SOVEREIGNTY AND CIRCUMVENTION: THE VIABILITY AND CONSTITUTIONALITY OF *CETA*'S ISDS FEATURES FOR AUSTRALIAN INVESTMENT TREATIES

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Investor-State Dispute Settlement ('ISDS') has attracted significant criticism. Arbitrators are perceived as insufficiently impartial, and tribunals are seen to be masquerading as an additional 'appellate tier' for investors aggrieved by decisions taken by States in pursuit of the public interest, which consequently is perceived as undermining States' regulatory sovereignty. This article examines these criticisms in light of the EU-Canada Comprehensive Economic and Trade Agreement ('CETA'). It argues that certain features of CETA's ISDS system address these criticisms and as such, Australia should incorporate those features into future investment agreements. In particular, this article examines the attributes of CETA which ensure the independence and impartiality of tribunal members. This is followed by an examination of the aspects of CETA's framework that are designed to mitigate the prospect of ISDS being used to 'outflank' national judiciaries and impede regulatory sovereignty, as well as the aspects intended to minimise the prospect of 'regulatory chill'. This article also argues that the benefits of CETA are further enhanced because despite its quasi-judicial character, an ISDS body like the CETA Tribunal would be compatible with Chapter III of the Commonwealth Constitution and accordingly the awards of such a body would be enforceable pursuant to the New York Convention.

I INTRODUCTION

In a 2015 speech, then-Chief Justice of the High Court of Australia Robert French stated that '[d]omestic courts have an important part to play in the enforcement of

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arbitral awards made under Investor-State Dispute Settlement processes. It is necessary, however, to maintain a *proper and mutually respectful distance* between their constitutional functions and those of arbitral tribunals.'[1] Investor-State Dispute Settlement ('ISDS') is a dispute resolution mechanism in trade and investment treaties designed to protect foreign companies investing overseas. Those treaties generally provide investors with a right to bring claims against States in an arbitral setting over breaches of rules under investment treaties surrounding the treatment of investors.[2] They consequently confer power upon arbitral tribunals to deem regulatory actions by States inconsistent with the investment protection standards in the relevant treaty.[3]

As a result, ISDS has been consistently criticised due to concerns about the capacity of tribunals to impede sovereignty by interfering with a government's ability to regulate.[4] Because of this, as well as the perception that ISDS tribunals are insufficiently impartial, Australia has resiled from including ISDS provisions in its investment treaties as a matter of policy. In particular, the Australian Labor Party, Australia's governing political party, ardently opposes the inclusion of ISDS in trade agreements and has committed to removing existing ISDS provisions and banning their use in future treaties.[5] In its National Platform, the Labor Party has also committed to 'work[ing] with the international community to reform ISDS tribunals so they remove perceived conflicts of interest by temporary appointed judges, adhere to precedents and include appeal mechanisms.'[6] The Commonwealth Government's intervention in the Australian gas market by capping gas prices in December 2022 has further reignited debates about the use of ISDS.[7] Of particular concern is whether multinational gas giants – who are typically the most prolific users of ISDS arbitration – will make use of ISDS clauses in response to the Australian government's measures.[8] Consequently, the controversies pertaining to ISDS give rise to questions about whether ISDS should remain a feature of investment treaties that Australia is a party to, and if so, what form it should take.

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[1] Chief Justice Robert French, 'ISDS – Litigating the Judiciary' (Speech, Chartered Institute of Arbitrators Centenary Conference, 21 March 2015) 3 ('Litigating the Judiciary') (emphasis added).

[2] Ruby Grounds, *The Case for Banning Investor State Dispute Settlement in Australia* (Report, May 2018) 3.

[3] Esme Shirlow, 'Deference and Indirect Expropriation Analysis in International Investment Law: Observations on Current Approaches and Frameworks for Future Analysis' (2014) 29(3) *ICSID Review* 595, 595.

[4] See, eg, Vera Korzun, 'The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs' (2017) 50(2) *Vanderbilt Journal of Transnational Law* 355, 358.

[5] Australian Labor Party, *Labor's National Platform* (Web Page, 2021) 88 [7], 93 [32], 94 [33] <https://www.alp.org.au/about/national-platform>.

[6] Ibid 94 [33].

[7] Andrew Probyn and Jane Norman, 'Government to cap wholesale gas prices as part of market intervention to lower power prices', *ABC News* (online, 30 November 2022) <https://www.abc.net.au/news/2022-11-29/government-gas-market-intervention-cap-prices-power/101712130>.

[8] Ronald Mizen, 'Huge lawsuits loom over gas market intervention', *Australian Financial Review* (online, 10 November 2022) <https://www.afr.com/politics/federal/massive-lawsuits-loom-over-gas-market-intervention-20221106-p5bvwf>.

The references in the Australian Labor Party's National Platform to moving towards a model involving 'judges', 'precedents', and 'appeal mechanisms' appears to suggest that the party in government supports the adoption of an ISDS system with the features of an 'investor-State investment court'. This kind of proposal has been consistently floated, with proponents arguing that such a system would, *inter alia*, enhance the right of States to regulate in pursuit of public interest objectives.[9] But such proposals beg the question — what features of an 'investor-State investment court' model would be viable for Australia?

This article argues that in light of these concerns, the ISDS system proposed under the EU-Canada *Comprehensive Economic and Trade Agreement* ('*CETA*')[10] provides viable features that Australia should adopt in future multilateral investment treaties. This article does not suggest that Australia should adopt individual permanent 'investment courts' under each of its future investment treaties. Rather, it argues that the beneficial features of *CETA* which are discussed in this article should be transplanted to bilateral and multilateral investment treaties which Australia is party to. Adopting those features would move Australia away from its previous practice of party-appointed, *ad hoc* arbitral tribunals under each agreement.[11]

CETA is a bilateral investment treaty ('BIT') between the EU and Canada which provides for a dispute resolution system akin to a permanent court, consisting of a Tribunal of first instance and an Appellate Tribunal.[12] A majority of *CETA* has been provisionally applied since 21 September 2017 pending its entry into force, although this does not include Chapter 8 Section F, which concerns this dispute settlement system.[13] The Tribunal of first instance will be comprised of fifteen Members — five Members will be nationals of either party or of any other nationality proposed by either party, and five Members will be third-country nationals.[14] The Tribunal will hear cases in divisions consisting of three Members and will be chaired by a Member who is a non-national.[15] The Appellate Tribunal's function will be to review awards rendered by the first instance Tribunal, and its composition will be decided by the *CETA* Joint

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[9] See, eg, Therese Wilson and Ozlem Susler, 'Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping and Indirect Expropriation Claims and Consistent Approaches to Decision-Making' (2018) 84(1) *Arbitration* 38, 50.

[10] *EU-Canada Comprehensive Economic and Trade Agreement*, opened for signature 30 October 2016, [2017] OJ L 11/23 (not yet in force) ('*CETA*').

[11] See, eg, *Agreement Between Australia and Japan for an Economic Partnership*, signed 8 July 2014, [2014] ATS 43 (entered into force 15 January 2015) art 19.6; *Australia-Chile Free Trade Agreement*, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009) art 10.19.

[12] *CETA* (n 10) arts 8.27 and 8.28.

[13] Anna Crevon-Tarassova et al, 'Investment Court Clears Legal Hurdle with Court of Justice of the European Union (CJEU) Opinion 1/17', Dentons (Web Page, 13 May 2019) <dentons.com/en/insights/articles/2019/may/13/investment-court-clears-key-legal-hurdle>.

[14] *CETA* (n 10) art 8.27(1).

[15] *CETA* (n 10) art 8.27(6); André von Walter and Maria Luisa Andrisani, 'Resolution of Investment Disputes' in Makane Moïse Mbengue and Stefanie Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer, 2019) 190.

Committee,[16] which is a body comprised of representatives from the EU and Canada that oversees trade matters and the implementation of *CETA*.[17]

This article intends to contribute to the existing literature on this topic through the lens of whether particular features of an ISDS system like *CETA*'s would adequately address recurring concerns about ISDS. These matters, using *CETA* as a case study, have not yet been considered specifically in the Australian context. Accordingly, this article contends that the features of ISDS under *CETA* discussed in this article largely address concerns about ISDS arbitrators being insufficiently independent and impartial, and those features also largely address concerns raised by Chief Justice French about ISDS being exploited to 'circumvent' domestic courts. In light of these notions, this article will additionally argue that were Australia subject to the jurisdiction of a tribunal like the one established under *CETA* pursuant to an investment agreement, such a tribunal would be compatible with Chapter III of the *Constitution*, and its awards would accordingly be enforceable. The exact mechanics of implementing a dispute resolution system with the characteristics of *CETA*'s ISDS system are beyond the scope of this article. Rather, the substantive features of *CETA* identified above will be analysed in terms of how beneficial they would be in the Australian context.

Section II will discuss the features of *CETA* which enhance the independence and impartiality of the *CETA* Tribunal. Section III discusses the issue of ISDS tribunals reviewing the application and interpretation of domestic legal norms by domestic courts, the potential relevance of this to the Australian context, and how *CETA* addresses this issue. Section IV assesses whether enforcement of the awards of a body like the *CETA* Tribunal would be compatible with Chapter III of the *Constitution*, and Section V examines how the decisions of such a body may be enforced.

II ASSESSMENT OF INDEPENDENCE AND IMPARTIALITY UNDER *CETA*

Widely held concerns about ISDS' lack of legitimacy largely stem from the perception that ISDS arbitrators are insufficiently impartial, as it is perceived that parties will appoint arbitrators who are sympathetic to their arguments.[18] The hybrid nature of a permanent tribunal like the one established under *CETA*, which incorporates elements of arbitral and judicial dispute resolution, means that requirements of independence do not apply to it in the same way that they would to an 'ordinary court'.[19] Nevertheless, such a body should have sufficient safeguards, such

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[16] *CETA* (n 10) art 8.28(1)–(2), 8.28(3), 8.28(7)(f).

[17] Ibid art 26.1(1).

[18] See, eg, UNCTAD Secretariat, 'Reform of Investor State-Dispute Settlement: In Search of a Roadmap' (2016) 23(1) *Transnational Corporations* 59, 63; Chester Brown, 'The Prospects for Reform of Investor-State Dispute Settlement' (Speech, CLI Lecture Series, Supreme Court of Queensland, 17 October 2019) 7–8 [12], 9 [15].

[19] *Opinion 1/17 of the Court (Opinion)* (Full Court of the Court of Justice of the European Union, 1/17, 30 April 2019) [90] ('*Opinion 1/17*').

as independence, impartiality, and tenure, to ensure confidence in its decisions, as they may significantly impact national economies.[20] Public perceptions of such a body lacking impartiality and independence is problematic for the legitimacy of ISDS generally, as an unfavourable decision is likely to be considered illegitimate if it is perceived to result from arbitrariness or bias.[21]

CETA aims to address issues of independence and impartiality through the appointment mechanism of Tribunal Members and through the inclusion of detailed rules on qualifications and ethics.[22] Australia should adopt these aspects of *CETA* by including analogous rules and requirements in its investment treaties in order to mitigate apprehensions about ISDS' legitimacy. Specifically, the *CETA* Tribunal's Members are appointed by the *CETA* Joint Committee for a five-year fixed term that is renewable once, and they are assigned cases by the *CETA* Tribunal's President at random on a rotational basis.[23] While this limits party autonomy, which is a feature of arbitration that is attractive to disputing parties, it serves to institutionally insulate Members from the parties. This reduces concerns that disputants could influence the appointment of arbitrators who are likely to rule in their favour, as the disputing parties will not know in advance who will hear their disputes.[24] The fixed terms of Members also contribute to this insulation of Members from being influenced by private interests. This is because a fixed term mitigates the risk of Members being predisposed, or being perceived as being predisposed, to decide cases favourably to certain parties on the basis that failing to do so might make them liable to removal.[25]

However, because Tribunal Members are not employed full time and are only held on monthly retainer to ensure their availability, they will still have a financial interest in pursuing outside activities to guarantee a sufficient income.[26] Notwithstanding the 'laudable expertise prerequisites' for appointment to the *CETA* Tribunal, as Members are expected to possess the qualifications required for appointment to judicial office in their respective countries or be jurists of recognised competence,[27] the terms of appointment and remuneration offered may be insufficient to ensure the

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[20] Francoise Lefevre and Nicolas Resimont, 'Impartiality and Independence of the Arbitrator. A View from Brussels: A Comment on *Republic of Poland v Eureko BV et al*' in Patrick Wautelet, Thalia Kruger and Govert Coppens (eds), *The Practice of Arbitration: Essays in Honour of Hans van Houtte* (Hart Publishing, 2012) 29, 30.

