

**CLI Lecture Series**  
**Banco Court, Supreme Court of Queensland, Brisbane**

**“The Prospects for Reform of Investor – State Dispute Settlement”**

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**A. Introduction**

1. Thank you very much for the kind introduction. It is a great honour to be invited to give this evening’s lecture, and would like to express my thanks to the organisers for the invitation. I am also grateful to Justice Fraser for chairing this lecture, and to Professor Cassimatis, in advance, for his comments. I would also like to thank the Chief Justice of Queensland for the opportunity to be able to deliver this lecture in Banco Court.
  
2. During the past week, and continuing tomorrow, a meeting has been taking place in Vienna of Working Group III of the United Nations Commission on International Trade Law, or “UNCITRAL”, the outcome of which may have significant implications for the architecture that underpins the system of international economic governance. For at Working Group III, States are discussing the current system that we have for the settlement of investor-State disputes, and serious consideration is being given to whether it should be reformed – including the possible creation of a permanent multilateral investment court, with an appellate body. This would be the first permanent international court or tribunal having potentially universal jurisdiction to be

created since the International Criminal Court was established under the terms of the Rome Statute of 1998.

3. These major reforms are being considered for a system which has come under increasing strain in recent years. To name but three examples:

a. In February 2016, 12 States – including Australia – concluded negotiations and signed the Trans-Pacific Partnership Agreement, only for President Donald Trump to announce that the United States was withdrawing from it (before it even entered into force) on one of his first days in office in January 2017, thus requiring a substantial renegotiation.

b. In March 2018, the Court of Justice of the European Union ruled in the *Achmea* case that the investor-State dispute settlement clause in the Netherlands – Slovakia BIT was incompatible with EU law, which has sounded the death-knell for all of the approximately 200 intra-EU BITs.

c. And more generally, States such as Indonesia, India, and South Africa have in recent years been rethinking their approach to international investment law. Such States have terminated large numbers of their BITs, and have either sought to renegotiate them based on texts which give greater protection to the State’s sovereign right to adopt regulatory measures, or have simply decided that they are better off without such treaties. Even the United States, Canada, and Mexico have agreed to terminate the North American Free Trade Agreement (“NAFTA”) and replace it with the (imaginatively titled) “United States – Mexico – Canada Agreement”, which will, after a transition period, only permit investor-State claims as between the United States (and its nationals)

and Mexico (and its nationals), in respect of claims for direct expropriation and discrimination.

4. None of this is to suggest that we have experienced a sort of Armageddon, but these are certainly turbulent times, so the reform process underway at UNCITRAL offers a valuable opportunity to shape the future.
5. Allow me to take a step back for a few minutes. As many of you will be aware, investor-State disputes concern claims which are typically brought under treaties known as bilateral investment treaties or “BITs”, or under investment chapters contained in broader free trade agreements, or “FTAs”. The first BIT was concluded in 1959 between Pakistan and Germany, and there are now more than 3,000 BITs in existence. In entering into such treaties, States accept obligations regarding the treatment of investments made by nationals of the other State party to the treaty; those obligations typically include (for instance) (i) the obligation to accord such investments fair and equitable treatment, which is also known as the “FET obligation”; (ii) the obligation not to expropriate protected investments, unless compensation is paid; and (iii) the obligation not to discriminate against protected investments – this is usually reflected in the obligation to provide them with treatment which is no less favourable than that accorded either to domestic investors (which is the “national treatment” obligation) or to investors from third countries (which is the “most-favoured-nation” treatment obligation).
6. The method of resolving disputes under these treaties (where those disputes are between private investors on the one hand, and States on the other), is usually referred to by the acronym “ISDS”, which stands for “Investor-State Dispute Settlement”. Most BITs, and investment chapters in FTAs, include an “ISDS provision”. These provisions usually state that in the event of a

dispute between a foreign investor and the host State of the investment, the parties to the dispute are required to attempt to settle the dispute amicably by negotiation. And in the event that the dispute cannot be so settled, the ISDS provision typically confers a right on a foreign investor to bring a claim in international arbitration directly against the host State, and the arbitration takes place under rules of arbitration such as the ICSID Convention and its Rules of Arbitration, the UNCITRAL Rules of Arbitration, or the ICC Rules of Arbitration – none of which were specifically designed for claims under treaties, but which were drafted for use in international commercial arbitration.

