**Dr Luke Nottage** ***BCA/LLB/PhD (VUW), LLM (Kyoto)***
Professor of Comparative and Transnational Business Law
Co-Director, Australian Network for Japanese Law (ANJeL)
Associate Director, Centre for Asian and Pacific Law (CAPLUS)

23 September 2016

Senate (Foreign Affairs Defence and Trade) Committee
Australian Parliament
Canberra

Dear Committee

***Submission to Senate Inquiry into the TPP Agreement[1] - Investment Chapter***

On 19 February 2016 I made a Submission in support of ratification (attached as **Annex 1**), to the JSCOT inquiry into the same treaty.[2] Please consider those arguments, noting also that since then:

1. Appendices A and B of my original JSCOT Submission have been elaborated into a more detailed analysis of both the substantive and ISDS commitments contained in the TPP's investment chapter, in this paper now accepted for publication in a special issue from a May conference at UMelbourne on "megaregional" treaties:
   - "The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification", *Melbourne Journal of International Law*, forthcoming, http://ssrn.com/abstract=2767996

   The first part of that paper further explains how **economies in the broader region, including potential future signatories to the TPP, remain generally comfortable with ISDS-backed commitments**.

2. **The award dismissing the first and only ever ISDS claim against Australia, brought by Philip Morris regarding tobacco packaging legislation** pursuant to a much more pro-investor first-generation (1993) investment treaty with Hong Kong, has been made public. A summary of this *cause celebre,* as well as broader lessons to be drawn in terms of

[1] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TPP

[2] http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016

Faculty of Law
New Law Building F10
Eastern Avenue
The University of Sydney
NSW 2000 Australia

**T** +61 2 9351 0210
**F** +61 2 9351 0200

**sydney.edu.au/law/anjel**

ABN 15 211 513 464
CRICOS 00026A

costs, delays, transparency, the existence or otherwise of "regulatory chill", and more pro-host-state interpretations by ISDS tribunals over the last decade (found recently through econometric research), are set out in:

- "Case Note: *Philip Morris Asia v Australia*" (with Jarrod Hepburn) *Journal of World Investment and Trade*, forthcoming, http://ssrn.com/abstract=2842065

3. **Potential for Australia to take leadership in negotiating further balanced investment treaties**, including aspects of contemporary EU preferences, have been further explored in:
   - "Models for Investment Treaties and Arbitration in the Asian Region", manuscript for the *Indian Journal of Arbitration* (attached as **Annex 2**)
   - "Rebalancing Investment Treaty Arbitration: Two Approaches" *Journal of World Investment and Trade,* forthcoming, http://ssrn.com/abstract=2685941

   Even within the framework of the TPP, the Australia government should therefore consult publically (as no longer bound by confidentiality) and:
   - propose already a detailed Code of Conduct for ISDS arbitrators (as signatories committed to do anyway before the TPP comes into effect), as under our FTA with China (which parallels the Code of Conduct agreed in the EU-Singapore FTA);
   - declare criteria and perhaps even a list of arbitrators it will choose in the (unlikely) event of an ISDS claim (a list is provided for in the China-Australia FTA but Australia could unilaterally adopt those nominees or another list, or at least detailed criteria for arbitrators)

4. My detailed analysis of ISDS issues and practice in Australia, for a **Canadian thinktank project comparing other developed economies**, has been published as:
   - "Investor-State Arbitration Policy and Practice in Australia", CIGI Investor-State Arbitration Series, Paper No 6 (June 2016), https://www.cigionline.org/publications/investor-state-arbitration-policy-and-practice-australia; also http://ssrn.com/abstract=2685941

I would be happy to elaborate at any public hearings.

THE UNIVERSITY OF SYDNEY

# Annex 1 – original JSCOT submission

19 February 2016

Joint Standing Committee on Treaties
Australian Parliament
Canberra

***Submission to JSCOT Inquiry into the TPP Agreement[3] - Investment Chapter***

From an Australian (treaty practice) perspective, this Chapter is mostly more of the same, regarding both:

- substantive protections for foreign investors (as explained in **Appendix A**); and
- the option of investor-state dispute settlement (ISDS, **Appendix B** below).

Perceptions about whether this is a good or bad thing will no doubt vary, based unfortunately in part on political and media differences which have intensified over recent years, especially regarding ISDS (**Appendix C**). These have undermined longstanding bipartisan support for more liberal trade and investment regimes.[4]

Over 2011-13, the Gillard Government (but not the earlier Rudd Government) took the unusual step of eschewing ISDS completely in Australia's future treaties. Since 2014 the Coalition Government has resumed the practice of including them on a case-by-case assessment, with increasing safeguards for host state regulatory space. That has also been the approach taken by several other countries that have reassessed the pros and cons of ISDS-backed investment treaty protections, especially those subjected to their first ISDS claim (like Australia with respect to the unsuccessful claim by Philip Morris).[5] Those countries include current TPP treaty partners such as Vietnam (an FDI-importer),[6] as well potential further candidates such as Korea[7] and Thailand[8] (FDI-exporters).

---

[3] http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016

[4] See David Uren, *Takeover: Foreign Investment and the Australian Pysche* (Black Inc., 2015), discussed at: http://blogs.usyd.edu.au/japaneselaw/2015/10/foreign_investment_regulation.html

[5] Leon Trakman and David Musayelyan, "The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration" 31(1) ICSID Review 194-218 (2016).

[6] Thanh Tu Nguyen and Thi Chau Quynh Vu, "Investor-State Dispute Settlement from the Perspective of Vietnam: Looking for a "Post-Honeymoon" Reform" TDM 1 (2014) http://www.transnational-dispute-management.com/article.asp?key=2041.

Australia's recent domestic politics should not obscure this broader international and historical context for investment treaties, especially as we cannot expect much objective analysis and debate by US leaders and policy-makers during their country's election year. There are aspects of the TPP's investment chapter that arguably could be improved (as indicated in my **Appendices A and B**). But some can be addressed even before the TPP comes into force (eg detailed criteria for arbitrator behaviour), and overall this chapter should not become a deal breaker.

The Australian government should rather focus now on recommendations by various commentators since 2014 (including myself, Chief Justice Robert French, and Senate committees)[9] to develop a model investment chapter or treaty or at least provisions. These could even include multiple options regarding ISDS procedures, including (a variant of) the recent EU proposal to the US for a permanent investment court for their (TTIP) FTA currently under negotiation. This concept has already found its way into the recent EU-Vietnam FTA.[10] It may appeal especially in Australia's ongoing bilateral FTA negotiations with India and Indonesia, which have been developing significantly more pro-host-state model investment treaty provisions, partly in the wake of BIT claims brought by Australian investors. In the longer run, this may lead to a broader Asia-Pacific FTA regime (beginning with the ASEAN+6 or RCEP FTA already under negotiation) that combines EU-style innovations with the more US-inspired provisions of the TPP investment chapter.

I would be happy to elaborate on any of these points at public hearings. I also invite JSCOT members or their staffers to attend (gratis) a public seminar on the TPP organized by Sydney Law School on 17 March 2016.[11]

---

[7] Luke Nottage, "Investment Treaty Arbitration Policy in Australia, New Zealand – and Korea?" 25(3) Journal of Arbitration Studies 185-226 (2015); Sydney Law School Research Paper No. 15/66. Available at SSRN: http://ssrn.com/abstract=2643926

[8] Luke Nottage and Sakda Thanitcul, "The Past, Present and Future of International Investment Arbitration in Thailand" (unpublished manuscript, February 2016, available on request).