[21] Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25(2) *ICSID Review* 339.

[22] von Walter and Andrisani (n 15) 192.

[23] *CETA* (n 10) arts 8.27(2), 8.27(5) and 8.27(7).

[24] J A Van Duzer, 'Investor-State Dispute Settlement in *CETA*: Is it the Gold Standard?' (Working Paper No 2016-44, Faculty of Law, University of Ottawa, October 2016) 11; von Walter and Andrisani (n 15) 193; Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions* (Brill Nijhoff, 2017) 23.

[25] Arseni Matveev, 'Investor-State Dispute Settlement: The Evolving Balance Between Investor Protection and State Sovereignty' (2015) 40(1) *University of Western Australia Law Review* 348, 383.

[26] Ibid; *CETA* (n 10) art 8.27(12); *Opinion 1/17* (n 19) [104]; Sonia Heppner, 'A Critical Appraisal of the Investment Court System Proposed by the European Commission' (2017) 72(2) *Dispute Resolution Journal* 93, 96.

[27] *CETA* (n 10) art 8.27(4).

independence of those with active arbitration practices.[28] If the *CETA* Joint Committee fails to further incentivise potential *CETA* Tribunal appointees, the temptation to pursue additional income through external work that potentially creates conflicts of interest will remain for those appointees. This may occur through a phenomenon known as 'double hatting', which is where arbitrators interchangeably represent parties or act as experts in other investment treaty cases with similar issues to cases which they are arbitrating.[29]

CETA seeks to address the mischief of 'double hatting' in several ways. First, *CETA* provides that its Members must adhere to the IBA Guidelines on Conflicts of Interest in International Arbitration, which provide wide transparency obligations with respect to all circumstances that might impact the impartiality of Members.[30] *CETA* also requires arbitrators to be 'independent' of the disputing parties by stipulating that they shall 'not be affiliated with any government'.[31] In this regard, *CETA* Tribunal Members must not take instructions from any organisation or government about matters related to the dispute or participate in the consideration of any disputes that would create a conflict of interest.[32] *CETA* also constrains the ability of Tribunal Members from engaging in outside work that would 'create a direct or indirect conflict of interest.'[33] Further, the 2021 Code of Conduct for Members places high standards on Members to avoid impropriety and the appearance of impropriety, and to observe high standards of conduct so that the integrity and impartiality of *CETA*'s ISDS mechanism is preserved.[34]

Specifically, Members are prohibited from incurring any obligation, accepting any benefit, entering into any relationship, or acquiring any financial interest that is likely to affect or appear to affect their independence and impartiality.[35] Members are also required to disclose to parties any matters in the past five years which are likely to affect, or could reasonably be seen as likely to affect, their independence or impartiality, or matters which create a real or apparent conflict of interest or appearance of impropriety or bias.[36] Members are further required to refrain from acting as representatives of any of the disputing parties in investment disputes before the Tribunal for three years.[37] Members are also prohibited from becoming involved

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[28] Elsa Sardinha, 'Towards a New Horizon in Investor-State Dispute Settlement? Reflections on the Investment Tribunal System in the *Comprehensive Economic and Trade Agreement (CETA)* (2017) 54 *The Canadian Yearbook of International Law* 311, 324.
[29] Matveev (n 25) 352.
[30] *Opinion 1/17* (n 19) [102], [239]; *CETA* (n 10) art 8.30(1).
[31] *CETA* (n 10) art 8.30(1).
[32] Ibid.
[33] Ibid.
[34] *CETA* Joint Committee, *Decision No 001/2021 of the Committee on Services and Investment Adopting a Code of Conduct for Members of the Tribunal, Members of the Appellate Tribunal and Mediators* (29 January 2021)<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/*CETA*-aecg/code-conduct-conduite.aspx?lang=eng> arts 2, 4(1) ('Code of Conduct').
[35] Ibid art 4(1) and (2).
[36] Ibid art 2(2).
[37] Ibid art 6(1).

in investment disputes which were pending before the Tribunal before the end of their term and in disputes which are connected with any disputes they dealt with as a Member.[38] This prohibition continues until the end of their term. Finally, Members are barred from serving as counsel, party-appointed experts, or witnesses in pending or new disputes under *CETA* or other agreements during their term, while other work as an arbitrator is permitted.[39]

However, despite Tribunal Members being largely prohibited from pursuing other sources of employment to minimise the risk of impropriety or appearances of impropriety, they are only paid on a per diem basis of $3,000 per day.[40] In this respect, *CETA* fails to address the risk that Members may be tempted to prolong proceedings to maximise their income.[41] A system of full-time adjudicators with set remuneration would arguably better ensure that this concern is addressed, as well as ensure independence and impartiality by further removing the risk of 'double hatting' through the incentive of a permanent salary and tenure.[42] However, this proposed solution fails to grapple with the logistical challenges of securing reliable experts as judges, as many individuals with arbitration practices may not be willing to commit fully to a five-year term during which they will not be able to pursue other activities if incentives or remuneration provided by the Joint Committee seem insufficient.[43] Implementing a stricter 'no double hatting' requirement may also have the detrimental effect of deterring highly qualified candidates from agreeing to serve as *CETA* Tribunal Members, particularly when the Tribunal first comes into existence and the workload is likely to be low.[44] Rather, it may be beneficial for the *CETA* Joint Committee to allow Tribunal Members to undertake some external work when the Tribunal begins operation, provided they comply with the IBA Guidelines, and for the Committee to subsequently implement stricter 'anti-double hatting' regulations as the *CETA* Tribunal becomes more consolidated and receives more work.[45]

Critics' concerns about lack of tenure may therefore remain due to holdovers from traditional ISDS practices, such as Tribunal Members retaining *some* financial interest in pending cases. However, *CETA*'s model in prescribing compliance with the broad disclosure obligations in the IBA Guidelines and the prospective *CETA* Code

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[38] Ibid art 6(2)–(3).

[39] David Gaukrodger, *Adjudicator Compensation Systems and Investor-State Dispute Settlement* (OECD Working Papers on International Investment No 2017/05, 2017) 37; *CETA* (n 10) art 8.30(1).

[40] Umair Ghori, 'Investment Court System or 'Regional' Dispute Settlement?: The Uncertain Future of Investor-State Dispute Settlement' (2018) 30(1) *Bond Law Review* 83, 96.

[41] *CETA* (n 10) art 8.27(14).

[42] *Possible Reform of Investor-State Dispute Settlement (ISDS) – Submission from the European Union and its Member States*, UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), 37th Session, UN Doc A/CN.9/WG.III.WP.159/Add.1 (1-5 April 2019) annex 1, 10 [47] ('UNCITRAL Working Group III Submission').

[43] Jaemin Lee, 'Mending the Wound or Pulling it Apart? New Proposals for International Investment Courts and Fragmentation of International Investment Law' (2018) 39(1) *Northwestern Journal of International Law and Business* 1, 17.

[44] Katia Fach Gómez, 'Article 8.30 – Ethics' in Marc Bungenberg and August Reinisch (eds), *CETA Investment Law: Article-by-Article Commentary* (Bloomsbury Publishing, 2022) 654, 684 [72].

[45] Ibid.

of Conduct takes a substantial step in addressing said concerns by limiting the stake of Tribunal Members in new cases being brought and insulating Members from appearances of influence.[46] Nevertheless, the security of tenure of a tribunal of this nature will ultimately be contingent on the size of the retainer for its Members and whether this will transition to fixed compensation so as to discourage outside work.[47] In the interim, the elimination of *ad hoc* appointments in conjunction with the retainer itself, fixed terms for Members, and a prohibition on certain outside activities that could compromise a Member's independence may be cumulatively sufficient to strengthen the independence of members of a body akin to the *CETA* Tribunal in its early stages, with stricter requirements likely required later to ensure this continues.[48] This is because mandated adherence to the IBA Guidelines, as well as the Code of Conduct for Members will meaningfully ensure independence and prevent 'double hatting' as they both set high standards for the independence and impartiality of arbitrators,[49] and failure to meet these standards makes Members liable to removal.[50] In particular, the Code of Conduct bars activities that present a real risk of conflicts of interest, or the appearance of conflicts of interest, and in this way serves to limit 'double hatting' while allowing Members to engage in more neutral pursuits.[51] Continuing disclosure under the IBA Guidelines and Code of Conduct also reduces the risk of an arbitrator lacking independence and impartiality, as this further insulates Members from private interests and appearances of influence.[52]

Accordingly, what such a system might look like in the Australian context is as follows. Instead of implementing a permanent 'court' system, Australia and its relevant corresponding treaty partners could operate a permanent 'list' of arbitrators that are held on retainer under each treaty (or under multiple treaties) and who are appointed by a joint party body like the *CETA* Joint Committee. Such arbitrators could be assigned cases randomly and rotationally by someone independent to the parties, such as a tribunal president, and arbitrators could be subject to strict independence and impartiality requirements under the IBA Guidelines and a code of conduct. Taken in conjunction, borrowing these features from *CETA* cumulatively reduces (but does not necessarily completely eliminate) the risk of the decisions of a system like *CETA*'s being infected by bias and partiality as such a system removes or mitigates traditional structural features of ISDS that have been perceived to threaten the independence and impartiality of ISDS arbitrators in the ways discussed above.[53] Those features of *CETA* therefore provide a viable and attractive model that addresses longstanding

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[46] Van Duzer (n 24) 15, 16.
[47] Ibid; *Opinion 1/17* (n 19) [231], [239]; *CETA* (n 10) art 8.27(15); Gaukrodger (n 39) 4, 37.
[48] See, eg, *Opinion 1/17* (n 19) [238]–[239].
[49] Mark Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (Springer, 2nd ed, 2020) 17; *Opinion 1/17* (n 19) [238]–[239].
[50] *CETA* (n 10) art 8.30(4); Code of Conduct (n 34) arts 6(4) and 8(1).
[51] von Walter and Andrisani (n 15) 194.
[52] *Halliburton Company v Chubb Bermuda Insurance Pty Ltd* [2018] EWCA Civ 817 [67] (Hamblen LJ for the Court); Sardinha (n 28) 324; Van Duzer (n 24) 15.
[53] Van Duzer (n 24) 13.

concerns of this nature and because of this, Australia should incorporate an ISDS system akin to *CETA*'s in its future investment treaties.

III CIRCUMVENTION OF DOMESTIC COURTS

In the 2015 speech referred to in Section I, Chief Justice French highlights the concern about investment tribunals being able to review and question the legality of measures affirmed to be valid by domestic courts, effectively creating a further 'appellate tier' for decisions of national judiciaries and allowing ISDS tribunals to undermine national regulatory autonomy.[54] This phenomenon may occur when arbitral processes are invoked to 'call into question the decisions of domestic courts either by submissions that such decisions are breaches of an investment treaty, or alternatively seeking findings based upon propositions inconsistent with such decisions'.[55] For example, a domestic court could rule a measure to be valid under domestic law, but because the measure allegedly violates a BIT, that ruling may consequently become subject to the consideration of an investment tribunal constituted under a BIT when that tribunal assesses the conformity of the measure with the BIT.[56] The decisions of domestic courts may therefore be called into question in ISDS proceedings, and while these bodies are not courts, their decisions nevertheless have the capability to significantly affect national economies and States' regulatory systems.[57]

In particular, States such as Australia face the prospect of an apex court's declaration on the constitutionality of legislation being 'outflanked' by an investor instituting an ISDS claim relating to that legislation and the ISDS tribunal ruling on their claim that by enacting that legislation, the State has infringed the rights of an investor under the relevant treaty and must pay compensation.[58] The prospect of this phenomenon occurring is a manifestation of the notion that a domestic measure may violate investor protections under an investment agreement irrespective of its validity under domestic law.[59] For a claimant, it is immaterial in these circumstances that the domestic measure has been ruled to be constitutionally valid because the right to compensation arises from a distinct, international, cause of action that domestic courts have no purview over. As such, even where ISDS tribunals do not strictly 'circumvent' domestic courts, they may nevertheless reverse or undermine the *effect* of their decisions

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[54] French, 'Litigating the Judiciary' (n 1) 3; Kyle Dickson-Smith, 'An Investment Court That Judges the Judges: A Case of Natural Selection' (2019) 44(2) *University of Western Australia Law Review* 71, 75 ('Judges').

