

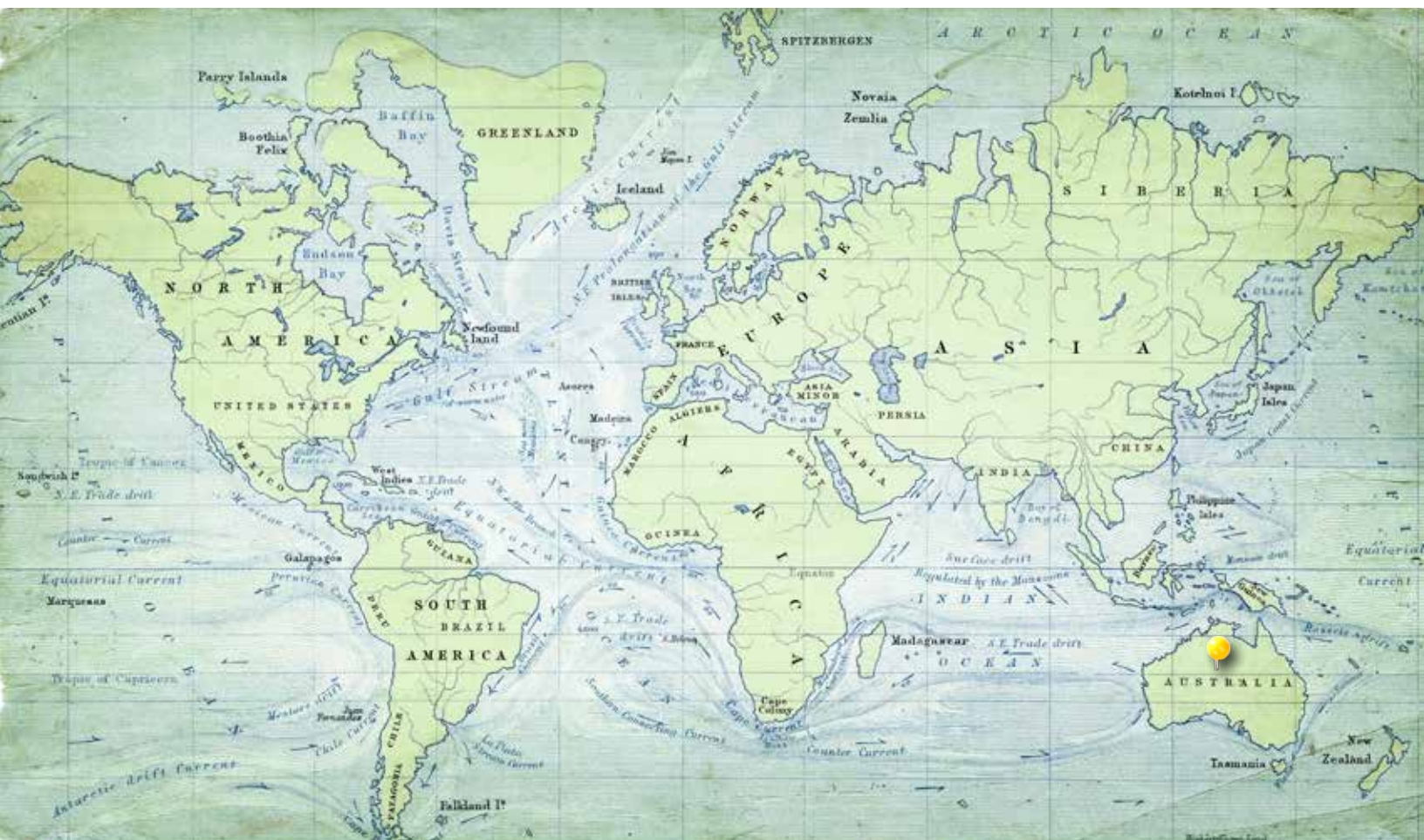


INVESTOR-STATE ARBITRATION SERIES

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INVESTOR-STATE ARBITRATION POLICY AND PRACTICE IN AUSTRALIA

LUKE NOTTAGE



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Luke Nottage



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ABOUT THE INVESTOR-STATE ARBITRATION PROJECT

Launched in November 2014, this project is addressing a central policy issue of contemporary international investment protection law: is investor-state arbitration (ISA) suitable between developed liberal democratic countries?

The project will seek to establish how many agreements exist or are planned between economically developed liberal democracies. It will review legal and policy reactions to investor-state arbitrations taking place within these countries and summarize the substantive grounds upon which claims are being made and their impact on public policy making by governments.

The project will review, critically assess and critique arguments made in favour and against the growing use of ISA between developed democracies — paying particular attention to Canada, the European Union, Japan, Korea, the United States and Australia, where civil society groups and academic critics have come out against ISA. The project will examine the arguments that investor-state disputes are best left to the national courts in the subject jurisdiction. It will also examine whether domestic law in the countries examined gives the foreign investor rights of action before the domestic courts against the government, equivalent to those provided by contemporary investment protection agreements.

CIGI Senior Fellow Armand de Mestral is the lead researcher on the ISA project. Contributors to the project are Marc Bungenberg, Charles-Emmanuel Côté, David Gantz, Shotaro Hamamoto, Younsik Kim, Céline Lévesque, Csongor István Nagy, Luke Nottage, Ucheora Onwuamaegbu, Carmen Otero, Hugo Perezcano, August Reinisch and David Schneiderman. A conference was held in Ottawa on September 25, 2015. The papers presented at that conference are in the process of being issued as CIGI Papers and will ultimately appear as a collective book.

ABOUT THE AUTHOR



Luke Nottage is a CIGI senior fellow, a professor of comparative and transnational business law, and co-director of the Australian Network for Japanese Law at the University of Sydney. He is associate director of the Centre for Asian and Pacific Law at the University of Sydney.

His publications include *Product Safety and Liability Law in Japan* (Routledge, 2004), *Corporate Governance in the 21st Century: Japan's Gradual Transformation* (Elgar, 2008, lead-edited with Leon Wolff and Kent Anderson), *International Arbitration in Australia* (Federation Press, 2010; lead-edited with Richard Garnett), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011, edited with Vivienne Bath), *Consumer Law and Policy in Australia and New Zealand* (Federation Press, 2013, edited with Justin Malbon), and *Asia-Pacific Disaster Management* (Springer, 2014, edited with Simon Butt and Hitoshi Nasu).

Luke has held or retains executive roles in the Australia-Japan Society, the Law Council of Australia, the Australian Centre for International Commercial Arbitration, and the Asia-Pacific Forum for International Arbitration. He has consulted for law firms worldwide, for the Association of Southeast Asian Nations, the European Commission, the Organisation for Economic Co-operation and Development, the United Nations Development Programme and the Japanese government; he has also made numerous public submissions to the Australian government, especially on arbitration and consumer law reform.

ACRONYMS AND ABBREVIATIONS

AANZFTA	ASEAN-Australia-New Zealand Free Trade Agreement
ACCI	Australian Chamber of Commerce and Industry
ASEAN	Association of Southeast Asian Nations
AUSFTA	Australia-US Free Trade Agreement
BITs	bilateral investment treaties
BRTAs	bilateral and regional trade agreements
CER	Closer Economic Relations
ChAFTA	China-Australia Free Trade Agreement
DFAT	Department of Foreign Affairs and Trade
FDI	foreign direct investment
FTA	free trade agreement
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ISA	investor-state arbitration
ISDS	investor-state dispute settlement
JSCOT	Joint Standing Committee on Treaties
KAFTA	Korea-Australia FTA
NSW	New South Wales
OECD	Organisation for Economic Co-operation and Development
PC	Productivity Commission
SOEs	state-owned enterprises
TPP	Trans-Pacific Partnership
TPS	Trade Policy Statement
WTO	World Trade Organization

EXECUTIVE SUMMARY

Australia has 21 bilateral investment treaties (BITs) in force, signed between 1998 and 2005, mostly with developing or middle-income countries (especially Asian and Eastern European) and all containing investor-state dispute settlement (ISDS) protections, albeit with arguably very limited scope for many treaties signed through to 2002. In 10 free trade agreement (FTA) investment chapters concluded and in force since 2003, ISDS is excluded with respect to the United States, New Zealand, Malaysia and Japan, but available under bilateral FTAs with Singapore, Thailand, Chile, Korea and China as well as a regional FTA encompassing all member states of the Association of Southeast Asian Nations (ASEAN), including Malaysia, plus three others where ISDS is unavailable under bilateral FTAs or BITs. If the expanded Trans-Pacific Partnership (TPP), signed on February 4, 2016, is ratified by Australia and comes into force, ISDS will also become available with the United States and Japan (but not New Zealand, due to a further bilateral “side letter”), as well as with three more states (Canada, Mexico and Peru — although ISDS was available anyway under BITs with the latter two states).

ISDS first emerged in public and parliamentary debates in the lead-up to Australia signing its FTA with the United States in 2004, and the official reason for excluding ISDS was mutual trust in each other’s domestic legal systems. However, a few civil society groups had also raised broader sovereignty concerns in opposition to the Organisation for Economic Co-operation and Development (OECD) Multilateral Agreement on Investment. Debates intensified from 2010, when Australia joined with the United States (and then 10 other Asia-Pacific economies) to negotiate the expanded TPP, and especially since 2011 when Philip Morris Asia launched the first-ever (and still pending) claim against Australia, regarding its tobacco plain packaging legislation, under a 1993 treaty with Hong Kong. As well as opposition to ISDS from the political left, economists in the Productivity Commission (PC) were skeptical in a 2010 report on FTA policy, which generally urged Australia to refocus on unilateral and multilateral liberalization initiatives. In 2011, the (centre-left) Gillard government Trade Policy Statement (TPS) largely accepted the commission’s recommendations, including eschewing ISDS in all future investment treaties — even with developing countries. Criticisms emerged, as major bilateral FTA negotiations stalled, and after the (centre-right) Coalition government gained power on September 7, 2013, it reverted to including ISDS on a case-by-case assessment (with bilateral FTAs then concluded with Korea and China, but not with Japan, as well as the regional TPP). However, the Greens Party in particular continued to object, initiating an “anti-ISDS bill” in the Senate in 2014. The committee recommended against enactment, but ISDS continues to be discussed in other parliamentary inquiries (into ratification of the Korea and China FTAs, Australia’s treaty-making process generally and the TPP). However, there has still been almost no sustained analysis of how Australia’s domestic law protections for (all) investors compare to substantive protections for foreign investors under international customary and treaty law.

INTRODUCTION

Australia has in force BITs and FTA investment chapters containing ISDS provisions with 29 economies (see the second section of this paper, entitled “Investment Treaties with and without ISA”).¹ ISDS (including especially investor-state arbitration [ISA]) currently does not apply with respect to the United States (pursuant to the Australia-US FTA [AUSFTA] signed in 2004), New Zealand (within a regional FTA signed in 2009 and a bilateral protocol in 2011) and Japan (the Japan-Australia Economic Partnership Agreement [JAEPA] signed in 2014).² BITs were generally concluded with what were then developing countries, beginning with one signed in 1988 with China; the last one was signed in 2005 with Mexico.³ Over the last decade or so, Australia has mainly signed FTA investment chapters

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- 1 See generally Luke Nottage, “The ‘Anti-ISDS Bill’ before the Senate: What Future for Investor-State Arbitration in Australia?” (2015) 28 Intl Trade & Business L Rev 245, at part 10; Kate Lindeman et al, “Investor-State Dispute Resolution in Australia: A Changing Landscape for Investors”, online: (2015) 1 Transnational Dispute Management <www.transnational-dispute-management.com/article.asp?key=2176>; Mark Mangan, “Australia’s Investment Treaty Program and Investor-State Arbitration” in Luke Nottage & Richard Garnett, eds, *International Arbitration in Australia* (Sydney: Federation Press, 2010) 191; Chester Brown, “Investment Arbitration as the ‘New Frontier’” (2009) 28 The Arbitrator & Mediator 59. A bibliography of further international investment and commercial arbitration works related to Australia, especially circa 2010, can be found online: <blogs.usyd.edu.au/japaneselaw/2014/10/intlarbaustralia_biblio.html>. Australia was also one of the original signatories of the 1994 Energy Charter Treaty (in force from April 1998) but has not ratified it: see online: <www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/B5C43BB22EE8D60ACA256C8B0010A881>.
 - 2 Official documents and related information on all Australia’s FTAs can be found online: <dfat.gov.au/trade/agreements/pages/trade-agreements.aspx>.
 - 3 The text of all Australia’s BITs can be downloaded online: <www.info.dfat.gov.au/treaties>.

instead, quite often involving middle-income or developed countries, such as Singapore (the first such comprehensive FTA, signed in 2003), Chile (2008) and Korea (KAFTA) (2014), as well as two major regional FTAs — all containing ISA provisions. Australia has not developed any publically disclosed model BIT or investment chapter, despite some very recent calls for this (as discussed below in “Opposition to ISA” and in the conclusion to this paper). Australia has been subjected to only one ISA claim (initiated in 2011 by Philip Morris Asia regarding tobacco plain packaging legislation under the 1993 Hong Kong BIT, dismissed on jurisdictional grounds in 2015).⁴ Australian investors have made three known ISDS claims under investment treaties (BITs with India, Indonesia and Pakistan — the latter two are pending) and several more under investment contracts.

The official reason for omitting ISA in Australia’s FTAs with the United States and New Zealand was that adequate remedies were available under local laws, through courts in the respective countries (as outlined below in “Relief through Domestic Courts”).⁵ However, discussions have not specified how such national laws may differ from the customary international law and/or commonly used treaty standards. Nonetheless, for example, a recent High Court of Australia ruling upholding tobacco plain packaging legislation⁶ indicates that Australian constitutional protection is narrower than that provided by the US Constitution’s “takings” clause. Despite this, since the 2004 FTA with the United States, Australia’s investment chapters have included an annex that sets out a definition of indirect expropriation derived from the US Model BIT, in turn based on US national law.

Opposition to treaty-based ISA protections first emerged around 2004 in the context of negotiating the AUSFTA, which was controversial especially among the political left at various levels. More widespread opposition has surfaced since 2010, both from the political left (concerned about losing sovereignty and capacity to regulate in the public interest) and the economic right (concerned about distortions created by protections for certain investors and by FTAs more broadly). This combined opposition grew especially after the following: FTA negotiations began for an expanded TPP;⁷ the PC presented a trade policy inquiry report that argued against ISDS essentially on a cost-benefit analysis;⁸ and the Philip Morris claim was made against Australia (formally notified on June 27, 2011).⁹ In April 2011, the (centre-left) Gillard government — led by the Labor Party in coalition with the Greens Party — responded to the Productivity Commission’s report by releasing a TPS that eschewed ISDS in all future treaties.¹⁰

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- 4 Luke Nottage, “Investor-State Arbitration Policy and Practice after *Philip Morris Asia v Australia*” in Leon Trakman & Nicola Ranieri, eds, *Regionalism in International Investment Law* (New York: Oxford University Press, 2013) 452; “Tobacco plain packaging — investor-state arbitration”, online: Australian Government Attorney-General’s Department <<https://www.ag.gov.au/tobaccoplainpackaging/>> [“Tobacco plain packaging”]; Gareth Hutchens, “Australian Government Wins Plain Packaging Case Against Philip Morris Asia”, *Sydney Morning Herald* (18 December 2015), online: <<www.smh.com.au/federal-politics/political-news/australian-government-wins-plain-packaging-case-against-philip-morris-20151218-glqo8s.html>.
- 5 Luke Nottage & Kate Miles, “‘Back to the Future’ for Investor-State Arbitrations: Revising Rules in Australia and Japan for Public Interests” (2009) 26:1 *J Intl Arbitration* 25, with further references; Thomas Westcott, “Foreign Investment Policy and Australia’s International Investment Agreements: Catching the Third Wave” (2007) (unpublished), online: at 17 <www.researchgate.net/publication/237376942_Foreign_Investment_Policy_and_Australia%27s_International_Investment_Agreements_Catching_the_Third_Wave> [Westcott, “Foreign Investment Policy”]. An early critique came from Bryan Firth, “US Can Win 90pc and No Third Umpire”, *The Australian* (11 February 2004) 24. He pointed out that Australian domestic law allows the federal Treasurer broad discretion to reject foreign investment applications in the national interest, essentially without rights of appeal. He urged the establishment of an independent statutory body, with appeal rights, to reduce scope for over-politicization (such as the Howard government’s blocking of Shell’s takeover bid for Woodside Petroleum in 2001). Cf Thomas Westcott, “Foreign Investment Issues in the Australia-United States Free Trade Agreement” (2008) (unpublished), online: at 80 <archive.treasury.gov.au/documents/958/PDF/06_Foreign_investment_policy_AUSFTA.pdf> [Westcott, “Foreign Investment Issues”], noting that an “important implication” of omitting ISDS “is that decisions by the Treasurer on foreign investment cases will not be subject to international arbitration where no similar rights are available under domestic law.”
- 6 *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited v The Commonwealth* (2012), 250 CLR 1 [JT International]. See generally Tania Voon, Andrew Mitchell & Jonathan Liberman, eds, *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (UK: Routledge, 2014).
- 7 See e.g. Leon Trakman, “The Status of Investor-State Arbitration: Resolving Investment Disputes under the Transpacific Partnership Agreement” (2014) 48 *J World Trade* 1 [Trakman, “The Status of Investor-State Arbitration”]; Leon Trakman, “Instituting Investment Claims under the Trans-Pacific Partnership Agreement” in Wenhua Shan, ed, *China and International Investment Law* (Leiden: Brill, 2015) 372.
- 8 Austl. Commonwealth, Productivity Commission, *Bilateral and Regional Trade Agreements — Research Report* (November 2010), online: <www.pc.gov.au/inquiries/completed/trade-agreements/report/> [PC Report].
- 9 “Tobacco plain packaging”, *supra* note 4.
- 10 Austl. Commonwealth, Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity* (April 2011), online: <blogs.usyd.edu.au/japaneslaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf>. For critical assessments of the Commission’s Report and the TPS, see e.g. Luke Nottage, “The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic’s View of Australia’s Gillard Government Trade Policy Statement” (2011) *Transnational Dispute Management*, online: <<http://ssrn.com/abstract=1860505>>; Jurgen Kurtz, “Australia’s Rejection of Investor-State Arbitration: Causation, Omission and Implication” (2012) 27 *ICSID Rev* 65; Leon Trakman, “Choosing Domestic Courts over Investor-State Arbitration: Australia’s Repudiation of the Status Quo” (2012) 35:3 *UNSWLJ* 979.

