or enforce measures for the protection of public morals and public order, necessary to protect human, animal or plant life, health or for the purpose of the conservation of living or non-living exhaustible natural resources.[103] The Agreement between Australia and China further notes that

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[96] Cf Australia-China BIT signed in 1988. The treaty is still in effect and provides rules on the minimum standards of treatment. See, Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments (signed 11 July 1988, entered into force 11 July 1988), art III.

[97] According to Article 9.9 of the China-Australia Agreement, the two Parties are urged to begin negotiations on further items in the investment chapter. Among the items listed on the agenda, the Parties are encouraged to negotiate for the provisions on the minimum standard of treatment. However, the agenda is aspirational in nature and does not oblige the Parties to successfully conclude these negotiations. See China-Australia Agreement (n 39) art 9.9 para 3.

[98] Australia-Korea Agreement (n 41) art 11.5 para 2; Australia-Japan Agreement (n 40) art 14.5 note 1; Central America-Mexico Agreement (n 59) art 11.4 paras 1-4 (in Spanish); India-ASEAN Agreement (n 54) art 7.1 (c).

[99] See eg Australia-Japan Agreement (n 40) art 14.10 paras 1 (a), (b), (c) and (d), Annex 6 (Non-Conforming Measures Relating to Paragraph 1 of Articles 9.7 and 14.10) and Annex 7 (Non-Conforming Measures Relating to Paragraph 2 of Articles 9.7 and 14.10); Central America-Mexico Agreement (n 59) art 11.9 paras 1-5 (in Spanish); China-Australia Agreement (n 39) art 9.5.

[100] Australia-Japan Agreement (n 40) art 14.10 para 4.

[101] See eg India-ASEAN Agreement (n 54) art 4 paras 1-6, art 21.

[102] China-Australia Agreement (n 39) art 9.5 paras 1(c) and 2(c).

[103] Australia-Japan Agreement (n 40) art 14.15; Australia-Korea Agreement (n 41) art 11.9 para 5 (a), (b) and (c); India-ASEAN Agreement (n 54) art 21; China-Australia Agreement (n 39) art. 9.8 paras 1 (a), (b), (c) and (d). Curiously, unlike the other

non-discriminatory measures related to legitimate public welfare objectives of public health, safety, the environment, public morals or public order are not actionable under ISA.[104] Annex 2 of the India-ASEAN Agreement also provides that, if an alleged measure falls under the category of security exceptions, the issue will have no standing before an arbitral tribunal.[105] Furthermore, in all the Agreements, additional exceptions are possible in cases in which a Party must secure compliance with laws or regulations or to protect national treasures of artistic, historic or archaeological value.

These GATT Article XX-inspired measures are frequently found in investment agreements. Improving upon this well-established drafting practice, the Australia-Japan Agreement clarifies when these measures are applicable and what they may include.[106] However, the implementation of these measures could well become problematic.[107] In particular, each state Party will need to ensure that such measures are not applied in a manner that would produce arbitrary or unjustifiable discrimination between covered investments or investors of the other state Party and other investments or investors, where like conditions prevail or constitute a disguised restriction on foreign investment.

In order to further regulate access to ISA, all of the Agreements require the disputing Parties to meet a number of procedural requirements before filing an arbitral claim. Such pre-arbitration requirements are used to encourage negotiated dispute resolution and to discourage frivolous claims.

In general, the contracting States to these Agreements rely on traditional approaches to screen disputes before arbitration. For example, the Australia-Korea Agreement attempts to pre-empt an ISA dispute by binding the disputants to a cooling-off period of six months.[108] Furthermore, investors are required to provide the host state with a written notice containing the intention to submit a claim to an arbitral tribunal.[109] This notice must be submitted at least 90 days before arbitration.[110]

Similarly, the India-ASEAN Agreement requires both disputing Parties to engage in negotiations. In fact, the Parties to a dispute are unable to proceed to arbitration without first submitting a notice requesting consultations.[111] This is somewhat different from Australia's FTA with Korea which only suggests consultations during the cooling-off period, but does not oblige the disputing Parties to engage in any particular ADR method. Having exhausted the cooling-off period of 180 days, the Parties to a dispute under the India-ASEAN Agreement have the option of proceeding to arbitration. A Party intending to initiate arbitration must provide a written notice 90 days before filing for arbitration.[112]

The Agreement between Central America and Mexico does not create a mandatory obligation to negotiate before resorting to arbitration. Rather, it urges the disputants to rely on good faith negotiations to resolve their differences.[113] However, it does require an investor to

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Agreements, the Central America-Mexico Treaty employs a more general language on exceptions and mentions specifically only health, safety and the environment. See, Central America-Mexico Agreement (n 59) art 11.16 paras 1-2 (in Spanish).