[55] Chief Justice Robert French, 'ISDS: Litigating the Judiciary' (2015) 26 *Public Law Review* 155, 156.

[56] Dickson-Smith, 'Judges' (n 54) 75.

[57] Chief Justice Robert French, 'Investor-State Dispute Settlement – A Cut Above the Courts?' (Speech, Supreme and Federal Courts Judges' Conference, 9 July 2014) 1 ('A Cut Above the Courts?').

[58] Justin Gleeson, 'Australia's Increasing Enmeshment in International Law Dispute Resolution: Implications for Sovereignty' (2017) 34 *Australian Yearbook of International Law* 1, 12.

[59] French, 'A Cut Above the Courts' (n 57) 4; Chief Justice Thomas Bathurst, 'The Role of the Courts' (Speech, Australian Centre for International Commercial Arbitration *New York Convention* Symposium, 4 July 2018) 7.

in a practical sense through the awarding of damages under a BIT for which no damages are available in domestic law because that measure has been ruled to be valid under domestic law.

But it must be recalled that while there may be a domestic court proceeding and a separate ISDS proceeding which both ostensibly arise from the same substratum of facts or in relation to the same domestic measure, it is only possible for this 'outflanking' described above to occur because the two claims in question are *premised on different legal rights and causes of action*. That is, the domestic proceeding relates to a domestic cause of action (e.g. related to the constitutionality of the measure) and the ISDS proceeding relates to a cause of action conferred under the relevant investment treaty (e.g. breach of an investment protection provision). Further, it is the mandate of ISDS tribunals to review the conformity of domestic law, including constitutional law, with host States' investment treaty obligations.[60]

Arguments that tribunals doing this amount to them acting as an 'additional appellate tier' are misconceived because those arguments elide the distinction between two conceptually distinct matters. The first matter is the 'effect' of a domestic court's decision being circumvented by an ISDS tribunal where the tribunal awards damages for a measure as a result of assessing the measure's conformity with that State's investment treaty obligations and finding that a violation has occurred, despite the measure being declared valid under domestic law by domestic courts. This can get confused as being the same as the second matter, which is the notion of such tribunals effectively 'substituting' their own application and interpretation of municipal law over domestic courts' applications and interpretations, thereby 'usurping' domestic courts. The former is merely the consequence of the ISDS tribunal assessing the relevant State action's conformity with the State's investment treaty obligations, which again provides for a cause of action distinct from and separate to the relevant domestic legal norm in question. *CETA* precludes the *CETA* Tribunal from doing the latter for the reasons in Section IIIA below. On the other hand, the former does not and cannot 'usurp' a decision of a domestic court in a strictly legal sense because arbitral tribunals under the auspices of ISDS provisions 'assess the relevant State action against an entirely different set of criteria from those which a [domestic] court would apply in assessing the validity of government action.'[61]

Indeed, it is axiomatic that investors are positively entitled to bring claims under the relevant investment treaty where a valid domestic measure gives rise to a violation of that treaty. Otherwise, if investors were unable to bring such claims, the act of States entering into such treaties to provide investment protections would be redundant. An investor in this situation would be pursuing distinct remedies arising under different legal regimes, and their claims in each forum would be premised on different legal

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[60] Christian Riffel, 'The *CETA* Opinion of the European Court of Justice and its Implications – Not that Selfish After All' [2019] (August) *Journal of International Economic Law* 1, 12.

[61] Lisa Burton Crawford, Patrick Emerton and Emmanuel Laryea, 'Investor-State Dispute Settlement and the Australian Constitutional Framework' in Colin Picker, Heng Wang and Weihuan Zhou (eds), *The China-Australia Free Trade Agreement: A 21st Century Model* (Hart Publishing, 2018) 259, 271.

rights and causes of action. As such, the 'effect' of a domestic court's judgment being 'reversed' or 'undermined' in this way is a natural consequence of the risk attendant to States conferring rights on investors under treaties which allow them to claim compensation where regulatory actions of governments interfere with their investments.

With this being said, the problem with the prospect of domestic courts' decisions being 'effectively reversed' lies in the failure of some arbitral tribunals to allow States a sufficient margin to implement regulatory measures, despite such tribunals lacking 'an open-ended mandate to second-guess government decision-making.'[62] Additionally ISDS Tribunals risk obscuring the distinction between themselves and national judiciaries if they do masquerade as a contrived appellate mechanism and deem measures declared valid under domestic law to be inconsistent with the relevant State's international investment obligations, particularly where ISDS tribunals examine the correctness of legal standards or decisions rendered by domestic courts.[63] All of this has undoubtedly contributed to the legitimacy crisis that ISDS faces.[64] These problems are especially pronounced by the fact that many investment treaties contain broadly worded and open-textured obligations that do not address the relationship between investment protection and the prerogative of host States to adopt public interest regulations.[65] As a result, ISDS tribunals are given broad discretion in interpreting the international investment obligations of States, which makes it difficult to ascertain the evaluative criteria that a tribunal will employ to determine whether a breach has occurred and consequently, when a State will be liable to pay compensation to an affected investor.[66]

The increasing significance of ISDS warrants consideration of the potential ramifications of its use in the Australian context. Two examples, although they are premised on a number of contingencies, are illustrative of the risk of ISDS being used to 'circumvent' the effect of unfavourable domestic court decisions and how this risk may manifest. The first is the *Philip Morris Asia Ltd v Commonwealth of Australia* case ('*Philip Morris*').[67] In summary, a constitutional challenge to the *Tobacco Plain Packaging Act 2011* (Cth) was instituted by tobacco companies in the High Court of Australia. That legislation mandated plain packaging on tobacco products, which those companies argued was as an 'acquisition' of their intellectual property without just terms compensation and contrary to s 51(xxxi) of the *Constitution*. The High Court did not accept the arguments of the tobacco companies, and instead ruled that no unconstitutional acquisition of property occurred under s 51(xxxi) of the *Constitution*

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[62] *SD Myers v Canada (Partial Award)* (2000) 40 ILM 1408, 1438 [261].
[63] See, eg *Eli Lilly and Company v Government of Canada* (*Final Award*) (ICSID Arbitral Tribunal, Case No UNCT/14/2, 16 March 2017) [224].
[64] Anthea Roberts, 'The Next Battleground: Standards of Review in Investment Treaty Arbitration' (2011) 16 *International Council for Commercial Arbitration Congress Series* 170, 173.
[65] Caroline Henckels, 'Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, *CETA*, and TTIP' (2016) 19(1) *Journal of International Economic Law* 27, 28.
[66] Ibid.
[67] *Philip Morris Asia Ltd v Commonwealth of Australia* (Award on Jurisdiction and Admissibility) (Permanent Court of Arbitration, Case No 2012-12, 17 December 2015) ('*Philip Morris*').

and that the legislation in question was therefore constitutionally valid.[68] Philip Morris Asia Ltd subsequently brought arbitral proceedings against Australia under the Hong Kong-Australia BIT seeking withdrawal of the legislation in question and compensation for losses resulting from it.[69] The tribunal declined to entertain jurisdiction on the basis that Philip Morris had effectively engaged in an abuse of process by 'treaty shopping' through a corporate restructuring when the dispute was foreseeable in order to obtain the protections under the Hong Kong-Australia BIT.[70]

However, had the tribunal in *Philip Morris* accepted jurisdiction, the use of ISDS potentially could have undermined the decision of the High Court.[71] Hypothetically, it is conceivable that Philip Morris would have contended that there is, or should be, a relationship between the concepts of 'acquisition' within the meaning of s 51(xxxi) under the *Constitution* and 'expropriation' under the Hong Kong-Australia BIT such that the High Court's ruling that no 'acquisition' occurred constitutes a breach of the Hong Kong-Australia BIT.[72] Because 'acquisition' requires, in broad terms, a loss of valuable rights coupled with someone else acquiring a corresponding benefit,[73] the effect of the High Court's ruling that there was no 'acquisition' under domestic law arguably effectively meant that expropriation had nevertheless occurred under the Hong-Kong Australia BIT because Philip Morris was deprived of their investments by the State.[74] If the *Philip Morris* tribunal had exercised jurisdiction and accepted this argument, it is possible that the tribunal would have been required to review the correctness of the High Court's conclusion that there was no acquisition of property under s 51(xxxi) of the *Constitution* in the context of applying the legal standard for expropriation.[75] The effect of having the proceedings eventuate in this way may have therefore required an Australian court to enforce an award that has made findings inconsistent with a binding High Court authority, with that award requiring damages to be awarded for measures that have survived a constitutional challenge.

Concerns about 'bypassing' the High Court have arisen again recently and are aptly illustrated by the following second example. Although there is limited information currently available about this claim, mining billionaire Clive Palmer is currently seeking $300 billion from the Commonwealth Government under the Singapore-Australia Free Trade Agreement for unlawful expropriation without just

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[68] *JT International SA v Commonwealth* (2012) 250 CLR 1.
[69] *Philip Morris* (n 67) [89]; French, 'A Cut Above the Courts?' (n 57) 6.
[70] *Philip Morris* (n 67) [585]–[588]; Wilson and Susler (n 9) 44.
[71] French, 'A Cut Above the Courts?' (n 57) 6.
[72] Ibid; Bathurst (n 59) 7.
[73] George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press, 7th ed, 2018) 1300 [28.88]; see, eg, *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 185 (Deane and Gaudron JJ).
[74] See the now-terminated *Agreement Between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments*, signed 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993) art 6(1). See also generally J M Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press, 2019).
[75] French, 'A Cut Above the Courts?' (n 57) 6; Dickson-Smith, 'Judges' (n 54) 97.

terms compensation.[76] In summary, the claim relates to financial losses suffered by Palmer as a result of his inability to sell an iron ore project in Western Australia to a Chinese company owing to decisions of the Western Australian government. A 2020 law[77] was passed in Western Australia to prevent Palmer from suing the Western Australian government for those decisions, which was held to be valid by the High Court.[78] Palmer nevertheless has the opportunity to potentially recover enormous losses at the expense of the Commonwealth under the Singapore-Australia Free Trade Agreement for a State law that extinguished his legal rights to recover those losses under domestic law. In this way, Palmer is attempting to 'bypass' the declaration of a domestic measure's constitutionality by bringing his claim before an ISDS tribunal for ostensibly the same conduct that gave rise to the constitutional challenge under domestic law. It is conceivable that he will attempt to 'reverse' the effect of the High Court's ruling that no compensation is available to him under domestic law by arguing that the 2020 law violates the Singapore-Australia Free Trade Agreement and that damages should be available to him under that agreement as a result.

The analysis and examples above indicate that an important lesson for the Commonwealth Parliament and the executive is that they should carefully consider the content of the obligations in prospective investment treaties where those treaties allow for ISDS challenges to public interest measures that could potentially affect property rights of foreign investors.[79] *CETA* addresses these concerns in three ways: *first*, through providing for a strict delineation between domestic courts and ISDS tribunals; *secondly*, through its provisions preserving States parties' right to regulate; and *thirdly*, through its provisions relating to indirect expropriation obligations of host states. Becoming party to a treaty with provisions framed in this way has the potential to confer a number of corresponding benefits on Australia. In particular, the framing of *CETA*'s expropriation provisions and its provisions ensuring the right to regulate for States in conjunction provide States with greater scope to enact regulatory measures that are more amenable to withstanding ISDS challenges, which accordingly makes it less likely that the effect of a domestic court's decision will be reversed or 'outflanked'. This is discussed in more detail below.

