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Joint Standing Committee on Treaties
PO Box 6100
Parliament House
Canberra ACT 2600

Re: Ratification inquiry for the "UN ISDS Convention" (2014 Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration)[1]

1. This treaty is a "no-brainer" for ratification by Australia. For over a decade I have joined others in arguing for ways to promote more transparency around investor-state dispute settlement (ISDS) arbitration. This is because of the greater public interests involved in ISDS compared to international commercial arbitration (ICA), where confidentiality is more valuable to limit over-formalisation (with problems of delays and especially costs) and maintain business relationships. There is now growing and widespread consensus for incorporating more transparency around the ISDS dispute resolution option provided by host states to encourage foreign investment flows.

(a) Why have transparency in ISDS? How about **via Arbitration Rules?**

2. One way to achieve greater transparency is relax confidentiality provisions typically found in general Arbitration Rules, in new tailored ISDS Arbitration Rules that can be chosen by foreign investors under the investment treaties that their home states have concluded with host states, setting out substantive commitments such as non-discrimination, compensation for expropriation or due process for foreign investors. Kate Miles and I argued a decade ago that the Australian Centre for International Commercial Arbitration (ACICA) and its Japanese counterpart (JCAA) should develop such rules and give them as options

1 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/ISDSUNConvention/Treaty_being_considered

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for foreign investors to select if invoking ISDS arbitration. We suggested that investors might choose them eg to reduce the chance of backlash from the host state if it loses the case, and consequently the possibility of strong efforts to resist enforcement and/or execution of an adverse arbitral award.[2]

3. Such ISDS Rules have not been developed by ACICA or the JCAA. But they were by the Singapore International Arbitration Centre (SIAC) in 2017 and then two Chinese arbitral institutions, with the SIAC ISDS Rules being included as an option in the new Singapore - Sri Lanka BIT.[3]
4. Such tailored ISDS Rules may be chosen by investors, compared to others provided in the applicable investment convention(s), because more transparency can also make host state citizens and stakeholders more conscious of the welfare loss they can be incurring from some measures then being challenged by foreign investor. An example would be discrimination against foreign investors to protect some narrow but politically powerful interests locally, benefiting a few local companies or sectors but diminishing welfare of the dispersed citizenry as a whole. (A similar dynamic can operate in the context of WTO claims, with transparency around its dispute settlement process thus increasing chances of settlements.)[4] In other words, transparency around ISDS can often be an advantage for foreign investors, not just for host states.
5. Transparency is also widely seen as an advantage nowadays for host states in developed countries. However, for some more developing countries (where in fact ISDS-backed treaties have the most impact for

[2] 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 Arbiration in Australia', Federation Press: Sydney, 2010; Journal of International Arbitration, Vol. 26, No.1, pp. 25-58, 2009; Sydney Law School Research Paper No. 08/62. Available at SSRN: https://ssrn.com/abstract=1151167

[3] http://www.siac.org.sg/our-rules/rules/siac-investment-arbitration-rules

[4] 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; Sydney Law School Research Paper No. 12/37. Available at SSRN: https://ssrn.com/abstract=2065636

encouraging more FDI flows[5]) the governments sometimes are still not so keen have their (in)actions exposed to public scrutiny.

6. Transparency in ISDS arbitration also seems to be increasingly acceptable to the arbitrators and counsel engaged in the now hundreds of cases that have been pursued worldwide under thousands of treaties. One reason may be that they see this as an opportunity to showcase their experience and skills in ISDS, potentially attracting future work. (Especially as we all tend to suffer from over-optimism bias: thinking, before the event and even sometimes afterwards, that we are better than average / others!)
7. This often mutual and growing interest in promoting transparency around ISDS arbitration helps explain why anyway there is empirically a surprising degree of openness around ISDS awards (or at least outcomes), as I pointed out in evidence given to JSCOT last year for the CPTPP ratification inquiry.[6] Such transparency around awards has emerged even under old Rules and treaties that did not expressly provide for awards or outcomes to be public, but it is less evident regarding other information (eg around submissions, hearings or procedural rulings).
8. This mutual interest also explains why the major sets of Arbitration Rules used historically in ISDS have been adding transparency provisions. First, the ICSID Arbitration Rules (used in around two-thirds of treaty-based ISDS cases, administered by the World Bank affiliated International Centre for Settlement of Investment Disputes established by the 1965 framework ICSID Convention) allow for excerpts of legal reasoning from awards to be published, along with other details of the claims – with many disputing parties voluntarily providing extra information.[7] ICSID Rules are now being revised and may further expand transparency.[8]

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[5] Armstrong, Shiro Patrick and Nottage, Luke R., The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis (August 15, 2016). Sydney Law School Research Paper No. 16/74. Available at SSRN: https://ssrn.com/abstract=2824090

[6] Nottage, Luke R. and Ubilava, Ana, Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry (August 6, 2018). International Arbitration Law Review, Vol. 21, Issue 4, 2018; Sydney Law School Research Paper No. 18/46. Available at SSRN: https://ssrn.com/abstract=3227401

[7] See eg https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx

[8] See https://icsid.worldbank.org/en/amendments

9. Secondly, the UNCITRAL Arbitration Rules designed originally in 1976 for ad hoc or non-institutional arbitration (including around a third of ISDS cases[9]) were amended in 2013 to incorporate the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Those transparency provisions extend beyond disclosures around the arbitral award. But one limitation is that these Rules only apply to disputes arising out of treaties concluded on or after 1 April 2014, when investor-State arbitration is initiated under the UNCITRAL Arbitration Rules (unless the disputing parties otherwise agree to incorporate them).[10]
10. An additional problem could be that the investor still chooses the option provided in a (post-2014) treaty of say ICSID Arbitration Rules, which still retain narrower transparency provisions.

(b) And/or how about more transparency **via direct treaty provisions?**

11. Because of such limitations to relying on Arbitration Rules provided in treaties and then perhaps invoked by foreign investors, even before the emergence of more transparency provisions in ISDS Arbitration Rules, they were being included in **individual investment treaties** concluded especially by developed countries, including Australia. If provisions are in treaties, they must be followed by the foreign investor, in addition to any transparency provisions in the chosen Rules.
12. An example of wide treaty provisions on ISDS transparency can be found in its investment agreement with Hong Kong, signed March 2019 and for which I gave evidence to JSCOT yesterday.[11] (See my shaded row on procedural "transparency" in the table comparing the new FTA with Indonesia, appended to my Submission.) In addition, because Hong Kong isn't a party to the ICSID Convention, that new BIT only gives the investor the option of UNCITRAL Arbitration Rules (or any other Rules it agrees with the host state – with developed states anyway likely to insist nowadays on Rules providing similarly broad transparency).