[104] China-Australia Agreement (n 39) art. 9.11 para 4.

[105] India-ASEAN Agreement (n 54) Annex 2.

[106] Australia-Japan Agreement (n 40) art 14.15 paras (a), (b), (c) and (d).

[107] For the relationship between WTO law and international investment law see Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press 2015 forthcoming).

[108] Australia-Korea Agreement (n 41) art 11.16 para 3.

[109] ibid art 11.16 para 2.

[110] ibid.

[111] India-ASEAN Agreement (n 54) art 20 para 7.

[112] ibid art 20 para 8 (b).

[113] Central America-Mexico Agreement (n 59) art 11.19.

submit a notice of an intention to arbitrate at least 90 days prior to initiating arbitration.[114] Identical to the other Agreements, the Treaty also provides a mandatory cooling-off period of six months before an investor may file for arbitration.[115]

Finally, the Agreement between China and Australia also encourages the disputants to resolve their differences through negotiations. According to the Agreement, two months after the occurrence of the measure in question, a Party may file a written request for consultations.[116] If these consultations fail to produce a settlement within 120 days, the claimant may file for arbitration.[117] Although the Agreement does not require the Parties to actually negotiate, a request for consultations is a prerequisite to an investor bringing an arbitration claim.[118]

In summary, treaty drafters have been remarkably consistent in regulating access to arbitration by relying on various sectoral and safety related exceptions. Furthermore, nearly all of the Agreements provide that MFN principles do not apply to arbitration; and all the Treaties rely on cooling-off periods to encourage conciliation. It is clear that the States dissatisfied with ISA emphasize ADR and attempt to pre-empt potential disputes by forcing disputants to engage in time consuming negotiations. Though negotiations are rarely mandatory, the required cool-off period is likely to encourage Parties to resolve their differences before engaging in formal arbitral proceedings.

Furthermore, this study notes the increased number and variety of provisions allowing the state Parties to vary from their treaty obligations. These provisions are broad and fall under various general categories such as “safety” and “security”. Few rules are provided on the manner in which these exceptions may be triggered and administered. Thus, the latest Treaties examined in this study resemble the first generation of BITs in which investors had few rights accorded to them. While these first generation Treaties construed investment in very restrictive language, the recent Treaties limit investor rights by emphasizing various ISA exclusions in their attempt to rebalance the rights of foreign investors and host states.

B. Rules for Arbitration Proceedings

With regard to ISA proceedings, the States selected for this study have employed a variety of treaty innovations to address common criticisms associated with investor-state arbitration. However, they differ significantly in their regulatory approaches.

Broadly, the Australia-Korea, Australia-China and Central America-Mexico Agreements provide extensive rules for arbitral proceedings. Australia-China Agreement is particularly notable in this regard as it provides a detailed code of conduct regulating activities of arbitrators[119] and even establishes a roster of standing arbitrators.[120] Comparatively, the India-ASEAN FTA leaves formalities related to the conduct of arbitration to the respective arbitral forums.

Although some agreements are more detailed than others, all of the Treaties analysed in this study reflect significant differences in the way states choose to regulate ISA. This is especially so when one considers the case of Australia. Although Australia concluded investment agreements

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[114] ibid art 11.20 para 2.
[115] ibid art 11.20 para 3.
[116] China-Australia Agreement (n 39) art 9.11.
[117] ibid art 9.12 para 2.
[118] ibid art 9.14 para 2(b).
[119] ibid Annex 9-A.
[120] Ibid art 9.15 para 4 (discussed further below).

with China and Korea, the two treaties feature significant differences in their approaches to regulating arbitral proceedings. This observation suggests that countries endeavour to regulate ISA according to national priorities. Thus, what appears to be a significant shortcoming of ISA to one state, may in fact not have any material influence upon the interests of another country negotiating an investment facilitation agreement. As will be discussed in the final Section of the paper, this will create additional challenges for future ISA reforms.