A 'Mutually Respectful Distance' Between National Judiciaries and ISDS Tribunals Under CETA

Chief Justice French draws attention to concerns about domestic courts being 'outflanked' in his speech, stating that 'the interaction of arbitral tribunals and judicial systems … requires careful attention by those engaged in framing international

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[76] Paul Karp, 'Clive Palmer hires Christian Porter for $300bn lawsuit against Australian government', *The Guardian* (online, 30 March 2023) <https://www.theguardian.com/australia-news/2023/mar/30/clive-palmer-christian-porter-300bn-lawsuit-against-australian-government>.
[77] *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA).
[78] *Palmer v Western Australia* (2021) 274 CLR 286; *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219.
[79] Gleeson (n 58) 14.

investment agreements …'.[80] Certain features of *CETA*'s ISDS system remedy Chief Justice French's concerns about ISDS being exploited to circumvent domestic courts and such features also seek to address the boundaries between domestic and international legal regimes in several ways.[81]

First, by contrast to more broadly-drafted ISDS clauses which confer jurisdiction on ISDS tribunals over '*any* dispute concerning investments',[82] *CETA* expressly limits the scope of its proceedings to claims about alleged violations of *CETA*'s investment protection and non-discrimination provisions.[83] Claims for breaches of a host State's domestic law are inadmissible under *CETA* and remain subject to the exclusive jurisdiction of the relevant domestic courts, and the *CETA* Tribunal does not have jurisdiction to determine the legality of a measure under a party's domestic law.[84]

Secondly, it must be acknowledged that the mandate of an international investment tribunal extends to considering elements of domestic law to determine the conformity of domestic law with the obligations of the host State under the relevant investment treaty.[85] *CETA* maintains a strict delineation between the *CETA* Tribunal and domestic courts by precluding the *CETA* Tribunal from substantively reviewing the correctness of national law, alleviating the prospect of ISDS being exploited to circumvent domestic courts. This is achieved through *CETA* only permitting the Tribunal to consider domestic law as a matter of fact.[86] That is, only the prevailing interpretation given to the relevant domestic laws by competent domestic courts can be taken into account by the *CETA* Tribunal when reviewing the consistency of a measure with *CETA*.[87] Additionally, any meaning given to domestic law by the *CETA* Tribunal is not binding.[88] Such provisions are intended to 'protect the autonomy of domestic legal orders from ISDS proceedings'[89] by avoiding situations where an ISDS tribunal alleges that a domestic court has incorrectly applied national law and uses this purportedly incorrect application as a basis for finding a violation of an investment treaty. By contrast, this would be permissible under ISDS provisions in other investment treaties that allow for ISDS tribunals to interpret and apply domestic law.[90]

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[80] French, 'Litigating the Judiciary' (n 1) 18.

[81] von Walter and Andrisani (n 15) 199.

[82] See, eg, Model Text for the French Bilateral Investment Treaty (2006) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5874/download> art 8; Model Text for the Brazilian Bilateral Investment Treaty (2015) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download> arts 23(1), 24(1) (emphasis added).

[83] *CETA* (n 10) art 8.18; von Walter and Andrisani (n 15) 199.

[84] *CETA* (n 10) arts 8.18, 8.31(2).

[85] Riffel (n 60) 12.

[86] *CETA* (n 10) art 8.31(2).

[87] von Walter and Andrisani (n 15) 200.

[88] *CETA* (n 10) art 8.31(2).

[89] Julian Scheu, 'Article 8.31 – Applicable Law and Interpretation' in Marc Bungenberg and August Reinisch (eds), *CETA Investment Law: Article-by-Article Commentary* (Bloomsbury Publishing, 2022) 704, 707 [4].

[90] See, eg, *Agreement Between the Republic of Benin and the Belgo-Luxembourg Economic Union Concerning the Encouragement and Mutual Protection of Investments*, signed 18 May 2001, (entered into force 30 August 2007) art 9(5); *Agreement Between the Belgo-Luxembourg Economic Union and the Government of the Republic*

These provisions of *CETA* recognise that domestic and international law have two separate and independent operations in which a breach of one has no direct influence on the other.[91] At the same time, those provisions also acknowledge the inherent practical relevance of domestic law to ISDS proceedings by allowing the *CETA* Tribunal to examine the effect of challenged domestic legal measures as a matter of fact when considering the compliance of those measures with *CETA* without also allowing the *CETA* Tribunal to apply domestic law as a legal standard.[92] These provisions are complemented by art 8.33 of *CETA*, the effect of which is to allow the *CETA* Tribunal to dismiss claims premised on calling into question the decisions of national courts. This is the consequence of the Tribunal only being competent to consider domestic law as a matter of fact.

Take the hypothetical of a claimant in similar circumstances to *Philip Morris* before an ISDS tribunal with these features. The claimant may argue that the High Court misapplied Australian law in deciding that a particular measure did not effect an 'acquisition' under s 51(xxxi) of the *Constitution*. Because of this misapplication, the measure (and the ruling that it is valid under domestic law) is argued to have effected an unlawful expropriation. Such a claim would be dismissed because the safeguards above prevent the Tribunal, as a matter of law, from making an award which reviews the substance of the High Court's decision. The existence of these provisions in *CETA* nevertheless permits the *CETA* Tribunal to find that national law violates the substantive investment standards under *CETA*.[93] But a framework of this nature is designed to ensure that a tribunal like the one under *CETA* would have no jurisdiction to determine or consider the legality of a State's measures under domestic law when that State has allegedly breached its treaty obligations. This is so even if those domestic law measures give rise to the treaty violation.[94]

This means that under such a system, domestic courts retain exclusive purview over the interpretation of domestic law and the relevant tribunal's jurisdiction is limited to the investment treaty itself.[95] Conversely, *CETA* requires investors seeking to rely directly on *CETA*'s protections to bring proceedings before the Tribunal and excludes the invocation of *CETA*'s investment protections before domestic courts, clearly demarcating the ambit of the Tribunal and domestic courts.[96] The cumulative effect of these provisions is to ensure that the *CETA* Tribunal and domestic courts operate in two parallel and strictly separate continuums. That is, the *CETA* Tribunal is only able to interpret and apply *CETA* investment rules, and domestic courts remain exclusively competent over binding interpretations of their respective domestic laws.[97]

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of Zambia on the Reciprocal Promotion and Protection of Investments, signed 28 May 2001 (not yet in force) art 9(5).

[91] *Elettronica Sicula S.p.A (ELSI)* (*United States of America v Italy*) (Judgment) [1989] ICJ Rep 15, 51 [73]

[92] *Opinion 1/17* (n 19) [131]; Scheu (n 89) 714 [21].

[93] See Section III above.

[94] *CETA* (n 10) art 8.31(2).

[95] *Opinion 1/17* (n 19) [131], [133]; Van Duzer (n 24) 13–14.

[96] *Opinion 1/17* (n 19) [198]; *CETA* (n 10) arts 8.18(5), 8.25, 30.6.

[97] von Walter and Andrisani (n 15) 200.

A claim under an ISDS system with these features of *CETA* therefore cannot be converted into an effective 'appeal' against the decisions of domestic courts, and because of this, *CETA* ensures that a 'mutually respectful distance' between its Tribunal and domestic courts is preserved.[98] Taken in conjunction, these features favour the argument that *CETA* provides a principled ISDS model which Australia should adopt in investment treaties, as such a model preserves the remit of Australian courts from usurpation by ISDS tribunals of this nature.

B Regulatory Sovereignty Preserved?

The right to regulate is a well-recognised principle in international investment jurisprudence.[99] It permits host States to regulate in derogation of international commitments it has undertaken in investment agreements without incurring a duty to compensate the affected investor(s).[100] Chief Justice French raises concerns in his speech about the ability of States to implement regulations in the public interest being threatened by ISDS.[101] These concerns pertain to arbitral processes being utilised by investors to effect a 'regulatory chill' on government action as a result of those investors challenging regulatory changes which affect their interests.[102] This 'chill' stems from the threat of multinational corporate investors claiming that regulations in the public interest violate investment treaty standards by adversely affecting investments, and such a threat may consequently cause governments to refrain from regulating for fear of costly investment arbitration.[103] The uncertainty created by imprecise or open-textured treaty obligations contributes to this chilling effect on States' regulatory behaviour, as difficulties in being able to predict how ISDS tribunals will interpret and apply those obligations may unduly expose States to liability for compensation for non-discriminatory regulations adopted to promote public welfare.[104] The power to make a binding award of damages against a State as a consequence of actions that are legally valid under that State's domestic laws, but may

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[98] *Loewen Group Inc v United States* (*Award*) (2003) 42 ILM 811, 833 [134]; Riffel (n 60) 12; French, 'Litigating the Judiciary' (n 1) 18.

[99] See, eg, *Philip Morris Brands SARL, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay (Award)* (ICSID Arbitral Tribunal, Case No ARB/10/7, 8 July 2016).

[100] Catharine Titi, *The Right to Regulate in International Investment Law* (Nomos and Hart Publishing, 2014) 33.

[101] French, 'Litigating the Judiciary' (n 1) 3, 9; Matveev (n 25), 349.

[102] See, eg, *Lone Pine Resources Inc v Government of Canada* (*Notice of Arbitration*) (ICSID Arbitral Tribunal, Case No UNCT/15/2, 6 September 2013); *Vattenfall AB and Others v Federal Republic of Germany* (*Notice of Arbitration*) (ICSID Arbitral Tribunal, Case No ARB/12/12, 31 May 2013); Lisa Burton Crawford, Patrick Emerton and Emmanuel Laryea, 'Investor-State Dispute Settlement: Controversial, but Constitutionally Valid?' *ILA Reporter* (Web Page, 15 June 2017) <https://ilareporter.org.au/2017/06/isds-controversial-but-constitutionally-valid/>.

[103] Burton Crawford, Emerton and Laryea (n 61) 269; Wilson and Susler (n 9) 39.

[104] Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How it Emerged and How it can be Reformed' (2014) 29 *ICSID Review* 372, 410; see also Jonathan Bonnitcha, *Substantive Protection Under Investment Treaties* (Cambridge University Press, 2014) 113–133.

constitute a violation of an investment treaty, may therefore impede States' sovereignty with respect to public interest regulation in important policy areas.[105]

CETA addresses these concerns in numerous ways. First, *CETA* expressly provides for the protection of the State's legitimate public interests. Article 8.9(2) provides that the mere fact that a party regulates in a manner which negatively affects an investment does not, in and of itself, amount to a breach of an investment protection obligation. More concretely, the right to regulate is affirmed through specific exceptions that allow derogations from those investment protection obligations.[106]

Secondly, *CETA*'s Annex 8-A(3) provides that State measures protecting legitimate public welfare objectives cannot be considered indirect expropriation unless the impact of the measures is 'so severe in light of its purpose that it appears *manifestly excessive*'.[107] The aim of this provision is to preserve the State's right to regulate by preventing all State measures from being considered indirect expropriation, even if they have some effect on investors' property.[108] Annex 8-A(3) requires the *CETA* Tribunal to assess the quantitative relationship between the aim of the measure and its effect.[109] Importantly, that provision also prevents the Tribunal from considering solely the effect of the measure in assessing whether a violation of *CETA* has occurred.[110] In other words, the *CETA* Tribunal would be required to examine the extent to which the measure is proportional to the public interest it is protecting by reference to its effect on investments in light of its objective.[111]

This 'proportionality test' in Annex 8-A(3) would provide broad discretion to tribunals to balance competing public and private interests in considering the effect of a measure and the legitimate objectives it is pursuing.[112] It is arguable that this test provides little guidance to tribunals as to how the test should be applied in practice, and that it would be preferable to have a more categorical statement of the relevant test.[113] An example of this could be a statement that non-discriminatory regulatory actions which are designed and applied to achieve legitimate regulatory objectives do not constitute indirect expropriations.[114] However, even if the test in *CETA* is

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[105] Wilson and Susler (n 9) 39.
[106] Catharine Titi, 'The Right to Regulate' in Makane Moïse Mbengue and Stefanie Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer, 2019) 171–172; see, eg, *CETA* (n 10) art 28.3.
[107] Emphasis added.
[108] Arnaud de Nanteuil, 'Expropriation' in Makane Moïse Mbengue and Stefanie Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer, 2019) 131, 150.
[109] Ibid 142, 150.
[110] Ibid.
[111] Ibid 152. See also *Técnicas Medioambientales Tecmed, S.A. v United Mexican States (Award)* (2004) 43 ILM 133, 164 [122].
[112] Henckels (n 65) 50.
[113] Ibid 43.
[114] *ASEAN Comprehensive Investment Agreement*, signed 26 February 2009 (entered into force 24 February 2012) Annex 2(4); *Investment Agreement for the COMESA Common Investment Area*, signed 23 May 2007 (not yet in force) art 20(8).

considered 'underarticulated', the qualifier of 'manifestly excessive' suggests that the threshold for an indirect expropriation is high.[115] This serves to moderate the amount and extent of claims that may be brought by investors. Additionally, because of this high threshold, it is also more likely that challenged measures which have been accepted by domestic courts as valid would not be considered indirect expropriations, especially where some relationship between a domestic norm similar to expropriation, like constitutional acquisition, is contended for in both forums. However, because a measure's effect will always have bearing on whether it is considered an indirect expropriation, it can still qualify as such depending on its effect, even if it is pursuing a legitimate objective.[116] As such, tribunals would still have discretion to make a global assessment of a variety of factors, including the measure's effect, in assessing whether an indirect expropriation has occurred.