[9] http://blogs.usyd.edu.au/japaneselaw/2015/06/senates_report_treaties.html

[10] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1449

[11] http://sydney.edu.au/news/law/457.html?eventcategoryid=39&eventid=11182

Appendix A

**"The TPP Investment Chapter: Mostly More of the Same"**

[Published in: *ACICA Review* (December 2015)]

On 5 October the Trans-Pacific Partnership[12] (TPP) FTA was substantially agreed among 12 Asia-Pacific countries (including Japan, the US and Australia), and the lengthy text was released publically on 5 November 2015. Commentators are now speculating on its prospects for ratification,[13] as well as pressure already for countries like China and Korea to join and/or accelerate negotiations for their Regional Comprehensive Partnership (ASEAN+6) FTA in the region.[14] There has also been considerable (and typically quite polarised) media commentary on the TPP's investment chapter, especially investor-state dispute settlement (ISDS). The *Sydney Morning Herald*, for example, highlighted a remark by my colleague and intellectual property (IP) rights expert, A/Prof Kimberlee Weatherall, that Australia "could get sued for billions for some change to mining law or fracking law or God knows what else".[15] Other preliminary responses have been more measured, including some by myself (in *The Australian* on 6 November)[16] or Professor Tania Voon[17] within Australia, and other general commentary from abroad.[18]

Based partly on an ongoing ARC joint research project on international investment dispute management, with a particular focus on Australia and the Asia-Pacific,[19] I briefly introduce the scope of ISDS-backed substantive protections for foreign investors in the

---

[12] http://dfat.gov.au/trade/agreements/tpp/pages/trans-pacific-partnership-agreement-tpp.aspx

[13] http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp_whats_next.html, with a shorter version at http://theconversation.com/as-asia-embraces-the-trans-pacific-partnership-isds-opposition-fluctuates-50979 [**Appendix C**]

[14] http://www.eastasiaforum.org/2015/10/29/the-tpp-isnt-a-done-deal-yet/

[15] http://www.smh.com.au/federal-politics/political-news/australia-could-be-sued-for-billions-by-foreign-companies-for-new-laws-under-tpp-20151106-gksbjx.html

[16] http://www.theaustralian.com.au/national-affairs/foreign-affairs/experts-test-andrew-robb-tpp-safeguard-claims/story-fn59nm2j-1227598099647?sv=e0536f8755bcf0b6f8b0482164737065&memtype=anonymous

[17] http://www.sbs.com.au/news/article/2015/11/06/calls-trans-pacific-partnership-be-independently-assesed

[18] https://www.iareporter.com/articles/a-first-glance-at-the-investment-chapter-of-the-tpp-agreement-a-familar-us-style-structure-with-a-few-novel-twists/; Amokura Kawharu, "TPPA: Chapter 9 on Investment", presented at the AFIA/USydney forum on 26 November 2015 and downloadable via http://sydney.edu.au/law/caplus/events.shtml.

[19] Armstrong, Shiro Patrick and Kurtz, Jürgen and Nottage, Luke R. and Trakman, Leon, The Fundamental Importance of Foreign Direct Investment to Australia in the 21st Century: Reforming Treaty and Dispute Resolution Practice (December 1, 2013) Australian Centre for International Commercial Arbitration (ACICA) Review, Vol. 2, No. 2, pp. 22-35, 2014; http://ssrn.com/abstract=2362122

TPP, compared especially to the recently-agreed bilateral FTAs with Korea and China.[20] My separate **[Appendix B]** online analysis briefly compares the ISDS provisions themselves.[21] Since publishing this assessment, the Australian government has also released a helpful 7-page summary of the entire Investment chapter.[22]

Overall, the risks of ISDS claims appear similar to those under Australia's FTAs (and significantly less than some of its earlier generation of standalone investment treaties). However, some specific novelties and omissions are highlighted below, and issues remain that need to be debated more broadly such as the interaction between the investment and IP chapters (as indeed raised by both A/Prof Weatherall and myself in last year's Senate inquiry into the "Anti-ISDS Bill").[23] The wording of the TPP's investment chapter derives primarily from US investment treaty and FTA practice, which has influenced many other Asia-Pacific countries (including Australia) in their own international negotiations. Yet the European Union is now developing some interesting further innovations to recalibrate ISDS-based investment commitments. These include a standing investment court with a review mechanism to correct substantive errors of law, developed especially for its ongoing (TTIP) FTA negotiations with the US, but reportedly just accepted in the EU's FTA with Vietnam (which interestingly had agreed to a more traditional ISDS procedure in the TPP).[24]

The TPP's investment chapter's substantive commitments by host states to foreign investors, aimed at encouraging more (but also potentially higher-quality) foreign investment, include for example:

(1) **non-discrimination** compared to local investors (ie national treatment "in like circumstances": Art 9.4) as well as third-country investors (most-favoured-nation treatment "in like circumstances": Art 9.5), both before and after establishment or admission of the investment, but with some listed exceptions;
(2) **fair and equitable treatment**, tied to the evolving customary international law standard (elaborated in Annex 9-A), including a specific reference to denial of justice through local adjudicatory proceedings (contrary to "the principle of due process embodied in the principal legal systems of the world": Art 9.6);
(3) **compensation for direct and indirect expropriation** (Art 9.7).

---

[20] http://dfat.gov.au/trade/agreements/Pages/trade-agreements.aspx
[21] http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp_investment_isds.html
[22] Available (with other chapter summaries) via http://dfat.gov.au/trade/agreements/tpp/summaries/Pages/summaries.aspx
[23] Nottage, Luke R., The 'Anti-ISDS Bill' Before the Senate: What Future for Investor-State Arbitration in Australia? (August 20, 2014) International Trade and Business Law Review, Vol. XVIII, pp. 245-293, 2015; http://ssrn.com/abstract=2483610
[24] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409

By contrast, the Australia-China FTA signed on 17 June 2015 (and now expected to be ratified soon, after a change of heart by the main opposition Labor Party),[25] had more limited non-discrimination commitments from China.[26] It also lacked a commitment to FET, although some protection remains available (not enforceable through ISDS) under the 1988 bilateral investment treaty, which will be reconsidered along with the new FTA's investment chapter during a work program after it comes into force.[27]

The TPP's main substantive commitments try to build in public welfare considerations, for arbitral tribunals to assess if when foreign investors allege violations, eg by further elaborating what constitutes "in like circumstances" as well as the now-familiar Annex (9-B, derived from US domestic law and then treaty practice) on what constitutes indirect expropriation. Article 9.15 adds that a host state may use measures "that it considers appropriate to ensure that investment … is undertaken in a manner sensitive to environmental, health or other regulatory objectives", but only if "consistent with this Chapter" (ie non-discriminatory etc). The TPP's Preamble also acknowledges the member states' "inherent right to regulate".

By contrast, investment chapters in Australia's FTAs with Korea (signed in 2014), China and even ASEAN-NZ (signed in 2009) included a general exception, based on GATT Art XX for trade in goods, allowing host states to introduce measures necessary to protect public health etc provided these were not applied in a discriminatory manner or as a disguised restriction on investment. An advantage of this approach is the extensive jurisprudence from WTO panels applying the GATT exception. Disadvantages include some obvious as well as subtle differences between trade and investment law,[28] as well as a potentially higher evidentiary burden on the state seeking to justify its measures.

Anyway, the TPP limits the scope of protection available to investors in specified areas raising strong public interest concerns, such as public debt claims (Annex 9-G) and tobacco control measures. Claims over the latter can be completely precluded in advance by member states, under the General Exceptions chapter (Art 29.5). This is clearly in response to arbitration claims brought by Philip Morris against Australia (and earlier

---

[25] Nottage, Luke R., The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration in Australia (November 3, 2015) Sydney Law School Research Paper No. 15/97; http://ssrn.com/abstract=2685941. Labour voted with the Government in the Senate to pass the necessary tariff reduction legislation on 9 November 2015: http://trademinister.gov.au/releases/Pages/2015/ar_mr_151109.aspx.