After the Gillard government lost power in general elections on September 7, 2013, the new (centre-right) Coalition government reverted to considering ISDS on a case-by-case assessment.¹¹ This approach resulted in ISA being included in bilateral FTAs signed with Korea in 2014, and China in 2015 (not yet ratified or in force), but omitted in the FTA signed with Japan in 2014. Australia also consented to ISDS in the expanded TPP, substantially agreed on October 6, 2015, and signed on February 4, 2016, albeit with a side letter excluding ISDS with New Zealand (as under their 2009 FTA with ASEAN, and their 2011 bilateral investment protocol). The approach of the Coalition government, led first by Prime Minister Tony Abbott and then Prime Minister Malcolm Turnbull, is seemingly to include ISDS if a counterparty presses strongly enough for it during negotiations (and is prepared to provide something significant in return), and/or the counterparty is a less developed economy or perhaps where there exist doubts about the capacity of its legal system.

The future of treaty-based ISA for Australia remains uncertain. Various parliamentary inquiries have raised concerns since 2014, on the part of increasingly well-organized civil society groups, as well as the opposition Labor Party and especially the Greens. A Greens senator from Tasmania has sponsored a bill that would preclude Australia from entering into any future treaties containing ISDS, although Coalition and even Labor senators have recommended against enactment.¹² The Coalition government lacks, in any case, a majority in the Senate (Upper House), which must vote in favour of legislation implementing preferential tariff reductions to allow ratification of FTAs. The Labor Party eventually voted with the government regarding the Korea FTA, but it initially balked with respect to the China-Australia FTA (ChAFTA) (which also includes ISDS) and can be expected to do so regarding the expanded TPP. In addition, Australia is presently negotiating FTAs with India and Indonesia, both of which have recently announced that they will be reviewing existing BITs and negotiating new investment treaties based on new templates that are significantly less pro-investor than Australia's existing treaties. Over 2015, a broader inquiry into parliamentary scrutiny of treaty making and implementation has provided a further platform for re-agitating concerns about ISDS.¹³ If the Coalition government loses power in general elections (due by September 2016), a new Labor (or especially Labor plus Greens) government could again eschew ISDS in any future treaties, even with developing countries.

INVESTMENT TREATIES WITH AND WITHOUT ISA

As set out in Appendix A, Australia commenced its BIT program by signing an agreement with China in 1988, followed by 19 others (including one with Chile in 1996 and India in 2000) until 2002 (with Uruguay), plus two more in 2005 (with Turkey and Mexico). These all included ISDS, albeit limited under article XII(2) of the China BIT to disputes related to "the amount of compensation payable" under article VII on expropriation. The 22 BITs provided for a term of 15 years (or 10 years, in the agreements with China, India and Mexico), thereafter to continue indefinitely unless either party gives one year's written notice of termination. Of these, 21 BITs remain in force, as the Chile BIT was superseded by agreement under a 2008 FTA containing an investment chapter (with ISDS).

Australia signed its first FTA in 2003, marking a significant policy shift given its strong commitment to the multilateral World Trade Organization (WTO) system, after it became clear around 2000 that further progress in liberalizing trade and investment would be slow and uncertain in the WTO. Investment chapters were signed with Singapore in 2003, followed by the United States (AUSFTA) and Thailand (each in 2004), Chile (2008), ASEAN and New Zealand (AANZFTA, in 2009), bilaterally with New Zealand (2011, complementing the Closer Economic Relations [CER] trade agreement dating back to 1982), Malaysia (2012), Korea and Japan (each in 2014) and China (2015). Such agreements continue indefinitely, unless one party gives written notice of withdrawal. Within these 10 FTAs in force, ISDS is provided in five bilateral agreements (with Singapore, Thailand, Chile, Korea and China), as well as AANZFTA (thus extending ISDS with respect to four more ASEAN countries: Brunei, Cambodia, Malaysia and Myanmar). If the TPP can be ratified by Australia and comes into force, its ISDS provisions

11 "Trade and Investment Topics: ISDS", online: Australian Government Department of Foreign Affairs and Trade <dfat.gov.au/trade/topics/Pages/isds.aspx>.

12 Luke Nottage, "Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis and Regional Implications" (2015) 1 *Transnational Dispute Management*, online: <ssrn.com/abstract=2424987>.

13 For more detail on these parliamentary inquiries and the political backdrop, see Jurgen Kurtz & Luke Nottage, "Investment Treaty Arbitration 'Down Under': Policy and Politics in Australia" (2015) 30 *ICSID Rev* 465.

will extend to Canada, Mexico and Peru. (However, Australia already has BITs containing ISDS with the latter two, which it proposes to terminate along with its BIT with Vietnam when the TPP comes into force among these four, and the eight other states.) Yet Australia and New Zealand have signed side letters to exclude ISDS bilaterally under the ASEAN and TPP agreements, consistently with omitting ISDS in their 2011 bilateral investment protocol.

The 2015 ChAFTA does not abrogate the 1988 BIT, so it will continue in force (at least until it's up for renewal again in 2018), unless separately terminated by mutual agreement. This is significant because the former's substantive protections (underpinned by ISDS) only extend to certain national treatment protections. By contrast, the BIT extends protections against expropriation (underpinned by ISDS regarding compensation payable), as well as for example fair and equitable treatment (albeit only underpinned by interstate dispute settlement). However, the ChAFTA is unique among Australia's treaties in providing (in investment chapter article 9.9) for negotiations after a work program reviewing the chapter (and the 1988 BIT) is completed within three years of the FTA entering into force. This will consider adding provisions such as fair and equitable treatment, expropriation, "application of investment protections and ISDS to services supplied through commercial presence," as well as "scheduling of investment commitments by China on a negative list basis."

Therefore, Australia has at least some ISDS protections in place with 29 economies. By contrast, ISDS was omitted first in AUSFTA in 2004, then with respect to New Zealand (in 2009 under a carve-out within the regional AANZFTA, also in a bilateral agreement in 2011), Malaysia (2012, pursuant to the Gillard government TPS) and Japan (2014, under the Coalition government). However, omitting ISDS in the bilateral FTA with Malaysia had little practical significance, because similar protections are available under AANZFTA. The remaining three countries are developed countries with robust domestic legal systems.

In addition, the treaty partners listed in Table 1 below and subject to ISDS provisions (especially the first four) could now be considered "developed countries":¹⁴

Table 1: Developed Country Treaty Partners Subject to ISDS Provisions

Country	UN High-income Index	IMF Advanced Economies	High-income OECD Economies
Korea (2014 FTA)	X	X	X
Czech Republic (BIT)	X	X	X
Lithuania (BIT)	X	X	
Singapore (FTA 2003, AANZFTA 2009)	X	X	
Brunei (AANZFTA 2009)	X		
Chile (FTA 2008, replacing BIT)	X		
Argentina (BIT)	X		

Source: Author.

14 See online: <<http://hdr.undp.org/en/content/income-index>>, <www.imf.org/external/pubs/ft/weo/2016/01/pdf/text.pdf>, and <http://data.worldbank.org/about/country-and-lending-groups#OECD_members>. Hong Kong (with a BIT dating back to 1993) would be another developed economy and legal system, but it is not a separate country or state.

Of these seven countries, the most intriguing are Singapore and, especially, Korea, as they are high-income countries that are newer treaty partners for Australia, whereas the others are mostly lower-income countries subject also to older BITs that remain in force until one state gives notice of termination. However, when the bilateral FTA with Singapore was signed in 2003, it had significantly lower per capita income, whereas the 2009 AANZFTA was a regional agreement concluded in the context of an overall preference for ASEAN to include ISDS protections both among the 10 Southeast Asian member states and in such “ASEAN+” FTAs.¹⁵ Australian parliamentary inquiry records and media reports find that a major reason for including ISDS in the FTA with Korea was insistence by the Korean government.¹⁶ There may have been a similar impetus from Singapore around 2003 and (through ASEAN) in 2009, given that country’s growing importance as a source of outbound investment (including major investments into Australia, such as in telecoms) and its active investment treaty program.¹⁷

The case of AUSFTA is also interesting because around 2004 the United States had the largest stock of foreign direct investment (FDI) potentially in need of and subject to new investment treaty protections, and had actively negotiated investment treaties that also almost always provided for ISDS.¹⁸ In addition, critics of AUSFTA around that time and to this day maintain that the Australian government largely “sold out” to US interests, due partly to then Prime Minister John Howard wanting to consolidate a broader diplomatic relationship with the United States, led then by President George W. Bush. They have highlighted, for example, restrictions maintained for agricultural product market access into the United States (for example, sugar) and the expansion of intellectual property right protections for the primary benefit of American IP rights holders (for example, copyright terms).¹⁹ Yet ISDS was omitted, at least partly at the insistence of Australia, for the first time in any of its investment treaties.

The official reason given was that each country was satisfied with the quality of the other’s legal system for protecting foreign investments.²⁰ Yet more seems to be at play. Around that time, the *Loewen* claim by a Canadian investor in a funeral parlour business was underway under the North American Free Trade Agreement (NAFTA), seriously calling into question the quality of at least the Mississippi courts. Indeed, the tribunal was chaired by a former Chief Justice of Australia (Sir Anthony Mason, as well as former Lord of Appeal Michael Mustill), yet one commentator ridiculed the case in the Australian media.²¹ Nor was any analysis published about how each country’s legal protections for investors matches up against customary international law or widely-accepted treaty standards. Instead,

15 See further Vivienne Bath & Luke Nottage, “The ASEAN Comprehensive Investment Agreement and ‘ASEAN Plus’: The Australia-New Zealand Free Trade Area (AANZFTA) and the PRC-ASEAN Investment Agreement” in Marc Bungenberg et al, eds, *International Investment Law* (Oxford: Hart, 2015) 283; and, focusing on Indonesia, Luke Nottage & Simon Butt, “Recent International Commercial Arbitration and Investor-State Arbitration Developments Impacting on Australia’s Investments in the Resources Sector” in Philip Evans & Gabriel Moens, eds, *Arbitration and Dispute Resolution in the Resources Sector: An Australian Perspective* (Berlin: Springer, 2015), online: <ssrn.com/author=488525>.

16 See e.g. R. Callick, “Korea Ready to Talk Turkey After FTA Hurdle Removed”, *The Australian* (1 November 2013), quoting Foreign Minister Julie Bishop as saying, “ISDS is quite a high priority for [the Koreans]... they see it as essential... We have to be more pragmatic.” Korea has developed an active investment treaty program, initially to encourage inbound investment and then as a major outbound investor worldwide: Joongi Kim, “The Evolution of Korea’s Modern Investment Treaties and Investor-State Dispute Settlement Provisions” in Vivienne Bath & Luke Nottage, eds, *Investment Law and Dispute Resolution Law and Practice in Asia* (London: Routledge, 2011) 211 [Kim, “The Evolution”]. ISDS emerged briefly as matter for public concern around 2011-12, after the first-ever treaty claim was filed by a US-based investor in a financial institution (via the Belgium-Luxembourg BIT); ratification of the Korea-US FTA (including ISDS) was debated in the legislature, and presidential elections took place. However, the Korean government seems to have reverted to actively pursuing full-scale ISDS when negotiating its treaties. Korean investors have also now commenced at least three known arbitrations under existing treaties: Joongi Kim, “A Bellwether to Korea’s New Frontier in Investor-State Dispute Settlement? The Moscow Convention and Lee Jong Baek v. Kyrgyz Republic” (2015) 15:3 *Pepperdine Dispute Resolution LJ* 549 [Kim, “A Bellwether”]. For a comparison of ISDS developments in Korea, New Zealand and Australia, see Luke Nottage (2015) “Investment Treaty Arbitration Policy in Australia, New Zealand - and Korea” (2015) 25:3 *J Arbitration Studies (Korea)* 185, online: <ssrn.com/abstract=2643926>.

17 See generally Jean Ho, “Singapore” in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) 623.

18 An exception was the Canada-US FTA signed on October 4, 1987 (but superseded by NAFTA, signed in 1993, which included ISDS due primarily to concerns about investing in Mexico).

19 See e.g. Linda Weiss, Elizabeth Thurbon & John Mathews, *How to Kill a Country: Australia’s Trade Deal with the United States* (Sydney: Allen & Unwin, 2004), and presentations e.g. by Patricia Ranald and Kimberlee Weatherall at a workshop on “Ten Years After the Australia-US FTA” (online: <<https://www.assa.edu.au/events/workshop/118>>). Some economists also remain skeptical about the net economic effects from this particular FTA: Shiro Armstrong, “The economic impact of the Australia-US free trade agreement” (2015) 69:5 *Australian J Intl Affairs* 513. For a robust critique, see the presentation by Andrew Stoler, “Assessing AUSFTA” (presentation delivered at Celebrating 10 Years of the Australia-US Free Trade Agreement, The United States Studies Centre, 2 July 2015), online: <ussc.edu.au/events/Celebrating-10-years-of-the-Australia-US-Free-Trade-Agreement>.

20 Westcott, “Foreign Investment Issues”, *supra* note 5; see also William Dodge, “Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement” (2006) 39 *Vand J Transnat’l L J* at 4.

21 David Elias, “Free Trade Leads to Torrent of Trouble”, *The Age* (23 August 2003).

AUSFTA’s investment chapter ended up simply incorporating substantive rights based largely on the 2004 US Model BIT, including, for example, an annex that largely restated US case law on indirect expropriation (discussed below in “Relief through Domestic Courts”), but not that model’s provisions on ISDS.²²

The author’s ongoing interview and archival research suggests that these additional factors led to this outcome. A few individuals and civil society groups in Australia (often originally opposed also to free trade in goods and services under the WTO) had learned over the 1990s, through counterpart organizations in North America, how NAFTA had come to add investor protections and ISDS, which had initially generated some very pro-investor decisions, against Canada in particular.²³ In the early days of the Internet, they joined a global campaign to block by the end of 1998 any further progress in the OECD on a multilateral investment treaty, which would have included ISDS.²⁴ Their concerns

22 Nonetheless, AUSFTA article 11.16.1 states:

If a Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate. On such a request, the Parties shall promptly enter into consultations with a view toward allowing such a claim and establishing such procedures.

In its Report 61 recommending ratification of AUSFTA, Australia’s Joint Standing Committee on Treaties (JSCOT) noted that concerns had been expressed by community groups (such as the Australian Fair Trade & Investment Network Ltd. [AFTINET]) that this article would be used to reintroduce ISDS in future through the back door: Austl, Commonwealth, Joint Standing Committee on Treaties, *Report 61*:

Australia - United States Free Trade Agreement (23 June 2004), online: <www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_committees?url=jscot/usaftra/report.htm> [JSCOT Report 61]. The committee therefore recommended clarification by side letters or otherwise an intergovernmental interpretation after AUSFTA came into force (paras 4.26–33). In fact, neither occurred, but a former Treasury official subsequently viewed JSCOT’s concerns as “unwarranted” — adding that article 11.16 “appears to be a face-saving mechanism to appease industry lobbies who will view [omission of ISDS] as a significant loss” (Westcott, “Foreign Investment Policy”, *supra* note 5 at 17).