By permitting this kind of assessment with the additional guidance that *CETA* provides, as opposed to blanketly providing that any measure pursuing a legitimate objective cannot be an expropriation, *CETA* establishes a greater equilibrium between protecting foreign investors and respecting the right of States to regulate by allowing for 'a certain balancing between the interests of the investor and the State'.[117] Therefore, *CETA* ensures that the capacity of investors to challenge legitimate government measures is limited whilst also safeguarding investment protections, striking an appropriate balance between the interests of investors and States. By doing this, States are provided with leeway in implementing public interest regulatory measures, which has the effect of potentially lessening the risk of claims being made which seek to 'outflank' the effect of a domestic court's ruling that a domestic measure is valid. Because of the way in which *CETA*'s provisions on the right to regulate are framed, adopting provisions of this nature would have the potential benefit of giving Australia greater scope to enact public interest measures without being subject to extensive ISDS challenges.

C Expropriation

A common legal avenue through which tension arises between a State's regulatory autonomy and the private property rights of investors is in cases of alleged expropriation, particularly where regulatory actions indirectly impair or impact property.[118] Under expropriation protections in investment treaties, property rights of foreign investors are protected from interferences or deprivations by a host State,[119]

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[115] Henckels (n 65) 43. See, eg, where the term 'manifest' in other ICSID provisions was considered to mean a high standard and a 'clear and obvious case': *Trans-Global Petroleum, Inc v The Hashemite Kingdom of Jordan (Tribunal's Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules)* (ICSID Arbitral Tribunal, Case No ARB/07/25, 12 May 2008) [88], [92].

[116] de Nanteuil (n 108) 152.

[117] Ibid 155; Ursula Kriebaum, 'Article 8.12 – Expropriation' in Marc Bungenberg and August Reinisch (eds), *CETA Investment Law: Article-by-Article Commentary* (Bloomsbury Publishing, 2022) 297, 336 [152].

[118] See, eg, Shirlow (n 3) 596; *Fireman's Fund Insurance Company v United Mexican States (Award)* (NAFTA Chapter Eleven Tribunal, Case No ARB(AF)/02/01, 17 July 2006) [176].

[119] Shirlow (n 3) 596.

although an expropriation will generally be deemed lawful if it meets certain conditions and if it can be justified on public policy grounds.[120] Relevantly, an indirect expropriation will generally consist of measures that substantially deprive an investor of their investment, or which result in the effective loss of the investor's enjoyment or control over their property.[121]

In its Annex 8-A(2), *CETA* provides that consideration of whether an indirect expropriation has occurred is dependent on a case-by-case factual enquiry, which is a requirement that aims to ensure that the Tribunal has a sufficient margin of appreciation when assessing State measures.[122] Annex 8-A provides for a non-exhaustive list of factors to be taken into account by the Tribunal when assessing whether State actions constitute an indirect expropriation. This clarifies, under *CETA*, whether to consider only the effect of measures tantamount to expropriation or to consider the effect and purposes of the measure, which has been a source of disagreement and confusion for some ISDS tribunals.[123] Although an extensive exposition about the standards and legal frameworks relating to substantive investment protections, such as expropriation, are beyond the scope of this article, *CETA* preserves regulatory sovereignty through the way in which the standard for indirect expropriation is framed. Accordingly, a number of important observations can be made about the list in Annex 8-A(2).

Annex 8-A(2)(a) provides the clarification that a State measure having 'an adverse effect on the economic value of an investment' is not enough, in and of itself, to establish an indirect expropriation.[124] Instead, Annex 8-A(1) requires the effect on an investor's property rights to constitute a 'substantial deprivation' of the 'fundamental attributes of property in its investment', which merely confirms the longstanding accepted view that deprivation must be substantial.[125] Where *CETA* is innovative, however, is in Annex 8-A(2)(d), which requires consideration of 'the character of the [State] measure(s) … notably their object, context and *intent*'.[126] 'Intent' refers to the general aim or objective of a State measure, rather than a State's intention to deprive.[127] As such, under *CETA*, for an indirect expropriation to occur, there must be a substantial and lasting deprivation taking into account, *inter alia*, the general character and object of the measure in question. Clarifying in an investment treaty that more than solely the effect of a State measure on a foreign investment is relevant to assessing whether an indirect expropriation has occurred provides States with a greater flexibility

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[120] See, eg, ibid; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/22, 24 July 2008) [434].
[121] Henckels (n 65) 41.
[122] de Nanteuil (n 108) 131.
[123] See, eg, *Azurix Corp v Argentine Republic (Award)* (2009) 14 ICSID Rep 367 [309]; *Compañia del Desarrollo de Santa Elena S.A. v Republic of Costa Rica* (2002) 5 ICSID Rep 153 [72], [77].
[124] de Nanteuil (n 108) 132.
[125] See, eg, *CMS Gas Transmission Company v Argentine Republic (Award)* (2009) 14 ICSID Rep 151 [262]; *Gami Investments Inc v United Mexican States (Award)* (2008) 13 ICSID Rep 144 [126].
[126] Emphasis added.
[127] de Nanteuil (n 108) 138.

to regulate.[128] This is an important clarification, given that tribunals constituted under other investment treaties have not always accepted that other elements should be taken into account when assessing whether an indirect expropriation has occurred, as opposed to solely considering the effect of the measure.[129] By framing substantive investment obligations under *CETA* in a manner that is more supportive of regulatory autonomy than other investment treaties, the scope for *CETA* Tribunal Members to make evaluative judgments about investment standards or depart from legal principles established in *CETA* is reduced.[130] As such, *CETA*'s more precise definition of the 'contours of States' obligations towards foreign investors' and its narrowing of the degree of interpretive discretion entrusted to the *CETA* Tribunal has the potential to reduce the likelihood of successful challenges to non-discriminatory public welfare measures.[131] As a result, these features would consequently provide States with greater scope to implement public interest regulations without fear of having to pay substantial amounts of compensation to foreign investors, especially where those measures have already been deemed valid by domestic courts. The inclusion of these clarifications reduces the risk of domestic courts' decisions being 'effectively outflanked' or 'bypassed' as discussed above,[132] and Australia could benefit from this were it to adopt an ISDS system with an expropriation framework akin to *CETA*'s. This would replace the existing commonplace practice of Australia having BITs without definitions of indirect expropriation.[133]

IV CHAPTER III TRAPPINGS

Before the enforceability of the awards of an ISDS body with *CETA*'s features can be considered, the anterior issue of the proposed system's compatibility with the *Constitution* must first be addressed. It is well-established that the judicial power of the Commonwealth can only be vested in and exercised by Chapter III courts.[134] Concerns have previously been raised, as expressed in *TCL Air Conditioner Co (Zhongshan) v Judges of the Federal Court* ('*TCL*'),[135] about international arbitral tribunals being impermissibly vested with Commonwealth judicial power due to such a body's awards being

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[128] Ibid 140.

[129] See, eg, *Alpha Projektholding GmbH v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/16, 8 November 2010) [409]–[410].

[130] Henckels (n 65) 31; Pierre Schlag, 'Rules and Standards' (1986) 33 *UCLA Law Review* 379, 386.

[131] Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685, 1688, 1701; Henckels (n 65) 27, 31.

[132] See Sections IIIA and IIIB.

[133] See, eg, *Agreement Between Australia and the Republic of Turkey on the Reciprocal Promotion and Protection of Investments*, signed 16 June 2005, [2005] ATS 8 (entered into force 29 June 2009). Although note that a similar framework to the one in *CETA* does exist in some other BITs that Australia has adopted: see, eg, *Investment Agreement Between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China*, signed 26 March 2019, [2020] ATS 5 (entered into force 17 January 2020) Annex II.

[134] *New South Wales v Commonwealth* (1915) 20 CLR 54; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[135] (2013) 251 CLR 533, 563 [64], 565 [65], 565 [69], 573 [101] (Hayne, Crennan, Kiefel and Bell JJ) ('*TCL*').

automatically enforceable in Australia pursuant to the *International Arbitration Act 1974* (Cth).[136] Those Chapter III concerns arose in the context of the enforcement of international commercial arbitration awards, not investment treaty arbitration awards nor, relevantly, the enforcement of awards of a permanent standing ISDS body like the *CETA* Tribunal. While arguments pertaining to judicial power being conferred on *commercial* arbitral tribunals were dismissed, it was not considered whether this same reasoning would apply to ISDS tribunals having the features of the *CETA* Tribunal.

Whether or not *all* ISDS is compatible with Chapter III of the *Constitution* is beyond the scope of this article. Rather, the issue in this context is whether the Commonwealth executive purports to impermissibly usurp the exclusively judicial power of the Commonwealth by becoming party to an investment treaty with an ISDS mechanism that is arguably quasi-judicial, and as a consequence of this, subjecting government action to the binding decisions of that quasi-judicial body under the treaty.[137] By doing this, the Commonwealth Parliament is arguably creating a body, in the form of that quasi-judicial treaty tribunal, that is instilled with what appears to be the hallmarks of judicial power because it can adjudicate matters in dispute between the Commonwealth and claimant investors and determine their rights and obligations outside the confines of Chapter III.[138]

Even though it may be 'largely inspired by traditional ISDS mechanisms', a permanent tribunal of 15 tenured (but term-limited) judges who are not pre-selected by parties suggests that the *CETA* Tribunal will, in essence, exercise judicial functions, or at least maintain the appearance of a court.[139] Typically, distinctive elements of a court include the permanency of judges and their method of appointment. Judges are appointed, generally by the executive, for a certain term and for an unlimited number of disputes whereas arbitrators are appointed by disputing parties to resolve a specific dispute.[140] The involvement of parties in the selection of arbitrators, which is a 'critical foundational principle in arbitration', is markedly contrasted with the parties' non-involvement in selecting the adjudicators to hear a dispute under *CETA*.[141] If one accepts that a characteristic feature of arbitration is the parties' right to appoint the tribunal, this militates against the conclusion that an ISDS system like *CETA*'s can be

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[136] Albert Monichino, 'International Arbitration: Sheep, Wolves and Vegetarianism – A View from Down Under' (2013) 8(3) *Construction Law International* 33, 35; Justice Clyde Croft, 'Judicial Intervention in the Asia-Pacific Region' (Conference Paper, UNCITRAL-MOJ-KCAB Joint Conference, 11-12 November 2013) 14; Dickson-Smith, 'Judges' (n 54) 116.

[137] Burton Crawford, Emerton and Laryea (n 61) 270.

[138] Thanks must go to the anonymous reviewer for raising this issue and framing it in the manner described here. See also *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J) ('*Tasmanian Breweries*').

[139] *Opinion 1/17* (n 19) [193]–[194], [197].

[140] August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for *CETA* and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Arbitration Investment' (2016) 19(4) *Journal of International Economic Law* 761, 766 ('Enforceable Awards'); J.G. Merrills, *International Dispute Settlement* (Cambridge University Press, 4th ed, 2005) 91.