[9] See statistics and public details nonetheless about many older UNCITRAL Rules cases via https://investmentpolicy.unctad.org/investment-dispute-settlement
[10] https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency
[11] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/A-HKFTA

13. By contrast, my table shows how the investment chapter in Australia's new FTA with Indonesia has narrower transparency provisions.[12] This won't matter if the investor chooses the UNCITRAL Rules option, as those will bring wide transparency provisions. But if the investor chooses the ICSID Arbitration Rules option, there will be less transparency (although still quite a lot notably around arbitral awards, both under those Rules and the treaty itself).
14. What the **framework 2014 Mauritius Convention** does is to extend between ratifying states the UNCITRAL Transparency Rules to other investment treaties already concluded between them. So, if and when Indonesia ratifies also this Mauritius Convention now being considered here by JSCOT, the extra transparency associated by those UNCITRAL Rules will be extended to the new Australia-Indonesia FTA investment chapter ISDS claims, even if the investor chooses current ICSID Arbitration Rules to bring an ISDS claim.
15. Australia's ratification of the Mauritius Convention will generate a similar expansion of transparency "retrofitted" to Australia's many other earlier investment treaties, as long as the counterparty states also ratify this framework convention.[13] This is especially important for Australia's early standalone BITs, as they usually don't add transparency provisions to the treaty text, and (as indicated in (a) above, any invocation of the option for UNCITRAL Arbitration Rules won't pick up the 2014 UNCITRAL Transparency Rules.) This lack of transparency provisions in BITs is different from Australia's more recent (US-style) FTA investment chapters. But such FTA transparency provisions vary too, so Mauritius Convention ratification will be useful even for those FTAs by making transparency obligations more uniform and pervasive.

(c) Conclusions

16. Accordingly, Australia should promptly ratify this Convention (without reservations) as it will more effectively address a significant public concern about transparency in ISDS. It is important to resolve this issue

[12] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Indonesia-AustraliaCEPA
[13] For current acceding states, see https://uncitral.un.org/en/texts/arbitration/conventions/transparency

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as some stakeholders and media retain wider concerns about ISDS.[14] And if Australia doesn't further improve transparency around ISDS procedures there is a risk that public opinion will increasingly push for confidentiality to be relaxed around ICA too, even though Chief Justice Allsop last year[15] persuasively joined others in pointing out that the public interests in commercial dispute resolution are different (as elaborated in my attached draft paper).[16]

17. A wider consideration favouring ratification is that it would highlight the potential for a future framework convention to retrofit other further reforms to ISDS procedures, on a world-wide basis, being deliberated eg in UNCITRAL with input from Australia[17] and the Academic Forum on ISDS of which I am part.[18] Proposals being investigated include notably the addition of an appellate body to review any serious errors of law by ISDS arbitrators, or even a two-tier (EU-style) permanent investment court alternative to traditional ISDS.[19] I believe that such options should also anyway be actively pursued by Australia in its treaty (re)negotiations,[20] and a Mauritius Convention like approach would be useful then to retrofit such innovations to past treaties.

I would be happy to give further evidence to this Committee to explain myself further if needed and respond to any questions.

Yours sincerely

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[14] Nottage, Luke R., International Arbitration and Society at Large (February 1, 2018). CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION, A. Bjorklund, F. Ferrari, S. Kroell (eds), Forthcoming ; Sydney Law School Research Paper No. 18/04. Available at SSRN: https://ssrn.com/abstract=3116528

[15] https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20180416

[16] Version also forthcoming via http://ssrn.com/author=488525.

[17] https://uncitral.un.org/en/working_groups/3/investor-state

[18] https://www.cids.ch/academic-forum-concept-papers

[19] See UGeneva proposals/reports via https://www.cids.ch/conferences-research/projects/isds-project

[20] https://www.eastasiaforum.org/2019/05/25/settling-investor-state-disputes-asia-pacific-style/


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"Confidentiality versus Transparency in International Arbitration: Tensions and Expectations"

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Abstract: Confidentiality is still widely seen as significant advantage of international commercial arbitration (ICA) over cross-border litigation, especially perhaps in Asia. This can be seen in rules of most arbitral institutions. Automatic (opt-out) confidentiality is also now found in many national laws, including statutory add-ons to the UNCITRAL Model Law and/or through case law for example in New Zealand, then Hong Kong, Singapore, Malaysia, and eventually Australia.

Yet there remain variations in the timing of these developments as well as the scope and procedures associated with exceptions to confidentiality. There is also no confidentiality provided in Japan's later adoption of the Model Law, although parties mostly choose the JCAA so opt-in to its Rules,, which have somewhat expanded confidentiality obligations since 2014.

Another recent complication is growing public concern over arbitration procedures through (especially treaty-based) investor-state dispute settlement (ISDS), especially in Australia since an ultimately unsuccessful treaty claim by Philip Morris over tobacco plain packaging legislation (2011-15). Statutory amendments in 2018 reverse automatic confidentiality for Australia-seated ISDS arbitrations where the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Concerns over ISDS may impede Australia enacting provisions for confidentiality of arbitration-related court proceedings, which could not be revised recently in New Zealand against the backdrop of its new government's anti-ISDS stance.

Growing transparency around ISDS arbitration is welcome given greater public interests involved in such cases, but transparency should not be simply transposed into commercial dispute resolution through ICA as the fields are overlapping but distinct. Confidentiality in ICA has the disadvantage of exacerbating information asymmetry, making it harder for clients and advisors to assess whether particular arbitrators and lawyers provide value for money. But confidentiality allows arbitrators in particular to be more robust in proceedings and drafting rulings, thus countering the rise in ICA delays and especially costs. More transparency around ISDS, as well as initiatives like "Arbitrator Intelligence" and experiments in reforming Arbitration Rules (eg recently by the ICC), can help reduce information asymmetry for users anyway, while retaining various advantages of confidentiality particularly in ICA.

This paper elaborates these tensions between confidentiality and transparency in ICA and ISDS, focusing on Australia and Japan in regional context. Both countries still get few ICA cases but are trying to attract more, taking somewhat different approaches to confidentiality in that field, while negotiating investment treaties that increasingly provide transparency around ISDS arbitration.

Keywords: dispute resolution, arbitration, international law, investor-state dispute settlement (ISDS), investment treaties, confidentiality, transparency, Asian law, Japanese law, Australian law, Commonwealth law

1. Introduction: Confidentiality versus Transparency in International Arbitration

Practitioners and users of international commercial arbitration (ICA) still see confidentiality as a significant advantage compared to cross-border litigation, although neutrality of forum and award enforceability are ICA's most prized features [21] despite the 2005 Hague Choice of Courts Convention [22] and the 2019 Singapore Mediation Convention. [23] Yet there is significant variation among national laws and arbitral rules. The 1976 UNCITRAL Rules, designed originally for ad hoc arbitrations, only required hearings to be held *in camera* (privacy for the parties) and for awards to be made public only if parties agreed (limited confidentiality), and the 2010 revisions left those rules unchanged. [24] The 1985 UNCITRAL Model Law on ICA, which generally followed the wording of the

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[21] For example, 36% of respondents to last year's QMUL survey listed "privacy and confidentiality" within the "three most valuable characteristics of international arbitration" (compared to 64% listing award enforceability and 60% listing the avoidance of specific legal systems and national courts). Focusing just on confidentiality in ICA, 40% saw it as quite important (including 57% of in-house counsel respondents), 33% as quite important, and 14% as somewhat important. Similarly around three quarters (74%) thought confidentiality should be available on an opt-out (automatic) basis for ICA. See https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration respectively p7 and pp27-8.

