



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)

19 February 2016

Joint Standing Committee on Treaties
Australian Parliament
Canberra

Submission to JSCOT Inquiry into the TPP Agreement¹ - 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.²

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).³ Those countries include current TPP treaty partners such as Vietnam (an FDI-importer),⁴ as well potential further candidates such as Korea⁵ and Thailand⁶ (FDI-exporters).

¹ http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016

² See David Uren, *Takeover: Foreign Investment and the Australian Psyche* (Black Inc., 2015), discussed at: http://blogs.usyd.edu.au/japaneselaw/2015/10/foreign_investment_regulation.html

³ 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).

⁴ 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>.

⁵ 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>



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)⁷ 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.⁸ 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 2016.⁹

⁶ Luke Nottage and Sakda Thanitcul, "The Past, Present and Future of International Investment Arbitration in Thailand" (unpublished manuscript, February 2016, available on request).

⁷ http://blogs.usyd.edu.au/japaneselaw/2015/06/senates_report_treaties.html

⁸ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1449>

⁹ <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 Partnership¹⁰ (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,¹¹ 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.¹² 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”.¹³ Other preliminary responses have been more measured, including some by myself (in *The Australian* on 6 November)¹⁴ or Professor Tania Voon¹⁵ within Australia, and other general commentary from abroad.¹⁶

Based partly on an ongoing ARC joint research project on international investment dispute management, with a particular focus on Australia and the Asia-Pacific,¹⁷ I briefly introduce the scope of ISDS-backed substantive protections for foreign investors in the

¹⁰ <http://dfat.gov.au/trade/agreements/tpp/pages/trans-pacific-partnership-agreement-tpp.aspx>

¹¹ 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]

¹² <http://www.eastasiaforum.org/2015/10/29/the-tpp-isnt-a-done-deal-yet/>

¹³ <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>

¹⁴ <http://www.theaustralian.com.au/national-affairs/foreign-affairs/experts-test-andrew-robb-tpp-safeguard-claims/story-fn59nm2j-1227598099647?sv=e0536f8755bcf0b6f8b0482164737065&memtype=anonymous>

¹⁵ <http://www.sbs.com.au/news/article/2015/11/06/calls-trans-pacific-partnership-be-independently-assesed>

¹⁶ <https://www.iareporter.com/articles/a-first-glance-at-the-investment-chapter-of-the-tpp-agreement-a-familiar-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>.

¹⁷ 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.¹⁸ My separate **[Appendix B]** online analysis briefly compares the ISDS provisions themselves.¹⁹ Since publishing this assessment, the Australian government has also released a helpful 7-page summary of the entire Investment chapter.²⁰

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").²¹ 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).²²

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).

¹⁸ <http://dfat.gov.au/trade/agreements/Pages/trade-agreements.aspx>

¹⁹ http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp_investment_isds.html

²⁰ Available (with other chapter summaries) via <http://dfat.gov.au/trade/agreements/tpp/summaries/Pages/summaries.aspx>

²¹ 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>

²² <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),²³ had more limited non-discrimination commitments from China.²⁴ 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.²⁵

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,²⁶ 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

²³ 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.

²⁴ http://lexbridgelawyers.com/wp-content/uploads/2015/06/Lexbridge_ChAFTA-Investment.pdf

²⁵ http://blogs.usyd.edu.au/japaneselaw/2015/06/compromised_isds_china.html

²⁶ 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),²⁷ 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”.²⁸ 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.²⁹ 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.

²⁷ <https://www.ag.gov.au/tobaccoplainpackaging>

²⁸ 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).

²⁹ <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 Partnership³⁰ (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,³¹ 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.³² 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.³³

As outlined by Ioannis Konstantinidis in the previous *KLRCA Newsletter*,³⁴ 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 rights³⁵ 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),³⁶ as explained by Loretta Malintoppi in the previous *Newsletter*,³⁷

³⁰ <http://dfat.gov.au/trade/agreements/tpp/pages/trans-pacific-partnership-agreement-tpp.aspx>

³¹ <http://theconversation.com/as-asia-embraces-the-trans-pacific-partnership-isds-opposition-fluctuates-50979>

³² <http://www.eastasiaforum.org/2015/10/29/the-tpp-isnt-a-done-deal-yet/>

³³ 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>

³⁴ “Effective Dispute Resolution Mechanisms” 19 *KLRCA Newsletter* 10-11 July-September 2015) at <http://klrca.org/downloads/newsletters/2015Q3newsletter.pdf>

³⁵ 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).