However, there was a little media comment related to this provision when the Australian Treasurer was faced by an application for foreign investment approval by a US investor into the grain industry in 2013 and took the rare step of rejecting the application, in the early days of the Abbott government: see Luke Nottage, “Investor-State Dispute Settlement Back for Australia’s Free Trade Agreements” (17 December 2013), *Japanese Law in Asia-Pacific Socio-Economic Context* (blog), online: <blogs.usyd.edu.au/japaneselaw/2013/12/isds_back.html>, with further references. In late 2015, it was also reported that US shareholders in locally incorporated NuCoal were pressing the US government to invoke consultations with Australia under article 11.16.1, arguing furthermore that it should be interpreted as requiring agreement on *how* to set up an ISDS procedure rather than *whether* it should be made available. The shareholders had acquired around 30 percent of NuCoal over 2010–11, soon after a mining exploration licence had been issued to its predecessor. In 2013 the New South Wales (NSW) anti-corruption commission found the minister to have acted corruptly in issuing the licence, so in 2014 the state government passed legislation to cancel it. Expropriation provisions are not contained in state constitutions, and can only be invoked under the federal constitution for federal government actions. In 2015 NuCoal lost a Federal Court challenge on other constitutional grounds, and a NSW Supreme Court challenge for lack of due process by the anti-corruption commission. The shareholders now invoking AUSFTA also argue that that claims in US courts would fail because of sovereign immunity for Australia. They also, therefore, query the premise that a direct right to ISDS in that treaty was unnecessary because of adequate remedies being provided under advanced systems of national law. A commentator also adds that the inclusion of ISDS in the expanded TPP might constitute a “change in circumstances,” triggering the application of article 11.16.1: Jarrod Hepburn, “US Investors Mired in Australian Dispute Contend that State-to-State Consultations, if Launched, Must be Followed by Investor-State Arbitration”, online: (1 December 2015) Investment Arbitration Reporter <tinyurl.com/pq5yam>. However, the shareholders’ interpretation is difficult to sustain given that the consultations, if requested by the home state, require both states to “consider allowing” an individual ISDS claim. The consultations must then be “with a view toward allowing such a claim and establishing such procedures,” but that also does not seem to commit the states to always allowing it. (*Cf* somewhat similar wording in Australia’s subsequent FTA with Japan, article 14.19(2), set out *infra* note 126.) Nonetheless, consultations were scheduled for May 4, 2016: see Chris Merritt, “NuCoal to Cloud US Trade Talks after ICAC, Barry O’Farrell Move”, *The Australian* (1 April 2016).

23 For example, in 1999 Patricia Ranald submitted her Ph.D. to the UNSW School of Political Science, entitled “Developing New Solidarities: Unions and the Internationalising State” (online: <primoa.library.unsw.edu.au>). It compared the WTO and regional trade agreements, topics dealt with in several other subsequent works (online: <sydney.edu.au/arts/political_economy/staff/index.shtml>). On August 22, 2003, writing on behalf of the Public Interest Advocacy Centre (in Sydney), she objected to Paula Stern’s advocacy for the AUSFTA, including ISDS, criticizing NAFTA claims whereby US investors “aggressively challenged environmental laws and sued Canadian and Mexican governments on the grounds that such laws harmed their investments.” Ranald highlighted a claim by UPS — characterized as Canada Post delivering standard letters to remote areas, at affordable rates, constituting an “unfair barrier to trade” — and warned that Australia Post’s services to rural areas could be similarly challenged (Patricia Ranald, “Free Trade Comes at Unacceptable Price”, *Australian Financial Review* (22 August 2003), 71. (In fact, the Tribunal subsequently wholly rejected the claim brought by UPS, although ordering the parties to bear their costs equally; see *United Parcel Service of America v Government of Canada* (2007), Award of 24 May 2007 at para 189 (UNCITRAL), online: <www.italaw.com/sites/default/files/case-documents/ita0885.pdf>). Another critic, who also subsequently objected publically to ISDS in various forums especially after Australia joined negotiations for an expanded TPP, focused on claims and risks associated with public health issues: Thomas Faunce, “US Free-Trade Deal: What’s In It For Us?”, *Canberra Times* (4 December 2003) 20. For other concerns related to environmental regulation, see e.g. Kenneth Davidson, “A Free Trade Pact Will Hurt Our Environment”, *The Age* (3 November 2003) 11.

24 See e.g. Patricia Ranald, “Disciplining Governments: The MAI Proposals” in J. Goodman & P. Ranald, eds, *Stopping the Juggernaut: Public Interest Versus the Multilateral Agreement on Investment (MAI)* (Sydney: Pluto Press, 1999) 15.

about allowing such a regime in the AUSFTA,²⁵ as well as their skepticism about trade and investment agreements generally, had a disproportionate impact on the Australian political scene. In 2003-2004, Australian firms were not investing abroad as much as they do currently,²⁶ and they were even less aware of the potential benefits of trade and investment treaties.²⁷ As for Australian government officials, the primary agency in charge of investment matters, and therefore the investment chapter, was the Treasury (comprising mostly economists), rather than the Department of Foreign Affairs and Trade (DFAT, playing a coordinating role and including international law experts).²⁸ Treasury officials may have been more concerned about greater liability exposure from ISDS claims from inbound investors, and/or the arguably distorting incentives created for outbound investment in a sparsely populated country like Australia that has traditionally been reliant on net capital imports. Further, at the political level, the (centre-right Coalition) Howard government lacked a majority in the Senate, which needed to pass legislation implementing FTA tariff reductions. Combined with broader scrutiny of the AUSFTA in parliamentary inquiries, this created an incentive for the Howard government to limit concerns being expressed especially by the opposition Labor Party, by seeking the omission of somewhat more controversial provisions such as ISDS.²⁹

In response, the US government seems to have decided that it was not worth pressing, perhaps because it would have meant conceding on other matters that were unpalatable politically at home (such as more access for Australian sugar imports). The US government was also dealing with local concerns about cases such as *Loewen* (as discussed further in “Opposition to ISA: From Left, Right and Perhaps Centre,” below), and earlier NAFTA proceedings that had resulted in Joint Commission interpretations, the bipartisan Trade Promotion Act 2002 (approving negotiation of investment treaties that did not give substantive rights greater than those available under US law) and, accordingly, the US Model BIT.³⁰ The then President George W. Bush was facing “a tightening presidential contest, with...trade and jobs issues coming to the fore politically.”³¹ Interview research suggests that then US Trade Representative Zelikoff consulted major American firms with interests in Australia, which reported that they were generally secure in their investments there and happy enough with local protections. To that extent, the quality of the (Australian) legal system was indeed a factor, but only one among many.

- 25 See e.g. David Elias, “Australian Keen to Keep Trade Litigation Floodgate Closed”, *The Age* (26 January 2004) 2. The journalist noted a briefing paper warning about NAFTA claims, from rights groups Liberty Victoria and the Catholic Commission for Justice, Development and Peace, which acknowledged that while many such claims would fail, they lead to regulatory chill — mentioning, for example, a claim concerning a ban on selling fuel with a harmful fuel additive. (This may be a reference to *Ethyl Corp v Canada*, where an ad hoc NAFTA tribunal upheld jurisdiction on June 24, 1998, online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng>, in a dispute involving legislation that did not ban the additive but instead required only those importing it from another province or country to obtain a permit. Canada settled the case for US\$13 million in July 2003, which seems unsurprising in view of national treatment and other obligations under NAFTA, but this case is still often cited as illustrating the dangers of ISDS in investment treaties, including recently in Australia: Jess Hill, “ISDS: The devil in the trade deal”, *ABC Radio National* (14 September 2014), online: <www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/5734490>. Another possibility is that the 2004 briefing paper was referring to *Methanex Corp v USA*. But in that case the ad hoc tribunal dismissed the claim in its award of August 3, 2005: online <www.italaw.com/cases/683>. Recently, North American international law professors favouring the inclusion of ISDS in TTIP instead point to this case to illustrate that “bona fide government acts will pass muster”: online: <www.mcgill.ca/fortier-chair/isds-open-letter>.)
- 26 Australian outward FDI stock was US\$208 billion in 2004 (compared to US \$386 billion in 2012) and Australian FDI stock in the United States was US\$101 billion in 2004 (compared to US \$108 billion in 2012). See online: <unctad.org/Sections/dite_fdistat/docs/webdiaeia2014d3_AUS.pdf> table 4. Interestingly, for the first time in 2001 (as well as in 2002 and 2003, when AUSFTA was negotiated) Australian FDI into the United States exceeded US FDI stock in Australia: Westcott, “Foreign Investment Issues”, *supra* note 5 at 71.
- 27 See e.g. Scott Gallacher & Iain Sandford, “Right Kind of FTAs are Worthwhile”, *Australian Financial Review* (3 March 2008) 63. Even now, a recent study by the Economist Intelligence Unit commissioned by HSBC found that only 19 percent of Australian exporters make use of Australian FTAs, compared to an average of 26 percent among Asian exporters: see ‘Australian Companies Under-utilising Free Trade Agreements’ (19 August 2014), online: HSBC <www.about.hsbc.com.au/news-and-media/australian-companies-under-utilising-free-trade-agreements>. However, one Australia-based lawyer from a large law firm did publish an op-ed emphasizing the benefits of treaty-based ISDS for offshore investors: Jonathan Hoyle, “Trade Deals and Investment Protection”, *Australian Financial Review* (5 November 2003) 59.
- 28 One news report (Elias, *supra* note 25) quoted a DFAT briefing paper as suggesting that ISDS was not necessary with a developed country like the US, with a robust legal system. The journalist added, somewhat curiously: “Australia’s chief negotiator at the trade talks, Steven Deady, told a Senate Inquiry last October [2003] that the transparency of the panel process was a key issue for both countries and there were concerns that the inclusion of a dispute mechanism might diminish Australia’s attractiveness to US investors.”
- 29 Cf e.g. Tony Walker & Cathy Bolt, “Farmers Split Over US Trade Deal”, *Australian Financial Review* (9 February 2004) 1, noting that the Labor opposition was “agitating over possible concessions to the US to win an agreement” and that any agreement would be referred to a Senate committee to allow public comment on the FTA. As unresolved issues, the report highlighted ISDS, as well as pricing under Australia’s Pharmaceutical Benefits Scheme, cultural content quotas for audiovisual programs, and Australia’s single-desk wheat exporter. (The latter was subsequently embroiled in a major corruption scandal in Iraq and then sold to a Canadian firm.)
- 30 See generally Mark Kantor, “Investor-State Arbitration over Investments in Financial Services: Disputes Under New U.S. Investment Treaties” (2004) 3 *Transnational Dispute Management* <www.transnational-dispute-management.com/article.asp?key=192>.
- 31 Tony Walker, “Vaile Fights to Save Trade Talks”, *The Australian* (2 February 2004) 1. In late 2003 seven Democrat members of the US Congress had also written to their trade negotiators arguing that ISDS provisions were intended for counterparties with less developed legal systems and therefore were not needed in AUSFTA: Allesandra Fabro, “US Support Over Trade Hitch”, *Australian Financial Review* (15 January 2004) 5.

A more inchoate aspect may be a lingering suspicion in Australia about the US, including its government and large corporations, as can be seen from parliamentary debates and media commentary on and around AUSFTA.³² Certainly, there was no media commentary when Turkey or Mexico signed BITs the next year (in 2005) with Australia, including ISDS. Nor was there any real criticism when, after the Labor Party won a landslide general election in 2007, the (centre-left) Rudd government signed a bilateral FTA with Chile in 2008 (albeit in the context of existing BIT protections) and the regional AANZFTA in 2009, both including ISDS (indeed drawing on US Model BIT provisions, for example, on transparency, especially for the former).³³ Opposition to ISDS only resurfaced in public discourse from 2010, when Australia commenced negotiations with the United States for an expanded TPP regional FTA (including an investment chapter),³⁴ and especially from 2011 when the (originally US-based) Philip Morris group initiated the first-ever ISA claim against Australia with respect to its tobacco plain packaging laws. Those who had successfully opposed ISDS around AUSFTA in 2004, especially on the political left, felt vindicated in their concerns and began campaigning against the expanded TPP – fearing that ISDS would come in through the back door and open the floodgates to ISA claims especially from US multinational corporations.

As explained further below in the section entitled “Opposition to ISA: From Left, Right and Perhaps Centre,” this led to the April 2011 Gillard government TPS eschewing ISDS in all future treaties for Australia.³⁵ This stalled the negotiations for bilateral agreements with Japan (formally underway since April 23, 2007), Korea (since May 18, 2009) and China (since May 26, 2005), respectively, as each of these major trading and investment partners was reportedly pressing for ISDS protections — albeit to varying degrees. A few months after the Coalition government took power under Tony Abbott from September 7, 2013, the DFAT website was updated to reflect its pre-election policy platform, namely that ISDS would once again be included in investment treaties based on a case-by-case assessment.³⁶ FTAs containing ISDS protections were substantially agreed with Korea on December 5, 2013, and with China on November 17, 2014. Now that China is also a major source of outbound investment, it has a strong preference for full-fledged ISDS provisions, like Korea, and both countries have relatively small investments into Australia — albeit growing.³⁷ Such investments have attracted some controversy,

32 See e.g. JSCOT Report 61, *supra* note 22, with further references. Generally, on Australia’s love-hate relationship with its big brother (or cousin), see e.g. Ross Gittins, “The Free Trade in So-called Free Trade Agreement”, *Sydney Morning Herald* (19 July 2004); James Riley, “FTA Joy Goes Sour”, *The Australian* (9 March 2004); “Two Cheers for the US Free Trade Deal”, *The Australian* (10 February 2004). See also Murray Goot, “Australian Attitudes Towards the United States: Foreign Policy, Security, Economics and Trade” (3 October 2007), online: The United States Studies Centre <ussc.edu.au/ussc/assets/media/docs/publications/0708_nationalopinionssurvey_part1.pdf>: of the 1,213 respondents surveyed, 63 percent said that “The US is likely to do better than Australia out of the [AUSFTA]” (the other options were “Australia is likely to do better than the US out of the [AUSFTA]”, “Australia and the US are likely to do equally well out of the [AUSFTA]” and “Don’t know”). On general attitudes toward the Australia-US relationship, see the Lowy Institute Poll 2014 at page 14 and especially figure 13, online: <www.loyyinstitute.org/loyyinstitutepollinteractive/2014-Lowy-Poll-web.pdf>. Regarding FDI from the United States, and Australian long historical ambivalence about inbound foreign investment generally, see David Uren, *Takeover: Foreign Investment and the Australian Psyche* (Collinwood, VIC: Black Inc, 2015) (reviewed online: <blogs.usyd.edu.au/japaneselaw/2015/10/foreign_investment_regulation.html>).

33 Indeed, major newspapers only carried two articles related to ISDS, both shortly before the Chile FTA was signed but without expressly citing those negotiations, by lawyers in large law firms who pointed out its potential benefits. See Keith Steele & Leon Chung, “Trade Dispute Resolution 101”, *Australian Financial Review* (13 June 2008) 53; Gallacher & Sandford, *supra* note 27 (remarking that: “Until now, the Australian Business Community has largely overlooked the remedies offered under these rules. But [ISDS] provides a useful tool for investors to manage government risk, particularly in countries such as Thailand which can experience various degrees of political instability.”).

34 See e.g. Kyla Tienhaara, “Trade Discord a Deal-Breaker”, *Canberra Times* (22 March 2010) 15, pointing out that the expanded TPP negotiations will involve “critically,” the US. She argued that ISDS would be a major issue as it would allow “foreign-owned corporations operating in Australia to sue the government for policy decisions that affect their bottom line.” In her view, “most concerning is that corporations frequently use [ISDS] to challenge legitimate social and environmental regulations,” giving as an example under NAFTA a claim against Canada for a ban on the lindane pesticide. (That claim was rejected soon afterwards: *Chemtura Corp v Canada*, ad hoc arbitration award of 2 August 2010 (UNCITRAL), online: <www.italaw.com/cases/249>. Nonetheless, in the Senate inquiry into the Anti-ISDS Bill a decade later, Tienhaara again raised the spectre of this claim: *cf* Nottage, *supra* note 12.)

35 Interestingly, however, Appendix A below shows that the Peru BIT came up for renewal on February 2, 2012, yet there is no indication that the Gillard government sought to extend it on the basis of omitting the BIT’s ISDS provisions. Around the time of the TPS, responses from government officials in public forums also suggested that the Gillard government had no intention of approaching treaty partners to seek a review of ISDS provisions in existing treaties.

36 *Supra* note 11. In addition, without any public discussion, on November 14, 2013, the 1998 Pakistan BIT was automatically extended, despite including ISA provisions. (Indeed, they are being presently invoked in pending ICSID proceedings brought by an Australian mining investor, as mentioned above in the section of this paper entitled “Investment Treaties with and without ISA”).