As the starting point of this discussion, in terms of their similarities, all of the Agreements provide a fork-in-the-road provision by excluding all other forums once a particular forum has been selected.[121] This rule is significant because it discourages forum shopping and avoids situations in which contradictory decisions are issued by different forums. Although scholars debate the ultimate utility of this provision,[122] it has become a standard treaty drafting practice that is commonly featured in investment agreements.

Second, it is evident that States are conscious of possible arbitral activism among arbitral tribunals. Thus, the Agreements analysed have adopted a number of safeguards to ensure that governments will retain control over sensitive economic sectors.[123] For example, Australia's Agreement with Korea strengthens the exceptions outlined in the annexes of the FTA by providing that, if a Party's defence is based on an interpretation of provisions in the FTA annexes, the arbitral panel must suspend its proceedings on a request of the respondent and refer both disputing Parties to the Joint Committee in charge of the FTA for the final determination on the defence.[124] The decision of the Joint Committee must be issued within 60 days and is final and binding on the arbitral panel.[125] The identical language is used in the Australia-China and the Central America-Mexico Agreements.[126]

The involvement of joint commissions in the interpretation of agreements is relatively common. However, such joint interpretations are reserved for special situations, as is the case in the Agreements cited above. These Agreements involve joint commissions only in matters related to security exceptions and the annexes. However, in the case of India-ASEAN Agreement, the Joint Committee is unconstrained in its ability to issue authoritative interpretations. Specifically, Article 20 paragraph 19 of the Agreement provides that an arbitral tribunal or a state may request a joint interpretation of a provision that is the subject of a claim. The interpretation is to be issued within 60 days and becomes binding on the arbitral tribunal.[127] This approach is particularly broad insofar as it allows States to challenge any provision of the Agreement. It is unclear how effective this provision will be in practice due to its broad scope.

Finally, nearly all of the Agreements analysed in this study rely on identical procedures for the selection of arbitrators. Typically, each Party selects one arbitrator, with the third arbitrator being jointly appointed by the disputing Parties.[128] This selection formula is frequently found in various trade and investment related agreements.

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[121] India-ASEAN Agreement (n 54) art 20 para 7; Central America-Mexico Agreement (n 59) art 11.20 para 4 (in Spanish); Australia-Korea Agreement (n 41) art 11.18 para 2(b); China-Australia Agreement (n 39) art 9.14 para 2.

[122] For discussion on challenges faced in restricting disputes to a single forum, see generally Jamie Shookman, 'Too Many Forums for Investment Disputes? ICSID Illustrations of Parallel Proceedings and Analysis' (2010) 27 Journal of International Arbitration 361.

[123] For a discussion on the role of state Parties in treaty interpretation see generally Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 American Journal of International Law 179.

[124] Australia-Korea Agreement (n 41) art 11.23 paras 1 and 2.

[125] ibid art 11.23 para 2.

[126] China-Australia Agreement (n 39) art 9.19 paras 1 and 2; Central America-Mexico Agreement (n 59) art 11.27 (in Spanish).

[127] India-ASEAN Agreement (n 54) art 20 para 19.

[128] See eg Australia-Korea Agreement (n 41) art 11.19; India-ASEAN Agreement (n 54) art 20.10.

The China-Australia Agreement is somewhat unique in this regard as it attempts to establish a roster of standing arbitrators. The system proposed in this Agreement is distinct from the NAFTA because it does not oblige the disputants to select arbitrators from the pre-arranged list. Rather, arbitrators are drawn from the list when the Parties are unable to select their own arbitrators or fail to appoint the chair.[129] Thus, the list serves as a back-up mechanism and is not the primary method for the selection of arbitrators.

In addition to promoting a system that encourages greater professionalism and expertize of arbitrators, scholars advocating a reform of ISA often emphasize the need for open and transparent arbitral proceedings. The States analysed in this study differ significantly in their approaches to transparency.