[26] http://lexbridgelawyers.com/wp-content/uploads/2015/06/Lexbridge_ChAFTA-Investment.pdf

[27] http://blogs.usyd.edu.au/japaneselaw/2015/06/compromised_isds_china.html

[28] See generally the book [from] my ARC project co-researcher Prof Jurgen Kurtz: http://www.cambridge.org/us/academic/subjects/law/international-trade-law/wto-and-international-investment-law-converging-systems

Uruguay),[29] although such a sector-specific exclusion had earlier been resisted by the US as setting a dangerous precedent for future treaty negotiations. The TPP Investment chapter also contains the usual "denial of benefits" provision (Art 9.14) to limit scope for forum-shopping, as alleged in the Philip Morris case under Australia's old BIT with Hong Kong.

Finally, despite such provisions aimed at limiting host state liability exposure to ISDS (and indeed inter-state arbitration) claims, one Australian journalist refers to a US lawyer's opinion in asserting that the MFN provision allows "foreign corporations from TPP states to make a claim against Australia based on the ISDS provisions in *any other trade deal* Australia has signed".[30] This is incorrect in that they overlook the Schedule of Australia for the overarching TPP "Annex II – Investment and Cross-border Trade in Services", which expressly excludes past treaties from the scope of MFN treatment.[31] Such (still uncorrected) media coverage illustrates the difficulties that the Australian government now faces in ensuring passage of TPP-related legislation through the Senate in order to be able to ratify this major regional agreement.

---

[29] https://www.ag.gov.au/tobaccoplainpackaging

[30] http://www.theguardian.com/business/2015/nov/10/tpps-clauses-that-let-australia-be-sued-are-weapons-of-legal-destruction-says-lawyer?CMP=share_btn_tw (original emphasis).

[31] http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/annex-ii-schedule-australia.pdf

Appendix B

**"ISDS in the TPP Investment Chapter: Mostly More of the Same"**

[Published in: 20 *KLRCA Newsletter* (Oct-Dec 2015)]

On 5 October the Trans-Pacific Partnership[32] (TPP) FTA was substantially agreed among 12 Asia-Pacific countries (including Malaysia, Australia, Japan and the US), and the lengthy text was released publically on 5 November 2015. Commentators are now speculating on its prospects for ratification,[33] as well as pressure already for countries like China and Korea to join and/or accelerate negotiations for their Regional Comprehensive Partnership ("RCEP" or ASEAN+6) FTA in the region.[34] There has also been considerable (and sometimes quite heated) media commentary on the TPP's investment chapter 9, especially investor-state dispute settlement (ISDS) protections.[35]

As outlined by Ioannis Konstantinidis in the previous KLRCA Newsletter,[36] the ISDS alternative procedure to inter-state arbitration (itself found separately in Chapter 28 of the TPP, as in almost all investment treaties) emerged as a common extra option for foreign investors to enforce their substantive rights[37] if their home states did not wish to pursue a treaty claim on their behalf, for diplomatic, cost or other reasons. This mechanism has been seen as particularly important for credible commitments by developing or other countries with national legal systems perceived as not meeting international standards for protecting investors. ISDS provisions have gradually come to be accepted in treaties concluded in the Asian region, leading recently to more arbitration claims (albeit off a comparatively low base),[38] as explained by Loretta Malintoppi in the previous Newsletter,[39]

---

[32] http://dfat.gov.au/trade/agreements/tpp/pages/trans-pacific-partnership-agreement-tpp.aspx

[33] http://theconversation.com/as-asia-embraces-the-trans-pacific-partnership-isds-opposition-fluctuates-50979

[34] http://www.eastasiaforum.org/2015/10/29/the-tpp-isnt-a-done-deal-yet/

[35] See eg http://www.smh.com.au/federal-politics/political-news/australia-could-be-sued-for-billions-by-foreign-companies-for-new-laws-under-tpp-20151106-gksbjx.html

[36] "Effective Dispute Resolution Mechanisms" 19 KLRCA Newsletter 10-11 July-September 2015) at http://klrca.org/downloads/newsletters/2015Q3newsletter.pdf

[37] For my preliminary analysis of core substantive protections offered in the TPP investment chapter, see http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp_investment.html (with a version also published in the December 2015 issue of *ACICA News*, via www.acica.org).

[38] Nottage, Luke R. and Weeramantry, Romesh, Investment Arbitration for Japan and Asia: Five Perspectives on Law and Practice. FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA, V. Bath and L. Nottage, eds., Routledge, pp. 25-52, 2011; Sydney Law School Research Paper No. 12/27. Available at SSRN: http://ssrn.com/abstract=2041686

[39] "Is There an 'Asian Way' for Investor-State Dispute Resolution" 19 KLRCA Newsletter 12-20 (July-September 2015) at http://klrca.org/downloads/newsletters/2015Q3newsletter.pdf

The inclusion of ISDS in the TPP is not too surprising given the involvement already of a developing countries such as Vietnam, and even a middle-income country like Malaysia with a complicated political and legal system (both already subject to occasional investor-state arbitration claims). Incorporating ISDS is also explicable because the TPP aims to attract further partners. These include capital-importing developing countries like Indonesia, whose President recently declared that it "intends to join the TPP",[40] although this will be very difficult to achieve domestically and the country is still reviewing old BITs partly due to some recent arbitration claims – including from an Australian investor.[41] Other potential candidates include capital-exporting countries like Korea, which pressed strongly for ISDS in bilateral FTAs – even with Australia and New Zealand.[42] China, emerging as a major exporter and importer of capital, has also come to favour ISDS protections. This is important because some already urge it to join a further expanded TPP[43] and because China already is party to the RCEP FTA negotiations currently involving many existing TPP partners, including Australia and Malaysia.

However, the arguments are more finely balanced for including the ISDS option for treaty commitments between developed countries with strong and familiar national legal systems. Intriguingly, when the TPP is signed Australia and New Zealand proposed to exchange official side letters excluding its ISDS provisions as between themselves.[44] They also obtained such a bilateral carveout in their FTA with ASEAN signed in 2009,[45] but partly for the reason that that the two countries were then considering adding an Investment Protocol to their longstanding bilateral FTA for goods and services. That 2011 Protocol also ended up excluding ISDS, ostensibly because Australia and New Zealand have strong mutual trust and understanding of each other's legal system. This argument does gain force in light of the conclusion in 2008 of a Trans-Tasman treaty on enforcing

---

[40] http://www.theguardian.com/world/2015/oct/27/indonesia-will-join-trans-pacific-partnership-jokowi-tells-obama

[41] Nottage, Luke R., Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis of *Planet Mining v Indonesia* and Regional Implications (April 14, 2014). Transnational Dispute Management, Vol. 12, No. 1, pp. 1-18, 2015; http://ssrn.com/abstract=2424987

[42] Nottage, Luke R., Investment Treaty Arbitration Policy in Australia, New Zealand – and Korea? (August 13, 2015). Journal of Arbitration Studies, Vol. 25, No. 3, pp. 185-226, 2015; http://ssrn.com/abstract=2643926

[43] http://www.lowyinterpreter.org/post/2015/11/03/TPP-Australia-should-take-the-lead-to-bring-in-China-and-Indonesia.aspx

[44] http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-new-zealand-investor-state-dispute-settlement-trade-remedies-and-transport-services.PDF

[45] Bath, Vivienne and Nottage, Luke R., The ASEAN Comprehensive Investment Agreement and 'ASEAN Plus' – The Australia-New Zealand Free Trade Area (AANZFTA) and the PRC-ASEAN Investment Agreement (September 26, 2013) in: INTERNATIONAL INVESTMENT LAW: A HANDBOOK, M. Bungenberg, J. Griebel, S.Hobe & A. Reinisch, eds., Nomos Verlagsgellschaft: Germany, 2015; also at http://ssrn.com/abstract=2331714

court judgments (and broader regulatory cooperation), in force from 2013 and unique among Asia-Pacific countries.[46] Australia and New Zealand have also achieved remarkable economic integration and business law harmonisation in other respects, albeit mainly through non-treaty mechanisms.[47]

Australia also omitted ISDS in its bilateral FTA concluded with Malaysia in 2012, consistently with the Gillard Government's Trade Policy Statement of April 2011[48] – abandoned by the new Coalition Government after it won the general election on 7 September 2013, and reverted to including ISDS in treaties on a case-by-case assessment.[49] However, omitting ISDS protection in the Malaysia-Australia FTA was largely symbolic since protection remained for respective countries' investors under the ASEAN-Australia-NZ FTA.