[22] So far with few ratifications (but including the EU, UK and Singapore): https://www.hcch.net/en/instruments/conventions/status-table/?cid=98

[23] Not yet in force but with 46 signatories at the diplomatic conference on 7 August 2019, including notably China, India, Malaysia, Korea and Singapore (as well as the USA): https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en. The Convention does not deal with confidentiality or privacy in court proceedings to enforce cross-border settlement agreements, but Article 10 of the 2018 Model Law on International Commercial Mediation (like Article 9 of the 2002 Model Law on International Commercial Conciliation) states: "Unless otherwise agreed by the parties, all information relating to the mediation
proceedings shall be kept confidential, except where disclosure is required under the
law or for the purposes of implementation or enforcement of a settlement agreement". Both and related texts are available via https://uncitral.un.org/en/texts/mediation.

[24] UNCITRAL Rules and other texts related to arbitration are available via https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

UNCITRAL Rules to create a template for national arbitration laws, did not even include such provisions. This remained true in the Model Law as amended in 2006, as most UNCITRAL delegates saw confidentiality as an interesting but not high priority topic, despite some delegates arguing that parties were increasingly concerned about the lack of provisions on confidentiality.[25]

Even the ICC Arbitration Rules have persisted in not imposing confidentiality obligations on the parties, although the ICC Court and Secretariat are bound under internal rules.[26] The Stockholm Chamber of Commerce 2017 Arbitration Rules require confidentiality by SCC, along with the arbitral tribunal and any tribunal secretary appointed, but not on the part of the parties themselves.[27] Yet almost all other Rules of arbitration, including in the Asian region, impose quite wide-ranging confidentiality obligations. It could be that the SCC, ICC and UNCITRAL Rules (influencing in turn the Model Law drafting) do not specify much confidentiality because they were and still are used in investor-state dispute settlement (ISDS) arbitrations, where the involvement of a host state and other features generate more public interest in transparency. Although the ICC and SCC do not now administer many investment treaty arbitrations,[28] they still have many cases that involve state entities,[29] albeit including commercially-oriented SOEs and cases based on one-off investment or trade cases, which would generally raise fewer public interests.

Whatever the historical and current rationales for not including expansive confidentiality obligations in the UNCITRAL Rules and especially the Model Law, jurisdictions adopting the Model Law (notably across the Asia-Pacific region[30]) have usually either added in legislative provisions providing

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[25] Referring to UNCITRAL deliberations in 1999 over amending the Model Law, see *Michael Hwang, Katie Chung, Si Cheng Lim & Hui Min Wong,* "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" in HKIAC (ed) *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan* (Kluwer 2019, via https://lrus.wolterskluwer.com/store/product/international-arbitration-issues-perspectives-and-practice-liber-amicorum-neil-kaplan/). This updates and Michael Hwang's Second Kaplan Lecture, 17 November 2008, with extensive comparative analysis across many issues around confidentiality in international arbitration.

[26] See Article 6 of the "Statutes of the Court of International Arbitration" and Article 1 of the , respectively Appendices I and II of the 2017 ICC Arbitration Rules via https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/. (In fact, this wording may not be so clear regarding confidentiality duties on Secretariat staff.) There also does not appear to be public information on how often parties and the tribunal nonetheless subsequently agree to confidentiality (eg through Terms of Reference).

[27] Article 3, via https://sccinstitute.com/our-services/rules/.

[28] Out of 942 known ISDS arbitrations based on investment treaties, SCC and ICC Rules have been applied in 46 and 17 cases respectively, with 295 UNCITRAL Rules and 508 ICSID Rules arbitrations: https://investmentpolicy.unctad.org/investment-dispute-settlement (calculated as of 22 August 2019).

[29] See further https://iccwbo.org/publication/arbitration-involving-states-state-entities-icc-rules-arbitration-report-icc-commission-arbitration-adr/.

[30] See generally Gu and Reyes, https://www.ssrn.com/abstract=3183550.

automatically for confidentiality (as in New Zealand, Hong Kong, Australia and Malaysia). Alternatively, they have achieved a similar default position through case law development (as in Singapore, following earlier English law). However, a closer analysis uncovers differences in the timing and scope of such automatic confidentiality connected to arbitration proceedings, including the listing and possible interpretations of exceptions to confidentiality. There is even more variability concerning the question of whether confidentiality should be maintained for arbitration-related court proceedings, because of the extra public interest in "open justice" involved when matters end up in court.

Thus, Australia had case law in 1995 maintaining that only privacy but not confidentiality applied automatically to arbitrations, 2010 legislative amendments added statutory exceptions if parties opted in to confidentiality for international arbitration proceedings, but 2015 made confidentiality automatic unless parties opted out.[31] New Zealand's 1996 enactment of the Model Law provided automatic confidentiality, but after an arbitration involving the national broadcaster ended up in court in 2000 followed by a Law Commission Report, legislative amendments in 2007 specified exceptions that applied to arbitration-related court proceedings as well the prior arbitration.[32] Malaysia followed the original New Zealand law by providing for confidentiality around arbitrations when enacting Model Law based legislation in 2005, with 2018 amendments (s 41B) providing that related court proceedings should not be generally in open court.[33]

As for jurisdictions in the Asian region that attract many more ICA cases, Hong Kong also has adopted the Model Law (in 1989, like Australia) but first added legislation (in 1997) allowing a party to apply to have arbitration-related court proceedings to be held in closed court and to restrict reporting of such proceedings.[34] In 2011 legislation made such proceedings closed unless a party applied or the court decided they should be held openly, and also extended case law to create automatic confidentiality around arbitral proceedings and awards.[35] Singapore still relies on case law to establish such a default rule for confidentiality regarding arbitration, but its 2002 International Arbitration Act