For example, according to the Australia-Korea Agreement, all hearings are open to the public.[130] Furthermore, the disputing Parties are obliged to release all relevant documents (the notice of intent, the notice of arbitration, pleadings, memorials and briefs submitted, minutes or transcripts of the hearings of the tribunal, orders, awards and its decisions) to the general public.[131] This transparency rule is subject to the standard protection that is accorded to confidential information.[132]

The approaches to transparency in the Australia-Korea Agreement are quite similar to the rules found in the Central America-Mexico Agreement. According to the Treaty, Parties are required to publish all relevant information, provided that they protect confidential information.[133] Finally, according to the Agreement, all arbitral proceedings are open to the public.[134]

Australia's subsequent agreement with China largely abandons the extensive commitments to transparency present in its FTA with Korea. In general, the Agreement gives the State Parties a right to veto provisions relating to transparency. For example, according to the Agreement, arbitral proceedings will be open to the public 'with the agreement of the respondent'. [135] Thus, without the agreement of the State involved in the dispute, proceedings will remain closed.

Furthermore, with regard to the publication of documents, the China-Australia Agreement is similarly restrictive. Article 9.17 paragraph 2, provides that the Respondent is required to make available to the general public the request for consultations, the notice of arbitration and orders, awards, and decisions of the tribunal.[136] However, submissions to the arbitral tribunal do not have to be released to the public.[137] Thus, according to the Agreement, investors are not granted a right to publicize any information relevant to a dispute against a host State. This approach has a number of shortcomings. Although States face pressure to publish the information related to arbitral proceedings, they have limited incentives to disclose such information due to various political considerations, especially if their claims are weak. Thus, by giving the State a right to veto publication of key documents, treaty drafters may weaken transparency related protections of an agreement.

While the Agreement between China and Australia contemplates the possibility of open proceedings and obliges countries to publish some case-related information, the Agreement between India and ASEAN features limited commitments to transparency. The Agreement notes

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[129] China-Australia Agreement (n 39) art 9.15 paras 3 and 4.
[130] Australia-Korea Agreement (n 41) art 11.21 para 2.
[131] ibid article 11.21 para 1 (a), (b), (c), (d) and (e).
[132] ibid art 11.21 para 4 (a), (b), (c) and (d).
[133] Central America-Mexico Agreement (n 59) art 11.25 paras 1-6 (in Spanish).
[134] ibid art 11.25 para 2.
[135] China-Australia Agreement (n 39) art 9.17 para 3.
[136] ibid art 9.17 paras 2 (a) (b) and (c).
[137] ibid.

that 'the disputing Party may make public the final awards and decisions of the tribunal'.[138] 'Disputing Party' is defined as the 'the Party against which a claim is made'.[139] Thus, according to the India-ASEAN Agreement, only States are allowed to publish final awards. However, they are not obligated to do so. More tellingly, the Agreement is silent on the issue of open proceedings.

Amicus curiae submissions are closely tied to the debate over the transparency in arbitral proceedings. Supporters of third-Party submissions argue that, since investment disputes impact upon important social issues, interest groups affected by the measure in question deserve a voice in arbitral proceedings.

This study concludes that States dissatisfied with ISA, have consistently restricted the right to third-party submissions. For example, although the Australia-Korea Agreement is quite progressive in its commitments to transparency, the Treaty is somewhat vague in its approaches to *amicus curiae* submissions. According to Article 11.20 paragraph 5, 'after consulting the disputing Parties, the tribunal may allow a Party or entity that is not a disputing Party to file a written *amicus curiae* submission with the tribunal'.[140] It is not entirely clear if a tribunal may allow a third-party submission on its own volition without the consent of the disputing Parties due to the confusion surrounding the 'after consulting the disputing Parties' phrase.

Other agreements are similarly restrictive in their treatment of third-party submissions. The Agreement between China and Australia is more precise in the sense that it clearly provides that the right to third-party submissions is conditional upon 'written agreement of the disputing Parties'.[141] By far, most uncertain is the Agreement between India and ASEAN since it is silent on this issue.

In summary, although third-party submissions are often suggested as a viable reform proposal to address the deficiencies of ISA, the latest Agreements analysed in this study suggest that *amicus curiae* submissions are generally highly regulated by signatory states. The Agreement between Central America and Mexico is the sole exception to this trend. The Agreement provides that a court 'is entitled to accept amicus curiae submissions from a person or entity other than a disputing Party'.[142] Thus, with the exception of the Central America-Mexico FTA, third-Party submissions are contingent on the explicit agreement of the disputing Parties.