By contrast, Australia does not propose any TPP side-letter with the US carving out ISDS, even though their bilateral FTA in 2004 also omitted ISDS. The official explanation given for the latter development was that both these countries also held great trust in each other's national legal system (despite the *Loewen* case brought by a Canadian investor against the US around that time, where a tribunal chaired by a former Chief Justice of Australia sharply criticized an underlying Mississippi court procedure).[50] Nor do there appear to be any other bilateral carve-outs of ISDS envisaged among TPP partners.

In terms of the ISDS procedures themselves, these also tend to follow the provisions in the US Model BIT and its FTAs from around 2004, which in turn have influenced the FTAs drafted by other TPP partners such as Australia.[51] For example, the TPP includes time limits for bringing claims (Art 9.20.1). It also has a now standard "fork in the road" provision (Art 9.20.2, intensified for four of the 12 countries through Annex 9-J) precluding situations as in the dispute brought by Philip Morris, whereby it claimed both before the

---

46 http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/D8A36F21714B92ACCA25748D0004C582

47 Nottage, Luke R., Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era (October 4, 2011). Sydney Law School Research Paper No. 09/125; http://ssrn.com/abstract=1509810

48 Nottage, Luke R., The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic's View of Australia's 'Gillard Government Trade Policy Statement' (June 10, 2011). Transnational Dispute Management; also at http://ssrn.com/abstract=1860505

49 http://dfat.gov.au/trade/topics/pages/isds.aspx

50 http://www.state.gov/documents/organization/22094.pdf

51 Nottage, Luke R. and Miles, Kate, 'Back to the Future' for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests (June 25, 2008). In L Nottage & R Garnett (eds), 'International Arbitration in Australia', Federation Press: Sydney, 2010; Journal of International Arbitration, Vol. 26, No.1, pp. 25-58, 2009; http://ssrn.com/abstract=1151167

High Court of Australia under constitutional law and (in 2011) before an ISDS tribunal under international treaty law.[52]

As in Australia's FTA with Korea (and to a somewhat lesser extent with China), Article 9.23 sets out extensive provisions for transparency in proceedings, including public hearings (still rare in WTO inter-state dispute resolution) and admission of *amicus curiae* briefs from relevant third parties. Article 9.22 requires arbitral tribunals to decide preliminary jurisdictional objections on a fast-track basis, and may award lawyer and other costs against the claimant after considering whether the claim was frivolous. (However, it does not have to award such costs, and nor is there a general "loser-pays" rule for costs as under the recent Canada-EU FTA: cf TPP Art 9.28.3).[53] An (inter-state) Commission can issue an interpretation of a TPP provision that then binds the arbitral tribunal (Art 9.24.3).

However, there is some debate among commentators about whether such a Commission can make such a binding interpretation regarding a pending dispute,[54] and the China-Australia FTA wording had helpfully clarified that it can. That FTA also adds an innovative provision, not found in the TPP (or any other FTA involving Australia) allowing a host state to issue a "public welfare notice" to the home state of the foreign investor, declaring that it invokes the (Article 9.11.4) general exception for public health measures etc. This triggers inter-state consultations and a requirement on the host state to publically announce its view on the home state's invocation of the exception.

Partly offsetting this omission in the TPP, it adds the option (in the General Exceptions chapter) of a host state precluding claims regarding tobacco control measures. More generally, the investment chapter adds that that the arbitral tribunal can only award limited damages if the foreign investor successfully claims that it was thwarted in attempting to make an initial investment, due to the host state violating substantive treaty commitments. The tribunal must also issue a draft award to the disputing parties for comment (Art 9.22.10), albeit not to the public or even the home state of the investor. Release of draft decisions is a feature of WTO inter-state dispute resolution, and is found already in Australia's FTA investment chapters with Chile (signed in 2008) and Korea.

---

[52] https://www.ag.gov.au/tobaccoplainpackaging

[53] http://ec.europa.eu/trade/policy/in-focus/ceta/

[54] See generally Burch, Micah and Nottage, Luke R. and Williams, Brett G., Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century (May 24, 2012). University of New South Wales Law Journal, Vol. 35, No. 3, pp. 1013-1040, also at SSRN: http://ssrn.com/abstract=2065636; Ishikawa, Tomoko, ""Keeping Interpretation in Investment Treaty Arbitration 'on Track': The Role of States Parties" TDM 1 (2014) www.transnational-dispute-management.com/article.asp?key=2048

However, the TPP does not establish an appellate review mechanism, to correct for errors of law (as opposed to procedure or jurisdiction) as under the WTO regime. There is only a commitment to consider such a mechanism if and when developed elsewhere for international investment disputes (Art 9.22.11). The EU is now expressing stronger interest, including in its ("TTIP") FTA negotiation with the US, where it recently even mooted the possibility of an international investment court.[55] Indeed, the EU has already reportedly agreed on this sort of court (including appellate review for errors of law) in an agreement just reached with Vietnam,[56] despite the latter being also party to the TPP and its more traditional ISDS mechanism.

Article 9.21.6 further envisages that, before the TPP comes into force, member states will "provide guidance" on extending the Code of Conduct for arbitrators (already in Chapter 28 for inter-state arbitrations) to ISDS disputes, as well as "other relevant rules or guidelines on conflict of interest". The Australian government will presumably point to the Australia-China FTA, where such a Code of Conduct has already been set out for ISDS arbitrators, and reference may also be made to further proposals now being raised in the EU and beyond.

In addition, the TPP allows ISDS claims not only for breaches of the substantive commitments set out in the treaty itself (as in the Australia-China FTA), but also where the host state has contravened its "investment authorization" or specified types of "investment agreement" relied upon by the harmed foreign investor. The latter scenarios are also covered in the Korea-Australia FTA, but the TPP goes on to expressly allow the host state then to raise a related counterclaim or set-off against the foreign investor (Art 9.18.2). Annex 9-L also restricts ISDS proceedings if certain other arbitration procedures have been agreed between the foreign investor and the host state relating to their investment agreement. Oddly, however, this includes arbitration agreed under ICC or LCIA Rules, but not the Rules of major arbitral institutions in TPP states such as KLRCA.

Finally, each member state commits to "encouraging" its enterprises to "voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility" endorsed or supported by the relevant state. This could extend, for example, to (local and foreign) retailers in Australia with respect to adopting the Accord on Fire and Building Safety in Bangladesh, which then locks firms to a separate enforcement regime underpinned by international arbitration law.[57]

Nonetheless, it remains to be seen whether all this is enough to assuage critics of ISDS and allow ratification of the TPP in Australia, the US itself and (arguably to a lesser

[55] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364
[56] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409
[57] http://bangladeshaccord.org/about/

extent) other TPP partners. The investment chapter's substantive protections also largely track existing FTAs concluded by and among TPP partners. But this will provide little comfort to those who remain firmly opposed to any form of ISDS,[58] or concerned more broadly about cross-border investment.[59]

[58] Cf eg Nottage, Luke R., The 'Anti-ISDS Bill' Before the Senate: What Future for Investor-State Arbitration in Australia? (August 20, 2014) International Trade and Business Law Review, Vol. XVIII, pp. 245-293, 2015; http://ssrn.com/abstract=2483610

[59] Cf eg Nottage, Luke R., The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration in Australia (November 3, 2015) Sydney Law School Research Paper No. 15/97; http://ssrn.com/abstract=2685941.