[141] *AKN v ALC* [2015] SGCA 18, [37] (Menon CJ for the Court). See also Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd ed, 2014) 1637, 1639.

considered arbitration, which would be reinforced by the lack of a case-by-case format that is typical of arbitration.[142] It is also illustrative that Chapter III courts must exhibit certain essential characteristics which demonstrate institutional integrity, namely satisfying minimum requirements of independence and impartiality.[143] A system like *CETA*'s has echoes of these independence and impartiality requirements.[144] Further, the existence of an appellate body under *CETA*[145] can be contrasted with the hallmark of finality in arbitration and also lends support to the conclusion that the power being exercised by a body with the features of the *CETA* Tribunal would be judicial.[146] These characteristics of *CETA*, in conjunction with *CETA*'s significant emphasis on the Tribunal's required independence and impartiality, are significant enough departures from traditional ISDS arbitration which indicate that this ISDS mechanism may more appropriately be characterised as judicial rather than arbitral.[147] However, it is submitted that these features of an ISDS system like *CETA*'s would not operate to impermissibly confer judicial power on a non-Chapter III court and such a mechanism's quasi-judicial appearance would not be fatal to such a system's constitutional compatibility. This is so for four broad reasons.

First, functions of fact-finding and imposing new obligations on parties in relation to their dispute are ordinarily performed by a court if the parties do not agree for a third party to perform those functions. But the fact that a court would have performed those functions had the parties not agreed for a third party to perform them does not make their performance by the third party the exercise of judicial power.[148] Additionally, although submitting disputes to either a body like the *CETA* Tribunal or a domestic court yields the same outcome, that is, 'the resolution of uncertainty through the expression of an authoritative opinion, award or judgment', an equivalence of outcomes does not mean in and of itself that judicial power is being exercised.[149] The *CETA* Tribunal and domestic courts both settle legal controversies between parties through authoritative determinations by applying the law to findings of fact

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[142] Gabrielle Kaufmann-Kohler and Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?* (Research Paper, 3 June 2016) 37 [92]; Sophie Nappert, 'Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism' (Inaugural Lecture, European Federation for Investment Law and Arbitration, 26 November 2015) 10.

[143] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 67 [41] (Gleeson CJ); *North Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 595, 597.

[144] See Section II.

[145] *CETA* (n 10) arts 8.27, 8.28.

[146] See *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, 261–262 [20] (French CJ, Gummow, Crennan and Bell JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 617 (Gummow J), 658 (Callinan and Heydon JJ). See Section VB for further discussion.

[147] Jessie Goldsworthy, 'Opinion 1/17 – The European Court of Justice, ISDS and Implications for Australia' (2019) 26 *Australian International Law Journal* 203, 207.

[148] See Castel Electronics Pty Ltd, 'Second Defendant's Submissions', Submission in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*, S178/2012, 23 October 2012, [23] ('*TCL* Second Defendant's Submissions').

[149] Ibid.

pertaining to the dispute in question.[150] But importantly, while these common elements may be essential to the exercise of judicial power, they are not themselves conclusive of it.[151] An example of an indicator militating against the *CETA* Tribunal exercising judicial power is that while the *CETA* Tribunal does undertake this process to resolve disputes between the parties, it is unable to enforce its own awards by contrast to the automatic enforceability of domestic court decisions in the jurisdiction which they are made.[152] Although the procedures of ISDS tribunals like the *CETA* Tribunal inevitably mimic the procedures of courts in many ways and may exhibit *some* trappings of courts, this does not lead to the conclusion that the *CETA* Tribunal is exercising judicial power.[153]

Secondly, it is an elementary proposition that 'arbitration is a creature of contract'.[154] Contracting parties may agree to alternative dispute resolution mechanisms where a third party such as an arbitrator can establish the fact and extent of existing obligations and can create new obligations superseding the old.[155] That observation applies equally, it is submitted, where parties have consented, in this case through a treaty, to the 'third party' consisting of a standing body of persons that are randomly assigned for that function. The fact that the *CETA* Tribunal (or a tribunal of a similar nature) has quasi-judicial features does not lead to the conclusion that it exercises judicial power because the parties have the *choice*, as a consequence of party autonomy, to submit themselves to its jurisdiction.

Thirdly and expanding on this, 'the *non-consensual* ascertainment and enforcement of rights in issue' between parties is a function which pertains exclusively to judicial power.[156] Following from the second point, the making of an award by a body akin to the *CETA* Tribunal – or an ISDS tribunal generally – does not involve the exercise of judicial power because it is an exercise of power sourced in the *voluntary agreement* of the parties to submit disputes to arbitration.[157] Although the form which the parties' consent may take differs under private arbitration and ISDS arbitration, the parties'

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[150] *R v Davison* (1954) 90 CLR 353, 369 (Dixon CJ and McTiernan J) ('*Davison*').

[151] *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188–189 (the Court) ('*Precision Data*').

[152] *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245, 268–269 (Deane, Dawson, Gaudron and McHugh JJ); *Davison* (n 150) 369 (Dixon CJ and McTiernan J).

[153] *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530, 543–544 (Lord Sankey LC); *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909, 976.

[154] Joachim Delaney and Katharina Lewis, 'The Presumptive Approach to the Construction of Arbitration Agreements and the Principle of Separability – English Law Post *Fiona Trust* and Australian Law Contrasted' (2008) 31(1) *University of New South Wales Law Journal* 341, 341; William H. Knull III and Noah D. Rubins, 'Betting the Farm on International Arbitration: Is it Time to Offer An Appeal Option?' (2000) 11(4) *American Review of International Arbitration* 531, 534.

[155] See, eg, *F J Bloemen Pty Ltd v City of Gold Coast* [1973] AC 115, 125–126 (Lord Pearson) and the observations in *TCL* Second Defendant's Submissions (n 148) [23].

[156] *Duncan v New South Wales* (2015) 255 CLR 388, 407–408 [41] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ) (emphasis added).

[157] *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643, 653 (Rich, Dixon, Evatt and McTiernan JJ) ('*Dobbs*'); see also Attorney-General (Cth), 'Submissions of the Commonwealth Attorney-General (Intervening)', Submission in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*, S178/2012, 26 October 2012, [9].

consent is the defining feature of an exercise of arbitral power and is common to both private and ISDS arbitration, including with respect to the *CETA* Tribunal.

By contrast to 'private' arbitration, ISDS arbitration (including arbitration under *CETA*) is not based on direct contractual relations between investors and host States, but rather on dispute settlement provisions contained in the relevant investment agreement.[158] Therefore, States consenting to a treaty with ISDS mechanisms in it, including those having the features of *CETA*, is tantamount to an 'agreement to arbitrate' via the route prescribed in the relevant treaty,[159] as their consent to the treaty constitutes consent to the procedures for the making of ISDS arbitral awards under it.[160] Because of this, a State's accession to an investment treaty represents a standing offer to arbitrate disputes within the treaty's ambit, so claimant investors plainly consent to an ISDS award being rendered when they accept that standing offer and derivatively take advantage of the promises between States in the relevant treaty by initiating a claim under the treaty's ISDS provisions.[161]

Although it is not possible to frame 'a definition of judicial power that is at once exclusive and exhaustive',[162] the fundamental character of judicial power is that it is a sovereign power exercisable '*independently of the consent* of those whose legal rights or legal obligations are determined by its exercise.'[163] In *CETA*'s case, respondent States provide their standing offer to arbitrate and consent to the settlement of disputes by the *CETA* Tribunal by virtue of art 8.25(1) of *CETA*, and claimant investors can accept that offer by requesting dispute settlement under art 8.23. Through these provisions, disputing parties voluntarily agree to a binding award, and an award pursuant to *CETA* is an expression of the binding result of the parties' agreement to the ISDS procedures under *CETA*.[164] Despite important practical differences, in this respect there appears to be no analytical boundary separating ISDS, including ISDS under *CETA*, from regular commercial arbitration.[165]

Critically, the distinction between a conventional exercise of judicial power and the rendering of a *CETA* award is that the former is invoked coercively and 'independently of the consent of those whose legal rights or obligations are determined by its exercise' whilst the latter, in contrast, is invoked by mutual agreement in the way

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158 Reinisch, 'Enforceable Awards' (n 140) 784.

159 *Occidental Exploration & Production Co v Republic of Ecuador* [2005] EWCA Civ 1116 [32] (Mance LJ); Reinisch, 'Enforceable Awards' (n 140) 767, 784; Dickson-Smith, 'Judges' (n 54) 116.

160 See, eg, *CETA* (n 10) art 8.25(1).

161 Jan Paulsson, 'Arbitration Without Privity' (1995) 10(2) *ICSID Review* 232, 247; *Republic of Ecuador v Chevron Corp*, 638 F 3d 384, 392–393 (2nd Cir, 2011); *Schneider v Kingdom of Thailand*, 688 F 3d 68, 72–73 (2nd Cir, 2012); Gleeson (n 58) 11; *TCL* Second Defendant's Submissions (n 148) [19]. See also *Dallal v Bank Mellat* [1986] QB 441.

162 *Precision Data* (n 151) 188–189 (the Court).

163 *TCL* (n 135) 553–554 [28] (French CJ and Gageler J); *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ) ('*Huddart Parker*') (emphasis added).

164 Reinisch, 'Enforceable Awards' (n 140) 784.

165 Jan Paulsson 'The Public Interest in International Arbitration' (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 300, 301–302; Anthony Cassimatis, 'Comments on The Prospects for Reform of Investor-State Dispute Settlement' (Speech, CLI Lecture Series, Supreme Court of Queensland, 17 October 2019) 4 [6].

described above.[166] The *source* of an ISDS tribunal's authority to render an award and the existence and scope of its function in doing so are founded on the agreement of the parties as embodied in the relevant investment treaty (in this case, *CETA*) establishing the ISDS body in question (in this case, the *CETA* Tribunal).[167] If parties agree to 'submit disputes as to their legal rights and liabilities for resolution by a particular person *or body*', such as the *CETA* Tribunal, and 'to accept the decision of that person as binding upon them', no judicial power is engaged.[168] Because of the consensual foundation of the *CETA* Tribunal and its awards as described above, the making of a *CETA* award cannot be an exercise of judicial power.

Fourthly, judicial power involves the conclusive determination of the *present existence* of rights or determinations of controversies about *existing* rights.[169] Nothing in *CETA* or its enforcement mechanisms displaces the centuries-old understanding of arbitral awards as determining the parties' rights by arbitrators pursuant to the authority conferred on them by the parties.[170] By agreeing that an award like a *CETA* award shall be binding and that disputing parties will comply with an award without delay,[171] parties to an investment treaty such as *CETA* voluntarily and consensually confer on the tribunal in question the authority to adjust the parties' rights by extinguishing their original causes of action and substituting them with new rights and obligations reflected in the award.[172] A tribunal making an award and consequently imposing on parties *new* legal duties and liabilities by discharging their former rights in the exercise of the tribunal's authority, while lacking the authority to determine the *already existing* rights of parties, is characteristic of non-judicial power.[173]

In other words, arbitral tribunals – even permanent ISDS tribunals like the one established under *CETA* – do not exercise judicial power because they create *new rights* pursuant to the mutual agreement of disputing parties,[174] as opposed to enforcing existing rights.[175] It is these new rights – not any disputed anterior rights which were

