International Law and Justice Working Papers

IILJ Working Paper 2021/6
International Economic Law Series

ISDS Reform: The Long View
(forthcoming in ICSID Review)

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ISSN: 1552-6275

New York University School of Law
New York, NY 10012

U.S.A.

Cite as:
IILJ Working Paper 2021/6

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Abstract

This essay surveys the criticisms directed at international investment agreements (IIAs) and their reliance on investor-State dispute settlement (ISDS) as well as the leading reform venues that have been addressing them: UNCTAD, ICSID, and UNCITRAL. It argues that despite these ambitious efforts, the international investment regime's reliance on investor-State arbitration will not be wholly displaced by any of the alternatives under active discussion – from national courts to mediation to a Multilateral Investment Court. In the long run, current reform efforts are likely to produce an ever more complex regime, governed by more diverse substantive rules interpreted by more complex options for dispute resolution. The focus on reforming the ways investor-State disputes are resolved fails to respond to doubts about the need for IIAs, undermines aspirations to harmonize international investment law, and ignores dire needs for stimulating (and protecting) foreign capital flows to achieve the goals of the Sustainable Development Goals – from mitigating climate change to preventing the next pandemic.

ISDS Reform: The Long View

The international investment regime has been under the shadow of two hydra-headed monsters for some time. To critics in the Global South, like M. Sornarajah, international investment agreements (IIAs) are an abomination bearing the visage of rapacious greed. They are exemplars of global capitalism run amuck: "neoliberal" tools that violate sovereign equality to grease an empire of

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capital.[2] To critics in the North like U.S. Senator Elizabeth Warren, IIAs are top-down undemocratic constraints on governments' ability to channel market capitalism to protect labor rights, the environment, and income equality.[3] For both, the most effectively enforced global international law regime in existence is a shameful enterprise that only protects the property of wealthy oligarchs – "the one percent." Those with this monster in their sights want to kill the 3000 or so IIAs in existence in order to, as Sornarajah says, "start afresh."[4] Multilateral reformers at ICSID and UNCITRAL's Working Group III, as the title of this essay suggests, have set their sights on a smaller hydra-headed monster – namely the way investor-state disputes under IIAs are resolved. They are attempting to reform investor-state dispute settlement (ISDS) by making it more like adjudication in rule of law states.

This is a mistake. Focusing on the ostensible inadequacies of investment arbitration while ignoring the looming beast above will, in the long run, undermine the immediate and long term goals of reformers. One cannot stabilize and legitimize a legal regime that many believe, rightly or wrongly, should not exist simply by trying to improve how it is enforced. Worse still, current ISDS reform efforts are ignoring the bigger threat that envisioned reforms will do nothing to enhance (or might even hinder) the flows of private capital everyone agrees are needed to address critical needs of the planet, from mitigating climate change to preventing the next global pandemic.

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[2] See, eg, M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015).
[3] Warren, among others, led efforts that produced a number of prominent letters in opposition to IIAs and/or ISDS. See, eg, 'Alliance for Justice Letter to Members of Congress' (11 March 2015) https://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3; 'Public Statement on the International Investment regime' https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/; and '220+ Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals that Include Investor-State Dispute Settlement (ISDS)' (7 September 2016) https://www.citizen.org/wp-content/uploads/isds-law-economics-professors-letter-sept-2016.pdf.
[4] M. Sornarajah, 'Starting anew in international investment law' (16 July 2012) Columbia FDI Perspectives, no 74.

This essay, first, summarizes current critiques of the international investment regime. Second, it surveys ISDS reform efforts. Third, it outlines five possible ways that existing ISDS might be displaced. It concludes that none of those possible replacements for ISDS are likely to fully prevail. Investment arbitration, as contained in the majority of existing IIAs, is likely to survive its current crisis. Despite the ambitious reform agenda being pursued in Working Group III, the most likely outcome is no single replacement for it – not even the much touted Multilateral Investment Court (MIC) – but a more complex "spaghetti soup" of substantive rules and methods for applying/interpreting ever more diverse IIAs. This complexification of the international investment regime will not generate the harmonized, predictable international investment law reformers want. Moreover, reformers' failure to address, head-on, the perception that IIAs themselves are either not necessary for economic growth or detrimental to it threatens to undermine their ultimate goal, namely to legitimize the international investment regime as a whole.

Two Monsters

Defenders of the existing international investment regime tend to dismiss the views of critics like Sornarajah or Warren. Many see IIA skeptics as simpletons who fail to understand David Ricardo's theory of comparative advantage, ideologues still in thrall of Das Kapital despite the end of the Cold War, or fact deniers akin to Nazi opponents to arbitration.[5] But serious scholars, mainstream politicians, and policy-makers are pulling the rug out from under the international investment regime. Fundamental premises that have used to justify IIAs for decades are now on the chopping block. Those intent on saving the investment regime need to pay close attention to their arguments.

[5] See, eg, 'Born startles with reference to Nazi history' *Global Arbitration Review* (15 March 2021) (reporting on a keynote address by Gary Born).

There are plausible reasons, grounded in political economy, to question the core rationale that IIAs are needed to prevent foreign investors from being "held up" as if by gunpoint by their host states. Foreign investors need not always or even usually face an "obsolescing bargain." That depends on how much sunk costs they have invested, on whether they have failed to carefully structure their investment to adjust to changing circumstances, or whether host states today really ignore the serious reputation effects of reneging on their original commitments.[6] There is also room to doubt whether all or most foreign investors truly face a "liability of foreignness" that justifies extending to them unique protections that exceed those granted under national law and enables them to escape adjudication in host state courts.[7] Some question whether entering into IIAs attracts foreign direct investment (FDI) or that the failure to do so deters it.[8]

Surveys of what sways companies to invest abroad or what impacts the price of political risk insurance do not clearly support either assumption.[9] And if some bilateral investment treaties (BITs) between some pairs of states correlate to marginal increases in FDI flows between them, why does it make economic sense for such treaties to extend their protections indistinguishably to all foreign investors even if these undertake no real risk or fail to contribute to job growth or otherwise to promote economic growth in the host state?[10] Why is it necessary for IIAs to constrain the power of regulators to adopt industrial policy tools long used by many developed countries in the past, including efforts to distinguish among foreign investors to encourage those with the most positive externalities (e.g., increased employment or technical spill-overs) and discourage those

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[6] See, eg, Jonathan Bonnitcha and others, *The Political Economy of the Investment Treaty Regime* (OUP 2017) (henceforth '*Pol. Econ. of Inv. Treaty Regime*') at 132-37.
[7] Id., at 149-51.
[8] Id., 158-166; 179-80 (table listing of studies that examine the impact of IIAs on FDI flows).
[9] Id., 164-166. See also Jonathan Bonnitcha and others, 'A Future Without (Treaty-based) ISDS: Costs and Benefits', in Manfred Elsig and others (eds), *International Economic Dispute Settlement: Demise or Transformation?* (forthcoming 2021) (henceforth '*A Future Without ISDS*').
[10] Compare *Pol. Econ. Of Inv. Treaty Regime*, note 6, above, at 137-147.

posing the most risk of negative ones (e.g., pollution)?[11] Why is it necessary, in any case, for IIAs to counterman basic concepts of national law in host states, including their corporate or intellectual property laws?[12] Some scholars have cast doubt on the assumption that IIAs promote a virtuous circle whereby the national as well as the international rule of law improves once a country adopts rights-respecting IIAs.[13] What if giving foreign investors an arbitral exit ramp dis-incentivizes national courts from engaging in self-improvement? And given highly charged investment claims – from those challenging Argentina's attempts to respond to an economic crisis to Uruguay's efforts to reduce smoking – does anyone still believe that the use or availability of ISDS "depoliticizes" investment disputes?[14]

There are, to be sure, responses to all these doubts or critiques. Some of the charges against IIAs are based on thin or anecdotal evidence.[15] Some surveys of corporate counsel and CEOs indicate strong correlations between a country's history of investor-state disputes and its commitments to substantive investor protections and ISDS via treaty and investors' decisions to invest.[16] The rise of nationalism, even in rule of law countries like the United States, has renewed concerns over the potential for anti-foreigner bias in both national courts and local administrative procedures. The power of IIAs to "chill" regulatory or legislative efforts genuinely directed to advancing public welfare, on the other hand, may be more myth than reality.[17] Ideologically loaded

[11] Compare the bans on a broad range of performance requirements contained in many IIAs, such as the U.S. Model BIT of 2012, art 8.
[12] See, eg, Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113 Am. J. Int'l L. 1.
[13] Cf., eg, Rodolf Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2006) 37 NYU J. Int'l L. & Politics 953, with *Pol. Econ. Of Inv. Treaty Regime*, note 6, above, at 216-220 and Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 Int'l Rev. L. & Econ. 107.
[14] See, eg, *A Future Without ISDS*, note 9, above; *Pol. Econ. Of Inv. Treaty Regime*, note 6, above, 193-98.
[15] Thus, Ginsburg acknowledges that the evidence that ISDS may undermine the quality of national courts is thin and insufficient to draw causal connections. Ginsburg, note 13, above, at 120.
[16] See, eg, Queen Mary, '2020 QMULK-CCIAG Survey: Investors' Perceptions of ISDS' (May 2020).
[17] See, eg, *Pol. Econ. Of Inv. Treaty Regime*, note 6, above, at 238-244 (citing the need for more research to confirm the existence and prevalence of regulatory chill).