37 Trakman, “The Status of Investor-State Arbitration”, *supra* note 6; Kim, “The Evolution”, *supra* note 16; Kim, “A Bellwether”, *supra* note 16.

especially with respect to China and its state-owned enterprises (SOEs).³⁸ Also, Australian investors and traders have already encountered serious difficulties with the Chinese legal system.³⁹

By contrast, the FTA with Japan, substantially agreed on April 7, 2014, omitted ISDS. Japan has maintained a more flexible negotiating stance even with some developing countries (such as the Philippines); their firms have much larger investments in Australia but with long and successful track records, and perhaps Japan did not offer Australia enough in terms of further agricultural or other market access. Japan also has a high-quality judicial system and protections for investors, as well as little FDI from Australia.⁴⁰ Like Howard in 2004, then Prime Minister Abbott may have been influenced also by his not having a majority in the Senate. Omitting ISDS in the Australia-Japan FTA minimized chances of the Opposition Labor Party siding with independents or the Greens to block legislation implementing tariff reductions, thus preventing ratification and the treaty coming into force.

Apart from the Philip Morris claim against Australia under the 1993 Hong Kong BIT and United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, discussed especially in “Relief through Domestic Courts,” below, Australia’s investment treaties in force from 1988 to 2015 have generated only three other publicly known claims:

- Completed under the **2000 BIT with India**: White Industries obtained approximately \$10 million (including interest) under UNCITRAL Rules, after an International Chamber of Commerce (ICC) award against its Indian SOE partner in a coal mining investment was seriously delayed in being enforced through Indian Courts. This was held to violate the most-favoured-nation provision, activating a requirement for India to ensure “effective means” for foreign investors to assert claims and enforce rights (as guaranteed under its BIT with Kuwait).⁴¹
- Pending under the **1992 BIT with Indonesia**: Planet Mining (a subsidiary of Churchill in the United Kingdom) is claiming expropriation with respect to its share in a coal mining venture in Kalimantan potentially worth more than \$6 billion.⁴² In February 2014, an International Centre for Settlement of Investment Disputes (ICSID) tribunal upheld jurisdiction, but only based on consent set out in mining licenses from Indonesian authorities. It reasoned that because the BIT required that the host state “shall consent” to ICSID arbitration, this allowed Indonesia to decide whether to provide a separate specific consent (subject perhaps to an interstate claim if it refused to provide such consent). This rendered the ISDS protections under the BIT almost non-existent, especially as the alternative of ISA under UNCITRAL Rules was foreclosed due to both states’ accession to the framework 1965 ICSID Convention. After examining similar wording used in most of Australia’s other early BITs, but not all of them, the tribunal argued that the Australian government must have intended this unusual result.

Commentators have criticized this reasoning on various grounds,⁴³ not least that such an intention has never been suggested by officials or politicians in the growing and ongoing debate within Australia over ISDS (explored further in “Opposition to ISA: From Left, Right and Perhaps Centre” and “Conclusions and Future Directions,” below). The tribunal’s interpretation would similarly sharply restrict availability of ISDS under the wording of Australia’s BITs with Poland,

38 See e.g. Hamish McDonald, “Price of Business the Issue When China Comes Shopping”, *Sydney Morning Herald* (26 July 2008) 20; cf generally “Demystifying Chinese Investment in Australia”, online: KPMG and The University of Sydney <demystifyingchina.com.au/>.

39 See McDonald, *supra* note 38; and e.g. John Gamaut, “A Chinese prisoner’s dilemma as man begging for release from Australian prison risks upsetting the delicate relationship with China”, *Sydney Morning Herald* (4 April 2015), online: <www.smh.com.au/business/china/a-chinese-prisoners-dilemma-as-man-begging-for-release-from-australian-prison-risks-upsetting-the-delicate-relationship-with-china-20150404-1m6gmc.html>. See also generally Vivienne Bath, “Foreign Investment, the National Interest and National Security - Foreign Direct Investment in Australia and China” (2012) 34 *Sydney L Rev* 5. Despite this, as mentioned above in the section of this paper entitled “Investment Treaties with and without ISA”, the 2015 FTA does not include fair and equitable treatment or denial of justice within its substantive protections; those remain available only under interstate arbitration pursuant to the 1988 BIT.

40 Shotaro Hamamoto & Luke Nottage, “Japan” in Brown, *supra* note 17, 374; Luke Nottage, “Investor-State Arbitration: Not in the Australia-Japan Free Trade Agreement, and Not Ever for Australia?” (2014) 38 *J Japanese L* 37.

41 *White Industries Australia Ltd v Republic of India*, Award of 30 November 2011 (UNCITRAL), online: <www.italaw.com/cases/documents/1170>. See e.g. Harisankar Sathyapalan, “Indian Judiciary and International Arbitration: a BIT of a Control?” (2016) *Arbitration International* forthcoming, also discussing some flow-on effects in India.

42 *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40, online: <www.italaw.com/cases/1479>.

43 See e.g. Sam Luttrell & Isuru Devendra, “Case Note — Planet Mining Pty Ltd v Republic of Indonesia” (2014) 10:2 *Asian J Intl Arbitration* 195.

Hungary, Romania, the Czech Republic, Peru, Pakistan, Lithuania, Egypt and possibly PNG.⁴⁴ However, Australia and Peru were involved in the negotiations for an expanded TPP. Further, under the tribunal's interpretation in the *Planet Mining* decision on jurisdiction, the problem arises under not just the BIT with Indonesia but also Australia's BITs with Laos and the Philippines. However, AANZFTA now provides clear and immediate consent to ICSID Convention arbitration for Indonesia (for disputes from January 10, 2012) and Laos (if and when it accedes), although AANZFTA requires a further and separate consent with respect to the Philippines. AANZFTA also provides clear consent to non-ICSID arbitration with respect to these three countries. By contrast, Australia's BIT with Uruguay allows non-ICSID arbitration even if both are ICSID Convention members. The India BIT allows ICSID arbitration if both are ICSID Convention members (India is not) and if further consent is given, but allows for non-ICSID arbitration. Clarification regarding advance consent to ICSID arbitration can also be secured in negotiations underway for the (ASEAN+6) Regional Comprehensive Economic Partnership, with countries such as Indonesia and India, if that FTA ends up including ISA like other ASEAN treaties. Clarification may also be found in the bilateral FTAs that Australia is also negotiating now with each of Indonesia and India.

- Pending under the **1998 BIT with Pakistan**: Tethyan Copper (incorporated in Australia, owned in equal shares by a Chile-headquartered UK company and a Chilean company) has commenced ICSID arbitration proceedings, seemingly alleging at least expropriation. A differently constituted tribunal issued a decision on December 13, 2012, declining to issue interim measures sought by the claimant regarding its mining project (originally developed by BHP). The tribunal found prima facie jurisdiction, but without hearing argument on the BIT wording along the lines developed by Indonesia and accepted by the tribunal in the *Planet Mining* claim.⁴⁵

Anecdotal evidence also indicates that the **1995 BIT with the Philippines** was also used to advance negotiations with their government to resolve an infrastructure dispute. Other ICSID arbitration claims have also been filed alone or jointly by Australian companies⁴⁶ or local subsidiaries⁴⁷ in at least six separate disputes based on consents allegedly provided mostly in relation to mining contracts in developing countries.

RELIEF THROUGH DOMESTIC COURTS

Investment treaty protections are not directly enforceable or judiciable through Australian courts. They do not need to be enacted through Parliament, but bind Australia as a matter of international law. However, when packaged as part of an FTA, tariff reductions and other changes to customs law must be enacted in Parliament. This limits the scope for a government to include ISDS or other

44 Nottage, *supra* note 12, updated and elaborated in Julien Chaisse & Tsai-Yu Lin, eds, *Liber Americorum, Mitsuo Matsushita: A Critical Assessment of International Economic Law and Governance* (Oxford: Oxford University Press, 2016).

45 *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, online: <<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/12/1>>. At paragraph 55 of the decision, the tribunal records the contention that through "exploration and feasibility activities which have consumed over ten years and hundreds of millions of dollars, Claimant and TCCP have done everything necessary to earn a legal entitlement to a mining lease for Reko Diq. Claimant claims that Balochistan [a province of Pakistan] has denied the mining lease and is now moving to either develop Reko Diq on its own, or to transfer some or all of it to third parties."

46 Searching at <<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?cntly=ST6>> found these claims brought by ostensibly Australian companies (although further research may be fruitful concerning their substantive links to Australia):

(a) related to fuel supply (also based on the 2005 Investment Law)

- *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v Democratic Republic of Timor-Leste*, ICSID Case No ARB/15/2 — pending

(b) related to mining

- *Tullow Uganda Operations PTY LTD v Republic of Uganda*, ICSID Case No ARB/12/34; *Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v Republic of Uganda*, ICSID Case No ARB/13/25 — pending
- *Russell Resources International Limited and others v Democratic Republic of the Congo*, ICSID Case No. ARB/04/11 — discontinued in 2009 for lack of payment of required advances
- *Misima Mines Pty. Ltd. v Independent State of Papua New Guinea*, ICSID Case No ARB/96/2 — discontinued in 2001

47 The claimants in these cases also based on consent in mining contracts in Gambia appear to be wholly owned subsidiaries of Australian companies:

- *African Petroleum Gambia Limited (Block A1) v Republic of The Gambia*, ICSID Case No ARB/14/6; *African Petroleum Gambia Limited (Block A4) v Republic of The Gambia*, ICSID Case No ARB/14/7 — concluded (after cancelled licences were reinstated, online: <www.offshoreenergytoday.com/african-petroleum-reinstates-gambia-licences/>)
- *Carnegie Minerals (Gambia) Limited v Republic of The Gambia*, ICSID Case No ARB/09/19 — pending (see also "African Petroleum seeks arbitration over offshore blocks termination in Gambia", *Offshore Energy Today* (14 March 2014), online: <www.offshoreenergytoday.com/african-petroleum-seeks-arbitration-over-offshore-blocks-termination-in-gambia/>).

controversial provisions in FTAs, especially if the government lacks an absolute majority in the upper house (Senate), as seen in the case of AUSFTA around 2004 (see “Investment Treaties with and without ISA,” above) and with the Korea FTA in 2014, although the main Opposition (Labor) party eventually overcame its doubts on ISDS and voted with the government to allow implementation legislation to pass and the treaty then to be ratified (“Opposition to ISA: From Left, Right and Perhaps Centre,” below).

The basic legal framework for a common law country like Australia that adopts the dualist approach to international law has recently been outlined by the Chief Justice of Australia:

The capacity of international treaties to confer rights on non-State actors has long been accepted. But such rights are not enforceable under the domestic law of dualist States, unless those States are constitutionally empowered to give effect to them and have done so. Of course a domestic court may be called upon to interpret provisions of a trade agreement where they may affect rights and duties under domestic law [citing: for example, *Republic of Ecuador v Occidental Exploration and Production Co* [2006] QB 432]. Domestic courts may be authorised to enforce arbitral awards arising out of investor-State disputes. They may also have jurisdiction to hear and determine causes of action under domestic law which arise out of an investor-State dispute. The scope of the jurisdiction and the remedies will depend upon domestic law and not necessarily be congruent with the jurisdiction and remedies available under ISDS provisions.

In Australia, laws giving effect to international investment agreements entered into by the Executive Government can be enacted under the external affairs power conferred by s 51(xxix) of the Constitution if they don't fall under some other head of power. The enforcement of rights and obligations, including arbitral awards which might arise under such laws, can be entrusted to State and Federal courts by a grant of jurisdiction under s 77 of the Constitution. Part IV of the *International Arbitration Act 1974* (Cth) [s32] provides that Chapters II to VII inclusive of the ICSID Convention have the force of law in Australia. It also provides that an award is binding on a party to the investment dispute to which the award relates and is not subject to any appeal or any other remedy, otherwise than in accordance with ICSID [s33]. An award may be enforced in the Supreme Court of a State or Territory or in the Federal Court of Australia with the leave of the Court as if the award were a judgment or order of that Court [s35].

Part IV has not been the subject of judicial exegesis in the High Court. The Court, in 2013, rejected an argument challenging the constitutional validity of the enforcement provisions of Pt III of the Act, which relate to international commercial arbitration awards and give effect to the UNCITRAL model law. The plurality judgment of four of the Justices observed that parties are free to submit their differences or disputes as to their legal rights and liabilities for decision by an ascertained or ascertainable third party whether a person or a body. Where parties do so agree the decision-maker does not exercise judicial power but a power of private arbitration [*TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 566].

Action by an investor in a domestic court of a host State arising out of conduct said to constitute a breach of an investment treaty may be based upon rights and obligations derived not from the treaty but from domestic law. The ways in which domestic law may be invoked are various. If legislative action is complained of, it may be alleged that the legislation is beyond the power of the relevant parliament. Tobacco companies which challenged the plain packaging tobacco legislation before the High Court in Australia sought to characterise the laws as an acquisition of their intellectual property rights other than on the just terms mandated for laws of the Commonwealth by s 51(xxxi) of the Constitution. If the action complained of is delegated regulatory action made pursuant to a statutory power, then a party

affected may argue that it was beyond that power. It may be assisted in some cases by a rule which would favour construction of legislation consistently with the host State's international obligations where a complying interpretation is open. If the investor complains of executive action, then it may be argued that the executive action exceeds the power conferred by law upon the relevant official. Again, the limits of the power may, according to the circumstances, be informed by reference to the host State's international obligations. The alleged breach may arise out of circumstances which also constitute a breach of a contract between the investor and the host State or an instrumentality of the host State. That kind of breach may be the subject of action in a domestic court or in private arbitration pursuant to the contract where the award is enforceable in the domestic court.

The disadvantage of actions based on domestic law is that they are contingent upon the scope of the particular jurisdiction and remedies able to be awarded by the domestic courts. Those will not necessarily be as wide as the jurisdiction which can be exercised by an arbitral tribunal or the remedies which it can award. On the other hand, the remedies are generally immediately enforceable in the host State jurisdiction subject to questions of State immunity. Unlike arbitral awards they do not have to go through a distinct judicial enforcement mechanism to be legally effective.⁴⁸

Acquisition v Expropriation

In the above-mentioned constitutional challenge to Australia's plain packaging law,⁴⁹ a majority of the High Court⁵⁰ upheld the law by holding that it did not involve an "acquisition" of the plaintiffs' property. Central to the decision was the distinction between a "taking" and an "acquisition." As Chief Justice French explained: "Taking involves deprivation of property seen from the perspective of its owner. Acquisition involves receipt of something seen from the perspective of the acquirer. Acquisition is therefore not made out by mere extinguishment of rights....*there must be an acquisition...[of] an interest in property, however slight or insubstantial it may be.*"⁵¹

The plaintiffs argued that the Commonwealth acquired a proprietary interest by gaining exclusive use and control of the plaintiffs' packaging. The majority judges rejected this argument, reasoning that the tobacco companies retained some use and control over the packaging.⁵² The majority was willing to accept that there had been a "taking" of the plaintiffs' property, but held that there had not been an "acquisition."

Justice Heydon, in dissent, adopted a more expansive interpretation of "acquisition" than the majority judges: "it is not necessary for the Commonwealth or some other person to acquire an interest in property for s 51(xxxi) to apply. It is only necessary to show that the Commonwealth or some other person has obtained some identifiable benefit or advantage *relating to* the ownership or use of property."⁵³

In Justice Heydon's view, the Commonwealth obtained the benefit of being able to control the space on the plaintiffs' cigarette packets for its own purposes.⁵⁴ This was a benefit or advantage "relating to" use of the property and therefore sufficient to constitute an "acquisition."

The protection afforded to the property holder by section 51(xxxi) of Australia's Constitution is significantly less than the protection afforded by the "takings" clause in the Fifth Amendment to the US Constitution. US Supreme Court jurisprudence on this clause generally focuses on the

48 "ISDS — Litigating the Judiciary" (21 March 2015) 9–11, online: High Court of Australia <www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac>. Focusing mainly on the different remedies available for challenging government conduct under Australian domestic law, see also generally Jonathan Bonnitche, "Submission to OECD Investor-State Dispute Settlement Public Consultation" (5 August 2012), online: <<http://ssrn.com/abstract=2129311>>.

49 *JT International*, *supra* note 6. See also Daniel Fletcher, "Case Note: *JT International SA v Commonwealth*: Tobacco Plain Packaging" (2013) 35:4 Sydney L Rev 827.

50 French CJ, Gummow, Hayne, Bell, Crennan and Kiefel JJ.

51 *JT International*, *supra* note 6 at para 42 [citations and quotation marks omitted, emphasis added].

52 *Ibid* at paras 42 (French CJ), 150 (Gummow J), 180–83 (Hayne and Bell JJ), 297–301 (Crennan J), 362 (Kiefel J).

53 *Ibid* at para 200 [emphasis added].

