A Dispute about Disputes: New Zealand and the Future of ISDS

Angus Hancock

A dissertation submitted in partial fulfilment of the requirements of the degree of Bachelor of Laws (Honours) at the University of Otago, Dunedin, New Zealand – Te Whare Wananga o Otago.

October 2018

Acknowledgements

My sincere thanks to Dr Tracey Epps for giving her up summer weekends to teach International Trade Regulation and International Investment Law, where I first learned about this area. Thanks also for supervising this dissertation from Wellington (and most of the Pacific Islands).

Thanks also to Shelley Griffiths for standing in as supervisor at my seminar, and for finishing your LAWS101 tutorial that I was in after 15 minutes because no one had prepared. That was when I realised I would have to put some work in to get a law degree!

Thanks to those in the investment arbitration field who have given their time to discuss this dissertation with me.

To my parents, Shelley and Hamish Hancock, thank you for all your love and support throughout my life. To my brothers and Victoria, thank you for helping me take my mind off the many abbreviations that have been running through my head while writing this.

Thanks to Ganesh and Tim for severely time-pressured but extremely useful proofreading and comments.

Finally, thanks to all my friends and flatmates in Dunedin for making the Otago experience such a good one.

List of Abbreviations

BIT: Bilateral investment treaty

CETA: Comprehensive Economic and Trade Agreement

CPTPP: Comprehensive and Progressive Trans-Pacific Partnership*

FDI: Foreign direct investment

FTA: Free trade agreement

ICSID: International Centre for Settlement of Investment Disputes

IIA: International investment agreement

ISDS: Investor-State Dispute Settlement**

OECD: Organisation for Economic Co-operation and Development

UNCITRAL: United Nations Commission on International Trade Law

UNCTAD: United Nations Committee on Trade and Development

WTO: World Trade Organisation

*CPTPP is a separate treaty from the Trans-Pacific Partnership (TPP). CPTPP incorporated *mutatis mutandis* all but a few provisions of the TPP (see CPTPP Article 1.1). For simplicity, I will refer to CPTPP throughout, rather than TPP, despite the fact the substantive Articles do not actually appear in CPTPP.
**ISDS is broader than investor-state arbitration, which is the specific focus of this dissertation. The terms will be used interchangeably because the difference is not material in this context.

Table of Contents

Chapter 1: Introduction

1.1 Introduction and Outline of Dissertation

International investment law governs the relationships between investors of one state and the government of another state that they invest in. This law comes from a mixture of bilateral investment treaties (BITs), regional/multilateral free trade agreements with investment chapters, and unique investment contracts between an individual investor and a state. International investment agreements (IIAs) will be used as a label for all of these various forms of investment agreements. Bilateral investment treaties are between two states and are the most common form of IIA.[1] Typically, these international investment agreements impose substantive obligations on host states to treat investors in a certain manner.[2] Many investment agreements also allow direct arbitration between investors and host states when an investor considers the host state has breached an obligation that has caused loss to the investor.[3] This is known as investor-state dispute settlement (ISDS). The reason for having these obligations and this particular remedy was because they were presumed to increase investment which would benefit both the investor and the host state.[4] Several thousand of these international investment agreements now exist.[5]

ISDS is facing significant criticism.[6] These criticisms include inconsistency and unpredictability, insufficient transparency, and biased arbitrators. The overarching argument is that ISDS is an illegitimate mechanism for resolving disputes involving nation states. For that reason, it is necessary to consider the status quo, what exactly is wrong with it, and how it might be changed. The recommendation of how it might be changed will be based on New Zealand's interests and priorities in relation to the global economy. The purpose of addressing

---

[1] Andrew Newcombe and Lluis Paradell *Law and Practice of Investment Treaties: Standards of Treatment* (1st ed, Wolters Kluwer, The Netherlands, 2009) at 57.
[2] A 'host state' refers to the state where the investment is made.
[3] Newcombe and Paradell, above n 1, at 70.
[4] Newcombe and Paradell, above n 1, at 41.
[5] There are 2668 BITs and treaties with investment provisions in existence, though the total number of IIAs would be higher because this count does not include investment contracts: "International Investment Agreements Navigator" UNCTAD, <http://investmentpolicyhub.unctad.org/IIA>.
[6] See generally: Susan D. Franck "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2005) 73 Fordham L Rev 1521; S W Schill *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward* (E15 Initiative, Geneva: International Centre for Trade and Sustainable Development/World Economic Forum, 2015); Lisa Diependaele, Ferdi De Ville & Sigrid Sterckx (2017) "Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System, New Political Economy" (2017) 1 New Political Economy 1; Sergio Puig and Gregory Shaffer "Imperfect Alternatives: Institutional Choice and the Reform of Investment Law" (2018) 112 American Journal of International Law 361; Kate M. Supnik "Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law" (2009) 59(2) Duke Law Journal 343 at 354-355.

this question is to offer a recommendation for New Zealand on the way forward in what is an extremely controversial area of international economic law.

I will argue that New Zealand should support a transparent, rules-based system with widespread international participation. These features are consistent with New Zealand's interests and position in the global economy. The European Union's investment court system most closely matches these requirements, and therefore should be supported by New Zealand.

1.2 The Need for Reform and the Context for this Dissertation

ISDS is facing a crisis of legitimacy.[7] Obligations and disputes aside, some research has suggested BITs do not even increase flows of FDI,[8] as the orthodox theory has presumed. This crisis is not simply theoretical; many countries are reconsidering their negotiating position in relation to ISDS. The Trans-Atlantic Trade and Investment Partnership (TTIP) negotiations between USA and EU faced roadblocks in the form of opposition to ISDS.[9] Brazil has always refused it,[10] and South Africa and India have threatened to withdraw from treaties that contain ISDS clauses.[11] Vidigal and Stevens have expanded on this, and touched on the wider theme; the challenge to the global economic and political order: [12]

> Between 2003 and 2010, resistance to investment arbitration was limited to states perceived as challengers of the post-Cold War global economic order. States such as Bolivia, Venezuela, Russia, and Ecuador not only voiced concerns with the system but followed up by withdrawing from treaties permitting ISDS. Subsequently, these states were joined by a number of developed countries… In 2014, Germany announced that it did not support ISDS in the proposed TTIP. In early 2015, Italy withdrew from the Energy Charter Treaty, while France and Germany jointly proposed to modify the ISDS provisions of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) originally concluded in 2014.

---

[7] See footnote 6; and Susan D. Franck "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2005) 73 Fordham L Rev 1521.
[8] On this, see: Axel Berger, Matthias Busse, Peter Nunnenkamp, Martin Roy "Do trade and investment agreements lead to more FDI? Accounting for key provisions inside the black box" (2013) 10(2) International Economics and Economic Policy 247; Jason Yackee "Do BITs 'Work'? Empirical Evidence from France" (2016) 7 JIDS 55; *Bilateral and Regional Trade Agreements*, (Australian Productivity Commission Research Report Australia, 2010) at 271, Finding 14.1.
[9] On this, see Cécile Barbière "Parliament's opposition to TTIP arbitration on the rise" (online ed, London, 21 April 2015); Elizabeth Warren "The Trans-Pacific Partnership Clause Everyone Should Oppose" Washington Post, (online ed, Washington DC, 25 February 2015).
[10] Brazil has refused ISDS n investment treaties but has engaged in arbitration pursuant to individual investment contracts.
[11] Emily Osmanski "Investor-State Dispute Settlement: Is There a Better Alternative?" (2018) 43 Brook J Int'l L 639 at 659.
[12] Geraldo Vidigal and Beatriz Stevens "Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?" (2018) 19(3) The Journal of World Investment and Trade 475 at 478.

Most significantly for present purposes is the fact that under the new Government,[13] New Zealand has opposed the inclusion of ISDS in future treaties.[14] It was considered too late in the day to attempt to remove it from CPTPP (or TPP-11 as it was known then), but it is being opposed in the NZ-EU FTA negotiations.[15] The Hon David Parker, Minister for Trade and Export Growth, has previously expressed some interest in the multilateral investment court system.[16] It is not yet clear whether the opposition to ISDS is absolute, or whether New Zealand might be open to joining the ICS. The EU has signalled its intention to make the ICS a multilateral body and therefore advocating for it in FTA negotiations would appear the likely path ahead for that.[17] It is therefore timely to analyse this system and recommend a suitable approach for the future.

1.3 Criteria for Assessing Reform

In assessing which method of reform most closely resembles a transparent, rules-based system with widespread international participation, three 'objectives' will be used. These objectives are greater consistency and predictability; more systemic integrity; and clearer scope for states' regulatory freedom. These are identified through explaining the challenges to the status quo and the responses that are required to 'answer' these concerns.

[13] Referring to the coalition agreement between the New Zealand Labour Party and New Zealand First, and the confidence-and-supply agreement with the Green Party, following the 2017 General Election.
[14] Sam Sachdeva "NZ ambassadors pushing for ISDS change" *Newsroom* (online ed, 3 November 2017)
[15] *New Zealand and EU approaches to investment chapters* (Ministry of Foreign Affairs and Trade, EU-NZ Free Trade Agreement).
[16] Sam Sachdeva "NZ ambassadors pushing for ISDS change" *Newsroom* (online ed, 3 November 2017).
[17] Laura Puccio and Roderick Harte, *From Arbitration to the Investment Court System (ICS): The Evolution of CETA Rules* (European Parliamentary Research Service, June 2017) at 28. CETA Article 8.29 requires the treaty parties to undertake efforts to make the investment court a multilateral one.

Chapter 2: The Status Quo, and New Zealand's Role in it

2.1 Introduction to International Investment Law

2.1.1 Definition of investment

The definition of what is an investment for the purposes of an IIA can be controversial. The term is defined in IIAs order to explain what type of economic activity by foreign investors is protected by the agreement.[18] An investment is no longer just a factory or a mine. The definition of investment can include intangible assets such as intellectual property, and complex financial derivatives or other financial products. However, a common definition (often followed by a list of specific examples), is: [19]

> every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

Some agreements also stipulate that an investment must have some economic developmental aspect to it in order to be protected.[20] This is intended to prevent situations where all the profits and benefits of the investment leave the country and the host state gains nothing.

---

[18] Protected meaning the state owes the investor the obligations outlined in the treaty with respect to that investment. Not everything that might be thought of as an investment in an ordinary sense is necessarily covered by an IIA.

[19] Comprehensive and Progressive Trans-Pacific Partnership (signed 8 March 2018, not yet in force) (CPTPP) Article 9.1; USA Model BIT 2012 Article 1, and an almost identical definition appears in Comprehensive Economic and Trade Agreement, Canada-EU signed 30 October 2016, not yet in force) (CETA) (Article 8.1. This definition is in fact narrower than what has appeared in past treaties. For example, in the Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (signed on 14 November 1991, entered into force 20 October 1994) (US-Argentina BIT) Article 1, and the Free Trade Agreement Between The Government of New Zealand And The Government of the People's Republic of China 2590 UNTS 101 (signed on 7 April 2008, entered into force 1 October 2008) (NZ-China FTA) Article 135, where these specific characteristics (commitment of capital, expectation of gain or profit, or assumption of risk) are not included.

[20] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed on 3 December 2016, not yet in force). These obligations are also included in Brazilian CIFAs: see Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation (signed 11 April 2018, not yet in force) (Brazil-Ethiopia CIFA) Article 14. For a comprehensive example of what this might look like, see Howard Mann, Konrad von Moltke, Aaron Cosbey and Luke Eric Peterson, *IISD Model International Agreement on Investment for Sustainable Development* (International Institution for Sustainable Development, 2006) at Part 3.

2.1.2 History of international investment law

Prior to treaties being used to protect investors of one state from the actions of another state, issues were resolved by diplomatic protection.[21] Under this concept, a wrong against a citizen of a state is considered to be a wrong against the state of that citizen.[22] The state stood in the place of the citizen in seeking a resolution.[23] Following de Vattel's writing on the rights of foreigners in their property, harm to a foreigners' property, such as investment, fell within diplomatic protection.[24] This was as extension of the principle which had covered only harm to the person.[25] Diplomatic protection could involve anything from informal negotiation to gunboat diplomacy.[26] Difficulties with this system contributed to the move to treaty-based protection. Diplomatic protection was a very politicised system because it involved state-state disputes and could lead to more serious diplomatic breakdowns.[27] Gunboat diplomacy was especially politically contentious and could be used to coerce other states into accepting resolutions they otherwise would not have.[28] The United Nations Charter also outlawed the use of force in this context and so states had to search for another way to protect investment.[29] Diplomatic protection was also deficient from the perspective of investors, as their home state's decision as to whether to bring a claim could be influenced by many factors that were irrelevant to, or outside the control of, the investor.[30] States also created ad hoc tribunals in relation to discrete claims or classes of claims.[31]

The closest predecessor to BITs were Friendship, Commerce and Navigation Treaties.[32] These treaties facilitated international trade by guaranteeing peaceful passage and security for ships of countries passing through waters of another country. In the decades following World War

[21] Newcombe and Paradell, above n 1, at 7.
[22] Newcombe and Paradell, above n 1, at 5.
[23] Newcombe and Paradell, above n 1, at 5.
[24] Newcombe and Paradell, above n 1 at 4.
[25] Newcombe and Paradell, above n 1 at 5.
[26] Newcombe and Paradell, above n 1, at 9. Gunboat diplomacy refers to states applying diplomatic pressure through anchoring gunboats near the wrongdoing country as a show of military might and threat if they did not cooperate.
[27] Puig and Shaffer, above n 6, at 394.
[28] H J Steiner & D F Vagts *Transnational Legal Problems: Materials and* Text, 2nd ed, Mineola, NY Foundation Press, 1976 at 357 as cited in Newcombe and Paradell, above n 1 at 8-9.
[29] M Sornarajah, *The International Law on Foreign Investment* (2nd ed, CUP, Cambridge, 2004) at 75. The Charter of the United Nations contains various provisions limiting the use of force or acts of aggression, in particular Chapters I, VI and VII: United Nations Charter (opened for signature 26 June 1945, entered into force 24 October 1945).
[30] Newcombe and Paradell, above n 1 at 6; Surya P Subedi, International Investment Law: Reconciling Policy and Principle (2nd ed, Hart, Oxford, 2012) at 203.
[31] Newcombe and Paradell, above n 1 at 7, 39. One notable example is the Iran-US Claims Tribunal, established to deal with claims arising out of the 1979 Iranian Revolution. The Tribunal was established pursuant to the Claims Settlement Declaration, 19 Jan 1981 (1981) 1 Iran-US CTR.
[32] Newcombe and Paradell, above n 1, at 41.

II the focus of these treaties moved to investment specifically.[33] The first BIT (as opposed to other treaties containing similar protections) was between Germany and Pakistan, in 1959.[34] It provided for state-state dispute settlement either before the International Court of Justice (ICJ) or, if either party did not agree to it being heard by the ICJ, a three-person arbitration panel.[35]

There were two main causes for the proliferation of IIAs, representing both economic and political motivations.[36] First, in the 1970s and 1980s international lending and aid were becoming more difficult to obtain, and so the market for attracting FDI became more competitive.[37] This required states to provide more favourable investment conditions for investors in order to attract investment.[38] Second, this type of investment protection was a key aspect of the 'Washington Consensus'; a set of policies formed by the IMF, World Bank and the US Treasury on the necessary conditions for the economic growth of developing countries.[39] This consensus focused on trade and investment liberalisation, and promotion and protection of FDI was central to that.[40] Signing onto this type of treaty signifies a country's willingness to protect the property of foreign nationals and is emblematic of good diplomatic relations. IIAs have now become embedded in the international economic framework.

2.1.3 Justifying theory

The orthodox theory of international investment law is that it is intended to promote investment across borders.[41] This is achieved by improving market access by providing and developing substantive protection for that investment.[42] International investment law protects investors from political risk, as distinct from commercial risk.[43] Developing countries often present the greatest political risk of investment.[44] It is therefore supposed that investors require a greater level of protection if they are to invest in these markets.[45] Investment from foreign citizens and companies is intended to benefit both the investor and the country in which the investment occurs.[46] Some countries lack the economic or business environment to allow economic

[33] Newcombe and Paradell, above n 1, at 23.
[34] Vidigal and Stevens, above n 12, at 478.
[35] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, 457 UNTS 23 (signed on 25 November 1959, entered into force 28 April 1962) Article 11.
[36] Newcombe and Paradell, above n 1, at 48.
[37] Newcombe and Paradell, above n 1, at 48-49.
[38] Newcombe and Paradell, above n 1, at 49.
[39] Newcombe and Paradell, above n 1, at 48.
[40] John Williamson "What Washington Means by Policy Reform" in John Williamson (ed) *Latin American Adjustment: How Much Has Happened?* (Washington, Institute for International Economics, 1990) as in Newcombe and Paradell, above n 1, at 48.
[41] Newcombe and Paradell, above n 1, at 41.
[42] Newcombe and Paradell, above n 1, at 41.
[43] Subedi, above n 30, at 216.
[44] Puig and Shaffer above n 6, at 371-372.
[45] Osmanski, above n 11, at 642.
[46] Osmanski, above n 11, at 642

development and growth to occur as efficiently and quickly as it could have, if the necessary economic and commercial infrastructure existed.[47]

This protection is in the form of obligations on states, backed up by the ability for investors to submit claims to arbitration through ISDS. Foreign investors are usually entitled to freedom from discriminatory treatment;[48] a minimum standard of treatment;[49] and no expropriation (direct or indirect) without compensation.[50] International investment law aims to encourage smaller to medium sized businesses (as well as larger multinational corporations) to invest in other countries.[51] These smaller organisations might not have the resources to otherwise cope with the political risk of investing in potentially challenging business environments. By contrast, some investors are of a size that they are able to take the risk without requiring protection from international investment law.