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[31] See *Esso Australia Resources Ltd v Plowman [1995] HCA* 19 and the *International Arbitration Act (Cth)* as amended, with Australian case law and legislation available via www.austlii.edu.au.
[32] See *TVNZ v Langley* [2000] NZLR 250; and ss14-14I of the *Arbitration Act* at http://www.legislation.govt.nz/act/public/1996/0099/18.0/DLM403277.html.
[33] For an overview of the amendments, see https://www.aiac.world/news/254/The-Arbitration-(Amendment)-(No.-2)-Act-2018-Comes-Into-Force--%E2%80%93-The-New-Era-of-Arbitration-in-Malaysia.
[34] See ss 2D and 2E of the 1997 Arbitration Ordinance, most conveniently available via www.wipo.int.
[35] See respectively ss 16-17 and s18 of the 2011 Arbitration Ordinance. These provisions are carried over into the current Arbitration Ordinance, available via https://www.elegislation.gov.hk/hk/cap609, attracting interest recently eg regarding the exception for disclosures anyway required by Hong Kong listed companies under its securities regulation: http://arbitrationblog.kluwerarbitration.com/2019/01/12/hong-kong-a-listed-companys-duty-of-confidentiality-in-arbitration-and-its-duty-of-disclosure-to-the-public/

(ss 22-23) followed the 1997 Hong Kong legislation in allowing a party to apply for arbitration-related court proceedings to be otherwise than in open court and for restrictions on reporting such cases.[36]

However, this tendency towards more confidentiality around arbitration in the Asian region is somewhat offset by Japan declining to deal with the issue when it replaced old German-law-inspired legislation with a Model Law based Arbitration Act in 2003.[37] In other jurisdictions, legislative and potentially case law developments may also now be influenced by the evolution of ISDS arbitration. For example, in its 2019 amendments New Zealand did not enact provisions proposed in 2017 to restore more confidentiality to arbitration-related court proceedings. This non-reform could have been influenced by general public sentiment[38] leading the new Labour Government declaring in late 2017 that it would not accept ISDS provisions at all in future trade and investment treaties.[39] Growing public concern about ISDS arbitration may also make it harder for Australia ever to amend its legislation to implement even partial confidentiality regarding arbitration-related court proceedings, despite longstanding calls for such legislation (as in Hong Kong, Singapore and New Zealand),[40] and even though most ICA involves far fewer public interests that ISDS arbitration. The visibility around ISDS is certainly reflected in 2018 amendments to Australia's International Arbitration Act (IAA) excluding from automatic confidentiality arbitrations where the 2013 UNCITRAL Rules on Transparency in Treaty-based Arbitration.[41]

There rest of this analysis takes a closer look at such tensions between *confidentiality* (especially in and for ICA) and *transparency* (especially in and for ISDS), focusing on Japan and Australia.[42] Both lie geographically on the periphery of the Asian region, where international arbitration has been burgeoning especially over the last 15 years. Yet both countries have struggled to attract significantly more arbitration cases, despite quite extensive efforts (especially by Australia); most cases still go to

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[36] Hwang, op cit.
[37] Available at http://japan.kantei.go.jp/policy/sihou/arbitrationlaw.pdf.
[38] http://arbitrationblog.kluwerarbitration.com/2019/05/21/arbitration-law-reform-in-new-zealand-a-lesson-in-competing-values/
[39] See generally Kawharu, Amokura and Nottage, Luke R., Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu (February 1, 2018). Sydney Law School Research Paper No. 18/03. Available at SSRN: https://ssrn.com/abstract=3116526
[40] Nottage, Luke R. and Garnett, Richard, The Top Twenty Things to Change in or around Australia's International Arbitration Act (April 13, 2009). In L Nottage & R Garnett (eds), 'International Arbiration in Australia', Federation Press: Sydney, 2010; Sydney Law School Research Paper No. 09/19; U of Melbourne Legal Studies Research Paper No. 405. Available at SSRN: https://ssrn.com/abstract=1378722
[41] https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency
[42] For an earlier suggestive analysis of Australia, see Shirlow, http://arbitrationblog.kluwerarbitration.com/2015/12/19/recent-developments-in-australias-approach-to-confidentiality-and-transparency-in-international-arbitration/.

Hong Kong, Singapore and (albeit especially where local parties are involved) China.[43] This is despite increasingly strict *confidentiality* obligations being introduced through the rules of the major arbitration institutions, and/or legislation, in Japan and especially Australia over recent years. Although aiming to meet the usual expectations of businesspeople and their legal advisors in international commercial dispute resolution, these changes may be "too little, too late".

By contrast, *transparency* obligations have been added increasingly around the investor-state dispute settlement (ISDS) option included in almost all investment treaties concluded respectively by Australia and Japan. This tendency may reflect growing concerns (especially in Australia[44]) about the public interests implicated by ISDS cases, although empirically there is already significant transparency at least around treaty-based ISDS awards or outcomes.[45] As mentioned above, Australia has gone the next step of revising its legislation in 2018 to automatically exempt some investment treaty arbitrations from the confidentiality obligations otherwise imposed by default on parties and others in Australia-seated international arbitration proceedings since 2015. Japan does not need to, because its legislation does not apply confidentiality to arbitrations by default.

Lessons from the tensions between these two trajectories in each country may be particularly interesting for other jurisdictions (especially adopting the Model Law, but also perhaps like Italy) that are seeking to promote and attract international arbitration cases amidst evolving expectations in business and wider communities. As concluded below, how those tensions play out may also influence the EU's ongoing negotiations for investment protection treaties with respectively Australia and Japan.

2. Australia

2.1 International Commercial Arbitration

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[43] For a report on the first of two symposiums on Asia-Pacific international arbitration, co-hosted by USydney and Hong Kong University, see Teramura, https://japaneselaw.sydney.edu.au/2019/07/new-frontiers-in-international-arbitration-for-the-asia-pacific-region-4-guest-blog-report-on-15-july-symposium-with-at-hku/.

[44] Nottage, Luke R., Investor-State Arbitration Policy and Practice in Australia (June 29, 2016). SECOND THOUGHTS: INVESTOR-STATE ARBITRATION BETWEEN DEVELOPED DEMOCRACIES, Armand de Mestral, ed, Centre for International Governance Innovation, Canada, 2017; Sydney Law School Research Paper No. 16/57. Available at SSRN: https://ssrn.com/abstract=2802450

[45] Nottage, Luke R. and Ubilava, Ana, Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry (August 6, 2018). International Arbitration Law Review, Vol. 21, Issue 4, 2018; Sydney Law School Research Paper No. 18/46. Available at SSRN: https://ssrn.com/abstract=3227401. See also the Concept Paper on "Empirical Perspectives" by Working Group 7 of the Academic Forum on ISDS, via https://www.cids.ch/academic-forum-concept-papers. (I co-authored the Concept Paper on "Independence" of arbitrators.)