7. The inclusion of ISDS provisions in BITs, and their conferral of standing on private investors to bring claims directly against the host State was a radical development when first introduced in the BIT between Italy and Chad in 1969. Together with the conferral of standing on individuals to assert claims before human rights courts, this turned on its head the traditional position in international law – exemplified by the *Mavrommatis Palestine Concessions* case before the Permanent Court of International Justice – whereby individuals (or private companies) do not have standing to assert claims on the international plane, but have to rely on their State of nationality to espouse their claims under the doctrine of “diplomatic protection”. The function of ISDS clauses in removing the role of the State of nationality of the claimant has the benefit of depoliticising investment disputes, and allowing such claims to be determined on their merits.
8. Australia itself has numerous BITs with such ISDS clauses. Australia has entered into 21 BITs (although three of these have been terminated: India, Mexico, and Vietnam), and two others will be terminated upon entry into force of newer treaties (Peru and Uruguay). In addition to its BITs, Australia has

11 FTAs which are in force, of which 7 contain ISDS provisions, including the “Comprehensive and Progressive Agreement for Trans-Pacific Partnership”, or the “CPTPP”. (Australia’s FTAs with Japan, Malaysia, New Zealand, and the USA do not.) Australia has also recently concluded treaties with Hong Kong and Indonesia which contain ISDS provisions (although these will either replace or sit alongside existing provisions in BITs). In addition, Australia is engaged in various multilateral trade and investment negotiations, which will likely include ISDS provisions; these include a proposed FTA with (i) the EU, with (ii) the Pacific Alliance, and (iii) the Regional Comprehensive Economic Partnership Agreement (or “RCEP”), in which the other negotiating parties are the 10 member States of ASEAN, China, Japan, Korea, and India.

9. To complete the picture with respect to Australia’s BITs and FTAs, it is worth noting that Australian investors have made use of the ISDS clauses in Australia’s treaties: there are four known cases in which Australian investors have invoked ISDS clauses to bring claims against other States, namely *White Industries v India* (which was brought under the Australia – India BIT), *Planet Mining Pty Ltd v Indonesia* (Australia – Indonesia BIT), *Tethyan Copper Company Pty Ltd v Pakistan* (Australia – Pakistan BIT), and *Kingsgate Corporation v Thailand* (Thailand – Australia FTA). And Australia has, so far, been the respondent in two claims brought under these treaties: the first being the claim by Philip Morris Asia Ltd, which concerned Australia’s adoption of tobacco plain packaging legislation (which Australia successfully defended) (this claim was brought under the Australia – Hong Kong BIT); and the second being a claim by a US company over the alleged taking of its interest in power generation equipment, including gas turbines (which has not been pursued and is now considered dormant) (the treaty here was the Australia – US FTA). (In the interests of full disclosure, I have been engaged

as counsel in three of these cases; I was counsel for India in the *White Industries* case, and I was counsel for Australia in both of the claims made against it.) The existence of these cases indicates that Australia has an interest in meaningful participation in the current process before UNCITRAL's Working Group III, as well as in the outcome of that process. And it is right that the Government should be engaged; what is at stake is the future of this system which offers valuable protections for Australian companies wishing to invest abroad, but which, on the flipside, also permits foreign investors to bring claims against Australia.

## **B. Why the Proposed Reform?**

10. So why are States meeting at UNCITRAL, discussing reform options? The background to the current process lies in the rapid expansion of investor-State disputes since the first such claim was made under the United Kingdom – Sri Lanka BIT in 1987, and the problems to which that expansion has given rise. There were comparatively few BIT claims through the 1990s – the entry into force of NAFTA in 1994 gave rise to a number of claims – but the picture really began to change in 2001-2003, with the advent of the Argentine financial crisis. This saw the Argentine Government adopt a series of emergency measures (including the freezing of bank accounts, the floating of the peso, and a prohibition on transferring funds abroad), which spawned a proliferation of claims against it. And now – as of 31 July 2019 – there have been 983 known ISDS cases, although the number is likely to be higher, given that some ISDS claims are confidential, and you cannot always find information about them in the public domain (the chart on the slide only shows the number of claims up to the end of 2018.) In 2018 alone, 71 new ISDS cases were launched, which continues a general upward trend in the annual number of new cases in recent years, and 31 new claims have been started in

the first seven months of 2019. These claims relate to complaints by investors against the adoption by governments of measures in a wide range of sectors of the economy, such as energy, mining, construction, financial and insurance services, telecommunications, real estate, transportation, and taxation. Given the high number of claims, as well as the quantity of decisions and awards being issued by arbitral tribunals, it is legitimate to consider investor-State arbitration as one of the more dynamic fields of public international law, with tribunals deciding important issues of State responsibility, treaty interpretation, and customary international law concerning the treatment of aliens.