generalizations about the North/South impact of BITs plausibly advanced when the universe of such treaties was limited to pairs of states in which only one was a capital exporter seem considerably less relevant when most states, including many LDCs, are both capital importers and exporters.[18]

But the merits of IIA critiques are not as important as the fact that ISDS reformers are working under the shadow of a broader legitimacy crisis that has arisen because the expected benefits of IIAs (from increased FDI flows to the de-politicization of disputes) have not materialized as clearly as have the over 1000 publicly available treaty-based investor-state cases directed at states seeking as much as $3.5 billion in damages.[19] For IIA critics like Martti Koskenniemi, "one-sided" arbitral outcomes are the predictable product of the treatification of unequal bargaining power. Koskenniemi argues that since IIA negotiations take place in the shadow of binding international dispute settlement that protects only investors, the balance of power in any IIA negotiation is decisively on the side of private interests.[20] For him, the form of binding dispute settlement contained in IIAs – whether traditional ISDS, reformed ISDS, or a global court or courts – pales in significance compared to the fact that such "unequal" treaties exist. For those who see IIAs as the more formidable problem, the identity of its adjudicators or how they are selected or for how long is less important than the rules they apply and the negotiation dynamics that produces them. To such critics, the real problem is that investment adjudicators are not authorized to protect domestic political communities from economic globalization itself.[21]

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[18] See, eg, José E. Alvarez, 'The Once and Future Foreign Investment Regime', in Mahnoush Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill 2010).
[19] UNCTAD, 'Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcome in 2019', IIA Issues Note (July 2020) (henceforth 'Issues Note') at 4 (reporting that the disclosed amounts sought by investors, covering about half the claims filed in 2019, ranged from $10 million to $3.5 billion in Odyssey v. Mexico).
[20] Martti Koskenniemi, 'It's Not the Cases, It's the System' (2017), J. of World Inv. & Trade, 18(2), 343-53 at 351.
[21] Id., at 352.

Candid talk about the broader legitimacy crisis of the investment regime remains relegated to forums outside UNCITRAL's WG III.[22] Within WG III the focus is instead on common, well-worn complaints about ISDS. This blinkered focus is easy to explain. Governments have learned from the numerous prior unsuccessful attempts efforts to negotiate global rules to protect alien property rights the apparent lesson that they differ too much among themselves as to what those rights should be.[23] Their delegated reformers have accordingly chosen not to tackle the big monster of IIAs and to focus on the more manageable, though still formidable beast called ISDS. Their sanctioned reform efforts are almost entirely about correcting ISDS's triple threats to democratic governance, sovereign equality and the rule of law.

Each of these perceived threats can be briefly summarized.

Critics charge first, that ISDS rulings all too frequently deviate from the ways representative democracies govern their citizens. Arbitral tribunals exacerbate the flaws of the "least democratic" branch of governments, namely judiciaries. They constitute a resort to "privatized justice" wherein those charged with interpreting (and incidentally making) the law are not necessarily citizens of the state whose laws they second-guess and who are even more immune from democratic accountability than are national judges. The latter are at least subject to national judicial codes of conduct, including conflict of interest rules, and accordingly, can be removed from office by a public process if shown to be less than impartial. Absent reform, investor-state arbitrators are accountable only insofar as they can be successfully challenged under arbitral rules. The "democratic deficit" of ISDS is particularly easy to see when, for example, one such ruling overturns a Canadian environmental

[22] See, eg, Columbia Center on Sustainable Development, 'Impacts of the International Investment Regime on Access to Justice' (September 2018) Roundtable Outcome Document https://www.ohchr.org/Documents/Issues/Business/CCSI_UNWGBHR_InternationalInvestmentRegime.pdf.

[23] For an account of the last failed attempt -- the negotiations for a Multilateral Agreement on Investment (MAI) – see Edward M. Graham, *Fighting the Wrong Enemy* (CUP 2000).

impact assessment precisely because that process permitted consideration of the reactions of local citizens[24] or when even just the threat of a potential ICSID ruling forces a government to pay for its parliament's decision to phase out nuclear power.[25]

To the extent ISDS privileges prominent capital exporters like the United States or multinational enterprises from the North with deep pockets to hire experienced counsel or repeat double-hatted arbitrators from an elite group with a clear incentive to maintain a steady flow of investment claims, it is not hard to see the process as violating sovereign equality or evincing a pro-investor bias. The sovereign inequalities built into the negotiation of IIAs are only made more evident by the structural inequities of investor-state dispute settlement – where well-heeled private companies aligned with lawyers adept in the boutique specialization of investment arbitration are accorded rights to select their own adjudicators whose views and vote are given the same weight as adjudicators chosen by a sovereign state.[26]

Finally, ISDS presents a rich target for the lawyers who dominate reform discussions at ICSID and WG III. Like good disciples of Tom Bingham, lawyers aspire to adjudicative methods that respect well known rule of law principles: the equal application of the law, a public process leading to clear, consistent, and predictable outcomes, the good faith exercise of interpretative powers by persons who respect the limits of that delegated power, respect for due process for all litigants – all achieved without prohibitive cost or unwarranted delay.[27] Precisely those features which render arbitration attractive as compared to litigation in local court – the possibility for discrete settlement or a formal ruling without publicity, the expeditious avoidance of appellate

[24] *Clayton/Bilcon v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015).
[25] *Vattenfall AB v. Federal Republic of Germany*, ICSID Case No. ARB/12/12.
[26] See, eg, Hans Smit, 'The pernicious institution of the party-appointed arbitrator' (23 June 2011) Columbia FDI Perspectives no 33 https://academiccommons.columbia.edu/doi/10.7916/D8G167Q9.
[27] See Tom Bingham, *The Rule of Law* (Penguin 2010).

review, the potential to limit participation to only the two litigants and not transform a discrete bilateral dispute into a messy polymorphous one, and the prospect of selecting adjudicators chosen for their special expertise under a variety of ad hoc arbitral forums – make it an easy bull's eye for rule of law critiques.[28] ISDS proceedings can indeed lack transparency – that is what may make it appealing in certain instances to either investors, respondent states, or both. The absence of appellate review lowers costs and enables expedition but also may leave errors of law and/or fact uncorrected. The absence of corrective mechanisms as well as the prospect of forum shopping renders investment caselaw less than predictable and its jurisprudence less than "constante." Even in cases involving issues of high political import, ISDS provides no assurance that there will be a public proceeding fully open to third party interveners or amicus. ISDS's rule of law failings encourage perceptions that it is a tool that wrongly privatizes what needs to be public.[29]

Whether merited or overstated, the perceived legitimacy deficits of ISDS have gained such public traction that opposition to it has, at least within the United States, eclipsed opposition to IIAs. Opposition to the former – and not to any and all "trade agreements" – today draws the most bipartisan support across a polarized Democratic-Republican divide – even in a once reliably arbitration friendly jurisdiction. It helps to explain why the United States, once the foremost defender of investor-state arbitration, has been shrinking its domain of over time (as by shrinking the scope of the investor rights those arbitrators can apply),[30] and, most recently, running away from

[28] See, eg, August Reinisch, 'The Rule of Law in International Investment Arbitration', in Photini Pazartzis & Marina Gavouneli (Eds), *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (Bloomsbury 2016) at 297-299. See also Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law', in El Nuevo Derecho Administrativo Global en América Latina (2009) (critiquing ISDS for falling short of basic principles of global administrative law and prescribing changes to advance transparency, participation, reason-giving and review).

[29] See, eg, José E. Alvarez, 'Is Investor-State Arbitration "Public"?' (2016) 7 J. Int'l Dispute Settlement 534 (2016).

[30] See, eg, José E. Alvarez, 'The Public International Law Regime Governing International Investment', in *Collected Courses of the Hague Academy of International Law* (2011) at 162-71.

it altogether in the United States-Mexico-Canada Agreement (USMCA). That 2020 agreement eliminates ISDS altogether as between the U.S. and Canada, severely constrains it in most cases involving investors from the United States and Mexico, and leaves it more or less intact only for a select few privileged investors that hold government contracts with the latter two governments.[31]

The three fold legitimacy critiques of ISDS has provided the grist for reformers at ICSID and UNCITRAL and forms an important backdrop for the work of UNCTAD. Each of those efforts will be summarized next.

ICSID's Latest Rule Changes

ICSID's 4th (and most intensive) rules amendment responds to many of the legitimacy concerns with ISDS noted above. The stated goals of this effort – to modernize ICSID's rules based on experience, to lessen time and costs, to enlarge the range of dispute settlement mechanisms on offer, and to make the process more efficient and transparent while maintaining procedural balance between investors and respondent states[32] – are designed to increase the curb appeal of this arbitral venue for investment arbitration. Some of the proposed rule changes – to provide greater transparency on third party funding, impose fixed time limits on certain procedures (from the appointment of arbitrators to the issuance of a final award), provide new procedures for dismissing claims for manifest lack of merit and allow parties to consolidate or coordinate claims, permit tribunals to order any party asserting a claim or counterclaim to provide security for costs, require the publication of excerpts of an award even when the parties do not agree to make it public, and enable tribunals to consider non-disputing parties' submissions – respond to rule of law complaints.[33] ICSID's on-going effort, along with UNCITRAL's, to draft a generally applicable

[31] USMCA, Annexes 14-D and 14-E (Mexico-US Investment Disputes), Annex 14-C (permitting only "legacy" ISDS as between US-Canada investment disputes for a period of 3 years).
[32] See, eg, ICSID, Working Paper 4 (Feb. 2020); ICSID, Working Paper 5 (expected 15 June 2021).
[33] Id.

code of conduct for ISDS arbitrators also responds to rule of law concerns such as conflicts of interest, double hatting, and repeat appointments.[34] But ICSID's other proposed changes – a new chapter for optional expedited arbitration, new mediation rules, and revised fact-finding rules – do not seek to emulate the virtues of formal courts but, on the contrary, appeal to those seeking the benefits of less formal modes of dispute settlement.