It is now fairly clear that the historical focus on economic growth has excluded or at least overshadowed other important considerations, such as environmental impacts and the extent of the benefits that accrue to the host country.[52] The emerging consensus is that investment agreements must not facilitate investment at any cost.[53] The interests of both investors and the host state must be considered and balanced, and an acceptable compromise must be reached.[54]

2.1.4 Nature of relationships

International investment agreement relationships are primarily bilateral. There are thousands of BITs in existence.[55] Some investment chapters are included in regional free trade agreements.[56] Investors can also agree unique investment contracts with host states in relation to specific investments.[57] The OECD led efforts in the 1990s to develop a multilateral investment agreement but this failed due to concerns relating to NAFTA disputes, a lack of consensus from OECD member states, and concerns of NGOs.[58] The closest there is to a

[47] Osmanski, above n 11, at 641-642.
[48] Most-favoured-nation: CPTPP Article 9.5; CETA Article 8.7; USA Model BIT Article 4; NZ-China FTA Article 139. National treatment: CPTPP Article 9.6; CETA Article 8.6; USA Model BIT Article 3; NZ-China FTA Article 138.
[49] CPTPP Article 9.6; USA Model BIT Article 12. NZ-China FTA Article 143 and CETA Article 8.10.1 do not provide for a 'minimum standard of treatment' specifically, but does require fair and equitable treatment and full protection and security, which are variants of the MST.
[50] CPTPP Article 9.8; CETA Article 8.12; USA Model BIT Article 6; NZ-China FTA Article 145.
[51] Osmanski, above n 11, at 642.
[52] Newcombe and Paradell, above n 1, at 63.
[53] Puig and Shaffer above n 6, at 373.
[54] Freedom of Investment Roundtable *Investment Treaties: The Quest for Balance* (OECD, Conference Summary, 14 March 2016); Secretary-General *OECD Guidelines for Multinational Enterprises 2011 Edition* (OECD, 2011) at 239-240; Subedi, above n 30, at 216-217.
[55] Osmanski, above n 11, at 647.
[56] CPTPP Chapter 9.
[57] Taylor St John, *The Rise of Investor-State Arbitration*, (1st ed, OUP, New York, 2018) at 9.
[58] Newcombe and Paradell, above n 1, at 55; St John, above n 57, at 21.

ubiquitous BIT is the guideline text developed and updated by UNCITRAL. This model document is intended to reflect best practice in for BITs and can be inserted into an FTA or RTA as an investment chapter. Many countries also have their own "model BITs", which incorporate specific features that country considers especially important.[59] Whilst investment agreements contained broadly similar obligations, the fact they are negotiated bilaterally means there are material differences. This is because parties to prospective treaties will modify the treaty text in an attempt to address the problems that have resulted from the particular wording of a past treaty. This can create challenges at the dispute resolution stage relating to consistency and predictability of decisions.

2.1.5 Investor-state dispute settlement

The process of dispute resolution is crucial to giving effect to rights contained within trade and investment agreements. Without effective dispute resolution processes, the protections contained within such agreements are hollow.[60]

The first BIT to include substantive investment protections and unqualified state consent to investor-state arbitration was the Chad-Italy BIT in 1969.[61] This is said to be the beginning of modern BIT practice, in its most recognisable form.[62] ISDS was created to provide a neutral mechanism for investors to have disputes heard and protect their investments.[63] The economic context was crucial for its emergence. Capital-importing countries were more strongly asserting their economic sovereignty, and investors faced increasing risk from associated programs of nationalisation.[64] The concern was that domestic courts, particularly in countries with less robust judicial independence, would be biased against investors.[65] The neutrality of ISDS came from the fact the dispute was not being heard in the domestic courts of the host state or the investor.[66] Additionally, state-state disputes were too politically charged, and meritorious claims might not be taken by a state due to other reasons outside of an investor's control.[67] ISDS was also intended to provide recourse for small to medium sized businesses which "lack the financial resources or legal knowledge to navigate international legal systems."[68] A state agreeing to engage in arbitration is a signal that a government is willing to

[59] Newcombe and Paradell, above n 1, at 61. See, for example, USA Model BIT 2012, India Model BIT 2015.
[60] *A Handbook on the WTO Dispute Settlement System* (WTO Secretariat Publication, 2017) at 1.
[61] Chad-Italy Bilateral Investment Treaty (11 June 1969).
[62] Newcombe and Paradell, above n 1, at 45.
[63] Osmanski, above n 11, at 639; and E Fabry and G Garbasso *ISDS in the TTIP: The devil is in the detail* (Jacques Delors Institute Policy Paper 122, January 2015).
[64] Newcombe and Paradell, above n 1, at 24.
[65] Osmanski, above n 11, at 640 and Newcombe and Paradell, above n 1, at 24.
[66] Newcombe and Paradell, above n 1, at 24.
[67] Ibrahim F.I. Shihata "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA" (1986) 1(1) ICSID Review - Foreign Investment Law Journal 1 at 4.
[68] Osmanski, above n 11, at 642.

be bound to treat investors in accordance with certain obligations and standards, for fear of paying compensation if they do not.

2.1.6 How ISDS works

(a) Source of rules

Investment disputes are usually conducted pursuant to institutional rules, or the IIA may allow the parties to choose their own rules. There are two main sets of institutional procedural rules for ISDS disputes. They have been developed by the International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL).

ICSID was established in 1966 as an offshoot of the World Bank.[69] It has its own set of procedural rules and panels of arbitrators.[70] Tribunals are also able to hear disputes following different procedural rules. Parties can appoint arbitrators not on the ICSID Panels.[71] It also has rules for disputes where either the respondent state or the state of the claimant is not a party to the ICSID Convention.[72]

UNCITRAL was established as a Commission within the United Nations in 1966.[73] Its membership comprises 60 states elected by the General Assembly. Its mandate is to contribute "to further the progressive harmonization and modernization of the law of international trade".[74]

Whereas ICSID is a body primarily concerned with dispute settlement, UNCITRAL fulfils a broader purpose. The UNCITRAL Commission forms working groups who have a mandate to consider areas of interest to members.[75] In consultation with member states, NGOs and intergovernmental bodies, it develops conventions and model texts, or other guides to legislative authorities.[76] UNCITRAL has published Rules on Transparency in Treaty-Based

---

[69] St John, above n 57, at 6; Convention of the Settlement of Investment Disputes between States and Nationals of Other States (entered into force 14 October 1966).
[70] ICSID Convention Arbitration Rules (opened for signature 25 September 1967, entered into force 1 January 1968, last updated in 2006).
[71] ICSID Convention Articles 12-16, Article 40. Panels are groups of possible arbitrators, nominated by the contracting states and the Chairman of ICSID.
[72] ICSID Additional Facility Rules (entered into force 27 September 1978, last updated in 2006).
[73] *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law*, (UNCITRAL Secretariat, 2013) at 1.
[74] *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law*, (UNCITRAL Secretariat, 2013) at 1.
[75] *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law*, (UNCITRAL Secretariat, 2013) at 7.
[76] *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law*, (UNCITRAL Secretariat, 2013) at 13-18.

Investor-State Arbitration (Transparency Rules), last updated in 2013,[77] which not form part of the UNCITRAL Arbitration Rules that can govern the procedure of investment disputes.[78] It also maintains a record of disputes heard pursuant to UNCITRAL Rules, to assist with their application in later disputes.[79]

(b) Conduct of arbitrations

Tribunals are not bound by precedent.[80] In practice, it is accepted that tribunals pay attention and may place significant weight on past decisions.[81] Parties also use past decisions to support their arguments.[82] However, there is no legal obstacle to prevent a tribunal adopting a vastly different interpretation from a past decision,[83] and tribunals are cautious to not unquestioningly follow precedent.[84] This can lead to surprising and possibly concerning results. For example, the most favoured nation (MFN) clause has been interpreted in a way allowing a Tribunal to give itself jurisdiction over a dispute that otherwise it may not have been able to hear.[85] In *RosInvestCo UK Ltd v Russia*,[86] the claim was made pursuant to the UK-USSR BIT. This BIT did not allow investors to bring a claim to arbitration on the basis of expropriation.[87] The UK-USSR BIT had an MFN clause.[88] The Denmark-USSR BIT allowed for claims of expropriation

[77] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Transparency Rules) (opened for signature 1 April 2014, entered into force 8 October 2017).
[78] UNCITRAL Arbitration Rules, first adopted in 1976 and last updated in 2006 (plus the more recent addition of the Transparency Rules); and see *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law*, (UNCITRAL Secretariat, 2013) at 18.
[79] *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law*, (UNCITRAL Secretariat, 2013) at 10.
[80] Christoph Schreuer and Matthew Weiniger "A Doctrine of Precedent?" in Peter Muchlinki, Federico Ortino and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (1st ed, OUP, New York, 2008) 1188 at 1189.
[81] Schreuer and Weiniger, above n 80, at 1192.
[82] As occurred in *Feldman v Mexico*, Award, 16 December 2002, 7 ICSID Reports 341 as in Schreuer and Weiniger, above n 80, at 1192. See also *ADC Affiliate Limited and ADC & ADMC Mgmt. Ltd v Hungary* at [293], explaining the benefits of predictability that flow from consideration and development of precedent.
[83] As was expressly acknowledged by the tribunal in *Amco v Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 395, as cited in Schreuer and Weiniger, above n 80, at 1191; Subedi above n 30, at 190, 198.
[84] *AES Corp v Argentina*, Decision on Jurisdiction, 26 April 2005 at paras 17-33 as in Schreuer and Weiniger, above n 80, at 1192. In a series of cases, Argentina repeatedly raised identical objections, and they were rejected every time. The tribunal in *AES Corp* were especially careful in explaining the reasoning for doing so and indicating they were entitled to consider past decisions, while accepting Argentina's argument that each IIA is a different agreement and precedents cannot be automatically applied.
[85] The most-favoured nation clause requires treaty parties to continually afford the most favourable treatment it has granted to investors of any party (whether by treaty or by conduct) to investors of parties with which the country had previously signed an IIA containing an MFN clause. It applies in this way: Country A signs a BIT with a Country B on certain terms including an MFN clause. Several years late Country A signs a BIT with Country C on more favourable terms, or has been treating investors of Country C in a more favourable way than it has treated investors of Country B. The MFN clause applies to Country A must also confer the treatment onto investors of Country B.
[86] *RosInvestCo UK Ltd v Russia* SCC Case No. V079/2005.
[87] *RosInvestCo UK Ltd v Russia* at [114], [118] as in Newcombe and Paradell, above n 1, at 215.
[88] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments 1670 UNTS 27 (signed 6 April 1989, entered into force 3 July 1991) Article 3.

to be made.[89] This was 'more favourable' for an investor, and so was applied to the UK-USSR BIT.[90] While this is rare,[91] it is still possible. This can fundamentally change the types of issues that are within the coverage of the Treaty.

In the past, investment disputes heard under either the ISCID or UNCITRAL rules have generally not been open to the public.[92] The base position, shown in the first iteration of the UNCITRAL Arbitration Rules in 1976, tends towards confidentiality; any information relating to the claim (potentially even the existence of a claim) would only be released if the consent of both parties was obtained.[93] ISDS inherited this from private commercial arbitration which places a strong focus on confidentiality.[94] Transparency was effectively determined on a case by case basis.[95]

Under ICSID Arbitration Rules, third party submissions are permissible if the Tribunal considers them necessary after consultation with the parties to the dispute, and a consideration of their usefulness and possible prejudice to the parties.[96] The full awards are only made public with the parties' consent, though excerpts of the legal reasoning will be released by the Centre if consent to release the award in full is not given.[97] There are usually enforcement mechanisms provided for in the investment agreement.[98]

The awards of the tribunal are binding only between the parties.[99] There is currently no appeal mechanism in investment disputes. The ICSID Convention allows for parties to an arbitration to apply for an interpretation, revision or annulment.[100] An interpretation relates to the

[89] Agreement between the Government of the Kingdom of Denmark and the Government of the Russian Federation concerning the Promotion and Reciprocal Protection of Investments 2009 UNTS 429 (signed 4 November 1993, entered into force 25 September 1996) at Article 8.
[90] *RosInvestCo UK Ltd v Russia* SCC at [139] as in Newcombe and Paradell, above n 1, at 216.
[91] Newcombe and Paradell, above n 1 at 210.
[92] Cristoffer Nyegaard Mollestad, *See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement* (PluriCourts, Research Paper, October 2014); Johannes Koepp and Cameron Sim, "The Application of Transparency" in Dimitrij Euler and others (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (1st ed, CUP, Cambridge, 2015) 65.
[93] Esme Shirlow, Dawn of a new era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration ICSID Review, Vol. 31, No. 3 (2016), pp. 622–654 at 626.
[94] Puig and Shaffer, above n 6 at 366, 386.
[95] Shirlow, above n 93, at 626.
[96] ICSID Convention Arbitration Rules, Rule 37(2).
[97] ICSID Arbitration Rules, Rule 48(4). Though, in 2004 as part of a review of ICSID rules, a Working Paper said ICSID actively sought and usually obtained the parties' consent: see *Possible Improvements of the Framework for ICSID Arbitration* (ICSID Secretariat, Discussion Paper, October 2004) at 8. Alternatively, one of the parties might release the decision to International Legal Materials, the Journal du Droit International or ICSID Reports for publication.
[98] CPTPP provides for three enforcement mechanisms in Article 9.29.12.-9.29.13: pursuant to the ICSID Convention; the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958) (New York Convention); or the Inter-American Convention on International Commercial Arbitration, done at Panama, January 30, 1975 (Inter-American Convention).
[99] CPTPP Article 9.29.7; CETA Article 8.41.
[100] ICSID Convention, Article 50.

interpretation of a particular obligation, and requires the parties to highlight the points in dispute.[101] A revision requires the discovery of a new fact which may affect the award.[102] An annulment relates to a situation where one party contends that the Tribunal had no jurisdiction; exceeded its jurisdiction; a Tribunal member was biased; there was a fundamental procedural flaw; or the award failed to give reasons.[103] The grounds for any form of review in UNCITRAL are more limited. These rules only allow for parties to apply for an interpretation of the award, or correction, or an additional award relating to arguments heard but not decided upon by the Tribunal.[104] In their present form, CTPPP, CETA and the USA Model BIT do not appear to confer any stronger review rights on the parties. Under the UNCITRAL Rules or ICSID Additional Facility Rules, court proceedings in the state where the arbitration occurred may be brought to overturn the result on a few narrow grounds.

2.1.7 Use of ISDS

ISDS was initially used infrequently.[105] This slow uptake was likely due to unfamiliarity with the process and a lower amount of FDI, leading to fewer disputes.[106] The use since has increased dramatically.[107] UNCTAD reported that there had been a total of 885 known cases at the end of 2017, and acknowledged the true total number may be higher as some disputes remain confidential.[108] The number of disputes that occur is predicted to rise as the amount of global investment increases.[109] This may be exacerbated by increasing regulation in order to protect the environment, as regulation in this area tends to commonly conflict with investor's interests. Extractive industries such as oil and gas, and mining account for 24%, and electricity power & other energy make up another 17% of ICSID disputes.[110] These industries feature so highly because they are often the ones whose interests are affected by environmental regulation. In 2017, most disputes related to the insurance and financial services industry.[111] The growing urgency with which environmental concerns must be addressed could feasibly lead to more environmental regulation and the prospect of more ISDS arbitrations. This is why it is important to promote reform which ensures such disputes will be dealt with in a system which has the confidence of all stakeholders. Failure to do so will lead to more criticisms of the system in the short term and greater challenges to its legitimacy.