11. Unsurprisingly, the States which are usually the respondent in such claims are developing countries, or countries with economies in transition, although developed countries are not immune. Argentina is in the unhappy position of having faced the most claims in total: it has been sued 60 times under BITs, with many of these claims relating to the Argentine financial crisis of 2001-2003. Spain is in second position; it is somewhat surprising to see a developed OECD country here in this list, but it has faced 49 claims, mostly arising out of the cancellation of legislative incentives it had introduced to encourage foreign investment in its renewable energy sector. In third place is Venezuela (with 47 claims), then comes the Czech Republic (38 claims), and in fifth position is Egypt (33 claims).

12. It is not the identity of the States being sued which is the principal cause for concern; any State which has entered into treaty obligations should be held to account for any breaches of those obligations. Rather, the perceived problems stem from the method of settling investment disputes, which is, as I have explained, typically by *ad hoc* arbitral tribunals which do not operate within any particular structure. They are not bound by any doctrine of precedent, and

there is no expected set of qualifications or eligibility requirements for arbitrators. These issues are symptomatic of widely held concerns that there is a lack of legitimacy and lack of democratic accountability of the ISDS regime.

13. Following more than a decade of increasing numbers of ISDS cases, these concerns bubbled to the surface during the negotiation of two mega-regional trade and investment agreements – the Trans-Pacific Partnership (or the “TPP”), and the Transatlantic Trade and Investment Partnership (or the “TTIP”), in 2015 and 2016. During these negotiations, much opposition was expressed to the inclusion of ISDS provisions, from various lobby groups. Criticism has come, unsurprisingly, from the left; the Greens and socialist political parties, as well as trade unions and NGOs have long been hostile to the idea that foreign corporations should be accorded special rights. But criticism has also come from the right (where proponents of pure liberal economic theory see the offering of advantages to foreign investors through ISDS as having trade-distorting effects, which negatively affect the operation of the free market economy.) In a quote which was memorialised in an internet meme, the EU Commissioner for Trade, Cecilia Malmstroem, was heard to proclaim during the TTIP negotiations that ISDS was “the most toxic acronym in Europe” (although I hasten to add that this was before she had to deal with Brexit.)

14. But let me identify the concerns with ISDS with greater specificity. There are four main areas of concern.



**B(1). Method of appointing arbitrators**

15. The first relates to the method of appointing arbitrators in investment treaty arbitration, and the impact of such methods on arbitrators' independence and impartiality. Typically, the claimant appoints one arbitrator, the respondent appoints another arbitrator, and the presiding arbitrator is either appointed by the two party-appointed arbitrators or with the agreement of the parties. In the case of the party-appointed arbitrators in investor-State cases, there is a perception of bias; that is, that the claimant will appoint an arbitrator who is likely to be sympathetic to its claim (that is, someone who is likely to favour the broad interpretation of the BIT's jurisdictional and substantive provisions.) And the respondent is, in turn, likely to appoint an arbitrator who will understand how governments work, who will have an understanding of public international law, and who will be more conservative in interpreting the BIT's provisions. And we all know who those people are, because we can read their decisions and awards, many of which are in the public domain. This leads to these two pools of arbitrators having repeat appointments by investors (or States, as the case may be), which further entrenches the suspicion that they have a predisposition regarding the determination of the dispute, one way or the other. This leads to a polarisation of the tribunal, and the outcome of the dispute may therefore depend on the identity of the presiding arbitrator. In the case of arbitrators who are appointed by an institution (which is likely to be the presiding arbitrator), there is a perceived lack of transparency in how these appointments are made. Sometimes there is a list procedure, where the institution puts 10 names on a list, and the parties are invited to cross out four names to which they would not agree; but as for how the names get on the list in the first place is an internal procedure shrouded in fog.