ICSID's efforts address many of the "low-hanging fruit" in broader forums for discussing investment regime reform. ICSID's work admirably adheres to Costa Rica's statement before UNCITRAL's WG III that there can be "early harvests" in achieving ISDS reform even in the midst of broader structural changes over time.[35] ICSID's rule changes are all the more likely to be adopted because they largely reflect innovations found in contemporary reformed IIAs, like the investment chapter of the TPP II.[36] For defenders of ISDS, ICSID's amendments are one way that ISDS is capable of self-correction even without establishing a single over-arching institution or centralized mechanism for investment disputes. Those defenders would also point out that ICSID's changes to its procedural rules are only the tip of a more significant (if subtle) transformation over time in investment arbitration: namely more "balanced" ISDS rulings over the last decade by arbitrators aware of and responsive to the broader sovereign backlash brought on by older ISDS awards.[37]

ICSID's latest effort is a bid by the world's leading forum for investment arbitration to remain relevant even if more fundamental structural changes to how investment disputes are

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[34] ICSID/UNCITRAL, Draft Code of Conduct for Adjudicators in International Investment Disputes (April 2021) https://icsid.worldbank.org/resources/code-of-conduct. Note that the current draft does not prohibit repeat arbitral appointments given disagreements among states on whether such appointments should only be barred when these present specific conflict of interests concerns. See, generally, Chiara Giorgetti and Mohammed Abdel Wahab, 'A Code of Conduct for Arbitrators and Judges' (14 October 2019) Academic Forum on ISDS Concept Paper, 2019/8.

[35] Possible reform of investor-State dispute settlement, Submission from the Government of Costa Rica, UN Doc. A/CN.9/WG.III/WP.178 (31 July 2019) at 2.

[36] See, eg, José E. Alvarez, 'Is the Trans-Pacific Partnership's Investment Chapter the new "Gold Standard"?' (2016) 47 Victoria Univ. of Wellington L. Rev. 503 (henceforth *New 'Gold Standard'*).

[37] See, eg, José E. Alvarez, 'The Return of the State' (2012) 20 Minn. J. Int'l L. 223.

handled are in the offing. ICSID's message to ISDS reformers is clear: if you want to establish an international assistance facility or even a formal appeals process as an alternative to ICSID annulment, you do not have to re-invent the wheel.[38] ICSID, an institution with a proven track record and the institution with the greatest experience on investment adjudication, is here and ready to be built upon. But its message to those who want to go beyond that is equally clear: do not expect an institution whose *raison d'etre* is investment arbitration to take the lead in replacing it with a single global investment court. Nor can one expect an organization that provides a procedural venue to venture ahead of its skis to propose substantive changes to states' IIAs. ICSID reformers are well aware that what are "low hanging fruit" to some are merely "lowest common denominator" solutions for others. They know that for those who object in principle to third party funding, for instance, making it more transparent is not enough.[39] ICSID is understandably focused on making what it does more cost effective, efficient, and attractive to its stakeholders.

The Agenda at UNCITRAL's WG III

The focal point for ISDS reform is UNCITRAL's WG III. WG III's original agenda was confined from the outset to address structural and procedural issues related to ISDS. It was to focus on the small monster of ISDS and address only (a) the lack of consistency, coherence, predictability and correctness of arbitral decisions; (b) the process for selecting and challenging arbitrators and decision makers; and (c) the cost and duration of ISDS proceedings.[40] But as those engaged in the process wrestled with the complexity of these topics, their agenda mushroomed under the rubric of procedural reform. The list of WG III's current agenda items – third party funding, dispute

[38] Thus, ICSID, on more than one occasion, has been the venue of serious discussions aimed at adding an appellate mechanism.
[39] See, eg, Brooke Guven and Lise Johnson, 'The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement', Columbia Center on Sustainable Development Working Paper (May 2019).
[40] See, generally, Report of Working Group III on the work of its thirty-sixth session, UN Doc. No. A/CN.9/964 (6 November 2018).

prevention methods, exhaustion of local remedies, appellate and multilateral court(s), shareholder claims and reflective loss, treaty parties' interpretations, security for costs, frivolous claims, third party participation, multiple proceedings and counterclaims, code of conduct, selection and appointment of arbitrators, advisory center, and a multilateral instrument on ISDS reform – suggest its mission creep over time.[41] All of these topics have been the subject of at least Secretariat notes and often extensive reports by scholars and others. At present WG III is devoted to developing solutions to the identified concerns – a process that is anticipated to continue through 2026.

To date, WG III has been an invaluable forum for generating information and interstate deliberation. Given the complexity of its current mandate, it is unlikely that it will add more topics to an agenda loaded with legitimacy challenges to ISDS that states prioritize differently. Since states do not agree on a single way forward with respect to other topics on the WG III's agenda, agreement beyond those being addressed by ICSID in its rules amendment process will prove difficult.[42] Moreover, as the WG III reports produced to date on many topics illustrate, the more closely one looks at more ambitious structural reforms – even when these are limited to improving dispute settlement – the more complex these become.

Consider the idea of establishing a global assistance body to equalize the scales among differentially endowed states facing investor claims. Many states, even those needing no such assistance, agree that poorer states could benefit from advice concerning this specialized area of the law, particularly given the rapidly developing (if inconsistent) jurisprudence produced under ISDS and the resources needed to keep track of it.[43] But while there is increasing support in WG III for

[41] See, eg, Possible reform of investor-State dispute settlement, Note by the Secretariat, UN Doc. A/CN.9/WG.III/WP.166 (30 July 2019).
[42] See, eg, Anthea Roberts, 'UNCITRAL and ISDS Reforms: The Divided West and the Rest' *EJIL Talk!* (30 April 2019).
[43] See, eg, Jeremy K. Sharpe, 'Control, Capacity, and Legitimacy in Investment Treaty Arbitration' (2018) 112 Am. J. Int'l L. Unbound 261.

establishing an assistance facility (perhaps in ICSID) that would emulate the WTO's, the devil is in the details. As a recent scoping study on this issue prepared for the Dutch government indicates, there are at least seven different models for such assistance and, depending on whether such a facility would engage in capacity building, negotiation support, policy advice, legal opinion writing, or the actual defense of claims, the political and other challenges escalate at every step – not to mention the costs.[44]

Getting help to states to ensure consistency in their own pleadings, in following and reacting to tribunal decisions, in intervening in annulment or set aside proceedings, and in issuing clarifying interpretations would require considerable resources. The costs and challenges only escalate if such a facility were, in addition, tasked with helping states anticipate, prevent or mediate disputes to avoid their escalation or actually helping respondent states manage arbitral claims. Given the average cost of defending an investment claim, a facility that would also help in case staffing, in appointing arbitrators, drafting briefs, working with experts and engaging in discovery would not come cheap. That scoping study provides a sobering comparison with the anticipated costs of the WTO assistance facility (or other international courts which provide assistance to litigants). The study suggests that a typical ISDS defense would require some 40 to 50 times the number of working hours as compared to the typical WTO case.[45] It concludes that the financial and personnel resources required would need to be vastly greater than in the WTO.[46] As this suggests, even assuming that states could agree on which model of assistance to implement, financing it would be a formidable challenge.[47]

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[44] A Scoping Study on Securing Adequate Legal Defense in Proceedings under International Investment Agreements, Prepared for the Ministry of Foreign Affairs of the Netherlands by the Columbia Center on Sustainable Development (11 November 2019).
[45] Id., at 23.
[46] Id., at 23-25.
[47] The attempt to establish such an assistance facility is also complicated by the fact that one of its supporters (and presumably leading funder), the EU, insists that it will support an assistance facility only if it is tied to the

UNCTAD's Reform Efforts

At UNCTAD the focus has not been on justifying ICSID's continued existence or buttressing the legitimacy of ISDS. UNCTAD's investment reform agenda emphasizes the need to "modernize old-generation treaties." For some time, UNCTAD has been hard at work in supporting states that want to replace their older "overly investor-friendly" BITs with more "balanced" ones. To this end, it has generated a regularly updated recipe book of desirable IIA reform options. These include updating old BITs by adding references to global standards (as on human and labor rights); managing relationships between coexisting treaties; consolidating a state's IIA network; replacing, abandoning, or amending "outdated" treaties; re-interpreting old treaty provisions by issuing joint state interpretations; and "engaging multilaterally."[48] UNCTAD provides states with a considerable data base of more contemporary IIA provisions that would presumably generate more "sovereign-sensitive" arbitral rulings.[49]

As this suggests, UNCTAD's vision of reform is not limited to recommending changes to ISDS. UNCTAD does not ignore the broader critique of the content of IIAs but it confronts that monster in piecemeal fashion, without attempting a unified list of prescriptions. While it has produced a Policy Framework for a "new generation" of international investment policies, its five principles for sustainable international investment and list of IIAs reform options are designed to encompass a wide range of options to "re-calibrate" the needs to protect states' "right to regulate"

establishment of an MIC. See Possible reform of investor-State dispute settlement, Submission from the European Union and its Member States, UN Doc. A/CN.9/WG.III/WP.159/Add.1 (24 January 2019), at paras 38-40.