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[166] *TCL* (n 135) 553–554 [28] (French CJ and Gageler J); *Huddart Parker* (n 163) 357 (Griffith CJ).
[167] *TCL* (n 135) 554 [29], 555 [31] (French CJ and Gageler J); *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645, 658 [31] (the Court) ('*CFMEU*').
[168] *CFMEU* (n 167) 657–658 [30]–[31] (the Court) (emphasis added).
[169] *Tasmanian Breweries* (n 138) 374 (Kitto J); *Rola Company (Australia) Pty Ltd v Commonwealth* (1944) 69 CLR 185, 203–204 (Rich J) ('*Rola Company*'). See also Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (LawBook Co, 5th ed, 2019) 201 [6.20] and James Stellios, *Zines and Stellios's The High Court and the Constitution* (The Federation Press, 7th ed, 2022) 234.
[170] *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1040, 1046 [9] (Lord Hobhouse of Woodborough).
[171] *CETA* (n 10) art 8.41(1)–(2).
[172] Indeed, this is the effect of arbitration awards generally, commercial or otherwise: Burton Crawford, Emerton and Laryea (n 61) 279; *TCL* (n 135) 567 [78], 573–574 [104] (Hayne, Crennan, Kiefel and Bell JJ); *Dobbs* (n 157) 653 (Rich, Dixon, Evatt and McTiernan JJ).
[173] *Rola Company* (n 169) 203–204 (Rich J).
[174] *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 452 (Barton J); *CFMEU* (n 167) 658 [31] (the Court); *TCL* (n 135) 575 [108] (Hayne, Crennan, Kiefel and Bell JJ).
[175] *Rola Company* (n 169) 203–204 (Rich J); Jesse Kennedy, 'Arbitrate This! Enforcing Foreign Arbitral Awards and Chapter III of the *Constitution*' (2010) 34(2) *Melbourne University Law Review* 558, 559. Of course, in doing this, a tribunal like the *CETA* Tribunal 'may find it necessary to form an opinion as to the existing legal rights of the parties as a step in arriving at the ultimate conclusions

submitted to arbitration under the relevant treaty – that are enforced by curial processes in substitution for the rights and liabilities which were the subject of the dispute referred to arbitration.[176] Enforcing an investment treaty award of a body like the *CETA* Tribunal merely entails enforcing the binding result of the parties' agreement to submit their dispute to arbitration under the relevant treaty. Because the existence and scope of a tribunal's authority to determine a dispute and render an award finds its basis in the agreement of the parties in the manner described above, it is not judicial power being exercised, but rather, *arbitral* power.[177]

These four reasons in combination, particularly the latter two, make the argument that this kind of body is compatible with Chapter III, respectfully, unanswerable. These common features support the notion that there is no reason in principle that private arbitration and an ISDS mechanism which has the court-like features that are identified in *CETA* should be treated differently with respect to any analysis of Chapter III issues. Those reasons also support the notion that arguments that a tribunal with similar characteristics to the *CETA* Tribunal would be exercising judicial power are unlikely to succeed.[178] This conclusion has important ramifications, because it indicates that the recognition and enforcement of awards of an ISDS system like *CETA*'s is likely to be approached by Australian courts in a manner similar to the recognition and enforcement of international commercial arbitration awards. In short and applying the reasoning in *TCL*, because the new rights in an award rendered by an ISDS system akin to *CETA*'s merely constitute the binding expression of the parties' consent to the resolution of their dispute under such a system, the rendering of the award cannot be an exercise of judicial power. Nor can it subvert judicial functions, because the relevant ISDS tribunal would create new rights through the award in substitution of the prior rights of the parties, and it is these new rights which would then be enforced by an Australian court.[179] Taken in conjunction, this analysis indicates that in addition to the benefits of adopting an ISDS system akin to *CETA*'s, such a system would also be a constitutionally viable option.

V ENFORCEMENT

A key issue for a standing ISDS mechanism like the *CETA* Tribunal is the effectiveness of its decisions, that is, whether a final and binding decision by such a body is legally enforceable, especially in third States not party to the treaty providing for the ISDS system in question. Under *CETA*, art 8.23(2) allows a claimant investor

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on which the tribunal bases the making of an award intended to regulate the future rights of the parties', but this does not detract from the fact that such a tribunal nevertheless substitutes new rights for old ones in the award: *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140, 149.

[176] *TCL* (n 135) 555–556 [34] (French CJ and Gageler J), 567 [79], 575 [108] (Hayne, Crennan, Kiefel and Bell JJ).

[177] Ibid 555 [31] (French CJ and Gageler J).

[178] See Burton Crawford, Emerton and Laryea (n 61) 279.

[179] Ibid.

a choice of submitting a claim under the *ICSID Convention*,[180] or under non-*ICSID Convention* rules. If the claimant investor chooses to submit their claim under the *ICSID Convention*, an award by the *CETA* Tribunal qualifies as an ICSID award.[181]

According to the *ICSID Convention*, ICSID awards must be recognised as binding and States parties are required to enforce the pecuniary obligations of the award 'as if it were a final judgment of a court in that State.'[182] Allowing claimants to choose to submit a claim under the *ICSID Convention* has the advantage of enhancing the enforceability of awards, as ICSID awards do not have to withstand reviews by an executing State. But art 54(1) of the *ICSID Convention* refers to States parties recognising and enforcing 'award[s] rendered *pursuant to* this Convention'. This means that in order to benefit from this effective enforcement regime, an award has to be an 'ICSID arbitral award'.[183] It is doubtful that awards of an ISDS body like the *CETA* Tribunal could be considered ICSID arbitral awards where that ISDS body incorporates drastic changes to the ICSID system, such as by replacing the method of constitution of tribunals.[184]

However, as has been discussed extensively elsewhere,[185] it would be conceivable for decisions of a body like the *CETA* Tribunal to be considered as ICSID awards resulting from the *inter se* modification of the *ICSID Convention* pursuant to art 41 of the *Vienna Convention on the Law of Treaties* ('*VCLT*').[186] But even if an *inter se* modification of the *ICSID Convention* for ICSID contracting parties who adopt the relevant features of *CETA* were permissible, the resulting modified ISDS decisions could not qualify as ICSID awards generally. At best, they would be arbitral awards for the modifying parties alone as art 41(1) of the *VCLT* provides for *inter se* modifications as between the modifying States *only*.[187] Because third States which do not participate in the *inter se* agreement would not be affected by such a modification, they would be under no obligation to enforce the ensuing awards under the *ICSID Convention* rules.[188] As such, it is crucial to determine whether non-ICSID awards under a system like *CETA*'s can be considered 'arbitral awards' within the meaning of the *New York Convention* ('*NYC*')[189] and accordingly susceptible to recognition and enforcement

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[180] *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,* opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('*ICSID Convention*').

[181] *CETA* (n 10) art 8.41(6).

[182] *ICSID Convention* (n 180) arts 53–54.

[183] Bungenberg and Reinisch (n 49) 159.

[184] Ibid; Kaufmann-Kohler and Potestà (n 142) 53 [141].

[185] See Reinisch, 'Enforceable Awards' (n 140) 768–782.

[186] Bungenberg and Reinisch (n 49) 159–160; *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

[187] Bungenberg and Reinisch (n 49) 160; Reinisch, 'Enforceable Awards' (n 140) 781; Kaufmann-Kohler and Potestà (n 142) 53 [141]; 'Draft Articles on the Law of Treaties with Commentaries' (1966) II *Yearbook of the International Law Commission* 187, 232, 235.

[188] Reinisch, 'Enforceable Awards' (n 140) 782.

[189] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*NYC*').

under that regime.[190] The effective enforceability of such awards hinges on this question. If the awards of this type of body can be so enforced, they would be directly enforceable in the States which are parties to the *NYC*.[191]

The characterisation of a decision as an 'arbitral award' ordinarily falls within the competence of the enforcing national courts.[192] The features of a body like the *CETA* Tribunal which support the conclusion that such a body exercises arbitral power[193] also support the conclusion that its awards can be characterised as 'arbitral'. National courts are therefore likely to characterise such a body's awards in this way. Nevertheless, a few additional comments should be made as to why the body's awards can be characterised as 'arbitral' and also as to why its quasi-judicial features do not alter that character.

A Characterisation — Arbitral Award or Judicial Decision?

There remains a risk that awards rendered by a hybrid tribunal like the *CETA* Tribunal, which incorporates elements of both judicial dispute resolution and international arbitration, would be unable to be enforced under the *NYC* due to non-recognition of those awards as arbitral awards.[194] Although *CETA* provides in art 8.41(5) that a non-ICSID award rendered by the *CETA* Tribunal is deemed to be an award within the meaning of art I of the *NYC*, whether a decision may qualify as an arbitral award is really a matter of substance over form, and must ultimately be determined by reference to the award's nature and content.[195] But it is generally accepted that in order to qualify as an arbitral award, a decision must be rendered by an 'arbitral tribunal' and the award must decide on a legal dispute between the parties in a final manner.[196] It is uncontroversial that the latter characteristic would be present for an ISDS system with *CETA*'s features.[197] Rather, the question of whether a decision of such a body could qualify as an 'arbitral award' turns on the characterisation of the body rendering it as an 'arbitral tribunal'.

It is submitted that the *CETA* Tribunal can be characterised as an 'arbitral tribunal' for much of the same reasons as to why it exercises arbitral, and not judicial, power.[198] Even though parties may not be able to appoint arbitrators and the system is semi-permanent, *CETA* nevertheless retains its character as a treaty incorporating an arbitration agreement between the State and the investor. This establishes the

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[190] Reinisch, 'Enforceable Awards' (n 140) 782; Bungenberg and Reinisch (n 49) 160.
[191] Bungenberg and Reinisch (n 49) 155–156.
[192] Bernd Ehle, 'Article I: Scope of Application' in Reinmar Wolff (ed), *New York Convention: Article-by-Article Commentary* (Bloomsbury, 2019) 25, 32–33 [14]–[19]; George A. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer, 2017) 13.
[193] As discussed in Section IV.
[194] Reinisch, 'Enforceable Awards' (n 140) 785; Goldsworthy (n 147) 207.
[195] Ehle (n 192) 34–35 [25].
[196] See, eg, Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 737 [1353]; Ehle (n 192) 34 [22].
[197] See Bungenberg and Reinisch (n 49) 164.
[198] See Section IV.

consent to submit disputes to this ISDS system and consequently, the jurisdiction of the *CETA* Tribunal.[199] As such, it maintains the inherent features of a consensual arbitration mechanism, so the better view would be that *CETA*'s system is best characterised as an institutionalised ISDS arbitration mechanism that can render enforceable awards under the *NYC*.[200] Indeed, the *NYC* does not restrict its notion of 'arbitration' to only mean *ad hoc* arbitration, and it acknowledges in art I(2) that permanent arbitral bodies can render enforceable arbitral awards.[201]

As is confirmed by the *travaux préparatoires* of the *NYC*, the crucial consideration in indicating whether a permanent dispute settlement mechanism can be regarded as arbitral is the *voluntary* nature of the mechanism.[202] Other matters are not decisive.[203] For example, even though the disputants are unable to choose their arbitrators under an ISDS system like *CETA*'s, the fact that they can freely consent to their dispute being heard by such a dispute settlement body means that the body can still be a 'permanent arbitral body'.[204] Further, bodies exist where parties, particularly in the sporting context, are unable to choose their arbitrators, yet it is undisputed that these bodies are arbitral.[205] Therefore, provided that the disputing parties have given their consent,[206] awards of a standing mechanism like the *CETA* Tribunal would likely be regarded as that of a 'permanent arbitral body'.[207]

As was canvassed in Section IV, that consent by the disputing parties is evidenced by the State's standing offer to arbitrate by virtue of acceding to the investment treaty providing for the relevant ISDS system combined with the claimant investor's acceptance of that offer by initiating a claim under the treaty. It is correspondingly recognised in art 8.25(2)(b) of *CETA* that this joint consent satisfies the requirements in art II(1) of the *NYC* that there be an 'agreement in writing' for the purposes of recognising and enforcing an award under the *NYC*. And importantly, unlike in domestic court proceedings, a national of a State party to the relevant treaty like *CETA* can *choose* to become a claimant before the ISDS tribunal in question but they cannot be compelled to do so. At the same time, they are allowed to freely choose between the host State's domestic courts and the ISDS mechanism.[208] So much is clear from art 8.22(1)(f) and (g) of *CETA*, which has the effect that claimant investors must

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[199] Dickson-Smith, 'Judges' (n 54) 116.
[200] Ibid; Riffel (n 60) 2.
[201] *NYC* (n 189) art I(2); Reinisch, 'Enforceable Awards' (n 140) 767.
[202] United Nations Conference on International Arbitration, *Summary Record of the Eighth Meeting*, UN Doc E/CONF.26/SR.8 (12 September 1958) 2, 5, 6, 7 ('*NYC* Eight Meeting'); Kaufmann-Kohler and Potestà (n 142) 38 [93], 40–41 [98], 281 [149]; Committee on the Enforcement of International Arbitration Awards, *Summary Record of the Third Meeting*, 1st sess, UN Doc E/AC.42/SR.3 (23 March 1955) 6.
[203] *NYC* Eighth Meeting (n 202) 2, 3, 5, 6; Kaufmann-Kohler and Potestà (n 142) 56 [152].
[204] Reinisch, 'Enforceable Awards' (n 140) 767–768.
[205] Kaufmann-Kohler and Potestà (n 142) 40 [96]; *X v Federation Internationale de Hockey*, Federal Supreme Court of Switzerland, 4A_424/2008, 22 January 2009 [2]; *A v X*, Federal Supreme Court of Switzerland, 4A_198/2012, 14 December 2012 [2.1].
[206] Born (n 141) 97.
[207] UNCITRAL Working Group III EU Submission (n 42) 7 [32]; Ehle (n 192) 54 [87].
[208] Kaufmann-Kohler and Potestà (n 142) 36 [88].

choose between submitting a claim to the *CETA* Tribunal or pursuing their claims in another forum. Accordingly, an ISDS system of this nature would likely be characterised as a 'permanent arbitral body'.