Australia's highest court famously decided in 1995 that there was no implied duty of confidentiality in arbitration (only an implied duty of privacy).[46] Although that *Esso* case involved a domestic arbitration and the government, the reasoning was thought to extend to international arbitration involving purely commercial parties and transactions. Because that was considered out of kilter with most expectations among businesspeople and the international arbitration community, when we drafted the first Arbitration Rules for the Australian Centre for International Commercial Arbitration (ACICA) based otherwise generally on the UNCITRAL Rules, confidentiality obligations were added that were relatively strict (eg extending to witnesses).[47] These were retained in subsequent Rules (eg 2016):[48]

> "22.2 The parties, the Arbitral Tribunal and ACICA shall treat as confidential and shall not disclose to a third party without prior written consent from the parties all matters relating to the arbitration (including the existence of the arbitration), the award, materials created for the purpose of the arbitration and documents produced by another party in the proceedings and not in the public domain except: (a) for the purpose of making an application to any competent court; (b) for the purpose of making an application to the courts of any State to enforce the award; (c) pursuant to the order of a court of competent jurisdiction; (d) if required by the law of any State which is binding on the party making the disclosure; or (e) if required to do so by any regulatory body.
> 22.3 Any party planning to make disclosure under Article 22.2 must within a reasonable time prior to the intended disclosure notify the Arbitral Tribunal, ACICA and the other parties (if during the arbitration) or ACICA and the other parties (if the disclosure takes place after the conclusion of the arbitration) and furnish details of the disclosure and an explanation of the reason for it.
> 22.4 To the extent that a witness is given access to evidence or other information obtained in the arbitration, the party calling such witness is responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party."

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[46] Morrison, James and Nottage, Luke R., Country Report on Australia for: International Commercial Arbitration – An Asia-Pacific Perspective (October 23, 2014). Sydney Law School Research Paper No. 14/95. Available at SSRN: https://ssrn.com/abstract=2514124.

[47] Greenberg, Simon and Nottage, Luke R. and Weeramantry, Romesh, The 2005 Rules of the Australian Centre for International Commercial Arbitration - Revisited (September 27, 2009). INTERNATIONAL ARBITRATION IN AUSTRALIA, L. Nottage, R. Garnett, eds., Federation Press: Sydney, 2010; Sydney Law School Research Paper No. 09/101. Available at SSRN: https://ssrn.com/abstract=1479348

[48] https://acica.org.au/wp-content/uploads/Rules/2016/ACICA-Arbitration-Rules-2016.pdf, outlined in Holmes, Malcolm and Nottage, Luke R. and Tang, Robert, The 2016 Rules of the Australian Centre for International Commercial Arbitration: Towards Further 'Cultural Reform' (May 31, 2016). Asian International Arbitration Journal, Vol. 12, No. 2, pp. 211-234, 2016; Sydney Law School Research Paper No. 16/49. Available at SSRN: https://ssrn.com/abstract=2786839.

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In public consultations from 2008, drafting committee members,[49] ACICA itself and others also pressed the government to add confidentiality provisions to the International Arbitration Act (IAA), which had given force of law to the UNCITRAL Model Law on ICA as early as 1989, but like the Model Law did not mention confidentiality. In 2010 amendments, confidentiality obligations were added but only if the parties expressly opted-in. This position was criticised as being little different from that established already by the *Esso* case, and therefore as still being inconsistent with usual expectations among ICA users and legal advisors.[50] Another critique was the IAA's inconsistency with new legislation also introduced from 2010 (based around the Model Law) that automatically applied confidentiality for domestic arbitration. The IAA was therefore further amended in 2015 to similarly apply confidentiality on an opt-in basis, for international arbitrations seated in Australia.[51]

However, it remains unclear whether this will be enough to establish Australia as an arbitration-friendly jurisdiction, and attract significantly more ICA cases to its shores. The situation may be similar to developments in Australian case law especially over the last decade. Judgments have become generally more pro-arbitration and internationalist especially over the last decade[52]; but without seeming to generate many more ICA cases – so far.[53]

There is also the irony that when Australia hosted the ICCA Congress in Sydney last year,[54] the 2015 legislative amendment switching to opt-out confidentiality was criticised by a leading practitioner

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[49] Nottage and Garnett, op cit (2009).

[50] At a seminar presented on 15 August 2019 at 12 Wentworth Selborne Chambers in Sydney, Michael Hwang SC and former NSW Supreme Court Justice Robert further suggested that *Esso*'s reasoning might still be relevant especially when assessing whether the an Australian court should allow disclosure after weighing the "public interest" under IAA s23G(1).

[51] http://arbitrationblog.kluwerarbitration.com/2017/05/13/australias-international-arbitration-act-amendments-rejuvenation-thousand-cuts/

[52] See eg *Casaceli v Natuzzi*, http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2012/691.html. The Federal Court of Australia stayed its proceedings in favour of Milan-seated arbitration, accepting expert witness evidence that the tribunal might apply as mandatory rules the "Australian Consumer Law" prohibitions against misleading conduct in trade, which apply to B2B as well as B2C transactions. (However, if they didn't there remains the possibility of the resultant award not being enforced in Australia on public policy grounds.) See also generally Teramura, Nobumichi and Nottage, Luke R. and Morrison, James, International Commercial Arbitration in Australia: Judicial Control over Arbitral Awards (April 10, 2019). Sydney Law School Research Paper No. 19/24. Available at SSRN: https://ssrn.com/abstract=3379494.

[53] Hu, Diana and Nottage, Luke R., The International Arbitration Act Matters in Australia: Where to Litigate and Why (Not) (October 31, 2016). The Arbitrator and Mediator, Vol. 35, No. 1, pp. 91-104, 2016; Sydney Law School Research Paper No. 16/94. Available at SSRN: https://ssrn.com/abstract=2862256

[54] http://arbitrationblog.kluwerarbitration.com/2018/09/20/australias-incapacity-international-commercial-arbitration/

(Constantine Partasides QC) as going against a broader shift towards transparency in global society. Against that backdrop, he argued that confidentiality only on an opt-in basis may be the way forward. Another unresolved issue in Australia is whether and how to limit confidentiality and privacy around IAA-related court proceedings (such as challenges to arbitrators or awards), as in Hong Kong or Singapore compared to (more transparent) New Zealand.[55]

2.2 Investment Treaties and Arbitration

In addition, the IAA was further amended in late 2018 to exempt international investment arbitrations in Australia from the opt-out confidentiality provision, if subject to the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.[56] None of Australia's treaties (even recently concluded, such as with Korea) adopt specifically those Rules, although they do incorporate directly into the treaty text somewhat similar transparency provisions around ISDS. However, Australia in 2017 signed the 2014 UN Convention on Transparency on Transparency in Treaty-based Investor-State Arbitration.[57] This Mauritius Convention later entered into force for a few other states,[58] and once Australia ratifies it will give the 2018 IAA amendment more traction, because the Convention extends or retrofits the UNCITRAL Transparency Rules to investment treaties concluded before 1 April 2014.