16. More generally, in the case of all arbitrators, there are also concerns that arbitrators lack accountability, that they lack awareness of the public interest inherent in investment disputes, and that there is a lack of diversity. A further problem exists which is known as “double-hatting”; this refers to the situation where arbitrators may also, in parallel, act as counsel in investor-State disputes, which can give rise to a conflict of interest in that they may be tempted to decide disputes in a way which might assist an argument that they need to make in future as counsel.

**B(2). Lack of Consistency and Coherence in the Interpretation of Legal Issues**

17. I turn now to the second set of concerns, which relates to the lack of consistency and coherence in the decisions and awards of ISDS tribunals, which leads to a lack of predictability and legal certainty. Some of you may be aware of several notorious cases. Perhaps the most infamous example is provided by the *CME v Czech Republic* and *Lauder v Czech Republic* cases, which were decided in the early 2000s. In these cases, two differently composed arbitral tribunals reached divergent positions on whether the conduct of the Czech Republic amounted to a breach of obligations under the Netherlands – Czech Republic BIT (in the case of *CME*), and under the United States – Czech Republic BIT (in the case of *Lauder*). These cases arose from the conduct of the Czech Republic’s Media Council towards CME’s Czech subsidiary which (according to CME) resulted in the destruction of its investment in the Czech Republic.

18. CME commenced proceedings for breach of the Netherlands – Czech Republic BIT, and Mr Ronald Lauder (the shareholder in CME) brought a claim for breach of the US – Czech Republic BIT. Two separate tribunals were constituted for the claims, and they were not consolidated – even though

the two claims obviously concerned (i) the same investment; (ii) the same conduct of the Czech Republic, which allegedly caused harm to that investment; and (iii) the same loss. But the outcomes were different:

- a. The *CME* tribunal found that the Czech Republic had breached various obligations under the Netherlands – Czech Republic BIT, and it ordered the Czech Republic to pay USD 270 million in compensation.
- b. The *Lauder* tribunal held that the Czech Republic had breached one of its BIT obligations, but found that this did not cause any loss, and it rejected the claimant’s other claims.

19. That two tribunals could, in parallel proceedings concerning the same set of facts, arrive at diametrically opposed positions was, rightly, a source of much consternation. And yet the *CME* and *Lauder* saga is not an isolated instance of investment tribunals disagreeing. Other examples proliferate; these decisions concern:

- a. the interpretation of the FET obligation, with some tribunals giving it an expansive interpretation, and other tribunals finding that it is consistent with the narrower obligation under customary international law;
- b. the scope of the MFN clause, with some tribunals saying that it applies only to permit investors to import better substantive standards of protection from other treaties, and other tribunals saying that the MFN obligation also permits the importation of ISDS provisions from other BITs;

- c. the interpretation of the “umbrella clause”, which essentially permits claims for breach of contract to be pursued as a treaty claim (but on which there are no fewer than four different interpretations); and
- d. the availability of the customary international law defence of necessity in times of financial and economic crisis, particularly in the case of Argentina in the period of 2001-2003.

20. A related concern is the absence of any possibility of “correcting” decisions and awards which have been wrongly decided, as there is no appeal from such decisions.

21. This all leads to a lack of legal certainty which is inefficient for both investors and States; investors do not know with any certainty what standard of treatment will be accorded to them, and States do not know with any certainty what the standards are against which their conduct will be assessed.

### **B(3). Excessive Duration and Cost of ISDS Proceedings**

22. I come now to the third set of concerns, which relates to the duration and cost of ISDS proceedings. This can be addressed more briefly. According to UNCITRAL, the average duration of an ISDS claim is 3-4 years, which is surprising in a system of dispute settlement which is supposed to be more speedy than traditional litigation, and which does not have the right of appeal. ISDS claims are also notoriously expensive, which is not aided by the lack of consistency in decision-making and lack of predictability, because counsel consider that they must run every available argument. The average tribunal costs are around USD 1 million; the average cost for the claimant is around

USD 6 million and the average cost for the respondent State is slightly cheaper, at around USD 4.8 million. These are, evidently, quite large numbers.