54 *Ibid* at para 217.

deprivation suffered by the property holder rather than on what the state acquires. In the plain packaging case, one of the majority judges, Justice Gummow, observed that the takings clause “may be engaged without what the decisions in this Court would classify as an acquisition.”⁵⁵ However, both Justice Gummow and the other judge to consider the takings clause, Justice Kiefel, considered the clause to be of limited guidance in interpreting the meaning of “acquisition” in the Australian Constitution.

As Jurgen Kurtz explains,⁵⁶ the US Supreme Court has distinguished a “categorical taking” from a “non-categorical” taking. The former occurs when a regulation “denies all economically beneficial or productive use of [property].”⁵⁷ Such takings (for example, when the government physically seizes property) are compensable per se. A “non-categorical” taking (i.e. where the regulation does not wholly deprive the owner of the economic benefit or productive use of property) is subject to a three-factor test which considers (i) the “economic impact” of the regulation, (ii) the extent of interference with “reasonable investment-backed expectations,” and (iii) the “character of the governmental action.”⁵⁸ The latter test was transplanted into the annex of the 2004 US Model BIT.⁵⁹

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

A similar test for indirect expropriation was first included in AUSFTA, then in all of Australia’s other FTAs.⁶⁰ But such wording still focuses largely on the impact of state actions on the foreign investor. By contrast, to prove expropriation under Australian constitutional law, it must be shown that the state

55 *Ibid* at para 115.

56 Jurgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge: Cambridge University Press, 2016) at 169–92.

57 *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015 (1992).

58 *Penn Central Transportation Co. v New York City*, 438 US 104, 124 (1978).

59 Online: <<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>>.

60 Interestingly, however, neither BIT signed in 2005 with Turkey or Mexico add such additional detail regarding the scope of indirect expropriation. Regarding obligations under the treaty with Mexico, the National Interest Analysis [2006] ATNIA 24 (prepared by DFAT for the federal Parliament) remarked at paragraph 13 that it “closely follows the Australian model IPPA text” (cf the section in this paper, below, entitled “Conclusions and Future Directions”). However, chapter 2 of the subsequent JSCOT Report (which recommended ratification: “Chapter 2: Agreement with the United Mexican States on the Promotion and Reciprocal Protection of Investments and Protocol” in Austl, Commonwealth, Joint Standing Committee on Treaties, *Report 83: Review of treaties tabled on 20 June (2), 17 October, 28 November (2) 2006 and CO2 Sequestration in Sub-Seabed Formations* (26 March 2007), online: <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/jsct/17october2006/report/chapter2>) did note:

2.13 The Queensland Government was concerned that *the expropriation and compensation provisions of the Agreement went further than what was provided under Queensland legislation*, that the Queensland Government should determine in what circumstances compensation is appropriate and that the Agreement may create *disparity between the rights of foreign and domestic investors*.

2.14 [DFAT] informed the Committee that the expropriation and compensation provisions of the Agreement are the minimum that Australian investors expect when investing overseas.

The Australian Government is keen to maintain a high standard for Australian investors internationally and these standards would be difficult to maintain if Australia were unable to commit itself to them. Indeed, foreign investment in Australia would likely be affected by any move by Australia away from these minimum conditions.

2.15 The expropriation and compensation provisions are *also common* among Australia’s other investment promotion and protection agreements, the free trade agreements with Singapore, Thailand and the United States, and have also been endorsed by State Governments.

2.16 Addressing a specific concern relating to the payment of compensation for the cancellation of a permit or lease, DFAT advised that it was unlikely that regulatory action by States, such as the imposition of taxation or the lawful revocation of licences of permits, would constitute expropriation at international law. [footnotes omitted, emphasis added]

This debate is intriguing in light of the claims being brought by US investors in connection with NuCoal after its licence was cancelled by legislation enacted by the NSW state government in 2014: *supra* note 22.

acquires a proprietary interest. Thus, something may amount to an indirect expropriation under treaty law without amounting to an “acquisition” under Australian domestic law. Australian treaty practice therefore appears to afford a higher level of property protection to foreigners than the Constitution affords to Australian investors.⁶¹

Kurtz further questions the rationality of the strategy adopted by Australia, focusing on AANZFTA. He argues that “the presumed Australian desire to achieve alignment (between treaty standards and Australian constitutional doctrine) most likely explains the dedicated exception to *indirect* expropriation within the Annex,” although it still refers to effects on adverse investors and therefore still allows *greater* scope for claims.⁶²

Conversely, in a different respect, foreign investors may have *fewer* protections. Kurtz points out that the general exception in AANZFTA, applicable to the Investment chapter and therefore also to claims of direct expropriation, would “inexplicably offer lower levels of property protection to foreigners (via the treaty) than that extended to nationals (via Australian constitutional law). Thus for Australia, a more rational strategy (to better align its treaty and constitutional standards) would explicitly immunize the guarantee on *direct* expropriation from the ambit of that general exceptions clause.”⁶³

Substantive Legitimate Expectations

Another area where Australian domestic law appears to differ from its own treaty practice (and that of other countries) arises because Australian administrative law has been reluctant to expand protections for legitimate expectations regarding matters of substance, as opposed to procedure. This is partly due to the constitutional backdrop, and it marks a departure from English public law, which has recently allowed for protecting some types of substantive legitimate expectations.⁶⁴ Yet international investment treaty law, mainly through a general “fair and equitable treatment” provision (like that stated in Australia’s treaties), protects such expectations especially when derived from (certain types of) contractual commitments or (quite specific, high-level) official representations attributable to the host state.⁶⁵

Privative Clauses

In Australia, federal and state legislatures have sometimes attempted to restrict access to judicial review through “privative” clauses, which purport to remove the jurisdiction of federal or state courts. However, the High Court of Australia has placed strong constitutional limits on privative clauses. In *Plaintiff S157*,⁶⁶ the High Court held that privative clauses cannot remove the High Court’s jurisdiction to grant relief under section 75(v) of the Constitution for “jurisdictional errors” made by federal decision makers. Then the High Court extended this reasoning to the state level, holding that a state legislature cannot deprive a State Supreme Court of its inherent “supervisory” jurisdiction to grant relief for

61 Kurtz, *supra* note 56 at 191. On international investment law’s general focus on the deprivations suffered by investors, see also Ursula Kriebaum, “Expropriation” in Bungenberg et al, *supra* note 15, 959 (but noting, at pages 988–92, that indirect expropriation claims have only been made in little more than a dozen cases).

62 Kurtz, *supra* note 56. Indeed, whereas this annex (as in the 2012 Malaysia-Australia FTA) omits the opening words “except in rare circumstances” (found in the US Model BIT), thus perhaps narrowing the scope of indirect expropriation claims, Australia’s FTAs with Korea and Japan in 2014 reinstate this wording and may thereby somewhat widen the scope of protection again.

63 *Ibid* [emphasis in original], referring to the general exception in AANZFTA Chapter 15, article 1(2): “For the purposes of Chapter 8 (Trade in Services), Chapter 9 (Movement of Natural Persons) and Chapter 11 (Investment), Article XIV of GATS including its footnotes shall be incorporated into and shall form part of this Agreement, *mutatis mutandis*.” However, even subject to such a general exception, the treaty protection against direct expropriation may be significant for foreign investors given that *state* constitutions in Australia do not contain express protections. See *supra* notes 22 and 60; and see e.g. *Durham Holdings Pty Ltd v New South Wales*, [2001] HCA 7.

64 Matthew Groves, “Substantive Legitimate Expectations in Australian Administrative Law” (2008) 32 Melbourne UL Rev 470.

65 Michele Potesta (2013), “Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept” (2013) 28 ICSID Rev 88 (contrasting, for example, representations allegedly made by Indian officials to White Industries executives that “it was safe for Claimant to invest in India and that the Indian legal system was, to all intents and purposes, the same as the Australian legal system.”). More debatable is whether and how this might extend to general expectations as to stability, predictability or consistency in the host state’s environment for foreign investment. See also Marc Jacob & Stephan Schill, “Fair and Equitable Treatment: Content, Practice, Method” in Marc Bungenberg et al, *supra* note 15, 700 at 723–31. As mentioned above, distinct expectations (arising, for example, from specific official representations) may also lead to findings of indirect expropriation. See also Kriebaum, *supra* note 61 at 1006–09.

66 *Plaintiff S157/2002 v Commonwealth* (2003), 211 CLR 476. See also Caron Beaton-Wells, “Judicial Review of Migration Decisions: Life after s157” (2005) 33 Federal L Rev 141.

“jurisdictional errors” made by state decision makers.⁶⁷ Thus, judicial review is *always* available when a federal or state decision maker makes a “jurisdictional error,” and privative clauses purporting to remove such review are invalid.

The High Court has declared that jurisdictional error occurs when the decision maker “misapprehends the limits of its functions and powers.”⁶⁸ Case law indicates that a wide range of errors may qualify as jurisdictional errors, including the failure to observe procedural fairness,⁶⁹ the failure to take into account relevant matters, the taking into account of irrelevant matters,⁷⁰ the failure to abide by the rules of evidence,⁷¹ and the misinterpretation of statutes.⁷² Still, much uncertainty remains about the scope of jurisdictional error. Some judges⁷³ have argued that the distinction between “jurisdictional” and “non-jurisdictional” error should be abolished, as has been done in England, so that all errors are in principle reviewable. However, given the wide range of errors that Australian courts have classified as “jurisdictional,” the practical difference between the Australian and English positions may be small.⁷⁴ The latter view also suggests that there may not be much difference between Australian domestic law invalidating privative clauses and the protection against denial of justice (typically, encompassed by fair and equitable treatment) available under international (treaty) law.⁷⁵

OPPOSITION TO ISA: FROM LEFT, RIGHT AND PERHAPS CENTRE

The first stage of opposition to ISA, leading to its exclusion from AUSFTA when signed in 2004, came predominately from the political left — a few individuals and civil society groups, then centre-left Opposition parties — as outlined above in “Investment Treaties with and without ISA.”

The Productivity Commission’s Report and the Gillard Government TPS

In a second stage since 2010, discontent intensified in the wake of negotiations for an expanded TPP, especially since leaked provisions from the draft investment chapter include ISDS protections,⁷⁶ followed by the Philip Morris claim (notified formally from 2011). Figures 1 and 2 below illustrate this by charting coverage (mostly reports by journalists, but some op-eds and letters to the editors):

67 *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* (2010), 239 CLR 531.

68 *Kirk* (2010), 239 CLR 531 at paras 74–76 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

69 *Re Refugee Review Tribunal; Ex parte Aala* (2000), 204 CLR 84 at para 58 (Gleeson CJ).

70 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001), 206 CLR 323 at para 82 (McHugh, Gummow and Hayne JJ).

71 *Kirk* (2010), 239 CLR 531 at para 76 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

72 An interesting question also arises in situations where the executive decision maker has misinterpreted or incorrectly applied a statutory provision. In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998), 194 CLR 355, the High Court of Australia held that the Authority had set a local content standard violating national treatment obligations under Australia’s FTA with New Zealand (directly incorporated into the relevant Australian legislation), but that such action was not retrospectively invalid but only prospectively unlawful (although an applicant might then be able to obtain an injunction to prevent future errors). The test applied, to determine the differing remedial consequences, was an analysis of the purposes of the relevant legislation, including its language, subject matter and objects, and consequences for the parties. See Peter Cane and Leighton McDonald, *Principles of Administrative Law* (Oxford University Press, 2012) at 90–92. Relevantly, such prospectively unlawful errors are not jurisdictional errors (despite some remedial consequences), so a privative clause preventing judicial review of such errors could still be effective. The author thanks Rayner Thwaites for this observation.

73 See e.g. Mark Leeming, “The Riddle of Jurisdictional Error” (2014) 38 *Austl Bar Rev* 139.

74 J. J. Spigelman, “The Centrality of Jurisdictional Error” (2010) 21 *Public L Rev* 77.

75 See generally Jacob and Schill, *supra* note 65 at 722–23. *Cf* the privative clause in section 11 of an act passed by the province of Newfoundland, outlined in paragraph 69 of the Notice of Intent (23 April 2009) to file NAFTA Chapter 11 arbitration in *AbitibiBowater Inc v Canada* (online: <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/AbitibiBowater.aspx?lang=eng>). The federal government settled the claim the next year: Bertrand Merotte, “Ottawa pays AbitibiBowater \$130-million for expropriation”, *The Globe & Mail* (24 August 2010), online: <www.theglobeandmail.com/report-on-business/ottawa-pays-abitibibowater-130-million-for-expropriation/article1378193/>.

76 Mélida Hodgson, “The Leaked TPP Investment Chapter Draft: Few Surprises...is that a Surprise?” (2015) 6 *Transnational Dispute Management*, online: <www.transnational-dispute-management.com/article.asp?key=2283>. *Cf* also Luke Nottage, “The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification” (2016) 16/28 *Sydney Law School Research Paper*, online: <<http://ssrn.com/abstract=2767996>>.

Figure 1: Articles in Main Australian Newspapers Referring to ISDS (2003–2015)⁷⁷

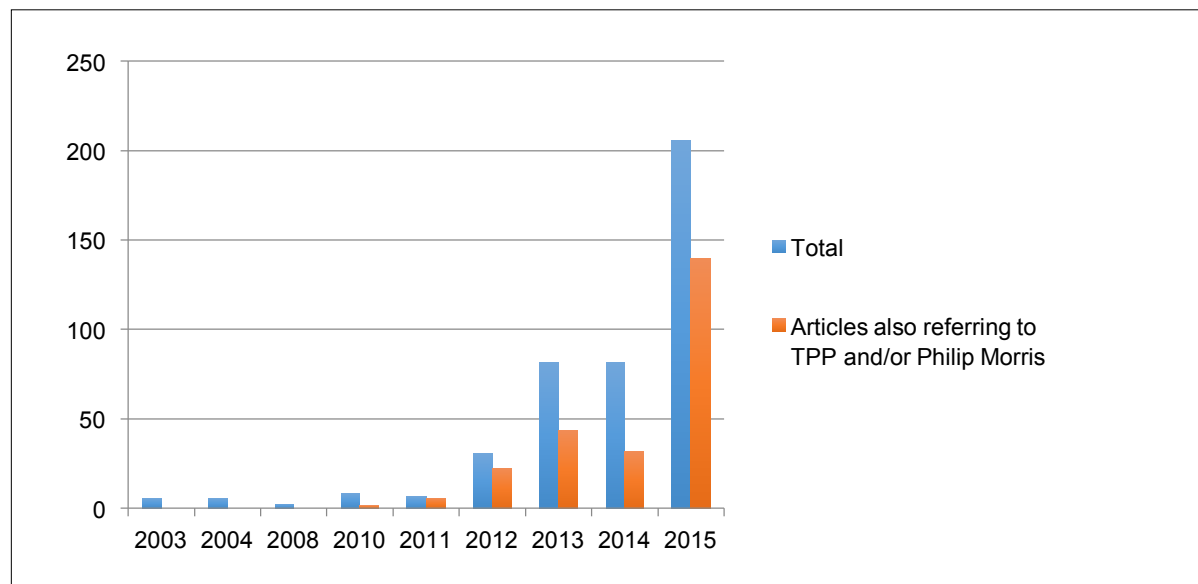
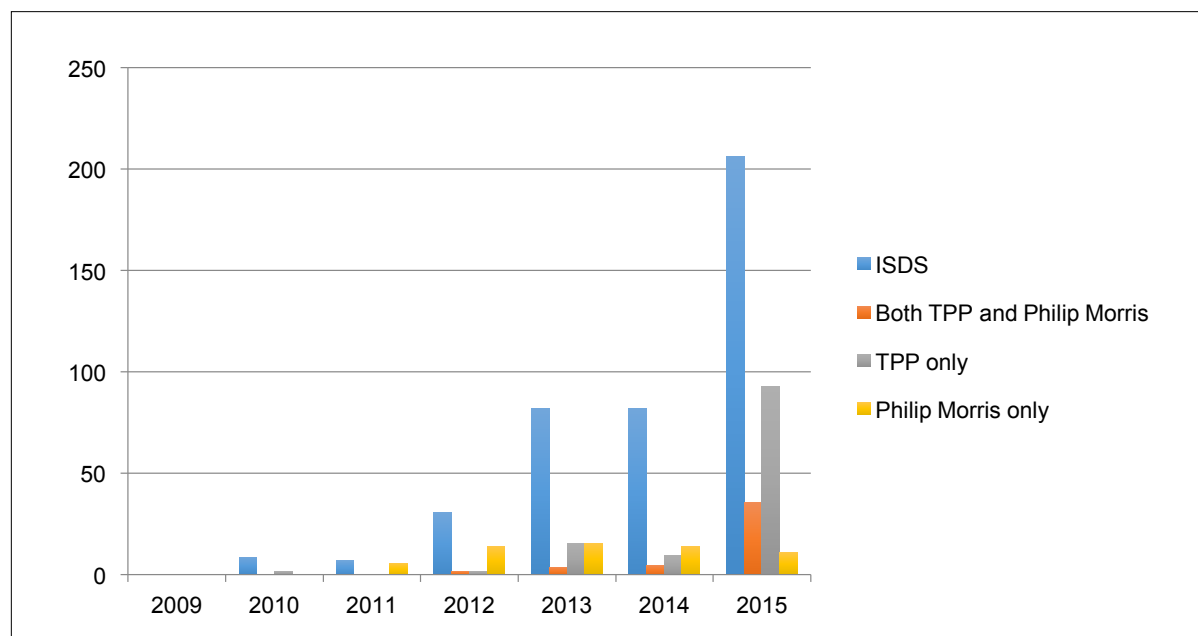


Figure 2: References to TPP and Philip Morris Arbitration in ISDS News Articles



⁷⁷ The source of this media analysis (including figures 1–5) is a Factiva database search of major Australian newspapers, for articles (and some letters or op-eds) containing at least one of the following terms: “ISDS,” “investor-state,” “investor state,” “investment arbitration.” A few results may cover investment and/or arbitration, without necessarily or specifically referring to treaty-based ISDS.