This 2018 amendment arguably aims first to address growing concerns and debate about ISDS generally among the public in Australia, especially since it was subjected to its first treaty-based claim from 2011. The claim over Australia's tobacco plain packaging legislation brought by Philip Morris Asia under an old investment treaty with Hong Kong was dismissed on jurisdictional grounds in 2015. However, the tribunal (applying 2010 UNCITRAL Arbitration Rules) ordered the application of a confidentiality regime,[59] which was criticised by some (eg those concerned about the costs spent by the Australian government to defend the case).[60] Secondly, the minister introducing the 2018

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[55] See eg Nottage, Luke R., International Commercial Arbitration in Australia: What's New and What's Next? (February 9, 2014). INTERNATIONAL COMMERCIAL LAW AND ARBITRATION: PERSPECTIVES, N. Perram, ed., Ross Parsons Centre of Commercial, Corporate and Taxation Law, pp. 307-341, 2014; Sydney Law School Research Paper No. 14/13. Available at SSRN: https://ssrn.com/abstract=2393232. At present the question remains governed by general Court Rule and Practice Notes across State, Territorial and Federal Courts.

[56] https://www.ashurst.com/en/news-and-insights/legal-updates/international-arbitration-update-staying-on-the-cutting-edge-180924/

[57] https://dfat.gov.au/news/news/Pages/australia-signs-the-mauritius-convention-on-transparency.aspx

[58] https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status (Italy signed but also hasn't yet ratified; Japan has not signed).

[59] Procedural Order No 12 via https://pca-cpa.org/en/cases/5/

[60] Cf eg https://www.theguardian.com/business/2018/jul/02/revealed-39m-cost-of-defending-australias-tobacco-plain-packaging-laws

amendment had argued that it "broadens the scope of arbitration work which can be conducted in Australia under the IAA".[61]

However, both arguments only apply if the parties conduct their investment treaty arbitrations seated in Australia.[62] That is unlikely where the Australian government or investors are involved; the arbitration will almost invariably instead take place overseas. (In the Philip Morris case, for example, it persuaded the tribunal to order Singapore as the seat; Australia had argued for London, somewhat curiously.[63]) The expected benefits from the 2018 IAA amendment, notably to increase scope and work for investment arbitrations in Australia, will only really arise if governments and investors from other countries choose Australia as a neutral third-country seat. That seems unlikely, given the difficulties of attracting even (typically smaller) ICA cases to Australia.

Still, Australia's 2018 IAA amendment may promote transparency generally around ISDS if similar legislation is enacted in other countries. Australia has the opportunity to elaborate these points in the ongoing UNCITRAL deliberations on ISDS reform, where transparency is a major issue.[64]

3. Japan

3.1 ICA

Japan also adopted the UNCITRAL Model Law on ICA, but only in 2003 as part of a broader package of justice system reforms.[65] Like Australia in 1989, Japan did not add any confidentiality provisions. Unlike Australia, however, Japan has not subsequently added provisions – indeed, it has not amended its Arbitration Act 2003 at all. There also seem to be no current plans to do so, despite a push since 2017 mainly from the governing Liberal Democratic Party to belatedly promote Japan as a

[61] http://arbitrationblog.kluwerarbitration.com/2017/05/13/australias-international-arbitration-act-amendments-rejuvenation-thousand-cuts/

[62] Both the 2014 UNCITRAL Transparency Rules and the 2017 Mauritius Convention provisions only cover treaty-based ISDS arbitrations, not those where the consent to arbitration and investment protections are in one-off contracts between investors and host states.

[63] A negative jurisdictional ruling (as eventually made by the tribunal) could have been appealed to courts at the seat in England, thus prolonging the dispute, but not at the time in Singapore: see Hepburn, Jarrod and Nottage, Luke R., Case Note: Philip Morris Asia v Australia (September 29, 2016). The Journal of World Investment and Trade, Vol. 18, No. 2, pp. 307-319, 2017; Sydney Law School Research Paper No. 16/86. Available at SSRN: https://ssrn.com/abstract=2842065

[64] See summaries eg via https://www.ejiltalk.org/author/aroberts/.

[65] Nakamura, Tatsuya and Nottage, Luke R., Arbitration in Japan (May 30, 2012). ARBITRATION IN ASIA, T. Ginsburg, S. Ali, eds., Juris: NY, Forthcoming; Sydney Law School Research Paper No. 12/39. Available at SSRN: https://ssrn.com/abstract=2070447

new regional hub for international dispute resolution services (following also initiatives in Korea and Malaysia).[66]

Again, however, arbitration institutions have stepped into the breach. Notably, the Japan Commercial Arbitration Association (JCAA) administers most of the (still comparatively few) ICA cases seated in Japan, and its Arbitration Rules have long included a confidentiality provision. The Rules amended in 2004, the year after enactment of the Arbitration Act based on the Model Law, included Article 38(2) and this was restated in the 2008 Rules as Article 40(2):[67]

> "The arbitrators, the officers and staff of the Association, the parties and their representatives or assistants shall not disclose facts related to arbitration cases or facts learned through arbitration cases except where disclosure is required by law or required in court proceedings."

Indeed, subsequent JCAA Rules have imposed somewhat stricter confidentiality obligations. Article 38(2) in 2014 extended them to others involved in the arbitration (such as witnesses, presumably):[68]

> "The arbitrators, the JCAA (including its directors, officers, employees, and other staff), the Parties, their counsel and assistants, and other persons involved in the arbitral proceedings shall not disclose facts related to or learned through the arbitral proceedings except where disclosure is required by law or in court proceedings, or based on any other justifiable grounds."

Article 42(2) of the main 2019 Rules further elaborate:[69]

> "The arbitrators, the JCAA (including its directors, officers, employees, and other staff), the Parties, their counsel and assistants, and other persons involved in the arbitral proceedings shall not disclose facts related to or learned through the arbitral proceedings and shall not express any views as to such facts, except where disclosure is required by law or in court proceedings, or based on any other justifiable grounds."

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[66] Claxton, James M. and Nottage, Luke R. and Teramura, Nobumichi, Developing Japan as a Regional Hub for International Dispute Resolution: Dream Come True or Daydream? (December 11, 2018). Journal of Japanese Law, Issue 47, 2019 (Forthcoming); Sydney Law School Research Paper No. 19/01. Available at SSRN: https://ssrn.com/abstract=3299097

[67] See http://www.jcaa.or.jp/e/arbitration/docs/e_shouji.pdf (2008) and p33 of: McAlinn, Gerald Paul and Nottage, Luke R., Changing the (JCAA) Rules: Improving International Commercial Arbitration in Japan. Journal of Japanese Law, Vol. 18, pp. 23-36, 2004. Available at SSRN: https://ssrn.com/abstract=837085

[68] See http://www.jcaa.or.jp/e/arbitration/Arbitration_Rules_2015e.pdf and http://www.jcaa.or.jp/e/arbitration/docs/Arbitration_Rules_2014e.pdf.