[48] See, eg, 'Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties', IIA Issues Note (June 2017) at 7, Figure 7. UNCTAD's Phase 1 was devoted to assisting states in devising their own model IIAs suited to their own development and regulatory needs in addition to helping states to negotiate more "balanced" treaties going forward.

[49] UNCTAD, 'Investment Policy Framework for Sustainable Development' Doc. No. UNCTAD/DIAE/PCB/2015/5 (2015) at 73-88.

while also protecting incoming FDI.[50] Opinions differ on whether UNCTAD is leading the reform of IIAs or merely responding to changes in IIAs already occurring on the ground, as states respond to the fact that erstwhile leaders of the regime like the United States are no longer concluding IIAs that look like its own treaties of the 1980s. While UNCTAD includes the possibility of multilateral engagement as one reform option, it not directing an effort to negotiate a global fundamentally recalibrated IIA.[51] It too has had its reform ambitions tempered by the failure of the MAI.

UNCTAD as a whole continues to operate on the assumption that states need to provide an enabling framework for foreign capital. It endorses a liberal framework that includes FDI-enabling treaties as well as national laws, regulations, and administrative processes consistent with such treaties. UNCTAD's technical assistance teams remain committed to helping states draft and implement national laws to liberalize the entry and operation of foreign businesses, thereby making the violations of existing IIAs less likely. Its annual investment reports point out, year after year, that LDCs need to increase the flow of foreign capital if they want to continue to reap the benefits of economic globalization.[52] These reports state unequivocally that increased flows of private foreign capital are vital to achieving the UN's Sustainable Development Goals (SDGs) – from the mitigation of climate change to securing universal access to education, health care, and clean water.[53] UNCTAD as a whole continues to affirm, as it has since the demise of the New International

[50] See id. (outlining five principles: safeguarding the right to regulate, reforming ISDS, promoting investment for sustainable development, encouraging investor responsibility, and enabling consistency in a country's investment national and international policies). See also UNCTAD, 'International Investment Agreements Reform Accelerator', Doc No. UNCTAD/DIAE/PCB/INF/2020/8 (2020) at 15.
[51] Compare the IISD Model International Agreement on Investment for Sustainable Investment, Negotiator's Handbook (2d ed. 2006) https://www.iisd.org/system/files/publications/investment_model_int_handbook.pdf.
[52] See, eg, UNCTAD, 'World Investment Report 2017, Investment and the Digital Economy' (7 June 2017) (emphasizing the critical role of increased flows of FDI to enable poorer states to take part in the next industrial revolution, namely the digital revolution). See, generally, Nicolás M. Perrone, 'INCTAD's World Investment Reports 1991-2015: 25 Years of Narratives Justifying and Balancing Foreign investor Rights,' (2018) 19 J. World Inv. & Trade 7.
[53] See, eg, UNCTAD, note 49, above (Sustainable Development) at 142.

Economic Order (NIEO), that private actors are the most efficient wealth-maximizers and governments need to facilitate private enterprise, both domestic and foreign, to achieve economic growth. Although individual UNCTAD reports are filled with intriguing ideas on possible ways to use IIAs, along with other policy tools, to direct FDI to where it is most needed,[54] UNCTAD leaves it to states to find a way to navigate between the organization's two-faced agenda: to replace older investor-friendly BITs while also enhancing and protecting FDI flows.[55]

The next section speculates about possible outcomes of the reform efforts summarized above.

Five Possible Alternatives to the ISDS Status Quo

(1) A Return to Calvo

The first possible scenario is a return to a world Carlos Calvo would have loved – where FDI host states' courts rule on foreign investor claims applying only national law.

A re-nationalization of investment disputes could occur if more states follow the lead of countries like Brazil, whose IIAs authorize only state to state dispute settlement, or adhere to other investment agreements that eliminate resort to ISDS, such as the USMCA (when it comes to disputes between the United States and Canada), the U.S.-Australia BIT, the EU-China Investment Agreement, or the EU-UK Trade and Cooperation Agreement.[56] A world where, de facto, most

[54] See, eg, UNCTAD, 'ASEAN Investment Report 2019' (31 October 2019), at 242-245 https://unctad.org/system/files/official-document/unctad_asean_air2019d1.pdf (identifying needs for investment facilitation, the use of private-public partnerships, and additional patent and data privacy protections to boost needed FDI in health care sectors in Asia).

[55] As an organization, UNCTAD has been content with promoting vague general principles for "investment policymaking" under the objective of promoting "inclusive growth and sustainable development." See, eg, 'Guiding Principles for ACP Countries' Investment Policymaking', Jointly Developed by UNCTAD and the ACP Secretariat, ACP/85/03/17, Rv. 1 (22 May 2017).

[56] But note that the EU-China Comprehensive Investment Agreement anticipates negotiation within two years of signature on a further agreement on investment protection and dispute settlement that would take into account ISDS reforms within UNCITRAL. EU-China Comprehensive Agreement on Investment, Institutional and Final Provisions, s VI, art 3. For an analysis of Brazil's Model IIA and its potential impact, see Geraldo Vidigal and Beatriz Stevens, 'Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?' (2019) 19 J. World Inv. & Trade 475.

investment disputes are heard only in national courts could also emerge should current IIAs come to be replaced – as urged by UNCTAD – by treaties that are so protective of sovereign prerogatives or so constrained with respect to investors' possible resort to ISDS that few claimant lawyers would urge reliance on them to vindicate their rights in any supranational forums anticipated by such treaties. A return to Calvo could also emerge if, for example, more countries simply adopt exhaustion of local remedies periods contained in some contemporary IIAs and investors see eventual resort to ISDS as not worth the effort.[57]

Calvo could also emerge triumphant should a majority of IIAs require non-binding efforts at dispute prevention and mitigation prior to supranational remedies. Resorts to national courts could also emerge un-intentionally as a by-product of IIAs that replace ISDS with non-binding methods such as mediation or conciliation but provide no other alternative to national courts.

Rhetorical support for non-binding dispute methods is often expressed in today's ISDS reform venues. At an intersessional regional meeting co-organized by UNCITRAL and the Dominican Republic in which 32 states participated, for example, states highlighted "[t]he importance of dispute prevention (including a joint committee of the treaty Parties) and other means of dispute resolution (in particular mediation)."[58] Those governments also urged the use of cooling-off periods and mandatory consultations.[59] But despite this supportive rhetoric and the substantial number of IIAs that contain provisions for conciliation/mediation, the numbers of publicly known attempts to actually mediate/conciliate investment disputes are not impressive.[60] There is not much evidence that investment disputes – at least the difficult ones that tend to come to ICSID – are

[57] See, eg, India Model BIT of 2016 https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf.
[58] Summary of the intersessional regional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Dominican Republic' (27 February 2019) at 8.
[59] Id.
[60] See, eg, Catherine Kesedjian and others, 'Mediation in Future Investor-State Dispute Settlement', Academic Forum on ISDS Concept Paper 2020/16 (Draft 24 February 2020) (reporting that some 627 IIAs have voluntary ADR provisions but only 12 cases have been reported under the ICSID conciliation rules).

amenable to non-binding dispute settlement methods. There is also little evidence that states have been inclined to derail investor-state arbitral claims by bringing issues to another alternative: state to state dispute settlement. Despite the fact that most IIAs that include the option of ISDS have long included the possible resort to state to state dispute settlement as well, there has been precious little use of the latter – at least that is publicly known. In many cases, states do not even answer letters sent by investors seeking to invoke alternatives to ISDS during the cooling off periods contained in some current IIAs. And, for all the enthusiasm expressed for the United Nations Convention on International Settlement Agreements Resulting from Mediation (the so-called "Singapore Convention"), that treaty remains untested with 51 signatories but, as of June 2021, only six ratifiers.[61]

There is as yet no evidence that requiring resort to non-binding dispute settlement methods or enabling state-to-state adjudication effectively mitigates binding investor-state adjudication when both are available or whether, on the contrary, requiring such alternatives as a precursor to ISDS will only delay settlement and increase costs for all concerned. Comparisons between the frequent turn to quiet settlement under the shadow of the WTO's Dispute Settlement System need to be treated with caution. That states are apt to mediate their disputes inter-se within a regime where formal adjudication is limited from the outset to interstate disputes is hardly a surprise.

Just why non-binding dispute settlement has not taken off with respect to investment remains a matter of speculation. While it is to be expected that investors would prefer an enforceable award in the hand to the mere prospect of conciliation, why wouldn't states invariably opt for non-binding alternatives if given the choice? Experienced counsel to states as well as some empirical evidence suggests one reason: the political salience of many investment disputes makes

[61] See UN Treaty Collection https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en.

governments less inclined to resort to non-binding international dispute settlement. What states may want from ISDS is precisely the political cover of someone else requiring them to pay a foreign investor.[62] If that political cover were not available and states and investors nonetheless want binding resolution, national courts remain a last resort – and may be the accidental beneficiaries of IIAs that anticipate only "soft" alternatives like mediation or conciliation.