23. There are of course some outlier cases – an example of this is the extremely high value claim which was brought by three different shareholders in the Yukos company, which was originally owned by the Russian oligarch Mikhail Khodorkovsky (who, unfortunately for him, had a falling out with Vladimir Putin.) Following an irregular tax audit, the Yukos company was issued with tax bills totalling some USD 24 billion, and when Yukos could not pay, the company's assets were taken from it and sold in a forced auction. The shareholders in Yukos brought a claim against Russia under the Energy Charter Treaty, and the proceedings lasted for ten years. The tribunal held that Russia had unlawfully expropriated the Yukos company, and ordered it to pay USD 50 billion in compensation. That is, to date, the highest amount of compensation awarded by a BIT tribunal, and the costs incurred by the parties were just as eye-watering. The claimants had spent USD 80 million pursuing their successful claim, and the Russian Federation had spent USD 32 million defending it. And in addition to the parties' costs, the tribunal's costs were EUR 8.4 million. So although this is an extreme case, you can see that these numbers can be very high indeed; and all of this was, in the Yukos case, for an award which has been set aside by the Dutch courts on the grounds that the tribunal exceeded its jurisdiction. The appeal before the Dutch Supreme Court is pending.

#### **B(4). Lack of Transparency of ISDS Proceedings**

24. The fourth set of concerns is the perceived lack of transparency in ISDS cases. This stems from the fact that the rules of arbitration which are used in

investment treaty claims originate in international commercial arbitration, where confidentiality usually attaches to the proceedings, and there has been a general presumption (which is in fact misplaced) that this is also the case for ISDS claims. It is not uncommon, for instance, to hear investor-State tribunals referred to by critics as “secret courts”. It is true that information about investor-State cases does not automatically come into the public domain; under most rules of arbitration, the hearing is closed to the public, and the award cannot be published without the consent of both parties. There is greater transparency in the case of arbitrations under the ICSID Convention; ICSID has a website on which information about each case is published, such as the names of the parties, the nature of the instrument said to confer jurisdiction on the tribunal, the industry sector in which the dispute has arisen, and the names of the arbitrators. A related concern is the very limited possibility of an interested party intervening in ISDS cases by way of amicus curiae brief.

25. I should note that some strides forward on the transparency front have been made with the adoption of the UNCITRAL Transparency Rules, but these have not had much impact as of yet, as they only apply to claims brought under BITs concluded after April 2014. The UNCITRAL Transparency Rules can be retrofitted to older BITs, if the two States parties have signed and ratified UNCITRAL’s “Mauritius Convention”; this has entered into force, but it only has five States parties (Mauritius, Switzerland, Canada, Cameroon, and Gambia.)

### **B(5). Summary re the Concerns**

26. So there are a number of concerns with the ISDS regime, and these concerns have led to there being what is described as the “backlash” against investment

treaty arbitration, some of which I referred to in my introduction. Thus, Bolivia, Ecuador, and Venezuela have all withdrawn from the ICSID Convention. Norway has abandoned its previous Model BIT, and adopted a model negotiating text which contains provisions which expressly preserves the State's right to regulate, and provides for greater transparency in any dispute settlement proceedings. South Africa has also terminated many of its BITs, and has sought to replace ISDS with dispute settlement before South Africa's courts. India has also terminated many of its BITs, and is seeking to negotiate new BITs on the basis of a new Model BIT which contains provisions requiring investors to exhaust local remedies before pursuing an ISDS claim. And Australia was also, for a period, one of the more vocal critics of the ISDS regime; the Gillard Government adopted a Trade Policy Statement in April 2011, in which it announced that it would no longer seek to include ISDS clauses in trade and investment treaties, although Australia subsequently and quietly returned (with the election of the Coalition Government in 2013) to its previous practice of including ISDS clauses in investment treaties on a case-by-case basis. But the concern of States reached a crescendo in 2015-2016, as I explained earlier, which led to the current process before UNCITRAL's Working Group III, which began in 2017.

### **C. The State of Play before Working Group III**

27. Let me come now to the state of play before Working Group III. Two years ago, UNCITRAL entrusted it with a broad mandate to work on the possible reform of ISDS, and its mandate has consisted of three parts: (i) first, to identify concerns regarding ISDS; (ii) secondly, to consider whether reform was desirable in light of any identified concerns; and (iii) thirdly, if it concludes that reform is desirable, to develop any relevant solutions to be recommended to UNCITRAL.