Appendix C

**"The Trans-Pacific Partnership FTA's Investment chapter: What's Next?"**

Prof Luke Nottage (USydney) & Prof Leon Trakman (UNSW)

[Shorter version published as:
https://theconversation.com/as-asia-embraces-the-trans-pacific-partnership-isds-opposition-fluctuates-50979]

Alongside [the 18-19 November 2015] APEC leaders' summit in Manila,[60] US President Obama met with counterparts and trade ministers from 11 other Asia-Pacific states that agreed in October to the expanded Trans-Pacific Partnership (TPP) free trade agreement.[61] These states, covering around 40 percent of world GDP, cannot sign it before 3 February, when the Congress finishes its 90-day review. But Obama and others in Manila reiterated the importance of the TPP for regional and indeed global economic integration.

However, public concern has been raised in Australia[62] and the US[63] about the TPP's investment chapter, including its investor-state dispute settlement (ISDS) provisions. These afford a foreign investor an additional dispute resolution procedure if unable to persuade its home state to bring an inter-state arbitration claim against the host state for violating its substantive treaty commitments, such as discrimination, uncompensated expropriation or denial of justice before local courts. The ISDS option has become a common feature of investment treaties, including now within the Asian region[64] where many states are now exporters as well as importers of capital. ISDS is seen as depoliticising disputes and encouraging a rules-based framework for investment, especially in developing countries where corruption or other governance problems remain endemic.[65]

Relying solely on inter-state dispute resolution, as also under the WTO system applicable mainly to trade disputes, means that affected groups in one country must persuade its state to go to the expense and potential diplomatic embarrassment of pursuing the claim. Perhaps for these reasons, Australia has not joined with New Zealand as WTO claimant

---

[60] http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11547492
[61] http://dfat.gov.au/trade/agreements/tpp/Pages/trans-pacific-partnership-agreement-tpp.aspx
[62] http://www.smh.com.au/federal-politics/political-news/australia-could-be-sued-for-billions-by-foreign-companies-for-new-laws-under-tpp-20151106-gksbjx.html
[63] http://ccsi.columbia.edu/2015/11/18/the-tpps-investment-chapter-entrenching-rather-than-reforming-a-flawed-system/
[64] http://ssrn.com/abstract=1789306
[65] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2401504

against Indonesia for discriminatory restrictions by Indonesia on imported beef.[66] Perhaps Australian exporters may claw back some other advantages through inter-governmental negotiations, now that Prime Minister Turnbull is repairing Australia's broader relationship with Indonesia, sullied before he took office. But the whole point of contemporary international economic law is to substitute such bilateral horse-trading (which tends to favour larger countries) for a rules-based system for everyone.

Despite such practical limits to inter-state dispute resolution, the inclusion of ISDS in international investment treaties has become a lightning rod for those in Australia who are unhappy about entering into FTAs aimed at promoting cross-border trade and investment beyond the WTO system. Media coverage has escalated particularly since 2011, with polarized views evident across Australia's major newspapers.[67]

Part of the criticism in fact comes from some economists,[68] including the Productivity Commission in 2010 when it reported on Australia's international trade policy. They in fact favour greater economic liberalisation, but believe it is more effectively done unilaterally, or at least through multilateral treaties. Although accompanied by a vigorous dissent, the Commission's main report also adopts a laissez-faire approach to investment: firms should make their own decisions about whether to invest locally or abroad, and do not need treaties to set baseline legal standards of protection even in developing countries.

However, most criticism of ISDS comes from the political left in Australia, generally also opposed to economic liberalisation. Treaty-based protections for investors are seen as undermining national sovereignty.[69] (Others, cited here,[70] point out this is inherent whenever one state commits to an international agreement, including eg relating to human rights.) Critics are also very concerned about "regulatory chill", namely host states no longer engaging in welfare-enhancing law-making out of fear of ISDS claims.[71] They often highlight the Philip Morris Asia arbitration brought against Australia regarding its tobacco plain packaging litigation.[72] (Others point out this is the only claim, still pending and under an old treaty with Hong Kong.[73] More generally, a careful empirical study recently found no significant extra regulatory chill even in a country like Canada,[74] which has lost a few ISDS claims under the North American FTA in effect since 1994.)

---

[66] http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11419890
[67] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685941
[68] http://www.smh.com.au/business/the-economy/tpp-will-the-transpacific-partnership-really-benefit-australia-20151006-gk24so.html
[69] http://aftinet.org.au/cms/node/962
[70] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033167
[71] http://theconversation.com/leaked-tpp-investment-chapter-shows-risks-to-australias-health-39799
[72] https://www.ag.gov.au/tobaccoplainpackaging
[73] http://ssrn.com/abstract=2041680
[74] http://etheses.lse.ac.uk/897/

These two lines of critique came together in the Trade Policy Statement announced in 2011 by the Gillard Government (with Labor in coalition with the Greens).[75] Controversially,[76] this abandoned Australia's longstanding practice by declaring that it would never agree to any form of ISDS in future investment treaties. The stance complicated negotiations for major bilateral FTAs as well as the TPP. The Malaysia FTA was agreed in 2012, omitting ISDS, but this was largely meaningless because ISDS-backed protections were already applicable under the Australia-NZ-ASEAN FTA signed under the Rudd Government in 2009.

Following through on a pre-election commitment in 2013, the Abbott Government reverted to including ISDS on a case-by-case assessment.[77] This helped Australia to reach agreement on major FTAs, but the political left continues to its opposition through multiple parliamentary inquiries.[78] This is especially evident in the Senate, where the Government lacks a majority needed to pass tariff implementation legislation allowing Australia to ratify FTAs agreed with overseas treaty partners.

The Greens began by proposing an "Anti-ISDS Bill",[79] which would have bound the Abbott and subsequent governments to the 2011 Trade Policy Statement stance. Even the Labor members of the relevant Senate Committee disagreed, mindful of setting a dangerous precedent might constrain any future Labor government from negotiating and signing treaties in other fields. However, Labor parliamentarians did initially side with Greens members on inquiries into the Korea and then China FTAs,[80] objecting in part to their ISDS provisions. Yet those are very limited regarding China,[81] and eventually Labor voted with the Coalition parliamentarians to allow tariff implementation legislation and therefore ratification to bring both FTAs into force.

The big question now is what approach Labor will take to the TPP, given its inclusion of ISDS (albeit with side-letters proposing a carve-out between Australia and New Zealand),[82] and the general election scheduled for 2016. Labor may well fudge its stance. After all, if elected but again only in coalition with Greens, a new Labor government may want to revive the Gillard Government Trade Policy Statement to eschew ISDS provisions. If elected outright, Labor may be willing to accept them at least for the TPP,

---

[75] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1860505
[76] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152752
[77] http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/fact-sheet-investor-state-dispute-settlement.aspx
[78] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561147
[79] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483610
[80] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643926
[81] http://blogs.usyd.edu.au/japaneselaw/2015/06/compromised_isds_china.html
[82] http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-new-zealand-investor-state-dispute-settlement-trade-remedies-and-transport-services.PDF

albeit perhaps negotiating some further side-letters or taking the lead to finalise a Code of Conduct already envisaged for ISDS arbitrators. Overall, the TPP's ISDS-backed commitments are quite similar to those in Australia's FTAs since 2003 – in turn largely modeled on treaties between third parties and the US,[83] which has never been subject to a successful ISDS claim.