---

[101] ICSID Convention Article 50(1)(c)(i).
[102] ICSID Convention Article 50(1)(c)(ii).
[103] ICSID Convention Article 50(1)(c)(iii).
[104] UNCITRAL Arbitration Rules, Articles 37-40.
[105] St John, above n 57, at 5.
[106] St John, above n 57, at 3, 5.
[107] Osmanki, above n 11, at 654; St John, above n 57, at 5.
[108] *IIA Issues Note: Investor-State Dispute Settlement: Review of Developments in 2017* (UNCTAD, Issue 2, June 2018) at 1-2.
[109] Roderick Abbott, Fredrik Erixon & Martina Francesca Ferracane, *Demystifying ISDS* (European Centre for International Political Economy, Occasional Paper, October 2016) at 7.
[110] *ICSID, The ICSID Caseload – Statistics* (ICSID, Issues 2018-1) at 12.
[111] *IIA Issues Note: Investor-State Dispute Settlement: Review of Developments in 2017* (UNCTAD, Issue 2, June 2018) at 4.

2.2 Critique of the Foundations of the Status Quo

At this point, it is important to note that critics of the status quo in international investment law challenge the preceding explanation of the underlying values and objectives of IIAs. They argue that the experience to date has shown that the prime focus of international investment law is to protect investors' capital in order to promote capital accumulation in the hands of investors.[112] This differs from the orthodox justification given; that protecting investors' capital incentivises investment which benefits the investor and the host state. International agreements necessarily curtail states' regulatory freedom in order to gain other benefits. Critics consider that the costs of affording substantive protection to investors' capital exceed the benefits host states derive from these agreements. Cast in this light, IIAs immediately become more controversial because it suggests the body of law as a whole exists for the interests of investors rather than as a balance between investor and host state interests.

Historically, primacy has been given to the interests of investors from capital-exporting countries as opposed to host state interests.[113] However, the balance of power is evolving, and more attention is now being given to the interests of host state.[114] Whether affording substantive protection is necessarily the most desirable foundation for international investment law is a controversial but different question from the one this dissertation will consider. This dissertation will examine the adequacy of dispute resolution based on the foundation of substantive protection for investment. I acknowledge that these foundations are contestable and ought to be the subject of further analysis.

2.3 New Zealand's Role in the Global Economy

As this dissertation provides a recommendation for New Zealand, it is important to understand New Zealand's interests and priorities in international investment agreements.

2.3.1 New Zealand and the legal framework for global economics

New Zealand is the 50th largest economy in the world.[115] It lacks the negotiating power and clout of the world's largest economies. It is for that reason that it relies on engaging in negotiation and is willing to grant concessions to the interests of other countries in exchange for getting some of what it needs to continue to grow its economy. This is what happened with

[112] Newcombe and Paradell, above n 1, at 63.
[113] Shown by the breakdown of negotiations for an OECD MAI because developing states were excluded from negotiations: Newcombe and Paradell, above n 1, at 43.
[114] J Pohl *Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence* (OECD, OECD Working Papers on International Investment, January 2018).
[115] GDP Ranking (21 September 2018) The World Bank <https://datacatalog.worldbank.org/dataset/gdp-ranking>

the New Zealand-Korea FTA in 2015;[116] New Zealand noted the opposition to the insertion of ISDS, but for Korea it was a bottom-line, and so the decision was made to make this concession to secure benefits in other areas.[117] This is a necessary consequence of New Zealand's position in the global economy.

The Briefing to the Incoming Minister of Trade and Export Growth following the 2017 election emphasised that New Zealand relies on the international rules-based system. New Zealand's political and economic security relies on connections with the world.[118] Ultimately:[119]

> New Zealand's interests lie in an open, connected, stable rules-based system consonant with our values. Small countries will not prosper in a world where larger powers can use economic and military might unconstrained by norms and rules.

There is both an economic and political justification for this. Clear and widely applicable rules decrease the cost and risk for investors operating around the world. States that are party to these rules decrease their cost of obtaining capital by providing a secure business environment for foreign investors.[120] Furthermore, a closely connected world economy reduces the chances of diplomatic breakdowns.[121] Countries which are economically independent have less to lose from isolating themselves from trading partners and treating foreigners operating in their country poorly.

This informs the thesis that this dissertation argues; that New Zealand should advocate for a transparent, rules-based system with widespread international participation. It is important to note that all international agreements involve trade-offs, and New Zealand has historically been a 'rule-taker' rather than a 'rule-setter'. New Zealand might feel compelled to accept obligations it ideally would not, if the benefits secured by other aspects of an agreement justify bearing the cost of potentially onerous obligations. Allowing ISDS is (by one view) a politically and economically acceptable action, in order to avoid blocking or otherwise impinging on New Zealand's ability to enter into an FTA. New Zealand has 13 treaties with ISDS provisions (including treaties with single states and regional/bloc agreements).[122]

---

[116] Free Trade Agreement Between New Zealand and the Republic of Korea (signed 23 March 2015, came into force 20 December 2015).
[117] Report of the Foreign Affairs, Defence and Trade Committee *International treaty examination of the Free Trade Agreement between New Zealand and the Republic of Korea* (22 May 2015) at 5.
[118] Brook Barrington, *Briefing for Incoming Minister for Trade and Export Growth*, (New Zealand Ministry of Foreign Affairs and Trade, October 2017) at 39.
[119] Brook Barrington, *Briefing for Incoming Minister for Trade and Export Growth*, (New Zealand Ministry of Foreign Affairs and Trade, October 2017) at 41.
[120] Puig and Shaffer, above n 6, at 371-372.
[121] Ralph Cossa and Jane Kahana "East Asia: economic interdependence and regional security" (1997) 73(2) International Affairs 219 at 223-224.
[122] *NZIER, ISDS and sovereignty* (NZIER report to Export New Zealand, 2015) at 2. The countries covered are: Hong Kong; Singapore; Thailand; China; Malaysia; ASEAN; Australia; South Korea.

2.3.2 New Zealand and ISDS

I argue that ISDS is of insignificant risk to New Zealand for two reasons. First, New Zealand has low exposure to ISDS-covered investment as a proportion of FDI. Second, New Zealand is a developed and stable country that is unlikely to regulate or act in a way that breaches a substantive obligation.

Over half of New Zealand's FDI comes from Australia.[123] New Zealand and Australia's Closer Economic Relations, including the 2013 Investment Protocol, does not include ISDS.[124] CPTPP (which includes New Zealand and Australia) contains ISDS provisions, but in March 2018 the two countries signed a side-letter excluding the application of ISDS between them.[125] In addition to this, side letters excluding ISDS in CPTPP were also signed with Brunei Darussalam, Vietnam, Peru and Malaysia.[126] New Zealand has never been a respondent in an ISDS claim under an investment treaty,[127] but has been the respondent in one case, pursuant to an investment contract.[128]

More recent developments, such as the signalled intention to transition to a carbon-neutral economy,[129] may necessitate stronger environmental regulation. Given the sectors affected by regulation protecting the environment have historically been the most litigious in ISDS, there is arguably increased risk to New Zealand from this type of regulation. Some oil and gas producers and explorers are at least partially owned by investors from countries with ISDS protection.[130] This would mean that if regulation does change in these areas in a discriminatory, arbitrary, or non-transparent way the affected investors would have recourse through ISDS. The investors would have to show the action directly harmed the value of their investment, which is the shares (not the general assets of the company). Unless the governmental action was something egregious like the direct expropriation of the company's key assets, this damage would be difficult to prove. A third of New Zealand's FDI in 2015 was in the finance and

---

[123] *Global New Zealand: International trade, investment, and travel profile, Year ended December 2017* (Statistics New Zealand, 24 July 2018) at 166.
[124] It also specifies that the Most-Favoured Nation Article cannot apply to incorporate dispute settlement procedures from other treaties: Protocol on investment to the New Zealand - Australia Closer Economic Relations Trade Agreement 2983 UNTS (signed 16 February 2011, entered into force 1 March 2013) Article 6.2.
[125] Hon David Parker "New Zealand signs side letters curbing investor-state dispute settlement" (press release, 9 March 2018).
[126] Hon David Parker "New Zealand signs side letters curbing investor-state dispute settlement" (press release, 9 March 2018).
[127] *ISDS and Sovereignty, NZIER report to Export New Zealand* (NZIER, September 2015) at 12.
[128] *Mobil Oil Corporation and others v. New Zealand* (ICSID Case No. ARB/87/2). The case was discontinued as settlement was reached.
[129] Hon James Shaw "Zero Carbon Bill Consultation Launch" (press release, 7 June 2018).
[130] Tamarind Resources is substantially Malaysian owned; Westside Corporation appears to be in part Chinese owned, and it is highly likely other operators have owners from countries with ISDS coverage. It is difficult to identify both who is involved in the industry and ownership of some of these companies, but PEPANZ details its members on its website: https://www.pepanz.com/about-us/our-members/

insurance industry.[131] This sector has historically been associated with fewer ISDS claims than sectors such as oil and gas.[132]

The 'plain packaging' litigation between Philip Morris and the Australian government highlights a type of risk that New Zealand may be more likely to face.[133] That case was decided on a jurisdictional question.[134] Additionally, that dispute was initiated pursuant to an 'old' BIT,[135] which had no public health protections. Therefore, even a decision on the merits of that claim may have provided little guidance (or cause for concern) on how a similar dispute may play out against New Zealand. There is specific protection in CPTPP against cases in this area. Article 29.5 allows countries to choose to exclude tobacco control measures from challenge under Section B of Chapter 9 (the Section which allows ISDS). A party can even elect to do this during proceedings relating to tobacco control measures.[136]

New Zealand is also an extremely stable country. The New Zealand government acts in predictable and in reasonable ways.[137] This allows other countries and investors to have confidence in their relationship with New Zealand.

2.3.3 Conclusion

New Zealand should support a transparent, rules-based system for investment dispute resolution that has widespread international participation. Such a system would simplify the rules governing the global economy which will reduce friction for flows of investment. The role of international investment in contributing to global development has not matched the theory to date. Despite that, it can have a significant beneficial impact on economic and social development.[138] Such gains therefore justify and necessitate the efforts to advocate for and implement an effective system to govern international investment dispute resolution.[139]

---

[131] *Foreign Direct Investment in New Zealand: A brief review of the pros and cons, NZIER report to Export New Zealand* (NZIER, March 2016) at 2.
[132] Though UNCTAD data (see footnote 111) notes that in 2017 most cases were in the finance and insurance sector, so this trend may be changing. Roughly 15% of FDI in the same year was either unallocated/confidential in Statistics NZ data, so it not possible to know whether some of this was in sectors that traditionally have more risk of ISDS (NZIER, above n 132, at 2).
[133] *Philip Morris Australia Ltd v The Commonwealth of Australia*, Case no 2012-12 Permanent Court of Arbitration 2015.
[134] *Philip Morris Australia Ltd v The Commonwealth of Australia*, Award on Jurisdiction and Admissibility, 17 December 2015.
[135]Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments I-30808 UNTS (signed on 15 September 1993, entered into force on 15 October 1993).
[136] CPTPP Article 29.5
[137] *Rule of Law Index 2017-2018* (World Justice Project, Rule of Law Index, 2018). New Zealand is ranked 7th on the list in terms of upholding the rule of the law. The Index defines the rule of law using four key criteria: 1) accountability [under the law]; 2) just laws; 3) open government; and 4) accessible and impartial dispute resolution.
[138] Subedi, above n 30; at 216.
[139] Subedi, above n 30; at 216.

Chapter 3: Proposed Reform

This chapter will consider possible changes to investment dispute resolution. The assessment of these changes will be based on the thesis that New Zealand should support a transparent, rules-based system to govern international investment law.

Three methods of reform will be examined. These methods are Incremental Reform, Systemic Reform, and Paradigmatic Reform.[140] Incremental Reform involves retaining the core structure and institutions but changing specific rules.[141] Systemic Reform would be a more significant shift in the institutional setting for investor-state arbitration.[142] Paradigmatic Reform is not targeted at dispute resolution. Rather, it seeks to redesign the system as a whole. Included in this, is a shift away from the direct arbitration model.[143]

Within each proposal, current criticisms of ISDS will be identified and assessed. The strength of these criticisms affects the nature of the necessary reform. The concerns are presented in relation to a specific type of reform, but they are relevant to all of the proposals discussed. They are presented in this way to highlight the most obvious types of concerns each particular method would address.

3.1 Paradigmatic Reform

Paradigmatic Reform substantially redesigns the law governing the relationships between investors and states. The new Cooperation and Investment Facilitation Agreements (CIFAs) developed by Brazil will be examined as the key example of this method. The CIFAs are significantly broader than changes to dispute resolution. An analysis of changes to the substantive obligations is outside the scope of this dissertation. There is an added difficulty in that the changes to dispute resolution are predicated on redesigning the substantive obligations. Considering these proposals on the principles underlying the status quo may not reflect the true nature of the Brazilian proposals. Consequently, this proposal will be assessed at quite a high level. However, it is important to note the calls for more significant change to the substantive obligations in IIAs. The form of dispute resolution recommended should be equipped to accommodate changes to the obligations, should that occur in the future.

I will argue that the focus on mediation and moving to state-state disputes, as proposed by Brazil, is undesirable. However, the ombudsman proposal is a useful development, which may

[140] These labels are borrowed from Anthea Roberts "Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*"* (2018) 112 AJIL 410 at 421.
[141] Roberts, above n 141, at 410.
[142] Roberts, above n 141, at 410.
[143] Roberts, above n 141, at 410.

be incorporated through Incremental or Systemic Reform, though is likely not needed in the New Zealand context.

3.1.1 Form

The Brazilian approach involves two key changes.

First, these agreements impose obligations onto investors, requiring them to operate in a socially responsible way and contribute to the development of the host state.[144] Such obligations on investors are a significant departure from the traditional approach to IIAs.[145] The focus of this dissertation is on dispute resolution, and so the substantive obligations will not be discussed in any detail.

Second, Brazil does not include ISDS in its new CIFAs. Brazil has never ratified a BIT with an ISDS clause in it,[146] though has used investment contract arbitration reasonably frequently.[147] Brazil has grown as an exporter of FDI and so its policies relating to investment protection have evolved and it seeks a degree of formalised protection.[148] Brazil has taken the position that ISDS is irredeemable: [149]

> ISDS is intrinsically flawed. No reforms would be enough to redeem the system … For us the best solution is simply throw it out of the window and use something different.

Brazil has adopted a new dispute resolution mechanism in its CIFAs.[150] A Brazilian official described the approach in a rather creative way: [151]

> Investment treaties are much like pre-nuptial agreements where a couple agrees to get married but is already looking ahead to the terms on which a divorce might happen. After that divorce, each party goes its separate way and is not to be seen again. I prefer to think of Brazil's investment facilitation approach as more akin to couple's counselling because we are trying to facilitate a long-term relationship that

[144] Brazil-Ethiopia CIFA Article 14; Katia Gómez and Catharine Titi "International Investment Law and ISDS: Mapping Contemporary Latin America" (2016) 17 Journal of World Investment & Trade 515 at 524; and Vidigal and Stevens, above n 12, at 487.
[145] Vidigal and Stevens, above n 12, at 487.
[146] It has signed several BITs with ISDS but has not ratified any.
[147] Vidigal and Stevens, above n 12, at 485. Interestingly, contract-based investment arbitration is excluded under CPTPP Article 2.
[148] Vidigal and Stevens, above n 12, at 486.
[149] Anthea Roberts & Zeineb Bouraoui "UNCITRAL and ISDS Reforms: What are States' Concerns?" (2 June 2018) <https://www.ejiltalk.org> as in Roberts, above n 141, at 418.
[150] Brazil-Ethiopia CIFA Article 23; Vidigal and Stevens, above n 12, at 486. It has signed six of these agreements: three with South American Countries and three with African countries.
[151] Interview, Brazilian investment treaty policy maker, May 5, 2018 as in Roberts, above n 141, at 418.

> remains positive rather than envisaging a future divorce. It's a completely different approach.

These agreements focus on dispute prevention and where there cannot resolve the issue, state-state disputes.[152] As part of dispute prevention, the CIFAs establish a foreign investment ombudsman.[153] This will be a first point of contact for foreign investors who have concerns. The ombudsman is intended to prevent concerns developing into formal disputes.[154] It does this by responding to concerns of investors and states and suggests improvements to governmental practice to best comply with its obligations.[155] In South Korea, where it was created, it has reportedly been very successful.[156]

CIFAs with other Latin American countries allow for compulsory state-state arbitration.[157] CIFAs with African countries allow for optional state-state arbitration,[158] if negotiation through the Joint Committees do not reach a resolution.[159] Underlying state-state arbitration is the principle of ensuring compliance with the substantive obligations, as opposed to the usual principle (in ISDS) of compensating for loss suffered.[160] This means governmental actions that do not comply with the treaty should be reversed to become compliant.