[69] See http://www.jcaa.or.jp/e/arbitration/docs/Commercial_Arbitoration_Rules.pdf (2019) via http://www.jcaa.or.jp/e/arbitration/rules.html

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This progression has been little noticed or discussed among commentators, unlike Australia where enhanced confidentiality obligations in ACICA Rules since 2005 and especially through the IAA since 2015 has been publicised as signalling a more pro-arbitration stance. It could be that Japan is being typically more modest in self-promotion, or that it has less scope to do so anyway because the legislation still does not provide automatically for confidentiality. But it could also be wise not to amend the Arbitration Act 2003, and instead maintain confidentiality in the main institutional Rules, given recent suggestions by Partasides and a few others that confidentiality is perhaps best available only on an opt-in basis even in ICA. However, most of the international arbitration cases in Japan seem to involve purely commercial arbitrations, namely contracts between private companies that raise no or minimal private interests. By contrast, Partasides and others may be influenced by the fact that many ICC and other cases now involve some state entity as a disputing party, which does raise more public interests and therefore arguments in favour of greater transparency in arbitration.

3.1 Investment Treaties and ISDS

For many decades Japan did not actively conclude many bilateral investment treaties, compared to say Korea, and was quite flexible in drafting them. (The pattern is similar to Australia, but the latter had much less outbound investment than Japan and therefore less incentive to pursue a BIT program.) Since Japan began to conclude investment treaties as part of broader Free Trade Agreements, beginning with Singapore in 2001, Japan has become more consistent with drafting[70] (inspired often by contemporary US-style treaties – as with many countries in the Asia-Pacific region, evidenced in the new mega-regional CPTPP[71]). Japan is also playing catch up by accelerating its program of concluding standalone BITs, especially in developing markets or politically unstable destination countries in Africa and the Middle East,[72] whereas Australia and other countries are concluding relatively fewer BITs and concentrating more on FTA negotiations. In UNCITRAL reform deliberations, Japan has been one of the countries more supportive of the current ISDS system.

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[70] Hamamoto, Shotaro and Nottage, Luke R., Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution (December 26, 2010). Transnational Dispute Management, Forthcoming; Sydney Law School Research Paper No. 10/145. Available at SSRN: https://ssrn.com/abstract=1724999

[71] Kawharu, Amokura and Nottage, Luke R., Models for Investment Treaties in the Asian Region: An Underview (September 21, 2016). Arizona Journal of International and Comparative Law, Vol 34, No. 3, pp. 462-528, 2017; Sydney Law School Research Paper No. 16/87. Available at SSRN: https://ssrn.com/abstract=2845088

[72] As noted recently, "the Abe Administration since 2012 has signed 16 standalone BITs (all with ISDS)": Claxton, Nottage & Williams, http://arbitrationblog.kluwerarbitration.com/2019/08/12/resolving-disputes-amidst-japan-korea-trade-and-investment-tensions-part-ii/.

However, a noticeable trend in recent Japanese investment treaties (similarly to Australia) has been already to enhance transparency provisions around the ISDS procedure.[73] It will be interesting to see if Japan moves soon to sign and ratify the 2017 Mauritius Convention. If it does, the Arbitration Act will not need an amendment similar to Australia in 2018 because it does not provide for confidentiality on an opt-out basis. Indeed, this aspect could be used by the Japanese government and arbitration community to promote Japan (rather than Australia at present) as an appropriate neutral venue for ISDS arbitrations. But many other factors are likely to be more important for parties thinking about choosing an appropriate venue. In the Philip Morris Asia case, for example, it was argued that London was better than Singapore because (at that time) the UK courts had had more experience in investment treaty cases. Japanese courts still have no such experience, or even much experience in ICA cases,[74] and indeed the government has never been subjected to a treaty-based ISDS claim.

4. Conclusions and Further Implications

We can discern a gradual strengthening of confidentiality obligations around ICA, in Japan and especially Australia, yet a loosening in both countries around ISDS.[75] The latter tendency is probably due mostly due wider public concerns over ISDS. Those could even have lead to Australia reverting to eschewing ISDS altogether in future treaties (as in 2011-2013 under a Labor-Greens government) if the government had lost the general election held in May 2019.[76] The Labor Opposition had further declared that it would also seek to renegotiate Australia's old treaties.[77] However, the Coalition Government unexpectedly won the election,[78] and so has resumed parliamentary inquiries into ratification of treaties it had signed with Indonesia and Hong Kong that both contain ISDS provisions.[79]

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[73] See Prof Ishikawa's chapter in Chaisse/Nottage (eds) 2018 at https://brill.com/view/title/36129.
[74] http://arbitrationblog.kluwerarbitration.com/2018/11/17/japans-incapacity-international-commercial-arbitration/
[75] http://arbitrationblog.kluwerarbitration.com/2015/12/19/recent-developments-in-australias-approach-to-confidentiality-and-transparency-in-international-arbitration/
[76] Kawharu and Nottage, op cit (2018).
[77] http://arbitrationblog.kluwerarbitration.com/2019/01/21/2018-in-review-australia-and-new-zealand/
[78] Nottage, https://www.eastasiaforum.org/2019/05/25/settling-investor-state-disputes-asia-pacific-style/
[79] The transcript of my evidence for the Joint Standing Committee on Treaties inquiry hearings in Sydney on 26 August will be available on request or via https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Indonesia-AustraliaCEPA and https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/A-HKFTA.

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The ISDS-related transparency provisions are far less extensive in the former than the latter treaty,[80] but in light of Australia's other treaty practice[81] this probably reflects the counterparty's preferences. The Labor Opposition is likely to focus on other aspects, voicing objections to ISDS and other investment-related provisions, but eventually (unlike the Greens) voting in favour of ratification by Australia. Now that Australia's general election is over, we can also anticipate parliamentary inquiries and more broad-based political agreement to ratify the Mauritius Convention as a major step towards enhancing transparency around ISDS, extending to treaties already in force.

Such moves to continuing promoting transparency in investment treaty arbitration could ramp up pressure to revisit Australian legislation and even ACICA Rules[82] favouring confidentiality in other international arbitrations. However, the Chief Justice of the Federal Court of Australia rightly reminded ICCA delegates in Sydney last year that there remain significant differences between ISDS

[80] Compare especially Indonesia FTA Art 14.31.1 (only public disclosure of tribunal "awards and decisions") against HK Investment Agreement Art 30.1 and 30.2 (much other information too and public hearings). A similar transparency regime will apply if the investor chooses UNCITRAL Arbitration Rules (incorporating the 2014 UNCITRAL Transparency Rules) but the treaty with Indonesia also allows the investor to choose ICSID (Convention or Additional Facility) Arbitration instead.