A return to Calvo draws some academic support – and not only from the usual opponents to international investment protection like Sornarajah. Defenders of global constitutionalism like Mattias Kumm argue that ISDS "has no plausible role to play in the relationship between developed liberal constitutional democracies."[63] Perhaps aware that special dispensation only for Western-style democracies poses some political liabilities, Kumm questions ISDS more generally: "The idea of investment arbitration as a field with its own separate dispute resolution infrastructure should be seen as an inherently dubious transitional phenomenon—perhaps comparable to the League of Nations Mandate System or the UN Trusteeship system – that deserves to wither away over time, rather than being reformed."[64]

But a large scale return to Calvo by states whose investors have long had access to various forms of supranational remedies – including unique institutions like the Iran-U.S. Claims Tribunal – does not seem in the cards. Such a prospect would be quite a departure from centuries of deep suspicion about national courts' capacity to handle impartially claims by foreign investors. For Calvo to win over all or most states that now accept ISDS, those states (including business interests

[62] See Seraphina Chew and others, 'Report: Survey on Obstacles to Settlement of Investor-State Disputes' (September 2018) NUC Law Working Paper 2018/022.
[63] Mattias Kumm, 'An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege' (25 May 2015) 4 ESIL Reflections, Issue 3 at 4 https://esil-sedi.eu/wp-content/uploads/2015/05/ESIL-Reflection-KUMM-final.pdf.
[64] Id., at 2. Kumm also argues that "[p]rivileging foreign investors among economically developed mature liberal constitutional democracies to attract capital by seeking to immunize them from financial implications of regulatory change merely supports a (de) regulatory race to the bottom." Id., at 4.

within them to the extent governments respond to them) would have to change their minds about the need for supranational scrutiny when such disputes arise. And even if such a change in mindset were to occur, states would have to follow through and terminate their existing investor protective IIAs – and not merely conclude additional ones that make resort to ISDS unlikely.

That is not now happening. UNCTAD's database shows that between 2018 and 2020 – a period in which ISDS has been the center of criticism-- at least 30 IIAs with some sort of ISDS have been signed.[65] The Brazilian model has been followed only in the seven IIAs in which Brazil is party.[66] History suggests that states are generally reluctant to disturb the status quo at least with respect to investment. Even Argentina – despite its notorious losses under ISDS – never withdrew from the US-Argentina BIT despite numerous and sometimes dramatic changes in presidential leadership. Perhaps governments realize that the enthusiasm for FDI waxes and wanes over time; that countries and periods that opt for nationalization tend to react to its disadvantages (e.g., the hits to a country's reputation in the markets) by returning to privatization and vice versa – as may be now taking place in Ecuador for example.[67] Terminating a BIT with a country whose investors have a prominent presence in a host state is, by contrast, a dramatic step with immediate reputational consequences – and one that may be very hard to reverse.

Moreover, it is not clear that dismantling treaty-based investor-state arbitration will end resort to ISDS. Once the ISDS toothpaste is squeezed by states (as through terminations of ISDS-reliant IIAs), arbitration may reemerge in other ways. Should investors be shut out of treaty-based ISDS, those that can (particularly the most powerful multilateral enterprises) may turn to investor-

[65] UNCTAD, Investment Policy Hub https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping (list of IIAs examined by author) (henceforth 'UNCTAD List of IIAs').
[66] Id.
[67] See, for example, Ecuador's sober submission to WG III. Possible Reform of investor-State dispute settlement, Submission from the Government of Ecuador, UN Doc. A/CN.9/WG.III/WP.175 (17 July 2019).

state arbitration under a pre-existing contract, after pressuring a state to agree to ad hoc arbitration, or under national laws granting arbitral access.[68] It would be interesting to see how today's reformers, many of whom are concerned with equalizing access to investment arbitration to smaller businesses, would react to a return to the days when ISDS was predominately the prerogative of only powerful MNEs.

(2) ISDS Constrained

Severely constrained ISDS could emerge under IIAs that restrict the type of claims that can be submitted to investment arbitration or impose difficult prerequisites to investment arbitration. Apart from those parts of the USMCA that require certain investors in either Mexico or the United States to exhaust their local remedies before opting for ISDS or the India Model BIT of 2016 which imposes a five year exhaustion requirement along with a number of formidable constraints to filing an investor-state claim, it is not uncommon for contemporary IIAs to preclude access to ISDS when the claims involve government procurement and subsidies, services supplied in the exercise of governmental authority, air services, and claims relating to public debt. An increasing number of IIAs, like contemporary US IIAs, also contain exceptions for actions taken to protect essential security that, on their face, are "self-judging" and even if not so interpreted by an arbitral tribunal serve to discourage investors from filing claims. Within WG III, some states, such as Indonesia, have endorsed a general return to requiring exhaustion of local remedies as a prerequisite to ISDS.[69] IIAs that impose such a constraint and combine it with exceedingly short period for filing claims, narrow investor rights, and vague respondent defenses may leave ISDS as impotent as was Samsun after Delila cut off his hair.[70]

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[68] See, eg, Jarrod Hepburn, 'Domestic Investment Statutes in International Law' (2018) 112 Am. J. Int'l L. 658.
[69] Possible reform of investor-State dispute settlement, Comments by the Government of Indonesia, UN Doc. A/CN.9/WG.III/WP.156 (9 November 2018) at 4.
[70] See, eg, USMCA, Annex 14-D, art 3.

Should enough states decide to make ISDS more apparent than real in their IIAs, this form of dispute settlement would be officially alive but practically dead. Over time, this option may devolve to the first outcome described above: a return to Calvo. But it is unlikely that large numbers of states will opt for negotiating treaties that are apt to disappoint investors by creating only the façade of ISDS. Investors under IIAs requiring the exhaustion of local remedies have to hope that the prospect of eventual resort to ISDS provides enough of a constraint to preclude host states from violating their rights. Many of them are likely to resist that outcome. Indeed, India adopted its severely constrained Model BIT reportedly only by ignoring the pleas of its own investors who sought reciprocal protections when going abroad. The likelihood that many other states will defy their outbound business interests who demand IIAs and choose to adopt agreements comparable to India's latest BIT Model seems remote. Even prior to COVID, states were already desperately seeking foreign capital. It is unlikely that states wishing to hang an "investor welcome" sign would opt for treaties that make the availability of investor arbitration more apparent than real. Only a state as confident in drawing foreign investors as the United States is likely to constrain ISDS quite as much as does its USMCA. To date, few states that have previously committed to traditional ISDS have gone that far.[71]

(3) ISDS Reformed

There is a stronger prospect that over the next 15 years more IIAs will be adopted that resemble the investment chapter of the TPP II or that replicate the procedural changes contemplated by ICSID's latest rule amendments. This is certainly suggested by UNCTAD's data on recently concluded IIAs and reflects the continuing influence of large players like the US – whose

[71] Indeed, even Canada, which eschewed ISDS in the USMCA with respect to the United States and has supported the EU's effort to establish a MIC, continues to include ISDS in its latest model IIA. See Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) (May 2021) https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng.

2012 Model BIT was the basis for the TPP II's investment chapter. In WG III, those who defend continued resort to ISDS, such as China and Japan, do so on the basis that the shortcomings of ISDS will be addressed and that reforms will be adopted that reflect the low-hanging fruit basket of procedural reforms that ICSID is pursuing.

China has, in addition, supported the idea of establishing a permanent appeal mechanism as a way to resolve the main problems in ISDS.[72] It has argued that such a mechanism "would be an important factor in promoting application of the rule of law to the settlement of disputes between investors and States. It would help improve error-correcting mechanisms, strengthen legal expectations for investment dispute settlement and establish limitations for the conduct of judges. It would also foster further standardization and clarification of procedures, thus reducing the abuse of rights by parties to disputes."[73] China's submission, however, does not explain how the appellate mechanism could be implemented. At WG III others have expressed support for complementing reformed ISDS with an appellate body of some kind but there is as yet no consensus on its scope or the method for its establishment.[74] It is therefore hard to predict whether a consensus will emerge that reformed ISDS will include full scale appellate review in lieu of ICSID annulment.

There is within WG III considerable support for how to make reformed ISDS a more realistic possibility over the long term without requiring states to renegotiate their existing IIAs BIT by BIT. Some have suggested the Mauritius Convention on Transparency in Treaty-based Investor-

[72] UNCITRAL WG III, Possible Reform of Investor-State Dispute Settlement, Submission from the Government of China, UN Doc. No. A/CN.9/WG.III/WP.177 (19 July 2019).
[73] Id., at 4.
[74] See, eg, UNCITRAL, Possible Reform of investor-State dispute settlement, Appellate mechanism and enforcement issues, Note by the Secretariat, UN Doc. A/CN.9/WG.III/WP.202 (12 November 2020).

State Arbitration or the OECD's Multilateral Tax instrument as models to implement ISDS reforms to old IIAs in a single step, including adding an appellate mechanism.[75]

But the prospect that reformed ISDS will dominate in the short to medium term needs to be tempered by some basic facts. While IIAs with reformed ISDS are the most popular model of today – 16 IIAs in UNCTAD's database contain what most would characterized as sufficiently reformed ISDS between 2018 and 2020[76] – that model has not completely dominated. During the same period, 9 IIAs with traditional ISDS were concluded.[77] For this reason, the best hope for convergence around ISDS reformed lies in ICSID's rules amendment and its emulation by other arbitration venues and not the individual negotiation or renegotiation of IIAs (as envisioned by UNCTAD) – which would take considerable time and political will.