3.1.2 Key concerns this reform address

(a) Courts and remedies available only to foreign investors

ISDS entitles foreign investors to bring cases outside domestic courts and those investors may be awarded remedies not available under domestic law.[161] This concern raises two connected issues. First, the availability of an extra-national Tribunal, in which a government can be sued directly.[162] Second, the fact these Tribunals may award remedies that a domestic investor is not entitled to.[163] Some consider this system to be illegitimate because a foreign investor should

---

[152] Brazil-Ethiopia CIFA Article 24; Vidigal and Stevens, above n 12, at 487.
[153] Brazil-Ethiopia CIFA Article 18.
[154] Vidigal and Stevens, above n 12, at 488.
[155] Vidigal and Stevens, above n 12, at 488-489.
[156] Vidigal and Stevens, above n 12, at 488.
[157] Vidigal and Stevens, above n 12, at 491.
[158] The more recent Brazil-Ethiopia CIFA allows for compulsory arbitration initiated unilaterally by either party: Article 24. The Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi (signed 25 June 2015, not yet in force) allows for state-state arbitration by agreement: Article 13.6)
[159] Vidigal and Stevens, above n 12, at 489-490. The Joint Committee is a body established pursuant to the treaty, which has members from the treaty parties' governments. It oversees the implementation and application of the treaty.
[160] Vidigal and Stevens, above n 12, at 490-491.
[161] See Roberts, above n 141, at 418.
[162] Osmanski, above n 11, at 650; Elizabeth Warren "The Trans-Pacific Partnership Clause Everyone Should Oppose" Washington Post, (Washington DC, 25 February 2015).
[163] Osmanski, above n 11, at 650; Elizabeth Warren "The Trans-Pacific Partnership Clause Everyone Should Oppose" Washington Post, (Washington DC, 25 February 2015).

not be entitled to a different process and greater substantive remedy than a domestic investor. This greatly undermines the systemic integrity of the status quo.

The availability of a court outside the domestic legal system is intended to address the feared implicit bias that exists when a case against a government is heard in domestic courts.[164] Capital-exporting states were concerned that their investors would be deprived of a fair chance to have their dispute heard without political influences – actual or perceived – impacting the resolution of the dispute. Among capital-exporting states, this implicit bias is likely not a large risk.[165] Many countries have sufficiently independent judiciaries to nullify the risk of political influence on decisions. However, the perception is that many capital-importing states do not have such independence between the executive and the judiciary. Consequently, the courts may make politically motivated decisions. Countries could find themselves in awkward negotiating situations if they chose to require ISDS with some countries but not others. Requiring ISDS would in effect be a vote of no confidence in the country's judicial.

In New Zealand, the key obligation that demonstrates the different remedies available to foreign and domestic investors relates to expropriation. In New Zealand domestic law, there is no general right to compensation for regulatory takings.[166] The obligation to compensate for expropriation reflects a different constitutional heritage; that being one which accords greater weight to property rights.[167] The fact this is different does not indicate for or against a greater level of protection. New Zealand is one of a number of countries that to an extent has had rules dictated to them, due to its position in the global economy. The imposition of stronger protection for investments of foreigners is one of a range of potential (and for New Zealand unlikely to be realised) costs of obtaining the benefits of such agreements.

(b) 'Regulatory Chill'

Critics argue that the potential for disputes leading to large awards of damages discourages governments from adopting regulatory measures which might otherwise be in the public interest.[168] The threat of an ISDS action might also give investors a significant say in regulation

[164] Jeswald W Salacuse and Nicholas P Sullivan "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and the Grand Bargain" (2005) 46(1) Harvard International Law Journal 67 at 75.
[165] Though the extraordinary circumstances present in the *Loewen* case are an example of this implicit bias. In that case, domestic proceedings in a Mississippi Court for damages out of all proportion to the harm were awarded against a Canadian investor. The amount in issue totalled about US$7.5M and the jury awarded $500m in damages. The investor challenged this court decision and it was accepted (controversially) that court proceedings could constitute a government action and thus be challenged through ISDS: *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3).
[166] *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [95]. There are some instances where domestic investors are compensated for land taken for public purposes: Public Works Act 1981 (NZ) Part 5.
[167] The USA, a key proponent of investment treaties, has a doctrine of regulatory takings. On this see, J Peter Byrne "The Regulatory Takings Doctrine: A Critical Overview" (paper presented to Regulatory Takings and Resources: What Are The Constitutional Limits? Conference, Colorado, June 1994).
[168] Osmanski, above n 11, at 651; Puig and Shaffer, above n 6, at 366. This is known as 'regulatory chill'.

of certain industries.[169] This effect is a result of the fact that it is unclear to what extent states can regulate without being at risk of violating an obligation and facing an ISDS claim. Effective reform must provide clearer scope for states' regulatory freedom.

There has been some response to this by treaty parties. For example, there is some protection built into the obligations themselves in CPTPP. Annex 9-B Expropriation specifies that, except in rare circumstances, non-discriminatory regulation relating to a states' core powers over areas such as public health, safety and the environment cannot constitute indirect expropriation.[170] If states have a justification for regulation to protect public health, safety and the environment, they ought to be able to rely on the dispute process to uphold that regulation. However, the current structure does not provide sufficient confidence that this will be the case.[171] This exacerbates the fear of regulatory chill. Due to inconsistency of interpretation,[172] states are not able to confidently understand and comply with their obligations when regulating or acting in a way to protect health, safety and the environment. Formalising the protection for states' regulatory freedom in obligations is only partially effective in addressing this concern. I argue that, while it is impossible to know how strong this 'chill' might be, the structure of the dispute process must be changed, to ensure these protections are applied in a consistent and predictable way. At present, governments cannot confidently rely on the Articles that might theoretically preserve this their regulatory freedom.

It must also be remembered that governments might not enact even seemingly desirable regulation for any number of reasons. Failure to regulate in an industry in which foreign investors participate should not be solely attributed to the possibility of an ISDS claim.[173]

3.1.3 Benefits

The foreign investment ombudsman is a useful proposal. Larger investors likely already have government networks and connections with which they can raise concerns. This may not be the case for smaller investors. Having an ombudsman as a first port of call will encourage investors and states to raise concerns early which will increase the chance of an quicker

[169] Osmanski, above n 11, at 651.
[170] CPTPP Annex 9-B(3)(b). Older treaties will not have an article/annex to this effect, and so the task is left to the Tribunal without textual guidance.
[171] On the ambiguity around indirect expropriation, see Suzy Nikièma *Best Practices: Indirect Expropriation* (International Institute for Sustainable Development, March 2012).
[172] Suzy Nikièma *Best Practices: Indirect Expropriation* (International Institute for Sustainable Development, March 2012).
[173] There has been an attempt to provide more detail about the extent to which it does have this effect, and the conclusions were that ISDS certainly does have an impact, but the authors did stress the context and sector dependent nature of this phenomenon: see Gus Van Harten and Dayna Nadine Scott "Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada" (2017) 7 JIDS 92.

resolution. The South Korean experience is particularly promising.[174] The independence of this body would have to be carefully protected. It must be seen to and actually operate outside political influence. This will enable it to provide clear, fair responses to matters raised by either investors or state. This proposal could be adopted within the Incremental or Systemic Reform approaches.

New Zealand may be less likely to need to create an ombudsman. There are regulatory agencies industry groups that can raise and address complaints on behalf of members.[175] In countries without as independent a civil service, an ombudsman would also contribute towards developing stronger institutional governance.[176] More discussion and attention paid to the obligations would lead to a better understanding of them.

There is arguably greater legitimacy if dispute resolution is conducted between states. However, I argue that the fact investors can directly bring actions against states does not accurately explain the concern relating to investment disputes.[177] Therefore changing the model to state-state disputes does not in itself address these issues. Even in state-state disputes, the same regulatory measure of a country might be challenged.[178] The now familiar private-public cooperation in the WTO could likely transfer into the investment context.[179] Challenges to state measures that diminish the value of a foreigner's investment could foreseeably be brought by states. Obviously the decision over whether or not to bring the case would be at the discretion of the state but the concentrated support of a major investor could have significant sway over the state's decision. Making the disputes between states would not actually address the concerns about the effect ISDS can have on a state's regulatory freedom. This undermines any apparent legitimacy the system acquires from having disputes conducted between states.

---

[174] See Vidigal and Stevens, above n 12, at 488; and Françoise Nicolas, Stephen Thomsen and Mi-Hyun Bang, *Lessons from Investment Policy Reform in Korea* (OECD, Working Papers on International Investment, 2013) at 24-25: The Office for Foreign Investment Ombudsman is widely credited for the prevention of ISDS claims in South Korea.

[175] Regulators include, for example, the Financial Markets Authority, Insurance Council of New Zealand, Land Information New Zealand, New Zealand Petroleum and Minerals. Industry associations include, for example, Petroleum Exporters and Producers' Association of New Zealand, Gas New Zealand, Financial Services Council of New Zealand, New Zealand Bankers Association.

[176] Gómez and Titi, above n 145, at 524. Some analysis has indicated bad governance has a statistically significant relationship with the amount of investment arbitration a country is party to: Cédric Dupont, Thomas Schultz and Merih Angin "Political Risk and Investment Arbitration: An Empirical Study" (2016) 7 JIDS 136. This suggests this is an especially important thing to 'get right'.

[177] See Chapter 3.3.2.

[178] For example, Australia's plain packaging regulation was challenged through the WTO as well in relation to intellectual property protections: *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS434 (Ukraine), WT/DS435 (Honduras), WT/DS441 (DR), WT/DS458 (Cuba), WT/DS467 (Indonesia).

[179] Amrita Bahri, "Handling WTO disputes with the private sector: the triumphant Brazilian experience" (2016) 50(4) Journal of World Trade, 641; Chad P. Bown and Bernard M. Hoekman "WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector" (2005) Journal of International Economic Law 8(4), 861 at 869.

3.1.4 Challenges

(a) Changing foundations

The dispute resolution process in CIFAs is a return to the politicised resolution of investment disputes.[180] An otherwise meritorious claim might not be brought due to extraneous political reasons. This particular concern may be less prominent in Brazil where there is strong cooperation between the public and private sectors in relation to WTO litigation,[181] and such an experience would presumably transfer over to the investment sphere.

In the WTO, countries that are found to have breached the rules are generally required to re-establish compliance.[182] Ensuring compliance with the substantive obligations is intended to promote trade.[183] Compliance is an appropriate foundation as trade rules are intended to promote reciprocal obligations and the theory is that the parties benefit by playing by the rules. WTO disputes maintain a balanced mutually beneficial arrangement through compliance. By contrast, dispute resolution in the investment context is currently focused on the protection of a specific investment. These different focuses naturally lead towards different processes for resolving disputes.

The compliance approach has been adopted in the Brazilian CIFAs.[184] This is a consequence of changing the underlying relationship to being more of a reciprocal two-way relationship. I will not address whether that change is desirable. However, I argue this approach to dispute settlement would give insufficient weight to the autonomy of investors and the significance of their investment. Investors facing issues that cannot be resolved through consultation and negotiation should not have to depend on the support of the home state to be able to initiate arbitration. As a commercial party investors ought to be entitled to make decisions about where to allocate their capital, particularly bearing in mind the responsibility to their shareholders. Foreign investment often involves significant capital expenditure and a necessarily long term commitment.[185] By contrast, a trade relationship could fluctuate a lot over time and an exporter can relatively easily redirect their exports.[186]

Trade and investment involve materially different interests. Consequently, in the investment context a greater disincentive for states to breach their obligations to foreign investors is

[180] Vidigal and Stevens, above n 12, at 511.
[181] Bahri, above n 180, at 651-658.
[182] In some cases, the breaching party simply agrees to pay compensation instead of removing the non-compliant measure.
[183] Vidigal and Stevens, above n 12, at 491.
[184] Vidigal and Stevens, above n 12, at 491.
[185] And in many treaties, investments must be of a long term nature to be protected by the substantive obligations: CPTPP Article 9.1; USA Model BIT 2012 Article 1, and an almost identical definition appears CETA Article 8.1
[186] Obviously, this depends on the nature of the exporter's product/service, but as compared to investments exporters would generally have greater transferability of their assets.

needed. The compliance foundation would also be problematic from the perspective of states, who may not want to repeal regulation to comply with their obligations to investors. Ensuring compliance is not an appropriate foundation for investment dispute resolution. A Brazilian official describes the new approach to investment disputes as being marriage counselling rather than an immediate divorce.[187] However, to extend upon this metaphor; a spouse should not be obliged to engage in marriage counselling regardless of the reason for the breakdown of the relationship. Some differences are irreconcilable. [188]

Governments are more unlikely to act in a way that harms domestic investors.[189] Doing so could have a significant political cost for a government. A government's aversion to this political cost is therefore a protection for domestic investors. By contrast, foreign investors do not have this protection. At times it may be politically expedient for governments to act with the direct intention of harming specific foreign investors.[190] Robust protection, over and above that which is available to domestic investors, is needed to act as a disincentive to this occurring. Whether foreign investors in fact lack this political protection is highly arguable. Some investors are of a size that gives them power to directly influence the host state. Alternatively, investors might lobby those in government in their home state to use diplomatic relationships to influence the host state of the investment. Such avenues could be very powerful. Smaller to medium sized investors would not have those networks or connections, either in the host state or in their home state. Taking away this remedy would remove a disincentive for states to harm foreign investors.

(b) Effect of mediation

Compulsory mediation may result in fewer arbitrations. However, mediation is an intensely commercial and pragmatic exercise. A dispute would not necessarily be settled on the basis of the true legal position, but rather on the basis of what the parties can agree to. Recent changes to the resolution of international taxation disputes have raised this issue. The two competent authorities[191] make submissions and the arbitrator chooses the one they consider closer to the true legal position.[192] The 'correct' answer is not necessarily determinative of the dispute. This is unsatisfactory from the perspective of the taxpayer.[193] It is also undesirable for a dispute involving a state to be settled in a potentially arbitrary way. Mediation may mean legal obligations are made secondary to the commercial practicalities of a mediation process. I argue

[187] Roberts, above n 141, at 418.
[188] To extend the metaphor even further, the decision whether the wronged spouse can initiate a divorce should not be made by their parent.
[189] Post "Home Court Advantage: Investor Type and Contractual Resilience in the Argentine Water Sector" (2014) 42(1) Politics and Society 108 at 109, 113.
[190] Sornarajah, above n 29, at 78-79.
[191] Tax authorities of the respective states.
[192] Joshua Aird and Brendan Brown "Double tax agreements and the multilateral instrument" (2017) NZLJ 118 at 121.
[193] Aird and Brown, above n 193 at 121.

this is no better than the present system, with its potential for inconsistency and unpredictability. The structure for disputes in CIFAs is substantially different, but the outcomes are unlikely to be better. This mediation (where many challenges to state regulation may be challenged) is not a great deal more transparent or public than arbitration.[194]

The usefulness of this proposal may not be especially significant. Investors likely already consult with governments, both their own and that of the host state, prior to bringing cases.[195] Existing agreements encourage the parties to settle issues through consultation before resorting to arbitration.[196] The Brazilian approach does not go far beyond formalising that principle.

The ombudsman-like role is a key aspect of the dispute prevention and is related to the use of mediation. In South Korea, the Office of the Foreign Investment Ombudsman has been credited with preventing issues escalating into formal disputes.[197] Improved institutional governance, including pathways for discussion to prevent disputes, is a good idea.

However, formally requiring mediation may lead to disputes being resolved inconsistently. I argue that for disputes involving states, a more judicialised process that searches for the correct legal outcome in a transparent and impartial manner is more desirable than mediation.[198] In some circumstances, the use of mediation will be appropriate. However, as a complete substitute to arbitration, it is insufficient. Additionally, state-state arbitration is an inappropriate backstop in the investment context. The Brazilian approach, with its emphasis on mediation, detracts from a rules-based system. Under this system, the rules are less important than what can be agreed by the parties. Additionally, it does not respond to the regulatory chill concern because it does not address the concerns of inconsistency and uncertainty around states' regulatory freedom. These factors would detract from the integrity of the system.

3.1.5 Analysis

This proposal represents a significant shift away from the current rules-based system governing international investment. The fact that this proposal involves more significant change than other proposals is not a reason to resist it. However, a degree of circumspection is appropriate in considering proposals that are different from the country's usual approach.

The benefits of the broader paradigm shift are not targeted at improving the dispute resolution process specifically. They focus on a change in the priorities and values of the body of law as

[194] Brazil-Ethiopia CIFA, Article 23.5.
[195] This is shown in the trade sector, where, despite the fact companies have to rely on States to bring claims, there are strong public-private partnerships established to pursue these claims, see footnote 182.
[196] CETA Articles 8.19-8.20; CPTPP Article 9.18.
[197] Vidigal and Stevens, above n 12, at 488.
[198] And state-state disputes are also an inappropriate backstop in the investment context.

a whole. The proposal does contain an alternative dispute resolution process. It is more focused on preventing disputes and amicable dispute settlement. This is a reaction to a view that the status quo pays insufficient regard to the interests of states. In my view, a paradigm shift is a reactionary approach that will not address the criticisms levelled at ISDS in its present form.