However, a new dimension has been opposition from certain economists, in particular from the PC (advising the Treasurer) in its December 2010 Inquiry Report into Bilateral and Regional Trade Agreements (BRTAs).⁷⁸ Such economists differ from those on the political left by desiring free trade and investment flows. The PC Report even urged unilateral liberalization as the starting point, followed by multilateral initiatives (such as the WTO). It saw BRTAs or FTAs as very much a third-best approach, and emphasized that they should be “high-quality” in design for economic outcomes, rather than overly political statements. The PC was also concerned that the FTAs might distort optimal trade and investment flows, or otherwise diminish net benefits for Australia (including consumers), by over-protecting IP or investment rights — beyond those available to locals and foreigners alike. This broad theoretical perspective is largely shared by some influential economists at the Australian National University (also, like the PC, located in Canberra).⁷⁹

From this vantage point, a few pages of the PC’s draft report (released in mid-2010, now longer online) briefly set out its doubts about providing ISDS protections for foreign investors through FTAs. After some further submissions (including from the author) queried this approach, the PC held an invitation-only workshop in Canberra on September 29, 2010.⁸⁰ However, its final report (December 2010) maintained its arguments, while significantly expanding this part of the report and acknowledging some counter-views.⁸¹ It included the following Recommendation 4:

The Australian Government should not include matters in bilateral and regional trade social policies that would serve to increase barriers to trade, raise costs or affect established social policies without a comprehensive review of the implications and available options for change. On specific matters, the Australian Government should:

1. adopt a cautious approach to referencing core labour standards in trade agreements; and to exclusions from BRTAs for trade in cultural goods and services;
2. avoid the inclusion of IP matters as an ordinary matter of course in future BRTAs. IP provisions should only be included in cases where a rigorous economic analysis shows that the provisions would likely generate overall net benefits for the agreement partners; and
3. *seek to avoid the inclusion of investor-state dispute settlement provisions in BRTAs that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors.*⁸²

The PC presented three key arguments and related evidence for this conclusion, but these were quite problematic, as set out in Table 2 below:

78 *Supra* note 8. The PC’s predecessor, when Australia had a much more regulated economy, was involved in recommending whether and how to set import tariffs etc. It is independent of the Treasury but there can be significant cross-fertilisation. *Cf* Laura Tingle, “Treasury Calls for Trade Overhaul”, *Australian Financial Review* (27 September 2010) 1. With reference to the PC’s ongoing inquiry, the Treasury’s advice to the incoming Gillard government by “Canberra’s most powerful policy department” reportedly stated that proliferating FTAs “has not built support for multilateral liberalization and is delivering only modest preferential market access outcomes at the cost of reduced government policy reform flexibility.” Treasury also urged more flexible and alternative approaches to FTAs, including the encouragement of “unilateral reform by our trading partners,” as well as “caution in accepting...[ISDS] provisions.”

79 See e.g. Shiro Armstrong & Peter Drysdale, “The Influence of Economics and Politics on the Structure of World Trade and Investment Flows”, in Shiro Armstrong (ed), *The Politics and the Economics of Integration in Asia and the Pacific* (Routledge, 2011) 65-91.

80 PC Report, *supra* note 8 at 336. Apart from the author, who was the only academic from a law faculty, attendees came from AFINET and the Australian Council of Trade Unions (by videoconference), the Attorney-General’s Department, DFAT, Treasury, and the Australian National University — Emma Aisbett. She had put in a submission (number 11, jointly with Jonathan Bonnitcha) that urged narrower drafting of post-establishment protections, including the removal of ISDS from Australia’s basic negotiating position — instead, she argued, including ISDS “in a particular FTA should be justified by a specific cost-benefit analysis.”

81 PC Report, *supra* note 8 at 255–77.

82 *Ibid* at XXXVIII [emphasis added].

Table 2: The PC's Arguments Against ISDS

The PC's Main Case against ISDS	Problems with the PC's Cost-Benefit Analysis ⁸³
1. There is no clear econometric evidence that offering ISDS increases <i>inbound FDI</i> .	1. Few studies were cited and one found a positive effect on one estimation for regional FTAs. Other studies have found positive effects. Generally there are difficulties with data, coding, timeframes, appropriate variables and causation. In any case, these are aggregate studies, not focused on the subset of countries currently and foreseeably more relevant to Australia.
2. World Bank surveys found no evidence that <i>outbound investors</i> are disfavoured by host states compared to local investors. Nor do Australian firms seem to value ISDS because they have not filed any claims or made submissions to the PC's inquiry.	2. The surveys were from an era when anti-bribery conventions and laws were much weaker (so foreigners may have been able to offset less access to host state politicians by extra-legal measures). Few submissions were to be expected to the PC because large Australian firms (especially engaged in high-risk FDI as in mining or infrastructure) have better access to host and home state politicians and officials, to resolve disputes indirectly or through investment contracts, while smaller firms are still less likely to know about FTA and investment treaty protections. The White Industries arbitration had been filed against India during the PC's deliberations, but was ad hoc and therefore not publicly known. ⁸⁴
3. By contrast, <i>costs</i> and risks associated with ISDS include: <ul style="list-style-type: none"> • direct liability exposure for past and future investments (especially for traditional net capital importer like Australia); • “regulatory chill” may discourage host states from introducing welfare-enhancing measures; • legal costs and other problems with ISA processes are significant. 	3. Costs and risks can be managed through new or clearer substantive rights offered by host states, as well as procedural rights under ISDS. Regulatory chill is hard to substantiate, especially in developed economies like Australia where public authorities should be constrained by domestic law and international obligations including those enforced through interstate dispute resolution in investment treaties or the WTO. The PC summarized some (NAFTA) cases as potentially problematic, but the assessments are debatable (especially from the standards of current treaty drafting and interpretations) and the list is selective.

Source: Author.

Another powerful criticism was that the PC failed to differentiate the need for more effective enforcement procedures depending on the substantive rights protected. Even the Nobel laureate economist Joseph Stiglitz, who has subsequently joined in open letter campaigns and other public discussions to argue

83 See especially Nottage, *supra* note 9. Alternatives to ISDS proposed by the PC are also problematic. Individually negotiated contracts or legislation from host states involve high transaction costs and favour large investors and/or projects. Political risks insurance is limited in scope, with premiums calculated in the shadow of investment treaty protections and often government support for insurers (see also Mark Kantor “Comparing Political Risk Insurance and Investment Treaty Arbitration”, online: (2014) Transnational Dispute Management <www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=554>). Legal technical assistance to build up domestic legal systems in developing countries, benefitting locals as well as all cross-border traders (not just investors under preferential treaties), is very slow, while Australia's official development assistance budget is comparatively low and, indeed, diminishing in recent years.

84 Even less visible would have been disputes involving Australia-related investors into developing countries under various mining contracts (like those discovered through the new ICSID website search facility and listed *supra* note 46). If treaty protections had been available, presumably such investors would have used them. More generally, only two articles published in major Australian newspapers (both in the AFR) mentioned the PC's inquiry: Tingle, *supra* note 78 (in the context of Treasury's advice to the incoming Gillard Government), and then, briefly, James Eyers, “Investment Treaties Scrutinised”, *Australian Financial Review* (19 November 2010) 45 (just before the PC's Report was released and the deadline for submissions had passed, and quoting a lawyer, Max Bonnell, whose firm was later revealed to be advising White Industries in its claim against India).

against ISDS,⁸⁵ noted that there is a much stronger economic argument for national treatment obligations in investment treaties, for example, than the more flexible notion of fair and equitable treatment.⁸⁶

The PC also did not consider the argument that offering ISDS may provide an incentive for foreign investors and host states to structure and implement transactions ethically and legally. This would complement anti-bribery laws, which use a “stick,” but unfortunately not yet a very large one — as shown by some corruption cases recently involving Australian companies especially in Asia.⁸⁷ More generally, the PC did not explore whether and how ISDS may significantly encourage host states to improve their governance structures and the rule of law generally,⁸⁸ other than to suggest that Australia should focus its resources and efforts on “technical legal assistance” and overseas development assistance to help developing countries improve their judicial processes and substantive rights for everyone.⁸⁹

It should also be noted that one of the three PC commissioners in charge of this inquiry, Andrew Stoler from Adelaide University (former US trade negotiator and WTO deputy director-general) and brought in as ad hoc or “associate commissioner,” took the unusual step for the contemporary PC of appending his views disagreeing with the majority report in several respects. This includes the following dissent regarding Recommendation 4.3 on ISDS, and it is worth setting out in full below, especially because Stoler’s views have hardly ever been directly acknowledged in subsequent policy debates:⁹⁰

He notes that foreign direct investment is very important in the modern economy and that Australians have significant investments in other economies. He considers that where the Australian Government deems it appropriate to negotiate a BRTA with a partner, that agreement should promote and protect investment and where the legal system of a partner is judged as not sufficiently developed to effectively handle investment disputes, Australian negotiators should preserve the option of including ISDS in the agreement.

The report argues that Australia’s investors do not require this added protection and that, by including ISDS, the Australian Government is taking on a risk (of being sued by foreign investors). The Associate notes that the report suggests that the investors are able to protect their overseas interests by accessing a variety of insurance schemes. In the view of the Associate, this is analogous to arguing against the need for a fire department because homeowners can buy property insurance.

The Associate notes that those who oppose ISDS in BRTAs also tend to cite the risk of ‘regulatory chill’ for Australia — in other words, the Australian Government might elect not to proceed with certain policies or regulations because it may be afraid of being sued in the ICSID. Opponents of ISDS cite cases such as where governments

85 See “Leading scholars, former judges sign letter opposing Investor-State Dispute Settlement”, online: Alliance for Justice <www.afj.org/press-room/press-releases/leading-scholars-former-judges-sign-letter-opposing-investor-state-dispute-settlement>, discussing Stiglitz’s co-authored letter to Congress dated 30 April 2015, which concludes: “ISDS weakens the rule of law by removing the procedural protections of the legal system and using a system of adjudication with limited accountability and review. It is antithetical to the fair, public, and effective legal system that all Americans expect and deserve. Proponents of ISDS have failed to explain why our legal system is inadequate to the task. For the reasons cited above, we urge you to uphold the best ideals of our legal system and ensure ISDS is excluded from upcoming trade agreements.”

86 As cited in Kurtz, *supra* note 10. See also Micah Burch, Luke Nottage & Brett Williams, “Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century” (2012) 35:3 UNSW LJ 1013.

87 Nottage, *supra* note 12. The problem of corruption is found not only in destinations for outbound investment from Australia, but also at the highest levels, such as in the (most populous) state of New South Wales: see e.g. Miles Godfrey, “ICAC exposes the NSW Legislature as the most corrupt parliament in Australian history”, *Daily Telegraph* (28 August 2014), online: <www.dailytelegraph.com.au/news/nsw/icac-exposes-the-nsw-legislature-as-the-most-corrupt-parliament-in-australian-history/story-fni0cx12-1227040649242>.

88 See ACCI submission to Anti-ISDS Bill inquiry (online: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Submissions) at page 6: “Passage of this Bill would mean that Australia could no longer utilise [ISDS] as a lever for improvements in the legal systems of developing countries around the world”; see Alex Baykitch, “Busting the myths surrounding investor-state arbitration”, *Business Spectator* (24 June 2015), online: <www.businessspectator.com.au/article/2015/6/24/national-affairs/busting-myths-surrounding-investor-state-arbitration>; and see generally Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance* (Oxford: Hart, 2016).

89 More generally, the PC’s overly narrow and instrumentalist approach to the rule of law, in the context of its 2015 report into access to justice within Australia (online: <www.pc.gov.au/inquiries/completed/access-justice/report>), has been criticized recently by the chief justice of NSW (online: <www.supremecourt.justice.nsw.gov.au/agdbasev7wr/_assets/supremecourt/m6700011771047/bathurst_20150204.pdf>).

90 PC Report, *supra* note 8 at 320-21 (appendix A).

may back off regulating cigarette packaging due to the threat of a suit by a foreign investor. In the Associate's view, the appropriate response to these concerns is to ensure that the ISDS-related provisions of a BRTA are drafted carefully enough that they preclude challenges to those regulatory areas that Australia wants to ensure are protected (for example, health-related policies). In addition, in the Associate's view, there is reason to believe that a little bit of 'regulatory chill' might be a good thing, even in Australia.

Finally, the Associate considers that it is not realistic to suggest, as in his view part (c) of the recommendation suggests and the report implies, that it might be possible to agree an ISDS provision in a BRTA that does not give foreigners rights not available to nationals, or that a BRTA partner might seek to offer ISDS to Australia without seeking a reciprocal grant of ISDS rights.

Despite all such criticisms, the PC maintains its objections to ISDS (and FTAs more broadly). Its *Trade and Assistance Review 2013-14*, published in June 2015, sketches the rise of ISA claims in other parts of the world (including the *Yukos* case outcome) as well as concerns about "regulatory chill" and ongoing debates in the EU and North America. The PC also crudely compares stocks of Australia's inbound and outbound foreign investment stocks in 2003 and 2013 with respect to treaty partners subject to ISDS, noting that "[w]hile this share [for outbound investment into countries other than Singapore has increased [from 3.4 to 6.4 percent of Australia's total]...it is not clear whether the presence of ISDS materially influenced the relative growth or whether it was the result of broader factors relating to commercial opportunity."⁹¹ That is precisely why a proper econometric study is called for, to explain the observed correlation between ISDS protections and greater outbound investment. Yet some Australian media commentators and the Labor Party's Shadow Trade Minister (and Senate Opposition Leader) have instead seized on these recent further few pages by the PC to further criticize ISDS.⁹²

The doubts about the main PC Report's analysis and recommendations in 2010 concerning ISDS prompted a successful application to the (independent federal) Australian Research Council, to reassess such arguments and evidence through sustained quantitative and qualitative analysis into international investment dispute management.⁹³ However, this collaborative interdisciplinary project only commenced in 2014 and will extend until at least the end of 2016 (and probably 2017). Meanwhile, the arguments presented by the PC against ISDS — and/or the scope of substantive rights offered by host states to foreign investors — have been directly or indirectly alluded to quite often, especially by critics in parliamentary and other public debates in Australia since 2011, including those on the political left (despite the PC's overall stance in favour of liberalized trade and investment). Importantly, the PC's Recommendation 4.3 was adopted in April 2011 by the Gillard government TPS.

Initially there was a possibility that this could still leave open the possibility of Australia negotiating treaties with ISDS provided they limited substantive rights to those offered by national law (similar to US treaty practice since 2002). However, official statements clarified that ISDS was not acceptable under any circumstances, even with developing countries. This novel stance was confirmed when ISDS was omitted from the FTA with Malaysia in 2012 — albeit retained anyway under AANZFTA.

91 Austl. Commonwealth, Productivity Commission, *Trade & Assistance Review 2013-14* (June 2015) at 77–82, online: <www.pc.gov.au/research/recurring/trade-assistance/2013-14/trade-assistance-review-2013-14.pdf>.