The other cloud over the prospect that reformed ISDS will come to dominate the scene is obvious: the appeal of investor-state arbitration with all the bells and whistles contained in the TPP II remains untested. No one knows whether investors (and their lawyers) would embrace or resist it. For now, most public investor claims continue to be brought under old-fashioned IIAs with unvarnished ISDS.[78] If past is prologue, that version of ISDS is likely to remain popular with investors and may remain the option of choice in investor-state contracts and even in some contemporary IIAs.

(4) Judicialization: a Multilateral Investment Court

[75] See, eg, Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention Serve as Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap' (CIDS, Geneva 2016).
[76] UNCTAD List of IIAs, note 65, above.
[77] Id.
[78] See, eg, Issues Note, note 19, above, at 4 (reporting that about 70 percent of the investment arbitrations in 2019 were brought under IIAs signed in the 1990s and earlier and the rest under treaties signed between 2000-2011).

The most touted structural reform within WG III is the EU's promotion of multiple, and ultimately a single, permanent international investment court. The EU's alternative to ISDS consists of a standing panel of full-time judges serving 6 to 9 year terms complemented by an appellate tribunal consisting of comparable judges serving for the same period. Such a court has been included on a piecemeal basis within recent EU IIAs, namely with Canada, Vietnam, and Singapore.[79] Before WG III, the EU has argued that an international investment court "is the only suggested option" that can solve all the identified concerns with ISDS, namely its inconsistent caselaw, the problem of multiple proceedings, the absence of a corrective mechanism, the lack of arbitral independence, insufficient transparency, the lack of diversity of arbitrators, the problems with arbitral appointments, and the high cost and length of arbitral proceedings.[80] According to the EU, judges, selected from jurisconsults qualified to serve on their countries' highest courts, would descend, like dieu ex machina, to harmonize the law, correct legal errors, and eradicate, at one blow, everything from biased adjudicators to double-hatted ones. Court proponents envision that final rulings, reviewed on appeal, would not require further examination at the domestic level and be fully enforceable as would any award by a "permanent arbitral body" under the New York Convention.[81]

The response to those who complain that multiple investment courts would neither have enough claims nor the capacity to harmonize international investment law is to spread the domain of such a court by consolidating it into a single body whose jurisdiction would be grounded in a Mauritus-type arrangement whereby states agree to send disputes under their old IIAs (normally

[79] Comprehensive Economic and Trade Agreement between the European Union and Canada (signed 30 October 2016, provisional application 21 September 2017) art 8.29; Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (signed 30 June 2019, entered into force 1 August 2020) art 3.41; Investment Protection Agreement between the European Union and its Member States and the Republic of Singapore (signed 15 October 2018) art 3.12

[80] Possible reform of investor-State dispute settlement, Submission from the European Union and its Member States, A/CN.9/WG.III/Wp.159, Add.1 (24 January 2019) at para 39.

[81] Id., at paras 30-32.

subject to ISDS) to the Court.[82] Should the court be granted jurisdiction to rule under treaties that now generate the bulk of investment claims – namely investor protective agreements like the US-Argentina BIT – it would be assured of enough business to serve as a focal point for consistent, coherent interpretations of vague rights like FET.

This alternative to ISDS appeals to self-described constitutionalists who are arbitration skeptics by default, such as Mathias Kumm. To Kumm, any system for international dispute settlement for investment claims must "meet constitutional requirements. . . There must be a properly constituted court of impartial and independent judges . . . [who] must meet the requirements for judicial appointments to [the] highest courts. That means that senior partners of major law firms without additional judicial experience or serious academic reputations do not make the cut. . . Arbitration procedures by private actors against public authorities are to be permitted, if at all, only against the backdrop of default judicial procedures that meet constitutionalist requirements."[83]

The ambitious goals for the envisioned single Multilateral Investment Court (MIC) are reminiscent of those made by proponents of the last similar effort: namely the establishment of the International Criminal Court as well as many of those, mostly in Europe, proposing a number of specialized global courts.[84] But there are many reasons to be skeptical that an MIC will effectively displace ISDS in the near future.

As suggested by the submission made by corporate counsel to WG III, such a court would eliminate one of the main sources of the appeal of arbitration, namely party autonomy in the

[82] See infra at (discussion of proposed multilateral agreement). Ameliorating the "systemic inconsistency" of arbitral caselaw is the most important single goal of some ISDS reformers. See, eg, Julian Arato and others, 'Parsing and Managing Inconsistency in Investor-State Dispute Settlement' (2020) 21 J. World Inv. & Trade 336.
[83] Kumm, note 63, above, at 8.
[84] José E. Alvarez, 'Mythic Courts', iCourts Working Paper Series No. 2014, 2020 (September 2020) at 10 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3685739.

selection of arbitrators, on the promise that it will achieve other stated goals.[85] But it is just as probable that a court with a limited set of judges serving for lengthy terms will reduce the pool of adjudicators instead of diversifying them while introducing considerable uncertainty with respect to the ability of investors to enforce awards.[86] As that corporate submission also suggests, the proposed court – whose judges would all be appointed by states – is likely to tilt the balance in favor of respondent states.[87] While it is true that most states are both capital exporters and capital importers and in principle *ought* to be concerned with both protecting their own foreign investors and not merely with protecting themselves from liability to incoming foreign investors, everything that we have seen to date suggests that states worry more about being sued and losing than they are about effectively protecting their foreign investors abroad. The political impact of even a single prominent arbitral award cannot be overstated. This is as likely to be true for leading capital exporters like the United States – which has been perpetually leery of losing even a single NAFTA case – as it is for poorer capital importers.

Another reason for skepticism is that such a court is largely unprecedented. Unless one treats the incipient Arab Investment Court under the Arab League[88] as a precursor, no comparable international judicial body exists. Standing international courts devoted to considering and awarding to private parties what may be substantial monetary awards against states for unknown prospective claims have not existed. The ICJ does not have that purpose or that jurisdiction. While the ICJ has the authority to issue damage awards against states, these do not emerge from claims by private

[85] Investor-State Dispute Settlement Reform, Submission by the Corporate Counsel International Arbitration Group (CCIAG) to UNCITRAL Working Group III (18 December 2019) (henceforth 'CCIAG Submission') at paras 13, 17.
[86] See, eg, Tom Jones, 'The pendulum has swung back', *Global Arbitration Review* (6 December 2009) (reporting on the Freshfields lecture delivered by Brigitte Stern).
[87] CCIAG Submission, note 85, above, at paras 21-26.
[88] See, eg, Walid Ben Hamida, 'The First Arab Investment Court Decision' (1 January 2006) J. of World Inv. & Trade, 7(5), 699-721.

claimants. Notably, that Court has been hesitant about deploying its authority to issue substantial damage awards even in respect to interstate claims.[89] Even if one considers claims settlement processes like the U.S.-Mexican Claims Commission or the Iran-U.S. Claims Tribunal, those semi-permanent bodies, like others, were established to adjudicate a defined set of claims known in advance. Neither had the open-ended jurisdiction to accept unknown claims – least of all presented by private parties seeking unlimited sums in damages – that is envisioned for the MIC. Regional human rights courts, like the ECHR, as well as the WTO's DSU, operate more like systems of correction to secure states' continuing compliance with their treaty obligations. The purpose of the WTO's DSU is not to secure compensation for injured traders. Of course regional human rights courts can take advantage of greater cohesion among their regional members but even while the European and Inter-American courts of human rights pay increasing attention to providing tangible remedies to human rights victims, few see those institutions as forums for tort-like damages. They are, like UN human rights treaty bodies, intended to function most effectively as compliance tools to ensure that states that have been found to violate human rights cease to do so. Large damage awards are seen as possibly hindering that goal and undermining the fragile support these bodies enjoy. (Accordingly, the European Convention for Human Rights authorizes its court to provide "just satisfaction" even when national law provides only for partial reparation but only "as necessary.")[90]

The lack of agreement in WG III on establishing a court as the sole replacement for ISDS is not likely to be a short term phenomenon that will be overcome by better EU propaganda. No one

[89] See, eg, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ 18 (Feb. 26). The Court of Justice of the European Union (CJEU), which is charged with the accountability of EU institutions, has the authority to issue damage awards where the EU injures private parties but that unique entity's powers and functions makes it more like a Constitutional Court.

[90] European Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) art 50.

knows what is likely to emerge from a permanent court of state-selected judges whose very purpose is to render monetary awards against the states that appointed them. Some foreign investors fear a court, like the WTO's DSU, dominated by a governmental ethos, and perhaps even government functionaries as adjudicators or as their influential "secretariat."[91] Such a court may defer to governments only too well, yielding an underused Court amidst a stampede of business by business to any remaining arbitral alternatives.