This method of dispute resolution also focuses on what can be agreed on, rather than the true legal position. These features do not provide for any more consistency and predictability than the current system. This prevents the proposal from addressing concerns about regulatory chill. Consequently, the Brazilian proposal is unlikely to be supported by states that are concerned about preserving regulatory freedom. This proposal does not create a structure that is different in the necessary ways from the status quo. New Zealand should support a system which is different in the right way, as that will promote systemic integrity and encourage international participation.

The adoption of a foreign investment ombudsman may be a useful addition to the investment system. Specifically, it would be a useful institution for helping developing countries build the governmental infrastructure to minimise the chances of having claims brought against them. Additionally, promoting understanding of the obligations enhances the rule of law in this field.

3.2 Incremental Reform

Incremental reform is the least significant method of change. It would leave the institutional structure untouched but changing specific rules within that structure.

3.2.1 Form

Incremental Reform would occur though updating ICSID or UNCITRAL rules, or through renegotiation of existing treaties. This type of change is already occurring; as shown by the recently development of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Transparency Rules).[199] The Transparency Rules require publication of the commencement of proceedings, responses, submissions, allowing third party submissions (including NGOs or non-disputing treaty Parties), and public hearings.[200] The Transparency Rules protect commercially sensitive information where necessary.[201]

[199] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 54749 UNTS (opened for signature 17 March 2015, entered into force 18 October 2017).
[200] Transparency Rules Articles 2-6.
[201] Transparency Rules Article 3.4.

The Transparency Rules apply through an opt-in mechanism.[202] Five countries have ratified the Transparency Rules directly,[203] but more have incorporated it into treaties (and perhaps have not felt the need to ratify the Transparency Rules themselves). These Rules have also been incorporated into CETA, which covers Canada and all EU member states.[204]

Alternatively, states can negotiate for gradual development of the rules in the development of future IIAs. The CPTPP is an example of this method.[205] ISDS is still retained but additional rules relating to transparency in the dispute settlement procedure have been introduced to respond to concerns raised about the system.[206] Article 9.23 effectively adopts the same transparency measures as the UNCITRAL Transparency Rules. Similar commitments are in the USA Model BIT,[207] and India Model BIT.[208]

Another possible change within this method would be the imposition of stronger independence requirements for arbitrators. Such change would likely require some form of practice restriction. This could include requirements for individuals to elect to be an arbitrator or a lawyer for a certain length of time with 'cooling off' periods in between. Or, it might prevent individuals from concurrently being an arbitrator in one case and counsel in another case which involve substantially similar legal issues or claims.

3.2.2 Key concerns this reform addresses

(a) Insufficient impartiality of arbitrators

Critics have raised concerns about partiality of arbitrators.[209] Of particular concern has been that arbitrators can be drawn from the legal profession, and can act as counsel for investors in

[202] For treaties (defined broadly in a footnote to Article 1.1 to include any bilateral or multilateral treaty with investment protections) concluded prior to 1 April 2014, the Transparency Rules apply if either: the parties to the dispute agree or if the respondent state and the state of the claimant have ratified the convention since that date: Article 1.2. The Transparency Rules also apply if the dispute is pursuant to an agreement made since 1 April 2014 that allows for disputes to be heard under the UNCITRAL Arbitration Rules: Transparency Rules Article 1.1; so, for example, this would include CPTPP.
[203] Figures given at 2 October 2018. The countries that have ratified it are Cameroon, Canada, Mauritius, and Switzerland, and Gambia. An additional 19 countries have signed it, though have yet to ratify it. New Zealand has not signed this convention.
[204] CETA Article 8.36.1
[205] Osmanski, above n 11, at 658.
[206] Osmanski, above n 11, at 658.
[207] United States of America Model BIT 2012 Article 29.
[208] Model Text for Indian BIT 2015 Article 14.8.
[209] Elizabeth Warren "The Trans-Pacific Partnership Clause Everyone Should Oppose" Washington Post, (Washington DC, 25 February 2015); Malcolm Langford, Daniel Behn and Runar Hilleren Lie "The Revolving Door in International Investment Arbitration" (2017) 20 Journal of International Economic Law 301;
Julian Donaubauer, Eric Neumayer, and Peter Nunnenkamp "Winning or losing in investor-to-state dispute resolution: The role of arbitrator bias and experience" (2018) 26(4) Review of International Economics 892.

one case, and then as judges in the next.[210] The concern is that such arbitrators will be biased in favour of protecting corporate interests to protect valuable workflows by making 'pro-investor' decisions when sitting as arbitrators. Some argue arbitrators might make decisions as an arbitrator which could have precedential value for their role as counsel in another dispute.[211] The methods for disqualifying arbitrators are also criticised as they lack separation from the challenged arbitrator.[212] Under the ICSID Arbitration Rules, the decision on whether to disqualify an arbitrator is made by the non-challenged members of the tribunal.[213] This process is clearly questionable when such disputes can have potentially very significant consequences for countries' regulatory schemes and treasury. Concerns about bias significantly detract from the systemic integrity of the status quo. It is difficult for stakeholders to have trust in a system where potentially biased arbitrators have the final say.

It has been suggested that arbitrators who have been predominantly appointed by an investor in the past are likely to favour investors in the future.[214] The researchers state that if the arbitrators were not biased, all claims would be decided on the merits.[215] Due to the cost involved, investors are likely to only bring strong cases. A majority of decisions being in favour of investors and decisions being made on the merits are not mutually exclusive. Regardless of whether bias can be 'proved', the current system gives rise to an appearance of impropriety. Arbitrators might benefit from seeming to express pro-investor views in their decisions by getting more work in the future (even though that 'pro-investor view' might simply be a natural result of the circumstances of that case). While some might suspect that judges in a domestic legal system might have subconscious ideological preferences, such judges have nothing to gain from expressing those views.

These concerns are strongly justified as a matter of principle. It is important, for justice to be seen to be done, that arbitrators are not strongly connected to either party to a dispute.[216] It is unreasonable to assume that any arbitrator who has also acted as a lawyer cannot bring sufficient independence to the task of arbitration. However, the appearance of propriety is

---

[210] Malcolm Langford, Daniel Behn, and Runar Hilleren Lie "The Revolving Door in International Investment Arbitration" (2017) 20(2) Journal of International Economic Law 301. There is also concern about arbitrators being biased against developing countries, see Daniel Behn, Tarald Laudal Berge, and Malcolm Langford "Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration" (2018) 38 Nw J Int'l L & Bus 335 at 347, though the authors' results suggest against such a bias (at 374), but concede their methodology is somewhat crude.
[211] Thomas Bürgenthal, "The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law" (2006) 22(4) Arb Int'l 495 at 497-498.
[212] Disqualifications are possible pursuant to Rule 9 of the Arbitration Rules, which refers to Article 57 of the ICSID Convention. Article 57 allows for disqualification if an arbitrator no longer meets the requirements of Article 14(1). Also, see UNCITRAL Arbitration Rules, Article 12-13. The appointing authority is a person or institution that assists with the arbitrator appointment process, and is defined in Rule 6.
[213] ICSID Arbitration Rules, Rule 9(4).
[214] Donaubauer, Neumayer and Nunnenkamp, above n 210, at 910.
[215] Donaubauer, Neumayer and Nunnenkamp, above n 210, at 910.
[216] Bolivia withdrew from the ICSID Convention in 2007 and cited the perception of bias in favour of foreign corporations as a reason for that. On this, see Subedi, above n 30, at 199.

crucial to rebuild the legitimacy of this system. Rules must be in place to prevent potentially biased arbitrators sitting on tribunals in the future. This need for independence must be balanced against the fact there are only a limited range of people who are experts in the field. Such individuals must work and be engaged in the area to have the sufficient expertise to be arbitrators. Requiring arbitrators to have had no connection with any party is not feasible or necessary. Additionally, parties should not be deprived of their arbitrator of choice without good justification. Overall, it is clear that independence requirements of arbitrators must be robust, and current provisions do not do enough to prevent the appearance of partiality.

(b) Confidentiality and transparency

As explained,[217] under the majority of investment agreements, the general approach has been one of confidentiality, rather than transparency. The procedural rules followed, result, legal reasoning and quantum of awards may be kept confidential.[218] Even the existence of disputes can be kept secret, though it is impossible to know how many are.[219] In the commercial arbitration context, confidentiality is touted as a key advantage over litigation in domestic courts.[220] This principle has proven to be inappropriate given states are involved in the international investment arbitration context.[221] Confidentiality has significantly undermined the systemic integrity of ISDS. Not having access to information prevents people form understanding it. Inevitably, this information vacuum is filled with suspicion.

The public ought to know if a government is party to investment arbitration for two key reasons. First, it enhances the legitimacy of that arbitration.[222] The tribunal in *Suez-Vivendi*,[223] constituted under ICSID rules, acknowledged the public interest in transparency of investor-state arbitration and the associated enhancement of the legitimacy of such arbitration.[224] The public also has a strong interest in knowing that a government may have violated its obligations, or been in corrupt in its dealings. Second, arbitral awards could have significant effects on a country's treasury.[225] Therefore large amounts of public money might be used to pay compensation.

---

[217] See Chapter 2.1.6(b).
[218] See footnote 92.
[219] An Australian Joint Standing Committee report into the TPP, prior to its signing, said many cases have never become public, but cited no authority for this proposition: see Joint Standing Committee on Treaties Parliament of the Commonwealth of Australia *Report 165: Trans-Pacific Partnership Agreement* (November 2016) at 6.18.
[220] Edna Sussman and John Wilkinson "Benefits of Arbitration for Commercial Disputes" American Bar Association https://www.americanbar.org/aba.html.
[221] Subedi, above n 30, at 172, 219.
[222] Joachim Delaney and Daniel Barstow Magraw "Procedural Transparency" in Peter Muchlinki, Federico Ortino and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* in (1st ed, OUP, New York, 2008) 721 at 758.
[223] *Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, ICSID Case No. ARB/03/19 (19 May 2005)
[224] *Suez-Vivendi* at [22] as in Delaney and Magraw, above n 223, at 758.
[225] Subedi, above n 3-, at 172.

3.2.3 Benefits

This method of reform has already had significant success, through both UNCITRAL reform, and in CPTPP and CETA. The familiarity significantly decreases the opposition this reform would face, or at least makes it easier to preserve something closer to the current system.[226] In relation to transparency, there appears to be some consensus emerging about the necessary response. This is shown by the similarity of the transparency provisions in UNCITRAL Transparency Rules, CPTPP and CETA.[227] It is a pragmatic path and can take effect in a shorter time, compared to more significant reform. There is already a strong level of acceptance from states for systems of this kind. Convincing the relevant stakeholders of the merits of an entirely new system would be a more difficult process.

The opt-in method is a desirable way to advance incremental change. Any individual state may ratify the Transparency Rules. Provided the state of a claimant has also done so, the Transparency Rules automatically apply.[228] It is not difficult to imagine that claimants from states which have not ratified this treaty might simply refuse to conduct the dispute under the Transparency Rules. They might also lobby their government against ratifying the these rules.[229] Other changes could also be made using this opt-in system.

Incremental Reform could usefully provide more stringent guidelines around an arbitrator's independence. Restrictions on arbitrators' practice would address the concern about arbitrators making decisions which might favour their arguments in another case. At the same time, this would allow individuals with expertise to continue to work in their chosen field. It is also important to allow parties to retain their preferred counsel or select a desired arbitrator.

The substance of this reform responds effectively to the criticisms raised above. Despite the fact these changes are 'only' operational, they would address some of the concern about the legitimacy and systemic integrity of ISDS.[230] It confers more confidence in the results, as the process leading to them is less mysterious and therefore suspicious.[231] Transparency is also useful to promote public participation in matters relating to a state.[232] This has intrinsic value because of its significance in democratic governance.[233] Interested parties should be entitled to information about disputes. This promotes accountability for both the investors and governments. Investors' claims can be scrutinised and its potential consequences can be

[226] Roberts, above n 141, at 421.
[227] See UNCITRAL Transparency Rules; CETA Article 8.36; CPTPP Article 9.24.
[228] UNCITRAL Transparency Rules, Rule 1.2.
[229] That said, ICSID has enjoyed significant degrees of investor consent to publication of awards in its history (see footnote 97) so this may indicate investors do not possess this opposition to transparency.
[230] Subedi, above n 30, at 205
[231] Delaney and Magraw, above n 223, at 780.
[232] Delaney and Magraw, above n 223, at 779.
[233] Delaney and Magraw, above n 223, at 779.

publicised. Governments can be held accountable for their actions which may have violated international obligations and exposed it to arbitration.

3.2.4 Challenges

This method of reform is criticised by some for not being seen to go far enough, given the magnitude of the issues involved.[234] ICSID is restrained in what change it can bring about without renegotiation of the ICSID Convention between the member states.[235] For example, the criteria under which arbitrators can be disqualified are set out in the ICSID Convention, rather than the specific rules on Arbitration, Conciliation or the Additional Facility Rules.[236] Another important matter embedded in the Convention is the ability of ICSID to publish awards. Currently, that requires the consent of both parties.[237] The Proposed Rules provide publication of the award in full if the Parties do not object, including provision for deemed consent after 60 days. [238] Under the current Arbitration Rules, if the parties do not consent to publication of the award, excerpts of the legal reasoning may be released.[239] These examples show that ICSID-led reform is limited due to it having a relatively narrow scope for changing rules.

I argue above that Incremental Reform would beneficially change aspects of the status quo. These changes would, in practice, address the main causes of criticisms of investment disputes.[240] However, Incremental Reform has a limited scope for possible change. Consequently, this method would be perceived as insufficiently different from the current system. This perception is important. There is a distinction between reform that would address the criticisms of the procedure of investment disputes, and reform that changes perceptions of the procedure of investment disputes. Incremental Reform is the former but not the latter. This undermines the political case for supporting this method because Incremental Reform would not strengthen the legitimacy of investment dispute resolution. Without that legitimacy, this method of reform will not attract international participation.

Incremental Reform may be supported by current institutional actors in order to quell the calls for Structural Reform or Paradigmatic Reform.[241] This may be for a number of reasons. The cynical view would be that the institutional operators wish to preserve their workstreams,

---

[234] Roberts, above n 141, at 417.
[235] Amendments to the ICSID Convention require two/thirds consent: ICSID Convention Articles 65-66.
[236] Article 57 of the Convention allows for proposals for disqualification to be made. This Article refers to the criteria in Article 14(1) of the Convention, which are the specific grounds for disqualification.
[237] ICSID Convention, Administrative and Financial Regulations, Regulation 22(2)(b).
[238] *ICSID Secretariat, Proposals for Amendment of the ICSID Rules — Working Paper, Volume 3* (Proposed Arbitration Rules) (OECD, Working Paper, August 2018) Proposed Arbitration Rule 44(2).
[239] ICSID Arbitration Rule 48(4).
[240] See Chapter 3.2.3.
[241] Roberts, above n 141, at 421.

which might diminish if more drastic change is made. These individuals and bodies undoubtedly have an interesting in preserving their market share and caseload.[242] However, these practitioners are also the ones most familiar with it and may genuinely believe that the current system works well. Additionally, these institutions have demonstrated a willingness to confront criticism.[243] Existing institutional actors can both be sympathetic to the concerns critics have of the status quo and believe that making changes within the current framework is sufficient.

3.2.5 Analysis

Incremental Reform can effectively address specific issues such as transparency and arbitrator independence. This would be beneficial for the conduct of future disputes. Arbitrators would take account of more, relevant considerations and would not be influenced by irrelevant matters. It also promotes public attention and scrutiny,[244] which might affect the conduct and strategy of the parties to the dispute.

These proposals would effectively target the features of the status quo which lead to criticisms of the system. It is arguable that if this reform is adopted and the process of disputes becomes more widely understood, the criticisms of ISDS may lose momentum. If proponents of ISDS believe the system provides adequate protection for regulatory freedom of states, then demonstrating that through greater transparency is advantageous for both proponents of the system and those that criticise it. The current debate about ISDS focuses on speculative concerns like bias and secret courts that are difficult to quantify. This draws attention away from more fundamental questions about the balance of sovereignty and substantive investment protection. Changing these features of the system would be useful in order to clarify what further analysis of international investment law is needed.[245]

Reform through multilateral institutions such as UNCITRAL or ICSID is the type of reform New Zealand is familiar with. It is consistent with the country's interest in advancing a multilateral rules-based system. A more coherent and stable practice for dispute resolution is in New Zealand's interest, regardless of whether or not New Zealand investors actually use it,

---

[242] Roberts, above n 141, at 425.
[243] For example, ICSID proposed the creation of an Appellate Structure in 2004 (which failed because countries' demands for it weakened), and UNCITRAL has recently updated its rules.
[244] Jan Paulsson "Avoiding unintended consequences" in Karl P. Sauvant with Michael Chiswick-Patterson (eds) Appeals Mechanism in International Investment Disputes (1st ed, New York: Oxford University Press, 2008) 241 at 243.
[245] For example, the role international investment law plays in sustainable development and environmental protection is an important topic to address. See generally: Anthony Van Duzer, Penelope Simons and Graham Mayeda *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat, August 2012); J Pohl *Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence* (OECD, OECD Working Papers on International Investment, January 2018).

or New Zealand faces claims. It enhances economic and political security by building stronger connections between businesses and governments. Incremental reform is at least a minimum that New Zealand is and ought to continue to support.