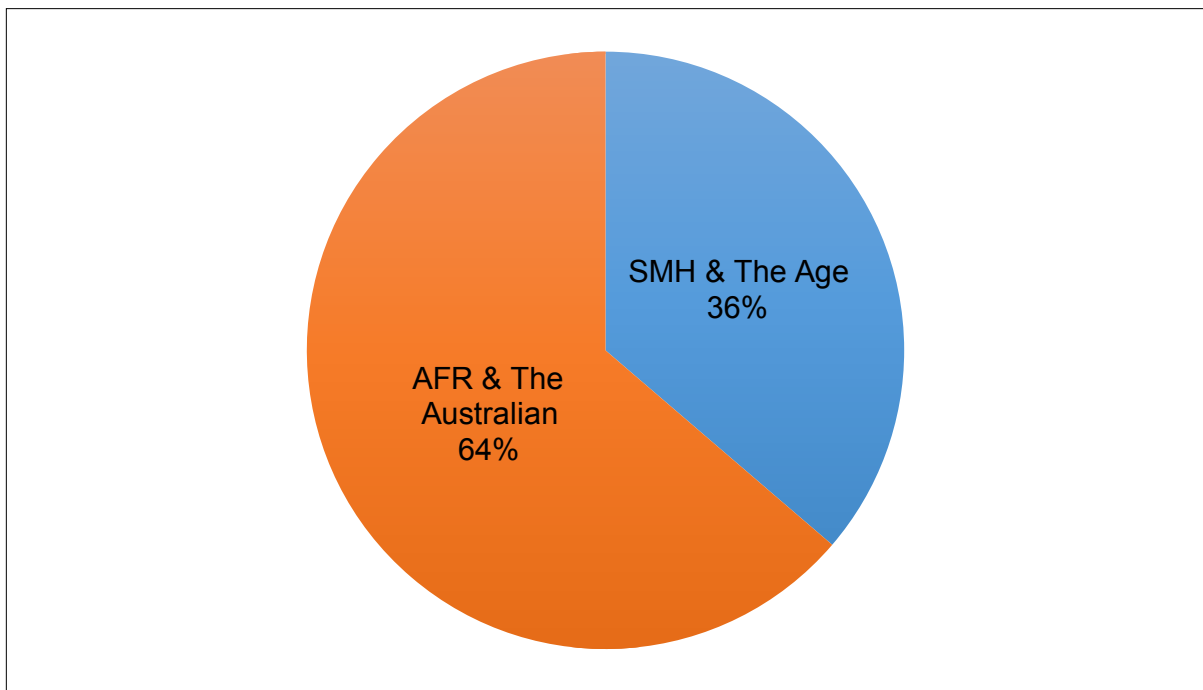
92 See e.g. Peter Martin, "Free trade agreements 'preferential' and dangerous, says Productivity Commission", *Sydney Morning Herald* (24 June 2015), online: <www.smh.com.au/business/the-economy/free-trade-agreements-preferential-and-dangerous-says-productivity-commission-20150624-ghw7rk.html>; Bernard Keane, "Productivity Commission savages TPP and 'free' trade deals", *Crikey* (24 June 2015), online: <www.crikey.com.au/2015/06/24/productivity-commission-savages-tpp-and-free-trade-deals/>; The Honourable Penny Wong, Media Release, "Productivity Commission Undermines Robb claims on ISDS" (25 June 2015), online: <www.pennywong.com.au/media-releases/productivity-commission-undermines-robb-claims-on-isds/>.

93 Shiro Armstrong et al., "The Fundamental Importance of Foreign Direct Investment to Australia in the 21st Century: Reforming Treaty and Dispute Resolution Practice" (2014) 2:2 Australian Centre for International Commercial Arbitration Rev 22, online: <ssrn.com/abstract=2362122>; see list of other related publications, online: <blogs.usyd.edu.au/japaneselaw/2015/04/publications_listing_arc_grant_1.html>.

“Business as Usual” under the Coalition Government?

A third stage began after the Abbott government took power on September 7, 2013. Before those elections, the Australian Chamber of Commerce and Industry (ACCI) had already coordinated a set of business groups to belatedly ask the Gillard government to reconsider its approach to ISDS. It declined, but the Opposition (centre-right) Coalition was amenable to the ACCI’s calls, which focused on the significance for Australia’s outbound investors especially into developing countries.⁹⁴ More conservative newspapers, namely the *Australian Financial Review* (owned by the Fairfax group) and especially *The Australian*, published several articles in 2011–2013 that were critical of the TPS stance on ISDS (and of the Gillard government more generally, in the case of *The Australian*). These emphasized, for example, that the TPS seemed to be holding up treaty negotiations with major trading partners. By contrast, the *Sydney Morning Herald* and *The Age* (in Melbourne) had relatively less coverage of ISDS over this period, as illustrated in Figure 3 below:

Figure 3: Coverage of ISDS (2011–2013)



The Coalition’s *Policy for Trade* document issued in September 2013 emphasized that, if elected, it would finalize FTAs by taking “a pragmatic approach to trade negotiations and [consulting] widely with industry bodies and associations to ensure that stakeholder priorities are taken into account. This includes remaining open to utilising [ISDS] clauses as part of Australia’s negotiating position.”⁹⁵

⁹⁴ See e.g. online: <www.acci.asn.au/news/isds-important-australian-firms-foreign-markets>.

⁹⁵ At page 4, online: <paweb-static.s3.amazonaws.com/Coalition%202013%20Election%20Policy%20%E2%80%93%20Trade%20%E2%80%93%20final.pdf>. The policy paper also stated, at page 9: “Labor’s refusal to consider a proposal for an [ISDS] clause in a free trade agreement with South Korea has placed Australian exporters at a direct disadvantage compared to their competitors in other countries. Labor claims to be opposed to ISDS as a matter of principle however it included such clauses in its 2009 free trade agreement with Chile. The Korea-United States free trade agreement, which entered into force on 15 March 2012, has enabled the USA to capture a significant part of Korea’s lucrative beef market at the expense of Australian beef producers who are still subject to higher tariffs.”

Accordingly, from late 2013, the new Abbott government reverted to the policy of Australia agreeing to ISDS on a treaty-by-treaty basis, so it was included in bilateral FTAs with Korea and China, but not Japan (as explained above in “Investment Treaties with and without ISA”). The factors leading to inclusion are not spelt out, but appear to be whether:

- there are perceived problems with protections available to investors under national laws enforced by local courts or tribunals, especially in less economically developed countries (such as China) but not necessarily so (Korea);
- the treaty counterparty is a significant existing or future destination for Australia’s outbound investment (especially China); or
- the counterparty presses strongly for ISDS due to its own general policy (Korea and China) and/or concerns about risks for its investors in Australia (perhaps China).

However, since these three major FTAs were concluded in 2014 and the TPP was agreed in October 2015 under the succeeding (Turnbull) Coalition government, many media reports have continued to be critical of ISDS. **Figure 4** shows that over 2014-5 *The Age* and *Sydney Morning Herald* had instead almost as much coverage of ISDS as *The Australian* and *Australian Financial Review*, which are more comfortable with the government’s reversion to including ISDS in some treaties:

Figure 4: Coverage of ISDS (2014-2015)

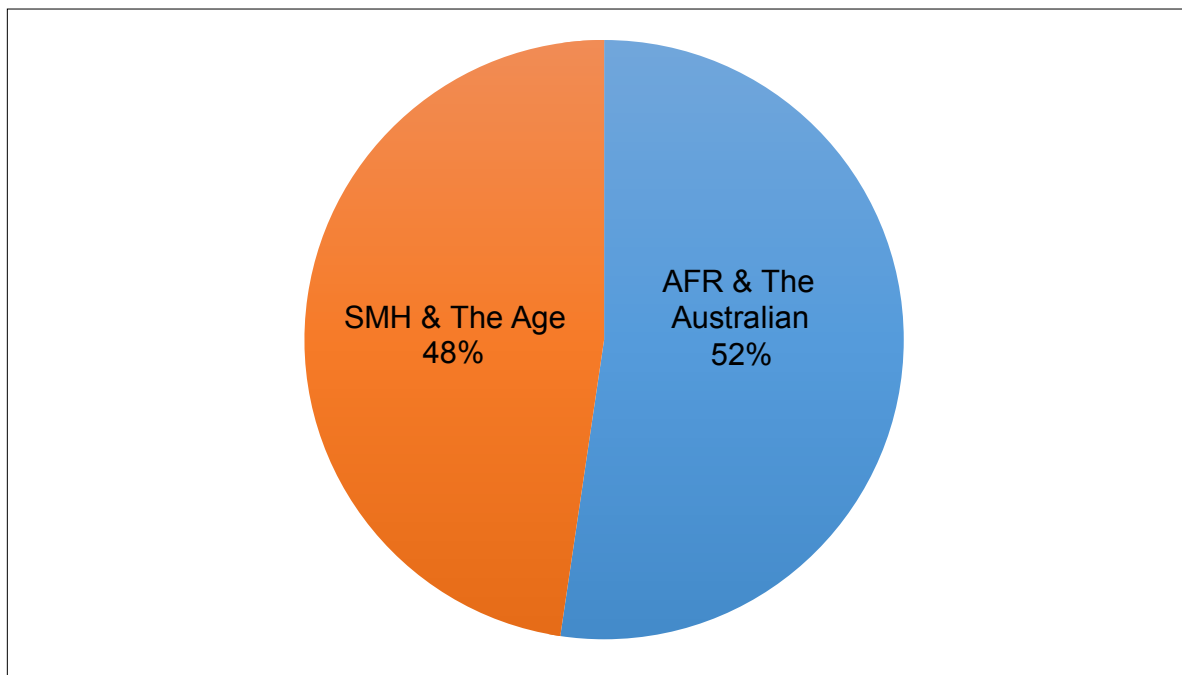
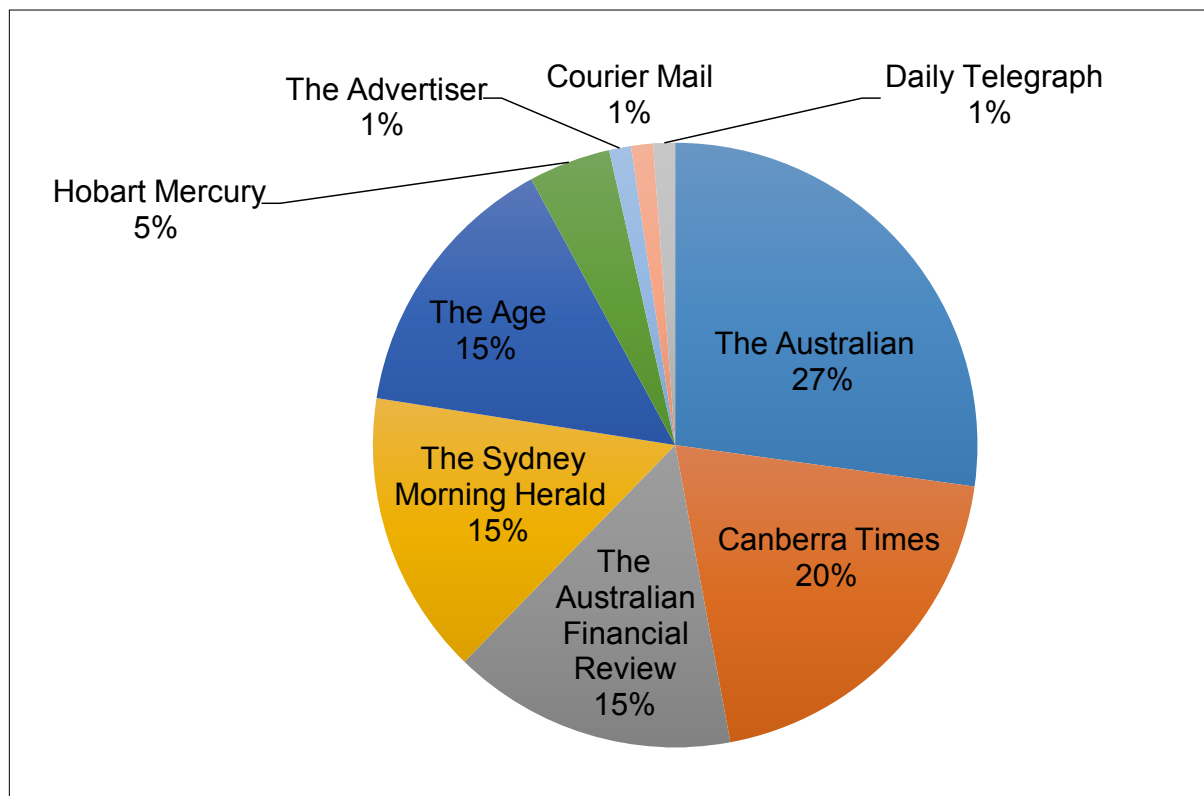


Figure 5 shows there is also considerable reporting in the *Canberra Times*, which generally appeals to a local readership comprising many public employees and academics (the Australian Capital Territory typically votes centre-left) and is also consistently critical of ISDS:

Figure 5: Coverage of ISDS in Major Newspapers (2014-2015)



Interestingly, there has been almost no reference in all these newspapers to the successful or pending formal ISA claims by Australian investors against India, Indonesia and Pakistan, despite being noted in various recent parliamentary inquiries.⁹⁶ As also outlined above in “Investment Treaties with and without ISA,” the media places a large emphasis instead on the Philip Morris claim pending against Australia, and/or negotiations for the expanded TPP — which gained momentum and therefore public attention from late 2014. Other examples of possible regulatory chill are also now highlighted by persistent ISDS critics, in media reports and Parliament, such as the Eli Lilly patent invalidation claim or the recent Bilcon award against Canada under NAFTA.⁹⁷ It certainly seems that “bad news sells,” arguably underpinned by psychological factors.⁹⁸

Public debate therefore continues unabated during this third phase. ISDS has been discussed in a suite of parliamentary inquiries, mostly in the Senate where the Abbott government lacks a majority. First, on March 3, 2014, a minority Greens Party senator from Tasmania introduced a private member’s bill, *The Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*, which simply stated: “The Commonwealth must not, on or after the commencement of this Act, enter into an agreement (however

⁹⁶ The only newspaper reference seems to be in relation to the successful claim against India (citing the main Australian lawyer in that proceeding) and the pending claim against Indonesia: Paul Garvey, “Treaty void hinders \$150bn push to beat a path into Africa”, *The Australian* (23 March 2013) 23. Even when referring to Indonesia’s subsequent announcement that it was reviewing its BITs as their terms came up, such claims are not mentioned by Peter Martin in, for example, “A lesson from history to better future”, *Sydney Morning Herald* (8 April 2014) 8 (also applauding the omission of ISDS in the FTA with Japan) or “Bank concessions open doors: Robb”, *Sydney Morning Herald* (21 June 2014) 7. (The economics editor for the related Melbourne *Age* has consistently opposed ISDS: see e.g. Peter Martin, “Open season on suing Australia? Not yet. Robb’s cautious” (23 September 2013), *Peter Martin* (blog), online: <www.petermartin.com.au/2013/09/open-season-on-suing-australia-not-yet.html>). Claims brought by Australia’s outbound investors could be seen by critics of ISDS, especially from the political left, as evidence of nasty mining companies taking advantage of developing countries. Those from the economic right might see them as a particular industry group successfully taking advantage of “rent-seeking” success in obtaining extra rights through treaties compared even to other business sectors in Australia.

⁹⁷ See e.g. Deborah Gleeson, Kyla Tienhaara & Sharon Friel, “Leaked TPP investment chapter shows risks to Australia’s health”, *The Conversation* (9 April 2015), online: <theconversation.com/leaked-tpp-investment-chapter-shows-risks-to-australias-health-39799>.

⁹⁸ See generally e.g. Ross Gittins, *Gittins: A Life among Budgets, Bullshit and Bastardy* (Sydney: Allen & Unwin, 2015) 243–46.

described) with one or more foreign countries that includes an investor-state dispute settlement provision.” This “Anti-ISDS Bill” attracted 141 submissions — mostly short documents in support of the bill.⁹⁹ The Senate’s Foreign Affairs, Defence and Trade Legislation Committee also received *over 11,000 emails from individuals using an online tool asking people to express their opposition to ISDS*. Nine individuals were invited to give evidence, including the author,¹⁰⁰ in public hearings that were held (and recorded) on August 6, 2014.¹⁰¹

Procedurally, the Anti-ISDS Bill sought to have Parliament set in advance specific parameters for treaty negotiations conducted by the executive branch of government. Yet section 61 of the Australian Constitution states that treaty making is the formal responsibility of the executive. This starting point, differing from, for instance, the US system,¹⁰² has limited the scope for longstanding calls for greater prior parliamentary scrutiny of treaty making in Australia. Such calls date back to at least 1983, resulting in the establishment in 1996 of the Joint Standing Committee on Treaties (JSCOT), comprising members from both the Senate and the lower House of Representatives and which only advises the executive branch of government about whether or not to proceed with ratifying treaties that it has signed and then tabled in Parliament. The *Treaties Ratification Bill 2012*,¹⁰³ another private member’s bill partly aimed at preventing further FTAs, had proposed to go further by requiring both Houses to approve all treaties before ratification. However, that bill was also opposed by both major parties, Liberal and Labor, during the Gillard government era (from 2010 to 2013).¹⁰⁴ Consistently, in the Senate Committee inquiry into the Anti-ISDS Bill, additional comments provided by the Labor Party senators agreed with Coalition senators that this bill should not be enacted, primarily on the basis that it was “not desirable to radically constrain the executive’s treaty-making power in the manner proposed.”¹⁰⁵

However, the Labor senators insisted that it was unnecessary to include ISDS provisions in any treaties. They reiterated the core arguments from the PC against the possible benefits, and contended that:

the current ISDS legal system suffers from some of the same problems as underdeveloped legal systems, including substantial delays, substantial costs, lack of precedent and lack of an appeal mechanism.