Labor will also have to bear in mind that other TPP partners are generally comfortable with ISDS, as are countries like Korea[84] and even China,[85] which may eventually join this FTA.[86] Present TPP partners supportive of ISDS include major outbound investors like Japan[87] and especially Singapore, and to a lesser extent Brunei and Malaysia. Canadian firms have invoked ISDS against other countries and the new centre-left government is likely to maintain support for ISDS. As a FDI-importer, New Zealand[88] has seen more public debate since signing its FTA with Korea this year, but the Labour Opposition supported ratification and there remains more bipartisan support for FTAs as the best way forward for this major exporter of agricultural products. Vietnam[89] recently went through a phase of reassessing the pros and cons of ISDS, after a few claims, but now has in place a better system for avoiding and managing investment treaty disputes. Chile, Peru and Mexico are likely to adopt the TPP with ISDS, if only to ensure that the agreement prevails, given extra outbound trade and investment opportunities, notably to the US. Ironically, apart from the Australia, it is mainly therefore the US – typically a strong proponent of ISDS – where some recent opposition may complicate TPP ratification, especially in light of the presidential elections.[90]

[83] http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp_investment.html
[84] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643926
[85] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244634
[86] http://m.lowyinstitute.org/node/46209
[87] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724999
[88] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643926
[89] http://www.transnational-dispute-management.com/article.asp?key=2041
[90] http://www.eastasiaforum.org/2015/10/29/the-tpp-isnt-a-done-deal-yet/

# **ANNEX 2** – manuscript for *Indian Journal of Arbitration*

(from: http://blogs.usyd.edu.au/japaneselaw/2016/06/us_vs_eu_vs_other_models.html)

**"Models for Investment Treaties and Dispute Settlement in the Asian Region"**

Luke Nottage*

## I. Introduction

International investment treaties and investor-state dispute settlement (ISDS) resurfaced in the news again in June 2015, in both Australia and India. Both are negotiating a bilateral Free Trade Agreement (FTA)[91] as well as the Regional Comprehensive Economic Partnership (RCEP or "ASEAN+6" FTA).[92] The possibility is emerging of a shift from U.S.-style to contemporary E.U.-style treaty drafting in the broader Asian region,[93] as a new compromise between the interests of foreign investors and host states.[94]

However, the potential for Australia to help lead the way has diminished as a result of its general election of 7 July 2016. The (centre-right) Coalition Government was returned to power but with a majority of only one member in the key lower House of Representatives. Since elections in 2013 it had been six Senators short of a majority in the upper house,

---

* Professor of Comparative and Transnational Business Law, Associate Director of the Centre for Asian and Pacific Law at the University of Sydney (CAPLUS). This paper draws on support from an Australian Research Council Discovery Project (DP140102526) on international investment dispute management. My related papers are freely downloadable via http://ssrn.com/author=488525. A version was presented at the CAPLUS seminar on 'Challenges to the Bilateral Investment Regime? India, China and the Asian Region' held at Sydney Law School on 13 October 2016. I thank Adelina Lee (CAPLUS intern) for research and editorial assistance.

[91] http://dfat.gov.au/trade/agreements/aifta/pages/australia-india-comprehensive-economic-cooperation-agreement.aspx

[92] http://dfat.gov.au/trade/agreements/rcep/pages/regional-comprehensive-economic-partnership.aspx. For background and how RCEP may be one major stepping stone towards a broader Asia-Pacific FTA, see also ROBERT SCOLLAY, *APEC, TPP and RCEP: Towards an FTAAP*, *in* Trade Regionalism in the Asia-Pacific: Developments and Future Challenges (Sanchita Basu Das & Masahiro Kawai eds., 2016).

[93] See generally http://www.eastasiaforum.org/2016/07/27/can-asia-transform-international-investment-law/.

[94] For a review essay of two recent books also exploring such a rebalancing, see Luke Nottage, *Rebalancing Investment Treaties and Investor-State Arbitration: Two Approaches,* Journal of World Investment and Trade, forthcoming http://ssrn.com/abstract=2795396 (2017).

but in this year's election this has increased to a shortfall of twelve Senators.[95] Accordingly, to pass legislation approved in the lower House (including tariff reduction legislation needed before Australia can ratify FTAs), the current Coalition Government will still need the votes either of the main opposition Labor Party, or 9 of the 11 cross-bench Senators.

## II. Renewed Media Coverage of Investment Treaties and ISDS

In Australia on 8 June 2016, a reporter for *The Guardian* described ISDS as allowing "foreign corporations to sue the Australian government in an international tribunal if they think the government has introduced or changed laws that significantly hurt their interests".[96] In fact, this is inaccurate. Investment treaties never contain such a broad substantive commitment on the part of the host state. Instead, investors need to establish violations of specific causes of action, such as discrimination, denial of justice or other egregious lack of fair and equitable treatment, or expropriation without adequate compensation.

Further, only a small proportion of ISDS claims challenge legislation - the vast majority of claims instead contest executive (in)action, such as not issuing or renewing a licence - and investors usually do not succeed.[97] For example, on 18 December 2015 the arbitral tribunal ruled against Philip Morris Asia on jurisdictional grounds, in the latter's challenge to Australia's tobacco plain packaging laws under an old Bilateral Investment Treaty (BIT) with Hong Kong. In the recently released award, the Tribunal found an 'abuse of rights' in obtaining trade mark rights in Australia through its Hong Kong subsidiary when it was reasonably foreseeable (and even in fact foreseen) by the parent company that the legislation would be enacted and therefore a dispute would arise.[98]

Anyway, investment treaties invariably commit to inter-state arbitration. The point of agreeing also to the ISDS procedure is that host states want to more credibly commit to living up to their substantive commitments by allowing the option also of a direct claim by foreign investors through ISDS if their home state does not feel like pursuing the inter-

---

[95] See generally http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/45th_Parliament_Composition.

[96] http://www.theguardian.com/australia-news/2016/jun/08/coalition-may-add-clause-that-lets-foreign-companies-sue-australia-to-trade-deal-with-japan

[97] As of 6 September, according to http://investmentpolicyhub.unctad.org/ISDS, for 444 concluded ISDS cases (out of 696 cases), 36.5 percent were decided in favour of the host state and 26.4 percent awarded redress to investors. The rest involved findings of liability but no damages, were discontinued (9.7 percent) or settled (25.7 percent)

[98] https://www.pcacases.com/web/view/5 and https://www.ag.gov.au/tobaccoplainpackaging.

state arbitration claim.[99] Not invoking an inter-state dispute settlement mechanism typically occurs due to cost or diplomatic reasons. That is probably why, for example, Australia has declined to join New Zealand in its World Trade Organization claim against Indonesia for the latter's discriminatory treatment of imported beef and other agricultural products.[100]

So why was the Australian reporter in June 2016 so concerned about ISDS? First, because the government had confirmed that it had commenced with Japan a review of their Free Trade Agreement (FTA) concluded in 2014. That had omitted ISDS, probably because Japan had not been willing to offer enough to Australia (for example in terms of extra market access for agricultural products) to justify the then Coalition Government facing difficulty getting tariff reduction legislation through the Senate.[101] Yet the Australia-Japan FTA had included a provision for such consultations "with a view to establishing an equivalent mechanism", within 3 months of another treaty containing ISDS being concluded by Australia and coming into force. The process has been triggered by the China-Australia FTA coming in force from 20 December 2015, although its ISDS-backed protections in fact were very narrow (and superimposed on an early BIT, with an agreement for a 3-year Work Program to consider consolidating the two treaties). Yet this had been pointed out in commentary last year on the China FTA, so this aspect was old news.[102]

More interesting was what might now happen, as the Australia-Japan FTA states that they should try to complete their FTA review "with the aim of concluding it within six months". As of September 2016, no announcement had been made, but the Australian Government was in "caretaker mode" (not allowing for new policy initiatives) for around three months prior to the general election. Japan also went through an upper house election on 10 July 2016, although the Abe administration instead emerged in a stronger position.[103] Anyway, both governments will probably just agree to wait and see whether the Trans-Pacific Partnership (TPP) Agreement signed on 4 February 2016, with ten

---

[99] For an econometric analysis showing statistically significant positive impact from ISDS provisions on cross-border foreign direct investment flows, albeit more so for weaker-form provisions, see SHIRO ARMSTRONG & LUKE NOTTAGE, *The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis*, 16/74 Sydney Law School Research Paper http://ssrn.com/abstract=2824090 (2016).

[100] http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11419890

[101] http://www.eastasiaforum.org/2014/04/09/why-no-investor-state-arbitration-in-the-australia-japan-fta/.