Those who have studied the output of many international courts that have come into being since the end of the Cold War are entitled to be skeptical of the claim that judges on such courts are necessarily more impartial or competent than party appointed arbitrators, including those from practice.[92] There is considerable evidence that international judges have sometimes been selected precisely because they are seen as reliable "agents" of the states that select them and not because they are neutral trustees.[93] It may also be difficult for the MIC to buck the elitism that characterizes repeat players in international courts generally. Many such courts, including the ICJ, rely on repeat (often pale and male) players from a small set of Western states not dramatically different from those that have most often been involved in ISDS.[94]

It is doubtful that the contemplated MIC will achieve proponents' goals for the systemic integration of international investment law. Legal harmonization can be expected if such a court were interpreting – as the WTO appellate body does – a single set of covered agreements. To the

[91] This is one way that the WTO's Dispute Settlement Understanding – a model for some defenders of the investment court idea – is described. See Joost Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Panelists are from Venus' (2015) 109 Am. J. Int'l L. 761.
[92] See generally, Charles N. Brower and Jawad Ahmad, 'For the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court' (2018) 41 Fordham Int'l L. J. 791.
[93] See, eg, Eric A. Posner & John C. Yoo, 'Judicial Independence in International Tribunals' (2005) 93 Cal. L. Rev. 1.
[94] See, eg, Kurt Taylor Gaubatz and Matthew MacArthur, 'How International is 'International' Law?' (2000-01) 22 Mich. J. Int'l L. 239; Andrea K. Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration' (2020) 21 J. World Inv. & Trade 410.

extent multiple international investment courts emerge under discrete EU IIAs with comparable provisions, those courts can be expected to harmonize the law under those treaties.[95] But multiple courts presiding over distinct IIAs will hardly be in a position to produce consistent global investment law – as even some proponents of a single MIC acknowledge.[96] This reality helps to explain why a single MIC has become the Holy Grail for those seeking to go beyond reformed ISDS.

Aspirations for a single MIC in WG III now rest on the negotiation of a plurilateral or multilateral treaty under which large numbers of states allocate to that Court jurisdiction to interpret those states' existing IIAs. Hopes that such a MIC will "defragment" international investment law rely on that Court drawing support from sufficient numbers of states and that those states will eventually delegate to it authority to adjudicate all or most of their investor-state disputes. Proponents argue that once armed with global clout and ample jurisdiction under existing and future IIAs, the MIC would become, by default, the leading and most respected interpreter of international investment law.

But this expectation rests on the prospect that the MIC's judges will find their way to common interpretations of IIAs despite the "heterogeneity" of treaty language. Judges would have to find consistency amid IIAs that contain as many as the seven different prototypes of FET clauses, umbrella clauses of different ambit, diverse guarantees of non-discrimination (from distinct formulations of national and most-favored-nation treatment to general bans on "arbitrary" or "discriminatory" treatment sometimes with or without subsidiary additional assurances to respect the international minimum standard under customary international law), a wide variety of banned

[95]Of course, to the extent that contemporary EU IIAs come to resemble one another in content, multilateral courts under them are indeed likely to produce more harmonious law among such treaties.

[96] See, eg, Jaemin Lee, 'Mending the Wound or Pulling It Apart? New proposals for International Investment Courts and the Fragmentation of International Investment Law' (2018) 39 Nw. J. Int'l Law & Bus. 1 (arguing against the establishment of multiple investment courts and in favor of a single MIC).

performance requirements, differentially defined rights to compensation for distinct forms of direct and/or indirect takings or other regulatory measures that are "tantamount" to such takings, along with equally diverse "exceptions" or "defenses" to such rights for respondent states (from only those extended under the Articles of State Responsibility to differentially worded "measures not precluded" clauses or exceptions for distinct sectors such as finance).[97] Even assuming the MIC's judges come to share a common hermeneutics of treaty interpretation,[98] hopes that a single group of judges can reconcile such differences elevate hope over experience. Aspirations that harmonious international investment law will emerge from the interpretation of such distinct texts presumes that the MIC judges will ignore the traditional VCT rules of treaty interpretation and its mandate to respect the texts and objects and purposes of the IIAs before them. But judges who ignore the plain meaning of a treaty – who choose, for example, to read a self-standing FET guarantee as only protecting investors from denials of justice or decide to read a "self-judging" essential security clause as an objective one – risk sovereign backlash. As members of the WTO Appellate Body have forcefully seen firsthand, to retain the confidence of stakeholders, international judges need to resist credible charges that they are legislating from the bench.[99] An MIC that ignores that reality and attempts governance by judiciary is not likely to last long.[100]

It also seems naïve for all but the most starry-eyed judicial romantics to presume that a MIC's rulings will be, on average, better reasoned than the ones issued under ISDS. For all those

[97] See, eg, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, (2nd ed. 2012) at 132-215.
[98] Cf. id., at 28-35 (discussing different models of interpretation).
[99] See, eg, U.S. Statement Delivered by Amb. Dennis Shea at the WTO General Council Meeting (Geneva, 7 May 2019).
[100] The suggestion that the MIC be empowered to generate harmonious investment law by giving it the power to issue preliminary rulings to other bodies or advisory opinions, see Stephan W. Schill and Geraldo Vidigal, 'Designing Investment Dispute à la Carte: Insights from Comparative Institutional Design Analysis' (2019) 18 L. and Prac. of Int'l Tribunals at 335, envisions a willingness to delegate judicial power at the global level that is politically unlikely.

who complain that ISDS rulings are poorly reasoned, there are others who praise the greater scrutiny and care exercised by arbitral counsel and ISDS panels – over and above that evident in local courts or some other international courts.[101] Moreover, under the EU's current proposal, judges for international investment court or courts will not be the experts in international investment law that one would think necessary for the credible development of that law. The EU envisions, on the contrary, appointment of general public international lawyers with no connection to the ISDS practice where investment law has developed. Moreover, the EU's proposal for 21 judges appointed for renewable six year terms does not establish a "permanent" judiciary. It leaves plenty of room for states to refuse to re-appoint judges whose rulings displease them, as has occurred on the ICJ and the WTO's Appellate Body.[102]

Finally, the investment court is less likely to displace ISDS on a global scale to the extent that option is only one of many and states continue to have access to ISDS. Under the proposal for a single MIC as part of a multilateral à la carte agreement, even states now concerned with the ISDS status quo still have the option of investment arbitration reformed along the lines anticipated by ICSID or WG III. Establishing such a Court or referring cases to it may be less necessary to states that have the option of resolving their disputes as anticipated by, for example, the investment chapter of the TPP II. That treaty conspicuously narrows investor rights as compared to earlier incarnations of the standards of protection (from FET to expropriation to national treatment and MFN), expands considerably on respondent states' rights to regulate, and subjects arbitral discretion to binding inter-state party interpretations.[103] Its reformed ISDS makes progress on virtually every ground that the EU cites to justify establishment of a MIC: it enables greater transparency,

[101] See, eg, Reinisch, note 28, above, at 300.
[102] See, eg, Gregory Shaffer, 'Will the US Undermine the World Trade Organization?', *Huffington Post* (24 May 2016) http://www.huffingtonpost.com/gregory-shaffer/will-the-us-undermine-the_b_10108970.html.
[103] See, eg, Alvarez, note 36, above (*New 'Gold Standard'?).*

participation, reason-giving, and correction and review. It anticipates, as does the EU's Court, a Code of Conduct for arbitrators; authorizes amicus and public hearings; provides access to the minutes and transcripts of hearings to ample transparency provisions; provides the parties with a first look at the proposed award to permit comment and arbitral reconsideration; clarifies that the burden of proof of claims rests with the claimant; provides a procedure for the expeditious handling of frivolous claims and even the awarding of costs for those who file them; requires arbitrators to refer some issues to the Party's Commission which can issue binding rulings in response prior to any arbitral decision; and even anticipates establishment of an appellate body should the parties want one.[104] Faced with the choice of reformed ISDS with dispute settlement under a tested institution like ICSID and resort to a wholly untested international investment court – or a series of them – my guess is that many if not most states will opt for the first.

For all these reasons, existing ISDS is no more likely to be replaced by an MIC than by the other alternatives considered above.

(5) All of the Above: the Multilateral Treaty Option

At WG III, some states are converging around the idea that a "menu" of reform options for ISDS is the most desirable option. Chile, Israel and Japan have suggested that "the Working Group should have maximum flexibility to develop a menu of relevant solutions, which may vary in form, and that Member States can choose to adopt."[105] Colombia has taken the same view, arguing that the recipe to follow is the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.[106] The proposal is to negotiate a multilateral

[104] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018) arts 9.21-9.25.
[105] Possible reform of investor-State dispute settlement, Submission from Chile, Israel and Japan, UN Doc. A/CN.9/WG.III/WP.163, (15 March 2019) at 3. See also Schill and Vidigal, note 100, above, at 314.
[106] Possible reform of investor-State dispute settlement, Submission from the Government of Colombia, UN Doc. A/CN.9/WG.III/WP.173 (14 June 2019) at 6.

agreement under which states will be able to choose which of their existing IIAs will be subject to the new treaty's diverse dispute settlement options. Parties to the new treaty would be able to adapt certain investor rights to what each of them decides to be the most suitable forum for enforcement and interpretation. Under this move to an "open architecture" of options, the twin monsters of the investment regime would not be defeated, but they would be cunningly outflanked by sovereign choice. States would get to keep as many different investment rules as they want – all seven varieties of FET clauses if they choose – but also be able to match those substantive rules with the kind of enforcement scheme with which they are most comfortable.

The envisioned treaty's dispute settlement options would be even more extensive than those in UNCLOS's dispute settlement menu.[107] States would be able to opt for only national courts, ISDS with or without exhaustion of local remedies, only non-binding mediation, state to state arbitration, old fashioned or reformed ISDS, ISDS (reformed or not) subject to an appellate mechanism, or a two tiered permanent multilateral investment court with respect to whichever group of IIAs they choose. The mix and match options for states would only add to sovereign choice: a state could choose, for example, to keep an old BIT with a vague FET right but displace that BIT's resort to ISDS by enabling only mediation or recourse to national courts. The risk that an adjudicator would interpret an open-ended FET clause to the detriment of sovereign discretion would be mitigated by delegating that discretion only to a national judge or by ensuring that any such interpretation would only be precatory. A state could, on the other hand, retain traditional ISDS but only with respect to their IIAs that omit an FET guarantee altogether or that only extend protections of national treatment.