B Finality and Rights of Appeal

Nevertheless, other features of the ISDS mechanism in question also warrant consideration. In the *CETA* Tribunal's case, the absence of finality that results from the inclusion of an appellate mechanism may undermine the notion that *CETA* awards can be characterised as 'arbitral' in nature, particularly when combined with the inclusion of the quasi-judicial features discussed in Sections II and IV. Those quasi-judicial features have largely been addressed, so this section primarily concerns the proposed appellate mechanism.

The principle of finality refers to the general rule that international arbitral awards cannot be appealed on the merits and that awards are final and binding subject only to limited grounds of challenge before national courts.[209] An arbitral award is not final and binding if it is open to appeal on the merits before a national court or appellate arbitral tribunal.[210] *CETA* deviates from finality as a hallmark of arbitration by introducing an appellate mechanism in art 8.28 which empowers an Appellate Tribunal to 'uphold, modify or reverse' the first-instance Tribunal's awards.[211] Rights of appeal are provided for: (a) errors in the application of applicable law; (b) manifest errors in the appreciation of facts; and (c) the grounds for annulment under art 52 of the *ICSID Convention* to the extent that are not covered by (a) and (b).[212] Disputing parties have 90 days after the issuance of a first-instance Tribunal's award to appeal.[213] The design of *CETA*'s Appellate Tribunal therefore can be described as 'a fully-fledged second tier with full authority to review procedural law, substantive law and the appreciation of facts'.[214] The inclusion of this appeal mechanism therefore 'strike[s] at the heart of the very concept of the arbitral process' in that it eschews the principle of finality.[215]

Despite this departure from finality that is ordinarily seen in 'traditional' arbitration, it is submitted that the presence of an internal appeal mechanism in *CETA* does not alter the nature and character of this ISDS system as 'arbitral'. Having the awards of this kind of body being subject to an appeal mechanism would also not

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[209] Nigel Blackaby et al, Redfern and Hunter on International Arbitration (Oxford University Press, 2015) 569 [10.02]; Rowan Platt, 'The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?' (2013) 30(5) *Journal of International Arbitration* 531, 532. See also *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257, 260, 262 (Lord Diplock).

[210] *Ku-Ring-Gai Council v Ichor Constructions Pty Ltd* (2019) 99 NSWLR 260, 271 [53], 275 [69] (Bathurst CJ); *L v B* [2016] 4 HKC 254, 260 [12]–[13] (Mimmie Chan J).

[211] *CETA* (n 10) art 8.28(2).

[212] Ibid art 8.28(2).

[213] Ibid art 8.28(9)(a).

[214] Frank Hoffmeister and Mattijs Kempynck, 'Article 8.28 – Appellate Tribunal' in Marc Bungenberg and August Reinisch (eds), *CETA Investment Law: Article-by-Article Commentary* (Bloomsbury Publishing, 2022) 610, 617 [17].

[215] See Pierre Mayer, 'Seeking the Middle Ground of Court Control: A Reply to I.N. Duncan Wallace' (1991) 7(4) *Arbitration International* 311.

detract from the enforceability of the body's awards under the *NYC*, provided the appeal mechanism functions similarly to the *CETA* Appellate Tribunal. Specifically, art 8.28(9)(c) of *CETA* provides that an award issued by the first-instance Tribunal only becomes final and no action for enforcement of that award may be brought until the time limits in art 8.28(9)(a) and (c) have expired and the other conditions provided there are fulfilled. Correspondingly, art V(1)(e) of the *NYC* provides that the recognition and enforcement of an award which 'has *not yet become binding* on the parties'[216] may be refused by domestic courts. In this respect, the *NYC* gives effect to recourse before an appellate mechanism by only allowing awards to be enforced under the *NYC* when the time limit for appeal has expired.[217] Importantly, the finality of an award is a direct consequence of the parties' choice of submitting a dispute to arbitration. But if parties can agree to finality in the traditional sense by virtue of party autonomy, then the principle of party autonomy – which is itself a 'bedrock of the arbitral system' – would equally permit parties to include appeal procedures if they so wished.[218] As observed by Born, there is no reason to not give full effect to internal appellate review where the parties have agreed to it and indeed, 'this result is required by the [*NYC*]'.[219]

Further, the Appellate Tribunal's awards on appeal are final awards for the purposes of enforcement under art 8.41 of *CETA*, allowing the award on appeal – or the original appealed award if the appeal fails – to be enforceable under the *NYC* provided the relevant deadlines have passed.[220] In this way and for the reasons above, the availability of recourse to an internal appeal mechanism in an ISDS system like *CETA*'s does not abolish finality. Rather, it merely delays 'the achievement of finality'.[221] Finality itself is unaffected once the relevant time limits have elapsed and the other preconditions for the enforcement of an award in art 8.28(9) of *CETA* are fulfilled. Although the inclusion of an appeal mechanism in an ISDS body like the *CETA* Tribunal means that finality is not 'final' in an immediate sense, the award of that body is nevertheless the 'ultimate product of the parties' agreement to submit their differences or dispute to arbitration'.[222] If the ability to appeal awards is encompassed within the scope of authority conferred on the relevant ISDS mechanism by the parties,[223] then an award nevertheless remains binding, enforceable, and can be characterised as arbitral *precisely because* it is made within the scope of that authority conferred on the ISDS mechanism by the parties.[224] As such, an appeal mechanism

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[216] Emphasis added.
[217] Born (n 141) 3162; von Walter and Andrisani (n 15) 59; Kaufmann-Kohler and Potestà (n 142) 59–60 [163].
[218] Knull III and Rubins (n 154) 534; Platt (n 209) 534.
[219] Born (n 141) 3162.
[220] *CETA* (n 10) art 8.28(9)(d).
[221] Cf Platt (n 209) 542; Erin E. Gleason, 'International Arbitral Appeals: What Are We So Afraid Of?' (2007) 7(2) *Pepperdine Dispute Resolution Journal* 269, 285–286.
[222] See *TCL* (n 135) 575–576 [110] (Hayne, Crennan, Kiefel and Bell JJ).
[223] As contained in the relevant treaty, as it is with *CETA*.
[224] See *TCL* (n 135) 550 [17] (French CJ and Gageler J).

like the one contained in *CETA* would be unlikely to present issues with respect to enforcement.

C Consequences for Enforceability

If it is accepted that a non-ICSID award from a body like the *CETA* Tribunal is that of a permanent arbitral body pursuant to an agreement in writing, enforcement in third States under the *NYC* would likely be conceivable. Most non-ICSID rules require a seat to be specified by the parties or chosen by the tribunal.[225] Provided that the parties have chosen a seat that is not the State where enforcement is sought, the territorial requirement in art I(1) of the *NYC* will be met.[226]

While *CETA* provides in art 8.41(5) that it is intended that the *CETA* Tribunal's awards are 'arbitral awards' for the purposes of the *NYC*, parties to *CETA* cannot prescribe between themselves how a third-party court will characterise a *CETA* award.[227] Rather, the question of whether an award of a system like *CETA*'s is an 'arbitral award' under the *NYC* ultimately remains within the competence of the national courts having jurisdiction over enforcement.[228] Nevertheless, national courts are still likely to characterise *CETA* awards as 'arbitral' for the purposes of enforcement under the *NYC* because, as was outlined in the reasons given in the preceding sections, the process for the making of awards by the *CETA* Tribunal has the same characteristics as the process for making arbitral awards generally. Those characteristics are, relevantly:[229] an arbitration agreement between the parties is present, as embodied in the State's standing offer to arbitrate via the route prescribed in the relevant treaty and the claimant investor's submission of a claim;[230] a voluntary submission of the parties is made for the reaching of a final and legally binding settlement of their dispute;[231] that binding and final result is provided by a non-State decision-making mechanism; and, a third neutral party renders that result in a court-like procedure.[232] As such, awards of a body like the *CETA* Tribunal will likely have the advantage of being subject to the extensive pro-enforcement regime of the *NYC*.[233]

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[225] See, eg, UNCITRAL Arbitration Rules (2021) art 18.
[226] AJ van den Berg, 'Non-Domestic Arbitral Awards Under the 1958 *New York Convention*' (1986) 2 *Arbitration International* 191, 206.
[227] Marc Bungenberg and Anna Holzer, 'Article 8.41 – Enforcement of Awards' in Marc Bungenberg and August Reinisch (eds), *CETA Investment Law: Article-by-Article Commentary* (Bloomsbury Publishing, 2022) 876, 900 [83].
[228] Ibid 900–901 [83]–[84].
[229] Ibid 902–904 [86].
[230] See Sections IV and VA.
[231] See Section IV.
[232] Ibid. Although the parties cannot select their arbitrators, this is not fatal for the reasons given in Sections IV and VA.
[233] Marike R.P. Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016) 1–3.

The enforcement of *CETA*'s decisions is governed by the laws of the nation where the enforcement is sought.[234] If enforcement is sought in Australia, the award may be enforced in a court of a State or Territory or in the Federal Court as if the award were a judgment of that court.[235] As such, because awards of an ISDS system like *CETA*'s have the conventional characteristics of 'arbitral awards' for the reasons above, it is likely that national courts will consider them that way. This means that the risk that these awards would be unenforceable in Australia, or in a third State if Australia were party to an ISDS claim under a *CETA*-like ISDS system, is greatly reduced.

VI CONCLUSION

In light of recently reignited discussions about Australia's inclusion of ISDS in its investment treaties and the prospect of ISDS being utilised in response to the Commonwealth Government's gas market intervention, uncertainty lingers about the future of Australia's use of ISDS. This article has argued that instead of outright refusing to include ISDS in investment treaties, Australia could reap benefits from incorporating features of *CETA*'s ISDS system into future treaties as that system mitigates many traditional concerns about ISDS.

In particular, the features discussed address longstanding issues pertaining to the independence and impartiality of ISDS tribunal members and meaningfully ensures that their independence and impartiality is likely to be maintained. Provisions of *CETA* also prevent ISDS tribunals from substantively reviewing domestic law by only allowing domestic law to be considered as a matter of fact, which ensures that decisions of national courts cannot be effectively 'appealed' to ISDS bodies. However, this feature does not preclude ISDS tribunals from reviewing the conformity of a State's measures with their respective investment treaty obligations. Nevertheless, *CETA*'s system is especially attractive because it limits the extent to which ISDS under *CETA* can be used to 'bypass' or 'outflank' the effect of decisions made by domestic courts by giving States greater scope to regulate through the framing of its right to regulate and expropriation provisions. Arguments to adopt *CETA*'s enforcement model are further strengthened by the fact that enforcing awards of such a body in Australia would not constitute an impermissible delegation of judicial power to the ISDS body. Further, awards of a body like the *CETA* Tribunal would be enforceable as an award of a 'permanent arbitral body' pursuant to the *NYC*. Australia adopting multilateral investment treaties with these features will therefore likely contribute to enhancing the legitimacy of ISDS, and above all, would provide Australia with a defensible ISDS scheme for preserving sovereignty and preventing circumvention.

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[234] *CETA* (n 10) art 8.41(4).

[235] *International Arbitration Act 1974* (Cth) s 8(2)–(3).