[102] http://www.eastasiaforum.org/2015/07/01/compromised-investor-state-arbitration-in-china-australia-fta-2/

[103] http://www.eastasiaforum.org/2016/07/12/whats-next-after-abes-supermajority-in-the-upper-house/.

other economies (including the United States but not India[104]) and containing ISDS, is ratified and comes into effect over the ensuing two years.[105] Australia and Japan may also obtain ISDS through RCEP anyway,[106] although those negotiations have been delayed.[107]

The second and more significant reason for the renewed media interest in ISDS in Australia was the lead-up to its general election. The main (centre-left) Labor Party opposition's trade spokesperson had announced on 7 June 2016 that, if elected, a new Shorten Government "would not accept … ISDS provisions in new trade agreements".[108] This would have reinstated the position under the Gillard Government Trade Policy Statement,[109] introduced in 2011 when that Labor Government was in coalition with the Greens (a more leftist minority party who are more strongly opposed to liberalisation and FTAs). That policy was abrogated when the Coalition Government took power in 2013 and reverted to agreeing to ISDS provisions on a case-by-case assessment. The Labor Party's spokesperson's announcement on 7 June 2016 suggested that if elected, a new Shorten Government would not even be able to ratify the TPP due to having being signed with the inclusion of ISDS provisions, albeit leaving some possibility that it might not be considered "new".

In addition, the spokesperson declared that a Shorten Labor Government would "develop a negotiating plan to remove ISDS provisions" in all Australia's existing FTAs and BITs. If impossible – as seems very likely, in light of the experience of negotiating recent FTAs where counterparties like Korea had pressed very strongly to incorporate ISDS provisions[110] – it was announced that a Shorten Government would "seek to update the provisions with modern safeguards". The rationale given was that: "Some of these provisions were drafted many years ago and do not contain the safeguards, carve-outs and tighter definitions of more contemporary ISDS provisions".[111]

---

[104] Cf generally http://www.eastasiaforum.org/2016/03/02/is-there-room-for-india-in-the-tpp/.
[105] http://theconversation.com/as-asia-embraces-the-trans-pacific-partnership-isds-opposition-fluctuates-50979
[106] At a meeting on 13 July 2015 in Kuala Lumpur, Ministers from states negotiating RCEP agreed that it would include an ISDS mechanism provided that appropriate safeguards were included for legitimate public welfare objectives.
[107] http://www.eastasiaforum.org/2016/08/02/three-relationships-for-rcep-members-to-ponder/
[108] http://www.pennywong.com.au/speeches/export-council-of-australia-australian-chamber-of-commerce-and-industry-trade-forum-sydney/
[109] Archived at http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf .
[110] See Luke Nottage, *Investment Treaty Arbitration Policy in Australia, New Zealand and Korea*, 25 JOURNAL OF ARBITRATION STUDIES 185 (2015).
[111] Supra n 18.

Although the spokesperson's statement focused on the ISDS *procedure*, such a policy shift might therefore extend to attempting to dial back the *substantive* commitments made to investors in earlier treaties. The latter should indeed be the primary focus, as an inter-state arbitration enforcement mechanism would surely remain to give some teeth to the treaty. Indeed, I recommended such a review of old treaties in my Submission against the stalled "Anti-ISDS Bill" introduced in 2014 by the Greens, and seeking to preclude any Australian government from negotiating treaties that contained ISDS provisions. (That Bill ended up being opposed even by Labor parliamentarians, for unduly constraining the executive branch's constitutional prerogative to negotiate treaties.[112]) Yet, in that Submission, I had also envisaged improving – without abandoning – the ISDS provisions. Overall, such as review seems especially important for BITs signed between 1988 and 2005 by Australia,[113] which had followed the more pro-investor template common worldwide from that era.[114]

## III. Models for Investment Treaty (Re)Negotiation

The key question would then become: what new provisions should be proposed in such attempted renegotiations by Australia. One obvious candidate would be those in the FTAs signed by Australia's Coalition Government since 2014 (with Korea, as well as Japan, China, and the TPP member states). Perhaps their substantive provisions could have been palatable even to a new Labor Government, as they are broadly similar to those in FTAs signed since 2003 – including several by the first Rudd Labor Government.[115] Yet, under the policy position announced on 7 June 2016, a new Labor Government could not use the safeguards built into those FTAs also around ISDS itself (such as enhanced transparency for the procedure), because a Shorten Labor Government will not countenance any ISDS in future treaties. Overall, this would be an unfortunate result because both procedural and substantive provisions in Australia's FTA investment chapters are heavily influenced by U.S. treaty drafting,[116] which was already significantly rebalanced in favour of host states from the early 2000s.[117]

---

[112] Luke Nottage, *The "Anti-ISDS Bill" Before the Senate: What Future for Investor-State Arbitration in Australia?*, XVIII INTERNATIONAL TRADE AND BUSINESS LAW REVIEW 245 (2015).
[113] For a full analysis of Australia's treaty program generally, and more details on the background domestic politics, see Luke Nottage, *Investor-State Arbitration Policy and Practice in Australia*, 6 CIGI INVESTOR-STATE ARBITRATION SERIES, http://ssrn.com/abstract=2685941 (2016).
[114] See generally LAUGE N. SKOVGAARD POULSEN, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES (2015).
[115] Comparing for example the provisions in Australia's FTAs signed in 2008 with Chile and with ASEAN in 2009, see Nottage supra n 22.
[116] See e.g., Luke Nottage, *The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification*, MELBOURNE JOURNAL OF INTERNATIONAL LAW forthcoming http://ssrn.com/abstract=2767996 (2016) Part 3.

An alternative candidate is the model now proposed by the European Union (E.U.), after extensive public consultations, especially for its ongoing Transatlantic Trade and Investment Partnership negotiation with the U.S.,[118] but already reflected in the E.U.'s bilateral FTAs with Canada and Vietnam.[119] Substantive commitments by host states are even more constrained (except perhaps for the National Treatment obligation, where the TPP drafting clearly limits liability to intentional discrimination).[120]

Most interestingly, the E.U. model substitutes a permanent investment court (including appellate review for serious errors of law) for the usual ISDS mechanism involving the appointment of ad hoc arbitrators.[121] This should largely address concerns about lack of transparency or consistency associated with the procedure, while still allowing an investor to pursue direct claims against a host state if its home state cannot be mobilised to bring an inter-state arbitration claim.[122] Perhaps even a new Labor Government might consider this not to comprise "ISDS", and therefore propose such a court in Australia's future treaties as well as older treaties subject to review.

Many in Australia familiar with the trajectory and details of international investment law, including myself,[123] would probably be comfortable with the E.U.'s alternative approach. More importantly, it seems to the more plausible way forward in Australia's ongoing FTA negotiations with India, bilaterally as well as via RCEP. After all, the other breaking news from June 2016 was that India had already written to counterparties to 47 BITs (seemingly including Australia) notifying them that treaties will be allowed to lapse so that

---

[117] See generally, Wolfgang Alschner & Dmitriy Skougarevskiy, *The New Gold standard? Empirically Situating the TPP in the Investment Treaty Universe*, 17(3) JOURNAL OF WORLD INVESTMENT AND TRADE 339 (2016).
[118] August Reinisch, *The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court*, 2 CIGI INVESTOR-STATE ARBITRATION SERIES PAPER https://www.cigionline.org/publications/european-union-and-investor-state-dispute-settlement-investor-state-arbitration-permane (2016).
[119] See e.g. Mark Mangan, https://www.dechert.com/The_EU_Succeeds_in_Establishing_a_Permanent_Investment_Court_in_its_Trade_Treaties_with_Canada_and_Vietnam_03-23-2016/
[120] Caroline Henckels, *Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA and TTIP*, 19 JOURNAL OF INTERNATIONAL ECONOMIC LAW 27 (2016).
[121] See generally, Reinisch, supra n 28.
[122] Nonetheless, some arch-critics of ISDS have already dismissed this proposal: Sornarajah, http://ccsi.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf. For more constructive proposals, cf John Gaffney, http://ccsi.columbia.edu/files/2013/10/Perspective-Gaffney-Final-Formatted.pdf
[123] See e.g. Nottage, supra n 26, Part 4.