28. Working Group III has already completed the first two of these stages: it has identified a number of broad categories of concern where reform is desirable. These are (i) the lack of consistency, coherence, predictability and correctness of arbitral decisions; (ii) the methods of appointing arbitrators and decision-makers; (iii) the excessive cost and duration of ISDS proceedings; and (iv) the use of third party funding. (This is because of its impact on the independence and impartiality of arbitrators, the increase in frivolous claims to which it can give rise, and its possible effect on the amicable resolution of disputes.)
29. This brings us up to point (iii) of Working Group III's mandate. This is the most difficult: what are the solutions that Working Group III can recommend to UNCITRAL? Is radical reform needed? Or is it sufficient to tinker around the edges and make a few improvements to the current system?
30. This is where States within Working Group III are at loggerheads. It seems that there are four broad groupings of States (and in noting these, I acknowledge the helpful series of blog posts which are being written by Professor Anthea Roberts, a colleague at the Australian National University):
- a. First, there are the "systemic reformers", who believe that there are systemic problems that cannot be achieved with incremental reforms. These States would retain a system of investment dispute settlement, but would replace *ad hoc* arbitration with claims before a multilateral investment court, with an appellate system, or (alternatively) at least the creation of an appellate system for the existing system of *ad hoc* tribunals. These States include the member States of the EU, Canada, and Mauritius, and, apparently, China, which has recently announced its support for research into an appellate structure.



- b. The second group of States are the “incrementalists”. These States view criticisms of the ISDS regime as being overblown, and they consider that the current system of ad hoc tribunals to resolve investment disputes is the best option available (subject to targeted reforms). It also includes States who may have some concerns with the way that ISDS has been working, but they are simply not ready to be railroaded into agreeing to a multilateral investment court. This group of States includes Chile, Japan, Russia, and the US.
- c. Then a third group of States may be termed the “paradigm shifters”. These are States which reject the legitimacy and utility of ISDS, regardless of which body hears them (whether it be ad hoc tribunals, or a permanent court.) These States propose replacing ISDS with State-to-State claims, or simply by claims before domestic courts (and these States include Brazil and South Africa.)
- d. A final, fourth group of States consists of those which have not yet decided or not yet declared their hand, and it would seem that Australia (along with many other States) falls into this category. Australia’s interventions so far have been constructive, and the approach appears to be to allow the process to continue and see where it goes.

31. The decision-making as to how to proceed has been, with all things at the United Nations, intensely political. Happily, Working Group III has reached a compromise on how to take the process forward, and it has decided to progress its work on both systemic reform as well as incremental solutions at the same time, in two separate workstreams:

- a. In the first stream, States are focusing on preparing a code of conduct for arbitrators; developing solutions to address issues of costs;

considering the creation of an “Advisory Centre for International Investment Law” (which would seek to replicate the “Advisory Centre for WTO Law”, which assists developing countries who are involved in the WTO dispute settlement process); the excessive duration of ISDS claims (including proposing methods of early dismissal of frivolous claim), and addressing issues relating to concurrent proceedings, and dispute prevention.

- b. In the second stream, States are focusing on reform options, which means considering the jurisdiction of a multilateral investment court, its composition (including the selection of members, their qualifications and diversity), the establishment of an appeal mechanism (either as built-in or standalone), and the enforcement of decisions.

32. One feature of the workings of UNCITRAL is that decisions are taken by consensus, which would appear to be difficult as things stand.

33. And it is worth noting that, the meantime, and even in advance of the UNCITRAL Working Group III being charged with its present task, the European Union has been going ahead with its own plans in its trade and investment negotiations. Thus, the EU has entered into investment treaties with Canada, Vietnam, and Singapore, the provisions of which set out its world view on the future “Investment Court System” which will replace *ad hoc* arbitration. By way of example, the investment chapter of the EU – Canada Comprehensive and Economic Trade Agreement contains the following features (among others):

- a. First, it provides for the creation of a “Tribunal” (CETA Art 8.23) (which has 15 permanent members – 5 EU nationals, 5 Canadian

nationals, and 5 third country nationals – which will sit in divisions of three members for individual cases);

- b. Second, it provides for the creation of an “Appellate Tribunal” (under CETA Art 8.24), which will have the power to uphold, modify or reverse the Tribunal’s award based on (a) errors in the application of the law; (b) manifest errors in the application of the facts (including domestic law); and (c) the grounds of annulment in Article 52 of the ICSID Convention;
- c. Thirdly, it contains an obligation to pursue the creation of a multilateral investment court and appellate mechanism (which if created, will replace the Tribunal and Appellate Tribunal created under the CETA – Art 8.29); and
- d. And fourthly, it contains transparency provisions (CETA, Art 8.36), which essentially consists of the application of the UNCITRAL Transparency Rules, meaning that the parties’ submissions and evidence are in the public domain, the hearings are open to the public, and the tribunal’s decisions, procedural orders and awards are also published (subject to the protection of any business confidential information).