In addition, neither treaty regulates disclosure of settlement agreements, yet the treaty with Indonesia lets the host state force the investor into conciliation before being able to commence arbitration (Arts 14.2 and 14.26.2(b)). Such potentially mandatory conciliation is very unusual for investment treaties: Ubilava, Ana, Amicable Settlements in Investor-State Disputes: Empirical Analysis of Patterns and Perceived Problems (March 13, 2019). Sydney Law School Research Paper No. 19/17. Available at SSRN: https://ssrn.com/abstract=3352181.

Curiously, only the treaty with Indonesia (Art 14.32) requires the investor to disclose any third-party funder, even though Hong Kong has recently legislated such as disclosure requirement for arbitrations seated there (or elsewhere where arbitration-related services are provided in Hong Kong): http://arbitrationblog.kluwerarbitration.com/2019/02/04/comparing-hong-kong-code-of-practice-for-third-party-funding-arbitration-with-the-code-of-conduct-in-england-wales/. (Third-party funding remains essentially unregulated in Australia since *Campbells Cash and Carry Pty Ltd* v *Fostif Pty Ltd* [2006] *HCA* 41, although this has not been actively marketed to make Australia a more attractive seat for international arbitrations compared to Hong Kong, or Singapore which also recently legislated to allow third-party funding on specified conditions.)

[81] See eg Andrew Mitchell, "Australia" in Markus Krajewski et al (eds) *Research Handbook on Foreign Direct Investment* (Elgar 2019).

[82] See also 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 Arbiration in Australia', Federation Press: Sydney, 2010; Journal of International Arbitration, Vol. 26, No.1, pp. 25-58, 2009; Sydney Law School Research Paper No. 08/62. Available at SSRN: https://ssrn.com/abstract=1151167

and ICA.[83] This tension is less pronounced in Japan, as its Arbitration Act does not provide automatically for confidentiality anyway. Nonetheless, JCAA (and other) Rules do impose confidentiality obligations, and as with ACICA or other arbitral institutions some cases may involve public interests. Accordingly, the possible tension with transparency principles should also be considered in Japan too.

For each country, moreover, such tensions may influence the negotiation and drafting of transparency provisions in treaties still being negotiated respectively with the EU. Even with the newly re-elected Coalition government, Australia may be amenable in ongoing negotiations[84] to the permanent investment court alternative to traditional ISDS now insisted on by the EU in its recent investment protection treaties (eg with Singapore, Vietnam and Canada), which also aims to make investment dispute resolution more transparent. But the court option may seem less pro-investor and therefore more unattractive for Japan, which has much larger FDI in Europe than vice versa, as the EU and Japan continue to negotiate an investment protection treaty.[85] Some hybrid process, such as traditional ISDS arbitration with appeals to a permanent court comprising members appointed only by treaty partner states, may be another compromise way forward.[86] Interestingly, this hybrid alternative has attracted some support by China in a proposal on ISDS reform to UNCITRAL dated 19 July 2019.[87] Nonetheless, as rather cautious and reactive players in international investment law making, Australia and especially Japan may well end up waiting for whatever consensus emerges from the protracted and ongoing debates in UNCITRAL.

One problem with such a wait-and-see approach is that opportunities will be lost for a hybrid dispute resolution mechanism providing a compromise to conclude negotiations for the Regional Comprehensive Economic Partnership (ASEAN+6 FTA, including Singapore and nine other Southeast Asian nations, Australia, New Zealand, Japan, China, Korea and India).[88] Momentum for concluding other Asia-Pacific investment treaties may also be lost. Public concerns over transparency

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[83] See http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20180416

[84] See https://dfat.gov.au/trade/agreements/negotiations/aeufta/Pages/default.aspx

[85] See http://bruegel.org/2018/10/the-eu-japan-economic-partnership-agreement/ at pp18-19. The Japan-EU FTA (in force from 1 February 2019) only provided for market access commitments, not investment protections and a dispute settlement mechanism, which proved controversial.

[86] As proposed by Prof Gabrielle Kaufmann-Kohler et al: https://www.cids.ch/conferences-research/projects/isds-project

[87] Summarised by Roberts, https://www.ejiltalk.org/uncitral-and-isds-reform-chinas-proposal/. Korea's submission of 31 July 2019 (A/CN.9/WG.III/WP.179) is decidedly cooler over any possible "standing mechanism" (seemingly encompassing the two-tier EU-style court or the permanent appellate review body hybrid). The government's stance may reflect the concerns voiced earlier by an eminent SNU Professor: https://scholarlycommons.law.northwestern.edu/njilb/vol39/iss1/1/.

[88] Nottage, op cit = https://www.eastasiaforum.org/2019/05/25/settling-investor-state-disputes-asia-pacific-style/.

or other issues around ISDS arbitration may even spread to undermine the generally positive image of ICA that has been painstakingly built up around the region.[89]

In particular, reducing confidentiality associated with parties choosing arbitration to resolve purely commercial cross-border disputes, risks further exacerbating longstanding and arguably increasing concerns about over-formalisation (including delays and especially costs) in ICA, even in the Asian region.[90] Confidentiality should be seen as a double-edged sword. It can allow arbitrators to be more robust with procedures and succinct in writing up their decisions, yet it can also exacerbate information asymmetry common in services markets by making it hard for clients to ascertain whether arbitrators and counsel really provide good value for money.[91] Hopefully such information asymmetry will decline as information about arbitrators and (perhaps less so) counsel becomes more widely available anyway, through publically available ISDS cases but also initiatives from "Arbitrator Intelligence"[92] and the ICC,[93] this reducing pressure to take away confidentiality from commercial arbitrations under the slogan of ever-greater transparency. If confidentiality is to be reduced in ICA, care needs to be taken when using the blunt instrument of legislation; a better approach is probably for arbitral institutions to experiment by amending their rules.

[89] For media analysis of reporting and impressions about different types of arbitration in Australia and elsewhere, see Nottage, 2017, https://www.ssrn.com/abstract=3116528.
[90] For such concerns, see eg the QMUL 2018 survey op cit (at pp7-8).
[91] Including also further empirical evidence of burgeoning costs and delays, see Nottage, Luke R., In/Formalisation and Glocalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia (2014). Formalisation and Flexibilisation in Dispute Resolution, J. Zekoll, M. Baelz, I. Amelung, eds, Brill, The Netherlands, 2014; Sydney Law School Research Paper No. 17/47. Available at SSRN: https://ssrn.com/abstract=2987674
[92] See https://arbitratorintelligence.com/ and eg Rogers, Catherine A., Arbitrator Intelligence: From Intuition to Data in Arbitrator Appointments (January 30, 2018). New York Dispute Resolution Lawyer Volume 11 No. 2 (Spring 2018); Penn State Law Research Paper No. 3-2018. Available at SSRN: https://ssrn.com/abstract=3113800.
[93] See https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/.