a new text can be negotiated. The starting point is reportedly India's Model BIT finalised in December 2015, which will also be proposed in pending FTA negotiations.[124]

India's new Model BIT[125] includes even more restrictive substantive commitments than the recent E.U. approach, let alone those on the U.S. template reflected in the TPP. For example, it does not include a Most-Favoured Nation (MFN) provision at all. India's new Model BIT also does not have an overarching commitment to Fair and Equitable Treatment, but rather sets out an exhaustive list of commitments all limited to the customary international law standard.[126] It adds extensive carve-outs, such as measures related to taxation or taken by local governments.[127]

It does includes ISDS, but under extremely strict conditions including "exhaustion of local remedies" – where the investor must first seek relief through local courts – and then tight timelines for pursuing investor-state arbitration. India's new Model is toned back from back last year's draft, [128] but still arguably represents a reaction to a successful ISDS claim brought by an Australian investor and ensuing "hesitance" about investment treaties.[129] Tellingly, that award in 2011 was for extremely lengthy delays in enforcing a commercial arbitration award against an Indian SOE. The tribunal found this to be contrary to a commitment made by India in its subsequent BIT with Kuwait (available also under the Australia-India BIT via the latter's MFN provision) requiring the host state to provide "effective means of asserting claims and enforcing rights with respect to investments".[130]

---

[124] Deepshikha Sikarwar, India seeks fresh treaties with 47 nations, *The Economic Times* (27 May 2016) economictimes.indiatimes.com/news/economy/foreign-trade/india-seeks-fresh-treaties-with-47-nations/articleshow/52458524.cms.

[125] At http://finmin.nic.in/the_ministry/dept_eco_affairs/investment_division/ModelBIT_Annex.pdf

[126] Compare Article 3.1 with e.g. Investment Chapter Article 8.10 of the concluded Canada-EU FTA (as adopted in July 2016 by the European Commission and submitted to the EU Council) available at http://ec.europa.eu/trade/policy/in-focus/ceta/. The latter provides for further examples of Fair and Equitable Treatment to be agreed by an inter-governmental committee, and does not limit them to the customary international law standard of protection.

[127] India Model BIT, Article 2.4

[128] http://www.iareporter.com/articles/analysis-in-final-version-of-its-new-model-investment-treaty-india-dials-back-ambition-of-earlier-proposals-but-still-favors-some-big-changes/

[129] This hesitance since 2011, illustrated by India's draft Model BIT released earlier in 2015, can be juxtaposed with the earlier 'embracement' of BITs (after India started opening up its economy from the early 1990s). That latter, in turn, was preceded by a post-Independence phase of 'rejection' of foreign investment and treaty commitments. See Prabhash Ranjan, 'India and Bilateral Investment Treaties: From Rejection to Embracement to Hesitance?' in R Babu and S Burra (eds) 'Locating India' in the Contemporary International Legal Order (Springer: 2016) Parts 2-4.

[130] *White Industries Australia Limited v Republic of India*, UNCITRAL Rules arbitration, Final Award (30 November 2011) available via http://www.italaw.com/cases/1169.

This award in 2011 was followed by several more ISDS claims against India by investors under other investment treaties, challenging retrospective taxes, a cancelled satellite venture, withdrawal of telecommunication licences, and other measures.[131] Ironically, given the backlash evident by the revised Model BIT in 2015, it has been suggested that these claims since 2011 have already generated some significant improvements in India's general law and practice related to commercial arbitration – potentially benefitting local as well as foreign investors.[132]

## IV. Conclusions

Treaty counterparties being approached by India since mid-2016 are unlikely to accept its restrictive new Model BIT. Yet India will probably resist the further entrenchment of U.S.-style investment treaty practice not only in its current renegotiation of old BITs but also in pending FTA negotiations.[133] Accordingly, the recent E.U. approach may well be an acceptable way forward.

The latter may also prove an acceptable compromise for Indonesia, which is also negotiating FTAs with Australia (and indeed the E.U.) bilaterally,[134] as well as through RCEP. After a few treaty-based ISDS claims (including one claim brought by an Australian investor[135]), Indonesia has also been letting old BITs lapse to negotiate new treaties based on its own revised Model BIT, although that remains undecided or at least undisclosed.[136] Yet other major Asian economies,[137] like Korea[138] and even Thailand as a developing country,[139] now appear to be quite comfortable with ISDS-backed investment treaties, despite having also having been subject to their first treat-based claims. They too may be attracted to an E.U.-style compromise for RCEP and other future negotiations.

Australia also now has an opportunity to help lead the way in the Asian region, and perhaps even restore a more bipartisan approach internally towards foreign investment

---

131 http://kluwerarbitrationblog.com/2015/10/14/bitten-by-the-bits-india-looks-to-constrict-its-model-bit/; Ranjan, supra n 39, Part 4.
132 HARISANKAR SATHYAPALA, *Indian Judiciary and International Arbitration: A Bit of a Control?*, forthcoming Arbitration International (2016).
133 http://www.eastasiaforum.org/2016/05/20/is-india-holding-the-line-against-another-tpp/.
134 http://dfat.gov.au/trade/agreements/iacepa/pages/indonesia-australia-comprehensive-economic-partnership-agreement.aspx
135 Nottage, supra n 22.
136 Antony Crockett, *Indonesia's Bilateral Investment Treaties: Between Generations?*, 30 ICSID REVIEW 437 (2015).
137 Nottage, supra n 26, Part 2.
138 Nottage, supra n 20.
139 LUKE NOTTAGE & SAKDA THANITCUL, *The Past, Present and Future of International Investment Arbitration in Thailand*, 16/31 Sydney Law School Research Paper http://ssrn.com/abstract=2770889 (2016).

policy in general,[140] at least after the dust settles from the (closely contested) general election on 2 July. However, the implications of that election remain unclear.

As mentioned in the Introduction above, the Coalition Government retained a (now razor-thin) majority in the lower House of Representatives, but its minority in the Senate diminished further (to 30 out of 76 Senators). The Labor Party may be emboldened by such a result, and therefore refuse to vote with the government on FTAs such as the TPP or eventually RCEP (as it eventually did with the China FTA in 2015[141]), if those contain conventional ISDS procedures or even an E.U.-style investment court.

The Greens (with 9 Senators in the upper House) will certainly refuse. The Coalition Government would then need to find 9 more votes from among the (11) cross-bench Senators, but Pauline Hanson's 'One Nation' (4) Senators are notoriously xenophobic and the Nick Xenophon Team (3) Senators favour more support for local manufacturing. [142] This difficult political landscape in Australia will make it even more likely that the Turnbull Government will now wait to see if and when the TPP is ratified in the U.S., which is also now uncertain given the upcoming presidential elections.[143]

In addition, "Brexit" is likely to impede the pace of existing and future negotiations of the E.U.'s negotiations with Asian countries and Australia, as they must now consider parallel negotiations with the U.K..[144] Indeed, the models for investment treaties advanced by the E.U. and the U.K. might even start to diverge, with the U.K. reverting to a template containing more pro-investor provisions. The potential for a shift from U.S.-style to E.U.-style investment treaty drafting in the Asian region is therefore now even more uncertain.

---

[140] LUKE NOTTAGE, *The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration in Australia*, 21 New Zealand Business Law Quarterly 266 (2016).
[141] Nottage, supra n 20.
[142] Cf generally, from an NGO consistently critical of ISDS and economic liberalisation, http://aftinet.org.au/cms/1606-2016-election-policy-scorecard.
[143] See e.g. http://www.eastasiaforum.org/2016/07/28/how-trumps-trade-policy-is-dividing-republicans/.
[144] Cf generally e.g. http://www.eastasiaforum.org/2016/06/27/can-asia-shield-the-world-against-europes-brexit-woes/.