Given the broad challenges to the legitimacy of ISDS, Incremental Reform would be too similar to the status quo to alter the public perception and legitimacy of ISDS. This perception could have a significant influence on the acceptance by states. New Zealand's interests lie in a multilateral rules-based system. Without international participation, the system would not promote consistency and predictability. Therefore, the rules governing investment disputes would be too dissimilar. For that reason, this is not a desirable method for reform.

3.3 Systemic Reform

Systemic Reform involves redesigning the key institutions and changing fundamental aspects of the current practice of investor-state arbitration. Systemic Reform includes and goes beyond the proposals discussed within Incremental Reform. Systemic Reform has been led by the EU. Several countries have already agreed to ICS.[246] New Zealand is currently negotiating an FTA with the EU.[247] While the current government has signalled an intention to oppose ISDS, the EU will presumably be advocating strongly for it in order to increase the court's multilateral coverage.[248] It is important to consider whether ICS is sufficiently different from ISDS to justify its endorsement by the current Government.

UNCITRAL has also set up a Working Group to consider very similar issues.[249] This process is still at an early stage. The proposals from the EU will be focused on providing a clearer example of how this change could progress.

---

[246] Roberts, above n 141, at 422.
[247] New Zealand-EU free trade agreement, MFAT, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/eu-fta/>.
[248] Though bearing in mind the current strategy appears to be creating different courts for different treaties.
[249] *A/CN.9/WG.III/WP.150 - Possible reform of investor-State dispute settlement (ISDS) - Consistency and related matters* (Working Group III (Investor-State Dispute Settlement Reform, 28 August 2018); *A/CN.9/WG.III/WP.152 - Possible reform of investor-State dispute settlement (ISDS) - Arbitrators and decision makers: appointment mechanisms and related issues* (UNCITRAL, 30 August 2018); *A/CN.9/WG.III/WP.151 - Possible reform of investor-State dispute settlement (ISDS) - Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS (advance copy)* (UNCITRAL, 30 August 2018); *A/CN.9/935 - Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session* (UNCITRAL, 14 May 2018).

3.3.1 Form

In recent bilateral agreements,[250] the EU has established an investment court system (ICS). This has formed part of wider FTAs with Vietnam, Canada, Singapore and Mexico.[251] The ICS in CETA is a permanent court with 15 professional judges.[252] The judges must be, or are qualified to be, jurists in their own country and are appointed for fixed terms of five years with possibility of reappointment for a further five.[253] Five are from EU countries, five from Canada, and five are non-nationals of a party to the treaty.[254] The judges are not full-time, but must be available to perform all their functions under the Article, and are paid a monthly retainer.[255] A President and Vice-President are appointed from the non-national judges.[256] Three judges are appointed randomly to a Tribunal by the President.[257]

Members are required to "not participate in the consideration of any disputes that would create a direct or indirect conflict of interest."[258] Once appointed, they must discontinue acting as counsel for any party in any existing or new investment dispute.[259] Decisions as to whether challenged arbitrators are to be removed will be made by the President of the International Court of Justice (rather than by the non-challenged Members of the division of the Tribunal, as currently occurs).[260] The President of the Tribunal or the disputing parties may also apply to the CETA Joint Committee for the disqualification of a Member where they are believed to be acting in breach of Article 8.30.1.[261] Additionally, the ICS will apply a modified version of the UNCITRAL Transparency Rules in its proceedings.[262]

CETA also creates an appellate court called the "Appellate Tribunal".[263] The Members of the Appellate Tribunal will be appointed at the same time as various other decisions are made relating to the administration and operation of the Appellate Tribunal,[264] such decisions

[250] I note the EU is a plurilateral body, but on these matters it makes treaties as a bloc with another country, so these treaties will be described as bilateral.
[251] Roberts, above n 141, at 421.
[252] CETA Article 8.27.2. The members of the Appellate Tribunal are appointed by the CETA Joint Committee (CETA Article 8.27.3). Sardinha notes that this removes a significant amount of autonomy from investors in the context of disputes: see Elsa Sardinha "The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement" (2017) 32(3) ICSID Review 625.
[253] CETA Article 8.27.5.
[254] CETA Article 8.27.2.
[255] CETA Article 8.27.11-8.27.12.
[256] CETA Article 8.27.8.
[257] CETA Article 8.27.7.
[258] CETA Article 8.30.1
[259] CETA Article 8.30.1.
[260] CETA Article 8.30.1-8.30.2.
[261] CETA Article 8.30.4.
[262] CETA Article 8.36.1. The modifications supplement the process to make it more transparent, including through publication of more documents: 8.36.2-8.36.3.
[263] CETA Article 8.28.1.
[264] CETA Article 8.28.3.

presumably also covering the issue of whether the Appellate judges are appointed on a full time basis.[265] They are required to be as qualified as Members of the Tribunal and abide by the same ethical requirements.[266] The grounds for review are errors of law, serious errors of fact, or the grounds for annulment under the ICSID Convention Article 52(1).[267] The agreement also adopts some innovative changes relating to mediation and a streamlined process for the benefit of small- and medium-sized enterprises.[268] To ensure ongoing control over the interpretation and application of the text by the treaty parties, there is a mechanism for the adoption of binding interpretations.[269]

The ICS will be set up after all member states of the EU have ratified the treaty.[270] Thus there is no timeframe for when this court system will be set up and consequently when it might evolve into a multilateral court. There is also no guidance on when decisions will be made relating to the administration and operation of the Appellate Tribunal.

The EU has expressed the hope that the ICS will be a multilateral court for all investment disputes.[271] CETA requires the parties to advocate for a multilateral investment court with their trading partners.[272]

3.3.2 Key concerns this reform addresses

(a) Inconsistency and unpredictability

The current structure of investment disputes creates a risk of inconsistency and unpredictability in ISDS awards. The features that give rise to this concern are ad hoc tribunals; absence of doctrine of precedent; and the lack of an appeal mechanism. To respond to this, reform must promote a structure and rules which leads to more consistency and predictability. While these features are desirable, any process of legal interpretation and application to a unique set of facts

[265] This decision would be within CETA Article 8.27.7(g) "any other elements it determines to be necessary for the effective functioning of the Appellate Tribunal."
[266] CETA Article 8.28.4.
[267] CETA Article 8.28.2.
[268] CETA Articles 8.20 - Mediation, 8.19.3, 8.23.5 – Submission of a Claim to the Tribunal, 8.39.6 – Final Award and Investment provisions in the EU-Canada free trade agreement (CETA) PDF at 7
CETA Article 8.27.9.
[269] CETA Article 8.31.3.
[270] European Commission "CETA Explained" <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/index_en.htm>. This is far from a mechanical process. See: Beatriz Rios "Italy threatens to block CETA ratification" *EURACTIV* (online ed, London, 15 June 2018).
[271] Cecilia Malmström, Commissioner for Trade "Discussion on Investment in TTIP at the Meeting of the International Trade Committee of the European Parliament March 2015" (Brussels, 18 March 2015). Changes in this respect would have to allow for a more geographically diverse Tribunal and Appellate Tribunal, but these are matters that have not yet been addressed.
[272] CETA Article 8.29.

inevitably has ambiguity. The goal must be tolerable, rather than absolute, consistency and predictability.

An obligation that highlights the potential pitfalls of this structure is the International Minimum Standard of Treatment. This standard has been interpreted in some instances by reference to the treaty preamble;[273] has been conflated with another standard;[274] interpreted in a way requiring a government to provide a 'secure' political and economic environment as well as physical security (seeming to prevent scope for regulatory action);[275] and has allowed for a subjective expectation of an investor to be enforced.[276] This demonstrates the potentially very broad interpretation of the obligation. These examples have not been used widely as generally tribunals do follow precedent on an informal basis.[277] Yet such results could occur in any given case.

Awards made by tribunals are final and binding as between the parties to the disputes.[278] There are only limited grounds for review. The absence of a full right of appeal exacerbates the fears of unpredictable results that is inherent in an ad hoc system, where tribunals are not bound by precedent. If a tribunal does adopt a particularly controversial interpretation there is no strong corrective mechanism. There is disagreement about the jurisdiction of an annulment tribunal. Some consider that some 'annulment' decisions have in substance been full appeals.[279] While this might achieve some 'better' results, misusing the annulment mechanism further contributes to inconsistency and unpredictability.[280] This is against the interests of all parties even if leads to more 'just' outcomes in certain cases.

(b) Perception of ISDS

ISDS is perceived extremely negatively. Responding to this perception essentially requires meeting all of the objectives that have been identified.[281] Reform needs more consistency and predictability in dispute resolution, greater systemic integrity, and clearer scope for states' regulatory freedom.

---

[273] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1. On this, see Margaret Clare Ryan, "*Glamis Gold, Ltd. v. the United States* and the Fair and Equitable Treatment Standard" (2011) 59 McGill L J 919 at 936-937.
[274] *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1. The Tribunal said "the name assigned to the standard does not really matter." at [210], see Ryan, above n 274, at 956-957.
[275] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.
[276] *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, (*Suez-Vivendi*) Decision on Liability ICSID Case No. ARB/03/19. Professor Nikken issued a dissenting opinion in *Suez-Vivendi*, criticising the concept of legitimate expectations as a subjective source of rights at [19]. And see Newcombe and Paradell, above n 1, at 279-289.
[277] Schreuer and Weiniger, above n 80, at 1189.
[278] See Chapter 2.1.6(b).
[279] Christoph Schreuer "From ICSID Annulment to Appeal Half Way Down the Slippery Slope" (2011) 10(2) The Law & Practice of International Courts and Tribunals 211 at 211.
[280] Schreuer, above n 280, at 211-213.
[281] See Chapter 1.3.

The overarching criticism is that foreign investors should not profit by challenging governmental regulation in the public interest. As raised in Chapter 3.1.4, the same regulatory measures can be challenged through both trade and investment disputes. The substance of both disputes have the potential to stymie state regulatory action. An obvious difference between the systems is that trade disputes are conducted between states whereas investors have personal direct access to arbitration.[282] In the EU and USA, private sector groups do a significant share of the pre-litigation preparation of WTO cases.[283] The arguments are then presented by government lawyers and economists.[284] The state makes the decision whether to proceed with the case. The private sector group presumably only sponsors it if they stand to benefit from the outcome. States are not necessarily acting exclusively in the public interest in pursuing a WTO claim.

Salacuse and Sullivan identify that the autonomy of investors in investment disputes is the key distinguishing factor.[285] Investors, in theory, need have no regard to the interests of their home state when determining whether to bring a claim. In reality, the situation may not be this simple. As argued,[286] investors are unlikely to bring a claim without any consultation with their government. There is a stronger check on private interests in the conduct of trade disputes because it is the state that decides whether to bring the case. However, the support and interests of private parties is still fundamental to that decision. Its outcome will significantly benefit those private interests.

Surprisingly, in light of those comparisons, the WTO dispute resolution system is widely praised.[287] This suggests that the negative perceptions of ISDS are not simply due to the fact ISDS protects private interests at the expense of potentially discouraging governmental regulation. WTO disputes have both of those features, but the system is not criticised on that basis. Therefore, it is more accurate to identify the concerns as relating to the procedure of the dispute rather than relating to the parties and interests involved. The implication is that the structure for WTO disputes has more procedural integrity than the status quo in ISDS. That is why the EU has used systemic changes, but built on the same foundations as the current system, to address the criticisms.

---

[282] Carmody explains the difference in terms of the interests being protected, in that trade disputes protect public goods, and investment disputes protect private interests: Chios Carmody "Obligations Versus Rights: Substantive Difference between WTO and International Investment Law" (2017) 12(1) Asian Journal of WTO & International Health Law and Policy 75. As noted (see Chapter 3.1.4), I find this argument unconvincing.
[283] Bown and Hoekman above n 180, at 869. And see Bahri, above n 180, at 651-658.
[284] Bown and Hoekman above n 180, at 869.
[285] Salacuse and Sullivan, above n 165, at 88.
[286] See Chapter 3.1.4(a)-(b).
[287] Claus-Dieter Ehlermann "The Workload of the WTO Appellate Body: Problems and Remedies" (2017) 20(3) Journal of International Economic Law 705 at 705. It faces criticism from the Trump Administration (and those gone before it) but the criticisms are more confined than those levelled at ISDS.

Investments involve a commitment of capital to a particular place, often for a long time. This is a more long term relationship with a state than an exporter, who would enjoy a higher degree of transferability of its assets.[288] Allowing for an investor to bring a claim directly is a strong disincentive to states to breach their obligations to investors. It recognises the significance of the economic activity for the investor.[289] Direct recourse against the state was also intended to avoid the issue of politicisation of disputes.[290] The dangers of such politicisation are readily apparent at the moment; with trade disputes seemingly being a precursor to more serious diplomatic breakdown.[291]

The importance of perception is apparent to countries considering ISDS. Accordingly, some states have taken a sceptical view of some of those suggesting only minor reform which might not remedy this issue of perception.[292] This issue of perception is extremely important as it can have a significant effect on the political justification for signing onto such agreements. For any reform to have significant effect, it must be politically attractive as well as addressing the specific concerns about the system.

3.3.3 Benefits

The EC view was that significant change was required.[293] The benefit of an investment court is that it responds to both procedural and systemic concerns that have been raised about ISDS.

The responses to the procedural concerns, those being transparency and arbitrator independence, are the same as the proposals discussed in Incremental Reform. That discussion will not be repeated in this part, but the analysis of those proposals applies equally here.

The key systemic differences are the changes from ad hoc disputes to a permanent Tribunal, and the introduction of an Appellate Tribunal. This would make it more similar to the WTO system.[294] It would also draw on features of domestic courts that ensure such courts have integrity and are trusted.[295] This structure promotes the development of clear principles which

[288] Puig and Shaffer, above n 6, at 394.
[289] Puig and Shaffer, above n 6, at 394.
[290] Puig and Shaffer, above n 6, at 394, 400.
[291] Puig and Shaffer, above n 6, at 375. See generally Liu Wei "Trump's Trade War on China Is About More Than Trade" *The Diplomat* (online ed, Tokyo, 20 July 2018); Maureen De Armond "Trade Wars, Tax Disputes, and Retaliatory Sanctions: A Growing Threat to the Evolving U.S.-EU Relationship" (2003) 13 Transnat'l L & Contemp Probs 307.
[292] Roberts, above n 141, at 417.
[293] Aline Roberts "European Parliament Backs TTIP, Rejects ISDS" (EURACTIV, July 2015).
[294] Interestingly, first-stage WTO Panels are also ad hoc; only the Appellate Body is permanent.
[295] "Commissioner Proposes new Investment Court System for TTIP and Other EU Trade and Investment Negotiations" (European Commission, September 2015).

can guide investors' and governments' behaviour.[296] The grounds for appeal are broader than the grounds for an annulment available under ICSID. In combination, these would address the broader legitimacy issue confronting ISDS.

This proposal contains no formal doctrine of precedent. In practice, having the same group of judges sitting on all disputes over a certain length of time is likely to ensure a high degree of consistency.[297]

3.3.4 Challenges

There are obstacles relating to both successfully negotiating for this type of proposal and the substance of the proposal.

(a) 'Multilateral paralysis'

Proposals for multilateral investment courts have been unsuccessful in the past. The OECD led efforts to establish a Multilateral Agreement on Investment (MAI) in the 1990s.[298] This failed due to disagreement on details, concern about NAFTA disputes, and criticisms from NGOs.[299] Amarashina and Kokott identified that this was unsuccessful because it largely consisted of developed economics (those in the OECD) attempting to dictate terms to developing countries.[300] The OECD countries wanted access for their investors but excluded the host states from negotiations. Related to this, is the amount of "horizontal hostility" that exists.[301] This refers to the disagreements between the parties who, whilst agreeing change is needed, do not agree on the best response to the problems that exist. This is a further obstacle to achieving significant change and is particularly relevant when balancing the interests of developing and developed countries. Surmounting this horizontal hostility is necessary to build the systemic integrity of the investment court and provide a structure that can allow for the preservation of states' regulatory freedom.[302] The upshot of this is increased international participation; and the promotion of a rules-based system.