The findings of this Section strongly suggest that States differ significantly in their approaches to regulating arbitral proceedings. A number of States outlined in this study view transparency as a major weakness of ISA. Thus, they have made a significant effort to enhance transparency and accountability in arbitral proceedings. Other States embrace the closed nature of arbitration and have created sectoral carve-outs to ensure that sensitive economic sectors are protected from arbitrators. This article acknowledges that these two regulatory approaches are crude approximations of the complex behaviour exhibited by countries. As was highlighted throughout this Section, no two agreements display the same regulatory approach. While States such as Australia are consistent in their preference for transparent proceedings, their agreements differ significantly accordingly to the needs of their treaty partners.

[138] India-ASEAN Agreement (n 54) art 20 para 17.
[139] ibid art 20 para 4.
[140] Australia-Korea Agreement (n 41) art 11.20 para 5.
[141] China-Australia Agreement (n 39) art 916 para 3.
[142] Central America-Mexico Agreement (n 59) art 11.24 para 3 (in Spanish).

VI. CONCLUSION

This article argues that, instead of rejecting ISA, the States examined in this study are increasingly qualifying the way ISA is applied in their Treaties. Thus, although these new generation BITs are likely to become popular, they are quite similar to the first generation of BITs. However, unlike the first generation BITs, the new agreements restrict investors' access to ISA by creating multiple carve-outs and various security exceptions. These exceptions fall under various headings and are generally broad enough to accommodate any non-conforming measure. All contracting Parties further guard these exceptions by shielding them from the arbitral process.

This study has also demonstrated that, although States employ common methods in qualifying investor access to ISA, they differ significantly in their approaches to regulating arbitral proceedings. While some States provide detailed rules for arbitration, other treaties rely on the rules of various arbitral forums. These findings question a number of reform proposals suggested by the critics of ISA.

First, ISA remains the preferred option among policy makers and it is unlikely that ISA will be replaced by a different form of dispute resolution. Thus, whatever the future of ISA may be, this chapter suggests that ISA will not be radically different from the present regulatory order.

Second, some scholars have suggested the establishment of a centralized body for the resolution of all investment disputes, akin to the ill-fated Multilateral Investment Treaty.[143] As this study demonstrates, policy makers have divergent opinions on the flaws of ISA. Some emphasize ISA's inherently closed nature as its main flaw, while others consider it to be its virtue. This different approach to regulating ISA stands in stark contrast to uniformity between various pre-arbitration safeguards employed by States. Thus, although States employ common practices in qualifying ISA, they have different visions on how arbitral proceedings should be administered.

Third, appellate mechanisms are often cited as a viable reform initiative.[144] However, this mechanism appears to be highly unpopular with policy makers. Specifically, nothing stops state Parties from adopting a system of appeals in their investment agreements. Australia's interest in such a mechanism is hinted at in its FTAs with Korea and China.[145] According to the Agreement with Korea

> [if] a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for the purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 11.26 in arbitrations commenced after the multilateral agreement enters into force between the Parties.[146]

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[143] For more recent works on the subject see Stephan Amarasinha, Juliane Kokott, 'Multilateral Investment Rules Revisited' in Peter Muchlinski, Federico Ortino, Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008); Andreas Åslund, 'The World Needs a Multilateral Investment Agreement' (2013) Peterson Institute for International Economics, Policy Brief No PB13-01); Rainer Geiger, 'Multilateral Approaches to Investment: The Way Forward' in Jose E. Alvarez and others (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford University Press 2011).

[144] Katia Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement: an Overview' (2006) OECD Working Papers on International Investment 1.

[145] China-Australia Agreement (n 39) art 9.23.

[146] Australia-Korea Agreement (n 41) art 11.20 para 13.

However, none of the States analysed in this study have attempted to introduce such appellate mechanisms in their treaties. Thus, while potentially beneficial, an appellate mechanism does not appear to be appealing even to the countries that have expressed strong dissatisfaction with ISA. Rather, a system of appeals remains a part of inspirational reform agenda and not a concrete policy direction.

In conclusion, rather than seeing a decline of ISA, the States that proposed abandoning ISA in the recent past are more likely to continue qualifying access to investor-state arbitration in their future agreements. However, contemporary state practice suggests that there is still little consensus among policy makers on how to best regulate arbitral proceedings concerning investors and host States.