34. The EU is actively pursuing this agenda in all of its FTA negotiations – and if you look at which countries are currently negotiating with the EU (which includes Australia, New Zealand, and Japan, among others), it would appear that, if the EU gets its way, the days of ad hoc tribunals deciding disputes may be coming to an end, with or without consensus within UNCITRAL’s Working Group III.

35.If there is (in time) consensus for systemic reform, there are various difficult issues which will need to be addressed. These include:

- a. What mechanism could be used to replace the existing ISDS provisions in more than 3000 treaties, with one permanent multilateral investment court (with or without an appeal system); do all BITs have to be amended separately (which sounds like several decades' worth of work for long-suffering diplomats), or can this be done by the negotiation of a new treaty, which States would sign and ratify, and which would amend their past bilateral or multilateral treaties (which is the approach that was adopted with the Mauritius Convention, by which States parties agree to adopt transparency measures for their past BITs)?
- b. How would the judges be selected for any new multilateral investment court and appellate tribunal, and how many would there be? How would any condition of diversity (be it by reference to geography, or gender, or race, or all of the above) be implemented? It is worth recalling that this was the issue which delayed the creation of the Permanent Court of International Justice at the two Hague Peace Conferences of 1899 and 1907; it was only achieved after the Versailles Peace Conference had concluded with the establishment of the Advisory Committee of Jurists in 1920. And we have a present day reminder of the difficulty in international judicial appointments with the current stand-off at the World Trade Organisation Appellate Body, with the United States refusing to confirm any new appointments – such that the Appellate Body will be no longer able to function beyond 10 December 2019, which is when the term of two of its members comes to an end. And what code of conduct would apply for such judges? At

present, there are different standards under different treaties, with gaps being filled in by soft law instruments, such as the IBA Guidelines on Conflicts of Interest in International Arbitration.

- c. If the systemic reform includes both the multilateral investment court as well as an appellate mechanism, will there be flexibility in allowing States to be part of one, but not the other, as part of an “open architecture”? For instance, there may be States who wish to preserve the existing system of ad hoc arbitration, albeit with an appellate mechanism to provide some recourse in the event of incorrect decisions, will they be able to do so? Alternatively, if States wish to agree to the creation of a multilateral investment court, but not sign up to the proposed appellate body, will they be able to choose that option? And will States be able to accept the jurisdiction of the multilateral investment court in respect of State-to-State disputes?
- d. If there is to be an appellate body, what should the grounds of appeal be? If those grounds are to include the grounds for annulment as contained in Article 52 of the ICSID Convention, is it possible for those grounds to apply to non-ICSID awards?
- e. What would be the enforcement regime that applies to decisions of any new multilateral investment court? For at present, there are different regimes that apply to ICSID awards, and to non-ICSID awards. ICSID awards are subject to the provisions on recognition and enforcement in Articles 53-55 of the ICSID Convention, and non-ICSID awards are enforced under the provisions of the New York Convention. But would the decisions of the “multilateral investment court” qualify as awards, which can be enforced under those treaties? The EU’s current approach

is to simply “deem” such decisions as being “awards” for the purposes of the ICSID Convention and the New York Convention (e.g., EU-Singapore IPA, Art 3.22(5) and (6)). But it is not clear whether this will withstand the close scrutiny of a curious national court judge, for these will be decisions of a body which will have more in common with a permanent court than with an arbitral tribunal.

36. There are, accordingly, some hurdles to be overcome, even if States can reach consensus on more significant structural changes, which is by no means guaranteed.

#### **D. Conclusion**

37. There is much to be decided, and there is everything to play for. If Working Group III reaches agreement on structural reforms, this will amount to what has rightly been described by Professor Stephan Schill as a “watershed” and as a “truly constitutional moment” in international governance, which can be compared to the creation of the World Trade Organization in 1994, and the adoption of the Rome Statute for the International Criminal Court in 1998. It is important for States to enter these negotiations with an open mind and flexible approach; that of course includes Australia, which has an opportunity to play an important role mediating between the apparently entrenched positions of the European Union and the United States. This topic is therefore work in progress; but States should be alive to this opportunity to make important improvements to the international architecture governing trade and investment issues.

38. Thank you.