³⁶ 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>

³⁷ “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”,³⁸ 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.³⁹ Other potential candidates include capital-exporting countries like Korea, which pressed strongly for ISDS in bilateral FTAs – even with Australia and New Zealand.⁴⁰ 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 TPP⁴¹ 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.⁴² They also obtained such a bilateral carveout in their FTA with ASEAN signed in 2009,⁴³ 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

³⁸ <http://www.theguardian.com/world/2015/oct/27/indonesia-will-join-trans-pacific-partnership-jokowi-tells-obama>

³⁹ 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>

⁴⁰ 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>

⁴¹ <http://www.lowyinterpreter.org/post/2015/11/03/TPP-Australia-should-take-the-lead-to-bring-in-China-and-Indonesia.aspx>

⁴² <http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-new-zealand-investor-state-dispute-settlement-trade-remedies-and-transport-services.PDF>

⁴³ 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 Verlagsgesellschaft: 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.⁴⁴ Australia and New Zealand have also achieved remarkable economic integration and business law harmonisation in other respects, albeit mainly through non-treaty mechanisms.⁴⁵

Australia also omitted ISDS in its bilateral FTA concluded with Malaysia in 2012, consistently with the Gillard Government's Trade Policy Statement of April 2011⁴⁶ – 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.⁴⁷ 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).⁴⁸ 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.⁴⁹ 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

44

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

⁴⁵ 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>

⁴⁶ 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>

⁴⁷ <http://dfat.gov.au/trade/topics/pages/isds.aspx>

⁴⁸ <http://www.state.gov/documents/organization/22094.pdf>

⁴⁹ 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.⁵⁰

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).⁵¹ 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,⁵² 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 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.

⁵⁰ <https://www.ag.gov.au/tobaccoplainpackaging>

⁵¹ <http://ec.europa.eu/trade/policy/in-focus/ceta/>

⁵² 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.⁵³ 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,⁵⁴ 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.⁵⁵

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

⁵³ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364>

⁵⁴ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409>

⁵⁵ <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,⁵⁶ or concerned more broadly about cross-border investment.⁵⁷

⁵⁶ 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>

⁵⁷ 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,⁵⁸ 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.⁵⁹ 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 Australia⁶⁰ and the US⁶¹ 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 region⁶² 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.⁶³

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

⁵⁸ http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11547492

⁵⁹ <http://dfat.gov.au/trade/agreements/tpp/Pages/trans-pacific-partnership-agreement-tpp.aspx>

⁶⁰ <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>

⁶¹ <http://ccsi.columbia.edu/2015/11/18/the-tpps-investment-chapter-entrenching-rather-than-reforming-a-flawed-system/>

⁶² <http://ssrn.com/abstract=1789306>

⁶³ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2401504



against Indonesia for discriminatory restrictions by Indonesia on imported beef.⁶⁴ 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.⁶⁵

Part of the criticism in fact comes from some economists,⁶⁶ 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.⁶⁷ (Others, cited here,⁶⁸ 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.⁶⁹ They often highlight the Philip Morris Asia arbitration brought against Australia regarding its tobacco plain packaging litigation.⁷⁰ (Others point out this is the only claim, still pending and under an old treaty with Hong Kong.⁷¹ More generally, a careful empirical study recently found no significant extra regulatory chill even in a country like Canada,⁷² which has lost a few ISDS claims under the North American FTA in effect since 1994.)

⁶⁴ http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11419890

⁶⁵ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685941

⁶⁶ <http://www.smh.com.au/business/the-economy/tpp-will-the-transpacific-partnership-really-benefit-australia-20151006-gk24so.html>

⁶⁷ <http://aftinet.org.au/cms/node/962>

⁶⁸ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033167

⁶⁹ <http://theconversation.com/leaked-tpp-investment-chapter-shows-risks-to-australias-health-39799>

⁷⁰ <https://www.ag.gov.au/tobaccoplainpackaging>

⁷¹ <http://ssrn.com/abstract=2041680>

⁷² <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).⁷³ Controversially,⁷⁴ 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.⁷⁵ This helped Australia to reach agreement on major FTAs, but the political left continues to its opposition through multiple parliamentary inquiries.⁷⁶ 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",⁷⁷ 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,⁷⁸ objecting in part to their ISDS provisions. Yet those are very limited regarding China,⁷⁹ 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),⁸⁰ 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,

⁷³ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1860505

⁷⁴ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152752

⁷⁵ <http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/fact-sheet-investor-state-dispute-settlement.aspx>

⁷⁶ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561147

⁷⁷ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483610

⁷⁸ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643926

⁷⁹ http://blogs.usyd.edu.au/japaneselaw/2015/06/compromised_isds_china.html

⁸⁰ <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,⁸¹ 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 Korea⁸² and even China,⁸³ which may eventually join this FTA.⁸⁴ Present TPP partners supportive of ISDS include major outbound investors like Japan⁸⁵ 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 Zealand⁸⁶ 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. Vietnam⁸⁷ 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.⁸⁸

⁸¹ http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp_investment.html

⁸² http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643926

⁸³ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244634

⁸⁴ <http://m.lowyinstitute.org/node/46209>

⁸⁵ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724999

⁸⁶ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643926

⁸⁷ <http://www.transnational-dispute-management.com/article.asp?key=2041>

⁸⁸ <http://www.eastasiaforum.org/2015/10/29/the-tpp-isnt-a-done-deal-yet/>