---

[296] Cecilia Malmström, Commissioner for Trade "Discussion on Investment in TTIP at the Meeting of the International Trade Committee of the European Parliament March 2015" (Brussels, 18 March 2015); Subedi, above n 30, at 201.
[297] It has been suggested the Appellate Tribunal could adopt the WTO Appellate Body 'collegiality' practice; where all Members hear cases and contribute to the resolution in order to promote consistency. See David Gantz, "An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges" (2006) 39 Vand J Transnat'l L 39 65-67.
[298] Newcombe and Paradell, above n 1, at 55.
[299] Newcombe and Paradell, above n 1, at 55. Subedi characterises the MAI as an attempt for multinationals to regulate states, rather than the way around: Subedi, above n 30, at 40
[300] Stefan D Amarashina and Juliane Kokott "Multilateral Investment Rules Revisited" in Peter Muchlinki, Federico Ortino and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (1st ed, OUP, New York, 2008) 119 at 135.
[301] Roberts, above n 141, at 420.
[302] Amarashina and Kokott, above n 301, at 135.

International investment law has been considered by the WTO.[303] However, disagreement on how to approach investment is seen as one of many reasons why the Doha Round has long been at a standstill.[304] The WTO had initially enjoyed significant success negotiating and implementing multilateral rules to govern trade, yet seems to have met its match when it came to international investment law.[305] This perhaps suggests that a multilateral system governing investment is ultimately unnecessary or too difficult to achieve.[306]

Currently, multilateralism does not appear to be politically popular. The continuing operation of the WTO Appellate Body is in question. The USA has blocked the appointment or reappointment of some judges.[307] This highlights an issue that may arise when a multilateral institution requires consensus for certain decisions to be made. The UK is also at least partially disengaging from the multilateral system that has governed global economics by leaving single market. These raise significant questions about whether the multilateral system is in fact the best forum for advancing such negotiations.

As an operational matter, a multilateral investment court may encounter similar issues to the WTO Appellate Body. The CETA Appellate Tribunal attempts to address these by inserting provisions that directly address the concerns in the WTO.[308] However, a system which requires long term multilateral cooperation always faces risk of disagreement over matters like judges' appointments or reappointments. This raises doubts about its long-term viability.

The benefit of a multilateral system is that one set of rules brings as much simplicity as possible to the field; all states know what rules bind them and others. Despite being based on a complicated web of predominantly bilateral relationships, investment tribunal outcomes are reasonably consistent.[309] This indicates multilateralism is not the only feasible way to achieve a reasonable degree of consistency (bearing in mind that total consistency is not a feature of any legal system). From New Zealand's perspective, it would be sage to take stock of the current obstacles to multilateralism and consider whether the bilateral approach is likely to be

[303] *Doha Declaration* 14 Nov 2001, 41 ILM 746 (Doha Declaration) at para 20.
[304] Newcombe and Paradell, above n 1, at 56.
[305] Newcombe and Paradell, above n 1, at 56.
[306] Pierre Sauvé "Multilateral Rules on Investment: Is Forward Movement Possible?" (2006) 9(2) Journal of International Economic Law 325 at 348.
[307] Puig and Shaffer, above n 6, at 375. If this opposition continues, the Appellate Body will have insufficient Members by December 2019 to be able to function, see: Tom Miles "US blocks WTO judge reappointment as dispute settlement crisis looms" *Reuters* (online ed, London, 28 August 2018).
[308] For example, Article 8.23.5 clarifies that a member may continue to hear a dispute, even if their term ends during the dispute. On the issue of Appellate Body members sitting on cases beyond the length of their term, see Tom Miles "US blocks WTO judge reappointment as dispute settlement crisis looms" *Reuters* (online ed, London, 28 August 2018).
[309] Paulsson above n 245, at 241. Schreuer and Weiniger, above n 80, at 1196. The authors put it as there being a *de facto* doctrine of precedent, rather than saying decisions tend to be consistent, but it has a similar implication.

more effective in the short to medium term. It can realise the benefits of multilateralism but may be more politically feasible in the current environment.

Proposals for appellate structures have also failed in the past (and the negotiations seemed to have never really begun in earnest).[310] It acquired some political currency in the mid 2000s; with articles in several USA FTAs requiring the parties to look into the creation of an appeals facility,[311] and was proposed in a 2013 iteration of TTIP.[312] These negotiations were ultimately fruitless. It was also considered by ICSID,[313] but ultimately did not succeed.[314]

(b) Achieving consistency and predictability

Currently, there are a plethora of different treaties containing similar but different texts.[315] While interpretations of obligations are broadly consistent, this network of relationships may undermine long term efforts to achieve meaningful consistency.[316] Perhaps surprisingly, the EU-Vietnam FTA establishes a separate investment Tribunal and Appellate Tribunal from CETA,[317] creating multiple forms of the ICS.[318] It is not clear whether the process of making discrete investment court systems into a single multilateral ICS would require all countries to adopt a single text containing the same obligations. Without similar underlying obligations, the system will remain fragmented and may not bring more consistency and predictability to investment disputes as hoped for. Indeed, the creation of specific appellate mechanisms for particular treaties may even make the situation worse.[319] The fact that CETA and the Vietnam FTA establish separate tribunals might suggest there were political obstacles to achieving even a small degree of multilateralism. In my view, the ICS requires a large amount of buy-in from states to obtain significant legitimacy and credibility.[320]

---

[310] Freya Baetens "Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms" (2017) 8 Journal of International Dispute Settlement 432 at 439.
[311] Baetens, above n 311, at 439. Subedi notes that more than 20 countries signed treaties containing a requirement to look into an appeals mechanism: see Subedi, above n 30, at 199.
[312] Baetens, above n 311, at 439.
[313] *Suggested Changes to the ICSID Rules and Regulations* (ICSID Secretariat, Working Paper, 12 May 2005).
[314] N Jansen Calamita "The Challenge of Establishing a Multilateral Investment Tribunal at ICSID" (2017) 32(3) ICSID Review 611 at 622.
[315] David Gantz "An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges" (2006) 39 Vand J Transnat'l L 39 at 63.
[316] Asif H Qureshi "An Appellate System in International Investment Arbitration" in Peter Muchlinki, Federico Ortino and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (1st ed, OUP, New York, 2008) 1154 at 1157.
[317] EU-Vietnam Free Trade Agreement Articles 12-13.
[318] This also raises the question of whether there are sufficient international investment law experts to sit on different iterations of the investment court, or whether the same individuals might be appointed to multiple investment courts.
[319] Christopher Smith "The Appeal of ICSID Awards: How the AMINZ Appellate Mechanism Can Guide Reform of ICSID Procedure" (2013) 41 Ga J Int'l & Comp L 567 at 576; Baetens, above n 311, 458.
[320] Smith, above n 320, at 576.

The use of an opt-in mechanism, similar to that used by UNCITRAL[321] and the OECD[322] would be an effective response. This would automatically update the treaty text as between parties that have ratified the convention. Individual countries can make the decision as to whether to ratify the new 'ICS-text', and it would not apply to countries that did not wish to be bound by it. The OECD used this mechanism to implement measures relating to base erosion and profit-shifting. This reform had significant buy-in, due to the widespread concern relating to the taxation of multinational corporations following high profile scandals.[323] The current attention on ISDS may give rise to a similar level of political impetus and so the uptake from countries may be significant. This would mean the feared issue of fragmentation does not eventuate or would not be as serious as it might otherwise have been.

3.3.5 Analysis

Systemic Reform includes and goes beyond the changes discussed within Incremental Reform. The permanency of the court and the introduction of an appellate mechanism would be a beneficial change from the present ad hoc conduct of these disputes. The successful implementation of this system would provide greater consistency and legitimacy in investment dispute results, clarify the scope of states' regulatory freedom and strengthen the systemic integrity of investment dispute resolution. To achieve these benefits, significant challenges must be overcome.

The EU is the obvious leader for bringing about this sort of reform. At this stage, the investment court has no time frame for implementation. Whether the EU will find itself in a position to in fact bring about this development is unclear. The long-term goal of this proposal is to create a multilateral court for the resolution of investment disputes. This is generally consistent with New Zealand's interests, but some factors suggest this may not necessarily be desirable at this time. First, the benefits of multilateralism can be achieved through other means. Consistency and predictability, based on a rules-based system, can be achieved by primarily bilateral but similarly worded treaties. Second, multilateralism is unlikely to be the most politically feasible method for achieving reform at the present time. An obvious lesson is that multilateral negotiations must be more inclusive and reflect countries' valid concerns about preserving regulatory freedom and not being at risk of maverick tribunal decisions. It may be that in the short term, approaching this reform through bilateral relationships in treaties is more likely to be effective, in light of historical failures to negotiate a multilateral investment agreement. An encouraging sign in the pursuit of multilateralism is that in recent renegotiations of NAFTA

[321] For the transparency rules, as discussed earlier.
[322] The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (opened for signature 7 June 2017, entered into force 1 July 2018).
[323] *Measuring and Monitoring BEPS, Action 11 - 2015 Final Report* (OECD, OECD/G20 Base Erosion and Profit Shifting Project, 2015) at 3.

(now known as USMCA), the USA has agreed to a dialled down version of ISDS.[324] The USA is a significant source of FDI. A multilateral system would likely require their participation to acquire legitimacy in the long term. This development is encouraging in that it indicates the USA may be open to a reformed version of ISDS.

The ICS proposal, in its present state, provides little concrete guidance about the systemic changes intended to provide the hoped-for consistency. Decisions relating to the operation of the Tribunal and the Appellate Tribunal in particular have yet to be addressed. There is no timeframe for when this will occur. The issues are not necessarily fatal, but in considering the proposal New Zealand must raise and seek to address them.

It is desirable for the structure of investment disputes to promote consistency more than the status quo does. A key challenge would be unifying the underlying treaty texts. The adoption of an opt-in mechanism for the obligations themselves would be an effective response to homogenise the underlying obligations. This would serve as a guide for governmental conduct which would assist in preventing disputes and increasing the efficiency of disputes. Increased certainty provides comfort for both investors and states. It is difficult to say whether there would be a critical mass of countries willing to buy into this system. The experience of many developing countries has meant they will likely oppose such a system. However, the ubiquity of the concerns increases the chances of more countries supporting this reform.

A key strength of ICS in this respect is that it would be 'future-proofed'. It is a well-designed dispute resolution system which will accommodate future changes to obligations or additional carve outs. This strengthens its systemic integrity and fulfil the demands of stakeholders, though compromise is inevitable. If changes occur within the system in the future, a well-structured system will ensure these are given appropriate force.

These changes would also benefit the perception of ISDS because it would not appear to be a secret court that can reach arbitrary results. The benefit of promoting consistency and predictability is that it would clarify the scope for states' freedom to act. Consequently, more states would participate in the system because there is reduced risk from doing so. More participation is in New Zealand's interests because a widespread rules-based system simplifies the international economy and makes diplomatic relationships more secure.[325] Additionally, greater consistency would contribute to systemic integrity of international investment law. This makes it more like a domestic legal system, which generally have a greater degree of integrity than the status quo in international investment law.

---

[324] Adam Behsudi "The USMCA has landed" (1 October 2018) Politico https://www.politico.com/newsletters/morning-trade/2018/10/01/the-usmca-has-landed-358167. This agreement limits the sectors that have access to ISDS (to the historically most litigious ones) with Mexico, and eliminates ISDS with Canada.

[325] Puig and Shaffer, above n 6, at 374.

While there are significant challenges, this system has the capacity to effectively respond to both operational and systemic concerns and for that reason it is the most desirable option.

3.4 Conclusion

Incremental Reform responds to the features of the status quo which create issues in practice. However, it falls short of addressing the legitimacy deficit that the status quo is faced with. Therefore it is unlikely to obtain the support of many countries. Paradigmatic Reform would not be consistent with New Zealand's interests in a rules based system. It does address an important debate about the values and priorities underlying international investment law. however, it offers insufficient benefit to justify diverging from the approach New Zealand would usually take.

Systemic Reform is a transparent rules-based system which is the most likely to have widespread international participation. A system that allows for consistency and predictability better accommodates future changes to obligations and priorities to achieve developmental objectives, as compared to a system which settles disputes primarily through mediation. A more judicialised system ensure future changes to achieve those types of objectives have a better chance of success, rather than potentially being compromised in the course of mediation motivated by commercial considerations. Resorting to state-state disputes is insufficient because, as compared with trade, the interests involved are materially different. Exporters generally would have a higher degree of transferability of their asset compared to an investor, especially if the investor is an industry requiring high fixed set-up costs. As such, investors are legitimately entitled to a stronger degree of protection in the form of the ability to bring a claim directly. The concerns about ISDS should not lead to a reactionary response that scraps one flawed system and replaces it with something that may be no better. For that reason, reform which genuinely enhances the transparency and consistency of investment dispute resolution is desirable.

Chapter 4: Recommendation and Conclusion

4.1 Introduction

This chapter will make a recommendation for the method of investment dispute resolution system that New Zealand should advocate for. This will be guided by a consideration of New Zealand's interests and position in the global economy, and the possible responses to the criticisms that have been raised so far.

4.2 Justification for Rejection of Paradigmatic Reform and Incremental Reform

Incremental Reform can involve valuable changes to transparency and independence requirements for arbitrators. These changes would address the 'day-to-day' concerns about ISDS. Incremental Reform is a familiar methodology and has clear institutional support. However, this method does not go far enough to address the perception issues. Consequently, this is unlikely to be sufficiently different from the status quo to justify support by states that are already sceptical of ISDS. This is a very important factor, given New Zealand's interest in supporting a multilateral system to govern international investment. Incremental Reform is unlikely to attract multilateral support.

Paradigmatic Reform seeks to promote the integrity of investment dispute resolution by fundamentally redesigning it. However, I argue that its most significant change (removing investor-state arbitration) does not address what actually causes concern about the current system. In fact, it may exacerbate issues which have generated concern about the status quo. Specifically, Paradigmatic Reform would reduce predictability and consistency. More disputes would be settled based on commercial reasons rather than reflecting the legal merits of a claim. This would move international investment law away from being a ruled-based system and this would be inconsistent with New Zealand's interests.

4.3 Recommendation

New Zealand should support Systemic Reform of investment disputes. Specifically, it should adopt the EU's investment court system in future investment agreement negotiations. The reasons for this relate to the conduct of specific disputes, and to the broader structure.

Systemic Reform effectively promotes consistency and predictability in investment disputes. This is achieved by creating a permanent Tribunal and Appellate Tribunal. The proposal, in its present form, does not include a doctrine of precedent. However, decisions made by the same individuals are more likely to be consistent. This is useful because it will create clearer principles to guide the conduct of states and investors.

This proposal also contributes to the systemic integrity of international investment law. There will be greater confidence in the results of investment disputes. Again, the creation of a permanent Tribunal and Appellate Tribunal are essential to this. Greater transparency and arbitrator independence also contribute to this end. Allowing more participation in disputes for third parties and non-disputing treaty parties will offer important perspectives. More open hearings and publication of documents means the disputes are no longer secret, which inevitably attracts more suspicion. The proposals reduce the risk of disputes being affected by personal biases of arbitrators.

This system will make the scope for states' regulatory freedom more clear. This is essential for generating international support. The proposed structure will also 'future-proof' this ability. ICS will be well placed to accommodate future changes to obligations or additional carve outs.[326] This will maintain its integrity into the future, rather than simply adopting a strong reaction to a present issue. The support of countries which have not had a good experience with ISDS to date is essential for achieving the long term goal of a multilateral investment agreement. Systemic Reform is the most likely to obtain this support.

Given the challenges to multilateralism currently, the extension of this system through bilateral negotiations may be more effective in the short term. However, the existence of multiple investment court systems may lead to inconsistent results. This will undermine efforts to achieve the benefits described above. In the future, the various investment courts should be amalgamated. This might require renegotiation of the treaties that establish the courts. The commitments already in treaties directed at this end indicates there is a commitment to allowing this amalgamation process to occur.

The investment court system is consistent with New Zealand's interests in international economic law. The investment court system is intended to provide a multilateral solution to issues relating to international investment law. It is transparent and clarifies scope for state regulatory action; measures which will promote participation by states. This system would simplify the rules governing the global economy. It will reduce friction for flows of investment and promote the rules-based system for international investment law. It also promotes political cooperation and stronger diplomatic ties, which are essential to global developmental objectives.

[326] In this respect, it addresses concerns about the underlying justifications and principles of international investment law raised in Chapter 2.2 (to an extent).

4.4 Conclusion

Investor state dispute settlement has been heavily criticised, and several of these criticisms are well justified. In considering reform of this system, it is important to understand how New Zealand fits into the global economy. All international agreements involve trade-offs and no system can be perfect. The best proposal to advance New Zealand's interest in a transparent, rules-based system with widespread international participation, is the investment court system. This proposal responds to concerns about the conduct of disputes currently, and addresses broader systemic questions. The point of advocating for this mechanism is to simplify the rules governing the global economy. This has both economic and political benefits.

The status quo has problems but it is not irredeemable. New Zealand should adopt a policy which responds to justified criticisms, rather than fall into the trap of adopting reactionary policy to address unjustified criticisms. The recommendation made addresses the justified concerns and is consistent with New Zealand's interests. It provides a sustainable long term solution to issues in international investment law.