[107] UNCLOS, arts 279-299. See, eg, Possible reform of investor-State dispute settlement, Multilateral instrument on ISDS reform, Note by the Secretariat, UN Doc. A/CN.9/WG.III/WP.194 (16 January 2020).

Many see this pragmatic option as a great advance on the more binary choices states now have – between ISDS or a national court or between ISDS and the EU's MIC, for example. The multilateral treaty option seems the perfect adaptable solution for a world of states with differing needs and requiring choices among "imperfect alternatives."[108] But irrespective of its appeal in principle, there is serious question that a world weary of ambitious treaty making will muster the diplomatic commitment to make such a treaty a reality or that many states will ratify such a treaty even if it is concluded and submit enough of their existing IIAs to its menu of options.[109]

The most likely outcome: The complexification of the spaghetti bowl

Given the five options outlined above – and the unlikely prospect that any one of them will displace on a global level the current reliance on ISDS – 15 years hence the most likely description of the investment regime will remain what it is today: a confusing spaghetti bowl of IIAs with diverse substantive standards and procedures for adjudicating them. Particularly, but not only, if a multilateral agreement emerges from the UNCITRAL reform process, the investment regime's spaghetti bowl is likely to become more, not less, complex. Over the next few years, states will be exercising more, not fewer, options over time. While some states may adhere to the envisioned multilateral instrument agreement, others will not or will leave some of their IIAs out of the MIC's jurisdiction. In the end, there will be more noodles in the regime's bowl, more substantive and procedural choices, not less.

Even without an overarching à la carte agreement, the increasing complexification of the international investment spaghetti bowl is borne out by UNCTAD's current data. While a decade

[108] Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 Am. J. Int'l L. 361.
[109] It is important to remember that even the leading model for the environed WG III agreement, the Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration of 2014, has to date yielded only seven ratifiers. See https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status.

ago, most IIAs opted for ISDS, between 2018 and 2020, Brazil signed 7 IIAs with inter-state arbitration clauses; the EU signed 2 IIAs with its investment court; and India signed 1 IIA with ISDS severely constrained by a requirement for exhaustion of local remedies.[110] During the same period, most states concluded treaties that contained some form of reformed ISDS while a smaller number continued to ratify treaties with traditional (unreformed) ISDS.[111] When these diverse forms of dispute settlement are considered alongside the reality that investment treaty reformers have largely focused on reforming ISDS and not on trying to secure more uniform agreement on the substance of IIAs, the prospect that international investment law will achieve much greater harmonization than it has under investor-state arbitrators' efforts to promulgate *jurisprudence constante* seems unlikely.

The hermeneutics of treaty interpretation are affected by who the interpreters are and the forums they inhabit.[112] A world where diverse BITs and regional free trade agreements with investment chapters will be interpreted within diverse institutions – from national courts to arbitrators operating under different rules to permanent international judges – is not a place likely to produce the predictable, coherent, consistent and stable substantive rules that most reformers seek.[113]

If this sounds like a disappointing outcome given the diplomatic energy being deployed on reform, it is. But what is most disappointing is that reformers are ignoring sage advice: they are

[110] UNCTAD List of IIAs, note 65, above.
[111] Id. States' insistence on having choices for investment dispute settlement is also borne out by ICSID's on-going rules reform. Although ICSID had originally proposed mandating expedited procedures for investment disputes, (which is estimated to reduce the 50% the average length of investor-State dispute settlement as compared to existing ISDS), resistance by states led it to make this only optional.
[112] See, eg, Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals', in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (CUP 2013) at 445.
[113] But efforts to reform ISDS procedures, as through ICSID's rules amendments and its efforts (with UNCITRAL) to secure a soft or hard code of arbitral conduct may eventually harmonize and clarify such rules.

letting a good crisis go to waste. At a time when the investment regime is in a state of crisis and reforming it has the world's attention, reformers are not addressing the most critical long-term challenges to the regime and the world. They are not confronting the bigger monster feared by politicians, serious academics, and NGOs in the North and South. Overly focused on plugging rule of law holes in investment arbitration, reformers are neither refuting nor responding to the fundamental criticisms of IIAs nor providing alternative reasons why such treaties are needed.

As is suggested by the backlash that produced the Trump Administration's USMCA, the two monsters are inseparable. While the USMCA's departures from traditional ISDS were, to be sure, a product of fear of possible adverse ISDS outcomes even within a nation that had never lost any of the 17 investor-state claims brought against it, it was also the product of second thoughts about the content of U.S. investment treaties. The USMCA's substantive rules reflect changes to the once slender U.S. Model BIT of 1984 that led ultimately to a 40 page plus U.S. Model of 2012. Even prior to Trump, the United States had either eliminated or narrowed virtually every substantive investor guarantee that it had originally given to foreign investors in its first U.S. Model BIT while, in addition, expanding respondent state defenses in critical respects.[114] The USMCA and other contemporary IIAs, including EU treaties like CETA which have also changed their substantive contents, demonstrate why it is important for reformers to keep the two monsters in mind.

Today, even in places as committed to ISDS reform as is WG III, the larger monster emerges unbidden – as when Thailand recommends that the working group keep open the possibility of addressing more than procedural issues and be willing to draft model substantive IIA clauses,[115] Indonesia argues that both the substance and the procedural provisions of IIAs are

[114] See, eg, Alvarez, note 30, above (*Public International Law Regime*), at 143-71.
[115] Possible reform of Investor-State dispute settlement, Submission from the Government of Thailand, UN Doc. A/CN.9/WG.III/WP.162, (8 March 2019) at 6.

"intertwined" and need to be addressed,[116] or when South Africa asks why businesses should be given the power to sue governments in the first place.[117] The broader critique of IIAs also veers into view even when WG III reports attempt to keep the focus on procedural prescriptions. This occurs, for example in an August 2019 report on shareholder claims and reflective loss which points out in passing that the procedural reform being contemplated – cutting back on treaty shopping by corporate shareholders – does not address the underlying question: namely why do many IIAs permit shareholders to file claims for their own damages when most states' corporate law does not?[118]

Unless reformers tackle, honestly and objectively, the perception that IIAs themselves are monstrous, that view is likely to persist to undermine whatever reformers accomplish.[119] Critics of the regime will say that ISDS reform or efforts to create an alternative like an international investment court are the functional equivalent of putting make-up on a zombie where the status quo, ISDS, while weakened, continues to amble along powered by sheer path dependency.

Worse still, WG III reformers are ignoring the tensions in UNCTAD's double game. While UNCTAD is encouraging states to adopt treaties that are less protective of investors and more protective of host states, it continues to affirm and to act in other respects as if the future of the planet – and the health of nations – depends on increasing, not hindering, the flow of foreign capital. Back in 2014, UNCTAD argued that an enabling framework for FDI was critical to fill what

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116 Possible reform of Investor-State dispute settlement, Comments by the Government of Indonesia, note 69, above, at 2.
117 Possible reform of Investor-State dispute settlement, Submission from the Government of South Africa, A/CN.9/WG.III/WP.176, (17 July 2019) at para 37.
118 Possible reform of investor-State Dispute Settlement, Shareholder claims and reflective loss, Note by the Secretariat, UN Doc. A/CN.9/WG.III/WP.170 (9 August 2019). See also Arato, note 12, above, at 32-39.
119 Addressing the perception that IIAs, and not only ISDS, are problematic is not merely a matter of making vague investor rights like FET more precise. Even assuming that adding greater precision to IIAs' standards of protection would better protect regulatory autonomy (see, eg, Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19 J. Int'l Econ. L. 27), that is not the only concern IIAs inspire.

it estimated to be a $2.5 trillion per year shortfall in foreign capital flows that were needed to attain the SDGs.[120] UNCTAD has long argued, in accord with many experts, that stimulating FDI flows – both low-carbon FDI and capital investments in necessary financing and tech transfers – is essential to climate change mitigation. In 2010, it noted the need to increase annual FDI flows by between $200 billion to $1.2 trillion per year merely to maintain greenhouse gas emissions at current levels in 2030.[121] In accord with many others, it has argued that annual FDI flows need to increase by comparably large sums to provide basic global health infrastructure or secure universal access to clean water, the internet, and basic education.[122] Post-COVID, such estimates need to be increased by orders of magnitude and yet, UNCTAD seems bent on changing both IIAs and ISDS without a clear sense of how its prescriptions might affect the amount of critically needed capital flows. But at least UNCTAD, alone among global investment regime reformers, acknowledges that there needs to be a close connection between IIA/ISDS reform and attaining sustainable, but real, economic development.

The most serious problem facing *ISDS reform* is that it does not address how the planet will vastly increase private and public funds to the places and industries that the peoples of the world need to survive. In the long run, if we fail to figure out whether the investment regime can actually do what it once promised – increase capital flows – the monster that we will face will be far more formidable than the two with which this essay began.

[120] UNCTAD, 'World Investment Report: Investing in the SDGs: An Action Plan' (24 June 2014) at 140.
[121] UNCTAD, 'World Investment Report 2010 – Investing in a Low-Carbon Economy' (22 July 2010) at 148.
[122] See, eg, UNCTAD, note 120, above (on SDGs) at 142 (Table IV.2).