Bibliography

1 Cases

1.1 New Zealand

Westco Lagan Ltd v Attorney-General [2001] 1 NZLR 40 (HC).

1.2 International Centre for Settlement of Investment Disputes

ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16.

AES Corporation v. The Argentine Republic, ICSID Case No. ARB/02/17.

Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (19 May 2005).

Amco v Indonesia, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 395.

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22.

Feldman v Mexico, Award, 16 December 2002, 7 ICSID Reports 341.

Loewen Group, Inc. and Raymond L. Loewen v. United States of America (ICSID Case No. ARB(AF)/98/3).

Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/.

Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1.

Mobil Oil Corporation and others v. New Zealand (ICSID Case No. ARB/87/2).

1.3 Permanent Court of Arbitration

Philip Morris Australia Ltd v The Commonwealth of Australia, Case no 2012-12 Permanent Court of Arbitration 2015

1.4 Stockholm Chamber of Commerce

RosInvestCo UK Ltd v Russia SCC Case No. V079/2005.

1.5 World Trade Organisation

Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS434 (Ukraine), WT/DS435 (Honduras), WT/DS441 (DR), WT/DS458 (Cuba), WT/DS467 (Indonesia) 28 August 2018.

2 Legislation

2.1 New Zealand

Public Works Act 1981.

3 Treaties

Note: where treaty series references are not provided, it is because that information is not on < https://treaties.un.org/pages/Home.aspx?clang=_en>

Agreement between the Government of the Kingdom of Denmark and the Government of the Russian Federation concerning the Promotion and Reciprocal Protection of Investments 2009 UNTS 429 (signed 4 November 1993, entered into force 25 September 1996).

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments 1670 UNTS 27 (signed 6 April 1989, entered into force 3 July 1991).

Agreement between the Federative Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation (signed 11 April 2018, not yet in force).

Charter of the United Nations and Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945).

Claims Settlement Declaration, 19 Jan 1981 (1981) 1 Iran-US CTR.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed on 8 March 2018, not yet in force).

Comprehensive Economic and Trade Agreement, Canada-EU (signed 30 October 2016, not yet in force).

Convention of the Settlement of Investment Disputes between States and Nationals of Other States (entered into force 14 October 1966).

Free Trade Agreement Between New Zealand and the Republic of Korea (signed 23 March 2015, entered into force 20 December 2015).

Free Trade Agreement Between the Government of New Zealand And The Government of the People's Republic of China 2590 UNTS 101 (signed on 7 April 2008, entered into force 1 October 2008).

Hong Kong and the Government of Australia for the Promotion and Protection of Investments 1770 UNTS 385 (signed on 15 September 1993, entered into force on 15 October 1993).

Protocol on investment to the New Zealand - Australia Closer Economic Relations Trade Agreement 2983 UNTS (signed 16 February 2011, entered into force 1 March 2013).

The Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi (signed 25 June 2015, not yet in force) Chad-Italy Bilateral Investment Treaty (11 June 1969).

Trans-Pacific Partnership (signed 4 February 2016, not yet in force).

Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, 457 UNTS 23 (signed on 25 November 1959, entered into force 28 April 1962).

Treaty between United States of America and the Argentine Republic concerning the reciprocal encouragement and protection of investment (signed on 14 November 1991, entered into force 20 October 1994).

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Transparency Rules) (opened for signature 1 April 2014, entered into force 8 October 2017).

4 Texts

Dimitrij Euler and others (eds), *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (1st ed, CUP, Cambridge, 2015).

Peter Muchlinki, Federico Ortino and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (1st ed, OUP, New York, 2008).

Andrew Newcombe and Lluis Paradell *Law and Practice of Investment Treaties: Standards of Treatment* (1st ed, Wolters Kluwer, The Netherlands, 2009).

Karl P. Sauvant with Michael Chiswick-Patterson (eds) Appeals Mechanism in International Investment Disputes (1st ed, OUP, New York, , 2008).

Gregory Shaffer *Defending Interests: Public-Private Partnerships in WTO Litigation* (1st ed, Washington DC, Brookings Institution Press, 2003).

M Sornarajah, *The International Law on Foreign Investment* (2nd ed, CUP, Cambridge, 2004).

Taylor St John *The Rise of Investor-State Arbitration* (1st ed, OUP, New York, 2018).

HJ Steiner and DF Vagts *Transnational Legal Problems: Materials and Text* (2nd ed, NY Foundation Press, Mineola, 1976).

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

John Williamson (ed) *Latin American Adjustment: How Much Has Happened?* (1st ed, Washington, Institute for International Economics, 1990).

5 Journal Articles

Joshua Aird and Brendan Brown "Double tax agreements and the multilateral instrument" (2017) NZLJ 118.

Freya Baetens "Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms" (2017) 8 Journal of International Dispute Settlement 432.

Amrita Bahri, "Handling WTO disputes with the private sector: the triumphant Brazilian experience" (2016) 50(4) Journal of World Trade, 641.

Maureen De Armond "Trade Wars, Tax Disputes, and Retaliatory Sanctions: A Growing Threat to the Evolving U.S.-EU Relationship" (2003) 13 Transnat'l L & Contemp Probs 307.

Daniel Behn, Tarald Laudal Berge, and Malcolm Langford "Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration" (2018) 38 Nw J Int'l L & Bus 335.

Axel Berger, Matthias Busse, Peter Nunnenkamp, Martin Roy "Do trade and investment agreements lead to more FDI? Accounting for key provisions inside the black box" (2013) 10(2) International Economics and Economic Policy 247.

Chad P Bown and Bernard M Hoekman "WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector" (2005) Journal of International Economic Law 8(4) 861.

Colin M Brown "A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches" (2017) 32(3) ICSID Review 673.

Thomas Bürgenthal, "The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law" (2006) 22(4) Arb Int'l 495.

N Jansen Calamita "The Challenge of Establishing a Multilateral Investment Tribunal at ICSID" (2017) 32(3) ICSID Review 611.

Chios Carmody "Obligations Versus Rights: Substantive Difference between WTO and International Investment Law" (2017) 12(1) Asian Journal of WTO & International Health Law and Policy 75.

Margaret Clare Ryan, "*Glamis Gold, Ltd. v. the United States* and the Fair and Equitable Treatment Standard" (2011) 59 McGill L J 919.

Ralph Cossa and Jane Kahana "East Asia: economic interdependence and regional security" (1997) 73(2) International Affairs 219.

Lisa Diependaele, Ferdi De Ville & Sigrid Sterckx (2017) "Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System, New Political Economy" (2017) 1 New Political Economy 1.

Julian Donaubauer, Eric Neumayer, and Peter Nunnenkamp "Winning or losing in investor-to-state dispute resolution: The role of arbitrator bias and experience" (2018) 26(4) Review of International Economics 892.

Cédric Dupont, Thomas Schultz and Merih Angin "Political Risk and Investment Arbitration: An Empirical Study" (2016) 7 JIDS 136.

Claus-Dieter Ehlermann "The Workload of the WTO Appellate Body: Problems and Remedies" (2017) 20(3) Journal of International Economic Law 705.

Carmen Elena Dorobăț "A brief history of international trade thought: from pre-doctrinal contributions to the 21st century heterodox international economics" (2015) 8(2) The Journal of Philosophical Economics: Reflections on Economic and Social Issues at 106.

Susan D. Franck "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2005) 73 Fordham L Rev 1521.

David Gantz "An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges" (2006) Vand J Transnat'l L 39.

Katia Gómez and Catharine Titi "International Investment Law and ISDS: Mapping Contemporary Latin America" (2016) 17 Journal of World Investment & Trade 515.

Jahangir Ahmad Khan "Managing Investment Disputes: A Critical Analysis of Investor State Dispute Settlement Mechanism in Bilateral Investment Treaties" (2017) 8(2) Journal of Management & Public Policy 33.

Ian A Laird "TPP and ISDS: The Challenge from Europe and the Proposed TTIP Investment Court" (2016) 40 Can-US LJ 106.

Malcolm Langford, Daniel Behn and Runar Hilleren Lie "The Revolving Door in International Investment Arbitration" (2017) 20 Journal of International Economic Law 301.

Emily Osmanski "Investor-State Dispute Settlement: Is There a Better Alternative?" (2018) 43 Brook J Int'l L 639.

Alison Post "Home Court Advantage: Investor Type and Contractual Resilience in the Argentine Water Sector" (2014) 42(1) Politics and Society 108.

Sergio Puig and Gregory Shaffer "Imperfect Alternatives: Institutional Choice and the Reform of Investment Law" (2018) 112 American Journal of International Law 361.

Anthea Roberts, "Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration" (2018) 112 AJIL 410.

Jeswald Salacuse and Nicholas Sullivan "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and the Grand Bargain" (2005) 46(1) Harvard International Law Journal 67.

Elsa Sardinha "The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement" (2017) 32(3) ICSID Review 625.

Pierre Sauvé "Multilateral Rules on Investment: Is Forward Movement Possible?" (2006) 9(2) Journal of International Economic Law 325.

Christoph Schreuer "From ICSID Annulment to Appeal Half Way Down the Slippery Slope" (2011) 10(2) The Law & Practice of International Courts and Tribunals 211.

Ibrahim Shihata "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA" (1986) 1(1) ICSID Review - Foreign Investment Law Journal 1.

Esme´Shirlow "Dawn of a new era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration" (2016) 31(3) ICSID Review 622.

Christopher Smith "The Appeal of ICSID Awards: How the AMINZ Appellate Mechanism Can Guide Reform of ICSID Procedure" (2013) 41 Ga J Int'l & Comp L. 567.

Kate M. Supnik "Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law" (2009) 59(2) Duke Law Journal 343.

Gus Van Harten and Dayna Nadine Scott "Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada" (2017) 7 JIDS 92.

Geraldo Vidigal and Beatriz Stevens "Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?" (2018) 19(3) The Journal of World Investment and Trade 475.

6 Parliamentary and Government materials

6.1 New Zealand

Brook Barrington, *Briefing for Incoming Minister for Trade and Export Growth*, (New Zealand Ministry of Foreign Affairs and Trade, October 2017) at 41.

Hon David Parker "New Zealand signs side letters curbing investor-state dispute settlement" (press release, 9 March 2018).

Hon James Shaw "Zero Carbon Bill Consultation Launch" (press release, 7 June 2018).

Global New Zealand: International trade, investment, and travel profile, Year ended December 2017 (Statistics New Zealand, 24 July 2018).

Report of the Foreign Affairs, Defence and Trade Committee *International treaty examination of the Free Trade Agreement between New Zealand and the Republic of Korea* (22 May 2015).

6.2 Australia

Bilateral and Regional Trade Agreements, (Australian Productivity Commission Research Report Australia, 2010).

Joint Standing Committee on Treaties Parliament of the Commonwealth of Australia *Report 165: Trans-Pacific Partnership Agreement* (November 2016).

6.3 European Union

Cecilia Malmström, Commissioner for Trade "Discussion on Investment in TTIP at the Meeting of the International Trade Committee of the European Parliament March 2015" (Brussels, 18 March 2015).

"Commissioner Proposes new Investment Court System for TTIP and Other EU Trade and Investment Negotiations" (European Commission, September 2015).

6.4 India

Model Text for Indian Bilateral Investment Treaty 2015.

6.5 United States of America

United States Model Bilateral Investment Treaty 2012.

7 Reports and Papers

Roderick Abbott, Fredrik Erixon & Martina Francesca Ferracane *Demystifying Investor State Dispute Settlement (ISDS)* (European Centre for International Political Economy, Occasional Paper, October 2016).

E Fabry and G Garbasso *ISDS in the TTIP: The devil is in the detail* (Jacques Delors Institute Policy Paper 122, January 2015).

Howard Mann, Konrad von Moltke, Aaron Cosbey and Luke Eric Peterson, *IISD Model International Agreement on Investment for Sustainable Development* (International Institution for Sustainable Development, 2006).

Cristoffer Nyegaard Mollestad, *See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement* (PluriCourts, Research Paper, October 2014).

Françoise Nicolas, Stephen Thomsen and Mi-Hyun Bang, *Lessons from Investment Policy Reform in Korea* (OECD, Working Papers on International Investment, 2013).

Suzy Nikièma *Best Practices: Indirect Expropriation* (International Institute for Sustainable Development, March 2012).

J Pohl *Societal benefits and costs of International Investment Agreements : A critical review of aspects and available empirical evidence* (OECD, OECD Working Papers on International Investment, January 2018).

Laura Puccio and Roderick Harte, *From Arbitration to the Investment Court System (ICS): The Evolution of CETA Rules* (European Parliamentary Research Service, June 2017).

S W Schill *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward* (E15Initiative,Geneva: International Centre for Trade and Sustainable Development/World Economic Forum, 2015).

J Anthony Van Duzer, Penelope Simons and Graham Mayeda *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat, August 2012).

A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law, (UNCITRAL Secretariat, 2013).

A Handbook on the WTO Dispute Settlement System (WTO Secretariat Publication, 2017).

Foreign Direct Investment in New Zealand: A brief review of the pros and cons, NZIER report to Export New Zealand (NZIER, March 2016).

ICSID Secretariat, Proposals for Amendment of the ICSID Rules — Working Paper, Volume 3 (Proposed Arbitration Rules) (OECD, Working Paper, August 2018)

IIA Issues Note: Investor-State Dispute Settlement: Review of Developments in 2017 (UNCTAD, Issue 2, June 2018).

Investment Treaties: The Quest for Balance (OECD Freedom of Investment Roundtable, Conference Summary, 14 March 2016).

Measuring and Monitoring BEPS, Action 11 - 2015 Final Report (OECD, OECD/G20 Base Erosion and Profit Shifting Project, 2015).

NZIER, ISDS and sovereignty (NZIER report to Export New Zealand, 2015).

Possible Improvements of the Framework for ICSID Arbitration (ICSID Secretariat, Discussion Paper, October 2004)

Possible reform of investor-State dispute settlement (ISDS) - Arbitrators and decision makers: appointment mechanisms and related issues A/CN.9/WG.III/WP.152 (UNCITRAL, 30 August 2018).

Possible reform of investor-State dispute settlement (ISDS) - Consistency and related matters A/CN.9/WG.III/WP.150 (Working Group III (Investor-State Dispute Settlement Reform, 28 August 2018).

Possible reform of investor-State dispute settlement (ISDS) - Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS (advance copy) A/CN.9/WG.III/WP.151 (UNCITRAL, 30 August 2018).

Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session A/CN.9/935 (UNCITRAL, 14 May 2018).
The ICSID Caseload – Statistics (ICSID, Issues 2018-1) at 12.

8 United Nations Declaration

Doha Declaration 14 Nov 2001, 41 ILM 746 (Doha Declaration)

9 Websites

Anthea Roberts & Zeineb Bouraoui "UNCITRAL and ISDS Reforms: What are States' Concerns?" (2 June 2018) <https://www.ejiltalk.org>.

Edna Sussman and John Wilkinson "Benefits of Arbitration for Commercial Disputes" American Bar Association https://www.americanbar.org/aba.html.

"CETA explained" European Commission <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/index_en.htm >.

"GDP Ranking" (21 September 2018) The World Bank <https://datacatalog.worldbank.org/dataset/gdp-ranking>.

"International Investment Agreements Navigator" United Nations Committee on Trade and Development, <http://investmentpolicyhub.unctad.org/IIA>.

"New Zealand-EU free trade agreement" New Zealand Ministry for Foreign Affairs and Trade, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/eu-fta/>.

10 Other Resources

10.1 Conference Proceedings

J Peter Byrne "The Regulatory Takings Doctrine: A Critical Overview" (paper presented to Regulatory Takings and Resources: What Are The Constitutional Limits? Conference, Colorado, June 1994).

10.2 News Articles

Cécile Barbière "Parliament's opposition to TTIP arbitration on the rise" *EURACTIV* (online ed, London, 21 April 2015).

Adam Behsudi "The USMCA has landed" *Politico* (online ed, Virginia, 1 October 2018).

Tom Miles "US blocks WTO judge reappointment as dispute settlement crisis looms" *Reuters* (online ed, London, 28 August 2018).

Beatriz Rios "Italy threatens to block CETA ratification" *EURACTIV* (online ed, London, 15 June 2018).

Aline Roberts “European Parliament Backs TTIP, Rejects ISDS” *EURACTIV* (online ed, London, 13 July 2015).

Sam Sachdeva “NZ ambassadors pushing for ISDS change” *Newsroom* (online ed, Wellington, 3 November 2017).

Elizabeth Warren “The Trans-Pacific Partnership Clause Everyone Should Oppose” *Washington Post* (online ed, Washington DC, 25 February 2015).

Liu Wei “Trump’s Trade War on China Is About More Than Trade” *The Diplomat* (online ed, Tokyo, 20 July 2018).