1.9 Another unintended consequence from the growth of ISDS litigation is “regulatory chill” where states may delay or fail to implement public policy measures for fear of an ISDS claim.

The Labor senators also claimed that “[g]overnments and groups in Germany, France, Indonesia and South Africa have all expressed their lack of support for future ISDS provision in multilateral agreements.”¹⁰⁶ They further emphasized that “Labor will continue to scrutinize the actions of the government, including its treaty-making actions, to ensure its conduct is in the national interest and *will give appropriate consideration to enabling legislation*.”¹⁰⁷ Nonetheless, since the Labor senators ultimately sided with the Coalition senators in recommending against enactment of the Anti-ISDS Bill,

99 “Inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014”, online: Parliament of Australia <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014>.

100 Nottage, *supra* note 12, incorporating an edited version of the author’s submission, responses to questions on notice from the hearings (except for a chart comparing Australia’s FTAs with Korea, ASEAN and Chile, available online: <ssrn.com/abstract=2483610>), and transcript of testimony given at the Senate hearing.

101 Transcripts are available via Parliament of Australia (*supra* note 101), with video recordings at “Foreign Affairs Defence & Trade” (6 August 2014), online: Parliament of Australia <parlview.aph.gov.au/mediaPlayer.php?videoID=233409&operation_mode=parlview>.

102 Cf. Jonathan T. Stoel & Michael Jacobson, “U.S. Free Trade Agreements and Bilateral Investment Treaties: How Does Ratification Differ?” (28 October 2014), *Kluwer Arbitration Blog*, online: <kluwerarbitrationblog.com/blog/2014/10/28/u-s-free-trade-agreements-and-bilateral-investment-treaties-how-does-ratification-differ>.

103 “House of Representatives Committees: Chapter 2 — Previous Parliamentary Initiatives to Scrutinise the Treaty Making Process” in Austl, Commonwealth, Joint Standing Committee on Treaties, *Report 128: Inquiry into the Treaties Ratification Bill 2012* (15 August 2012), online: <www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jscot/ratification_bill/report/chapter2.htm#anc3>.

104 Sophie Maltabarow, “Parliamentary Ratification of Treaties” (19 September 2012), *Constitutional Critique* (blog), online: <blogs.usyd.edu.au/cru/2012/09/parliamentary_ratification_of.html>.

105 See *supra*, note 99, Report of 27 August 2014, at 1.18.

106 *Ibid* at 1.3–1.9.

107 *Ibid* at 1.19 [emphasis added].

it is unclear whether it will ever move up the order sufficiently to be voted on, despite proceeding to second reading speeches on February 12, 2015.¹⁰⁸

Greens and Labor Party parliamentarians then opened a second front in the battle on ISDS: over legislation that needed to be passed through both Houses to implement tariff reductions under KAFTA, before it could be ratified by Australia and therefore brought into force. They dissented in the JSCOT inquiry report of May 13, 2014,¹⁰⁹ which recommended (by majority) that KAFTA should be ratified. The Labor Party had also initiated a separate inquiry into KAFTA on March 27, 2014, by the Senate's Foreign Affairs, Defence and Trade References Committee, comprising three Labor Party members (and one Greens member) out of the six total members. In a report dated October 1, 2014, this committee agreed (with another dissent from the Greens substitute member, Senator Whish-Wilson) that on balance the treaty should be ratified. However, the majority report recommended that the ISDS provisions be narrowed by side letter, and not included in future agreements.¹¹⁰ Specifically, the report from this inquiry recommended that discussions to narrow the KAFTA provisions should include consideration of:

- a narrower definition of 'expropriation';
- a non-exhaustive list of public policy areas covered by the term 'legitimate public welfare objective';
- limitations as suggested by French CJ, or as subsequently formally recommended by the Council of Chief Justices [discussed further below]; and
- that the parties promptly establish a bilateral appeal mechanism as envisaged in Annex 11-E of the agreement.

Additional comments from the two Coalition senators rejected these recommendations.¹¹¹

Despite such misgivings, Labor Party members voted in favour of the two bills that the Coalition government had introduced on September 4, 2014, to implement tariff reductions and other customs law measures agreed in KAFTA.¹¹² Despite urging the government to renegotiate the treaty to omit ISDS provisions, a key figure in the Labor Party conceded that overall the FTA remained in the national interest and therefore should be ratified.¹¹³ The implementing legislation consequently passed both Houses by October 1, receiving royal assent on October 21. KAFTA (including the unchanged ISDS provisions) entered into force on December 12, 2014, after an exchange of notes between the Korean and Australian Governments on December 3 (the day after Korea's National Assembly agreed to ratification).¹¹⁴

108 Transcripts available at "Trade and Foreign Investment (Protecting the Public Interest) Bill 2014", online: Parliament of Australia <www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=s951>.

109 Austl, Commonwealth, Joint Standing Committee on Treaties, *Report 142: Treaty tabled on 13 May 2014* (4 September 2004), online: <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014/Report_142>. One of the Labor Party JSCOT members in dissent, Kelvin Thomson MP, also emphasized opposition to ISDS in KAFTA (calling for its renegotiation to exclude those provisions) when the report was tabled in the House of Representatives on September 4, 2014. Shortly, however, a government minister (Scott Morrison MP) simply introduced the two bills implementing KAFTA. See Austl, Commonwealth, House of Representatives, *Hansard*, (4 September 2014) at 9722–26, online: <parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber/hansardr/512317ee-6094-4e3d-88f0-38ac38d28920/0000%22>.

110 Cf Austl, Commonwealth, Senate Foreign Affairs, Defence and Trade Committee, *Report: Korea-Australia Free Trade Agreement* (1 October 2014) at 50 (para 5.8), 52 (para 5.15), 59 (para. 1.3), online: <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Korea-Australia_Free_Trade_Agreement/Report>[Korea-Australia FTA Report]. For a preliminary analysis of issues recommended by the Labor Party senators, including the matters raised for discussion by the Chief Justice of Australia, see Robert French, "Investor-State Dispute Settlement — A Cut Above the Courts?" (Address delivered at the Supreme and Federal Courts Judges' Conference, Darwin, 9 July 9 2014), online: <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>; and Nottage, *supra* note 15.

111 Cf Korea-Australia FTA Report, *supra* note 110 at 50 (para 5.8), 52 (5.15), 59 (1.3).

112 Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 and Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014. Both bills had their third readings in the House of Representatives on September 25 and in the Senate on October 1, 2015.

113 See Austl, Commonwealth, Senate, *Hansard*, 1 October 2014) (Penny Wong), online: <parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber/hansards/4630d1fc-e7c9-4b04-8c13-d1aa918c703f/0000%22,7548-7551>.

114 Minister for Trade and Investment, Media Release, "Robb announces Korea FTA to take effect in 9 days" (3 December 2014), online: <trademinister.gov.au/releases/Pages/2014/ar_mr_141203.aspx>.

Then a third front was opened, by the Senate requesting on December 2, 2014, that the Foreign Affairs References Committee conduct an inquiry into the Commonwealth's treaty-making process:

particularly in light of the growing number of bilateral and multilateral trade agreements Australian governments have entered into or are currently negotiating, including:

- a. the role of the Parliament and the Executive in negotiating, approving and reviewing treaties;
- b. the role of parliamentary committees in reviewing and reporting on proposed treaty action and implementation;
- c. the role of other consultative bodies including the Commonwealth-State-Territory Standing Committee on Treaties and the Treaties Council;
- d. development of the national interest analysis and related materials currently presented to Parliament;
- e. development of the national interest analysis and related materials not currently presented to parliament, such as the inclusion of environmental impact statements;
- f. the scope for independent assessment and analysis of treaties before ratification;
- g. the scope for government, stakeholder and independent review of treaties after implementation;
- h. the current processes for public and stakeholder consultation and opportunities for greater openness, transparency and accountability in negotiating treaties;
- i. a comparison of the consultation procedures and benchmarks included by our trading partners in their trade agreements;
- j. *exploration of what an agreement which incorporates fair trade principles would look like, such as the role of environmental and labour standard chapters; and*
- k. related matters."¹¹⁵

Paragraph (j) of these terms of reference opened the route to re-agitating the debate over ISDS. The topic was raised in many of the 95 submissions provided by the end of February 2015. It was also mentioned directly in 12 of the 15 sessions in public hearings held over May 4-5. As indicated in Table 3 below, ISDS was often discussed in response to questions raised by Senator Whish-Wilson, if those called to give evidence based on their submissions did not volunteer any view on this topic.

115 "The Commonwealth's treaty-making process", online: Parliament of Australia <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process>.

Table 3: Discussion of ISDS in the Senate Inquiry into Treaty Making

Organization or Individual Giving Evidence	Extent of Reference to ISDS
*Australian Digital Alliance & Australian Library and Information Association	X
Associate Professor Kimberlee Weatherall ¹¹⁶	—
*AFTINET (Dr. Patricia Ranald ¹¹⁷)	X (partly in response)
*Public Health Association (Dr. Deborah Gleeson ¹¹⁸ & Adjunct Professor Michael Moore ¹¹⁹)	XX
DFAT	—
*Australian Manufacturing Workers' Union (and other unions bodies) ¹²⁰	XXX
Australian Human Rights Commission (Professor Gillian Triggs)	X (referring to “tobacco litigation”)
Australian Industry Group	—
Law Council of Australia	X (in response)
* Australian Network of Environmental Defenders Offices	X (in response)
* Choice	XX
Export Council of Australia	X (in response)
*Dr. Hazel Moir	XX
*Associate Professor Matthew Rimmer	XXX
Professor Luke Nottage	X (urging a model BIT or provisions)

Source: Author.

116 See e.g. on the interface between IP law (her specialist area) and ISDS, her submission and evidence in the Anti-ISDS Bill inquiry (Inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014”, *supra* note 99); but subsequently more general views criticizing aspects of ISDS procedure, as reported on ABC television: Australian Broadcasting Corporation, “Trans-Pacific Partnership: how do we make sense of the TPP secret negotiations?” (17 March 2015), online: ABC <www.abc.net.au/7.30/content/2015/s4199640.htm>.

117 See e.g. its campaign against the TPP, characterized as “Corporate power vs peoples’ rights” and listing as a top concern that “Foreign companies could sue our governments! Special rights for foreign investors to sue governments over health and environment laws” (online: <aftinet.org.au/cms/trans-pacific-partnership-agreement>), elaborated briefly (and with links to some public commentary) online: <aftinet.org.au/cms/node/631>.

118 See e.g. Gleeson, Tienhaara & Friel, *supra* note 97; Deborah Gleeson, “Coalition’s policy bodes ill for health in free trade negotiations”, *The Conversation* (15 October 2014), online: <theconversation.com/coalitions-policy-bodes-ill-for-health-in-free-trade-negotiations-32575>.

119 Quoting this Michael Moore (not the documentary maker nor the former NZ prime minister and WTO director-general), see e.g. Peter Martin, “Health Experts Worry as Trans-Pacific Partnership Talks End”, *The Age* (8 April 2015); Esther Han, “Taskforce hit by claims of conflict of interest”, *Sydney Morning Herald* (25 March 2015) 8; Nicole Mackee, “Trade Deal Health Concerns” (9 February 2015), *Medical Journal of Australia Online*, online: <<https://www.mja.com.au/insight/2015/4/trade-deal-health-concerns>>.

120 See also their opposition to ISDS reported in “FTA with China could deal fatal blow to local industry”, *The Australian* (17 November 2014), online: <www.theaustralian.com.au/national-affairs/industrial-relations/fta-with-china-could-deal-fatal-blow-to-local-industry/story-fn59noo3-1227124987027>.

Many of those providing submissions had also expressed views in the parliamentary inquiries into the Anti-ISDS Bill (such as the author) and/or KAFTA. Those asterisked above expressed clear opposition to including ISDS in Australia's future agreements.

This inquiry was due to finish by June 18, 2015, but the deadline was extended and the reports were released on June 25. The majority report, from the three Labor senators on this References Committee, sought a middle way between Greens Senator Whish-Wilson's dissenting report seeking more radical changes to Australia's treaty-making process, and the two Coalition senators who rejected all recommendations in the majority report. The majority report began by noting: "While a number of issues specific to individual trade agreements, such as inclusion of [ISDS] clauses and intellectual property...and copyright chapters, are controversial and the subject of public debate, they are only considered in this report to the extent that they shed light on the treaty-making process" (paragraph 1.7). However, the majority report did later mention ISDS, remarking that "increasing complexity of international trade agreements can sometimes have unintended consequences, especially with regard to intellectual property provisions negotiated in the context of bilateral or regional trade deals," and quoted the Australian Digital Alliance's evidence that this can be exacerbated by such IP rights being subject to ISDS (paragraph 2.33). Later (paragraphs 5.19–34), the majority report was attracted to the suggestion by the author of this paper that Australia develop a model treaty or provisions, including on ISDS, and included Recommendation 9 (paragraph 5.35): "that the government develop a model trade agreement that is to be used as a template for future negotiations. The model agreement should cover controversial topics such as investor state dispute settlement, intellectual property, copyright, and labour and environmental standards and be developed through extensive public and stakeholder consultation."¹²¹ However, the Labor senators' reformist zeal may well wane if the Labor Party wins a future general election and it wishes to advance its own treaty-making program.

It is therefore unclear whether this latest of several inquiries into Australia's treaty-making process will lead to any lasting changes, let alone significantly affect the ISDS debate in Australia.

The next front was JSCOT and another Senate inquiry into ratifying the ChAFTA, which got under way after the text was disclosed following signature on June 17, 2015.¹²² The latter inquiry was before the Senate's Foreign References Committee, with only two Coalition senators out of six, whereas the Legislation Committee — which reported against the Anti-ISDS Bill — has three out of six. JSCOT also has a majority of Coalition government parliamentarians, who duly recommended ratification of the ChAFTA in that committee's report dated October 19, whereas the Labor (and Greens) members dissented — again objecting to the ISDS provisions (despite their narrow scope).¹²³ Nonetheless, soon afterwards the Labor Party leadership agreed with the Coalition's new Prime Minister (Malcolm Turnbull) to vote in favour of implementation bills (introduced on September 16) in order to allow ratification of the ChAFTA, subject to agreed extra safeguards regarding labour mobility concerns. It was therefore expected that the ChAFTA would enter into force by the end of 2015, although unions reported pressing the Greens and cross-benchers to vote against the implementation bills in the Senate.¹²⁴ The (majority) Labor members on the Senate References Committee then sided with the Coalition members to recommend ratification in its report dated November 6, albeit urging the government to use the three-year Work Program stipulated under ChAFTA for reviewing its investment chapter

121 See also Luke Nottage, "Senate's Report into Australia's Treaty-Making Process — and ISDS Model?" (25 June 2015), *Japanese Law in Asia-Pacific Socio-Economic Context* (blog), online: <blogs.usyd.edu.au/japaneselaw/2015/06/senates_report_treaties.html>.

122 See "Proposed China-Australia Free Trade Agreement", online: Parliament of Australia <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/China-Aust_Free_Trade>. Recall also Senator Penny Wong's renewed recent complaints about ISDS: The Honourable Penny Wong, *supra* note 92.

123 See Austl, Commonwealth, Joint Standing Committee on Treaties, *Report 154: Treaty tabled on 17 June 2015* (19 October 2015), online: <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/17_June_2015/Report_154>.

124 See Daniel Hurst, "Labor and Coalition reach agreement on China-Australia free trade deal", *The Guardian* (21 October 2015), online: <www.theguardian.com/business/2015/oct/21/labor-and-coalition-reach-agreement-on-china-australia-free-trade-deal>; Heath Aston, "China FTA: Unions draft Greens and crossbench to take up fight on trade deal", *Sydney Morning Herald* (22 October 2015), online: <www.smh.com.au/federal-politics/political-news/china-fta-unions-draft-greens-and-crossbench-to-take-up-fight-on-trade-deal-20151022-gkg1v4.html>.

together with the 1988 BIT; and Labor voted with the government on the bills, which were duly passed on November 9.¹²⁵

In addition, within three months of the ChAFTA being ratified and coming into force, Australia and Japan must consult as to whether to add ISDS provisions, pursuant to an unusual provision in their 2015 bilateral FTA (in force from January 15, 2015).¹²⁶ If the Japan FTA added ISDS provisions, they would also be subject to parliamentary scrutiny. The agreed TPP provisions were made public on October 6, 2015, but only signed on February 4, 2016. The treaty was then tabled for JSCOT review (with public submissions due by March 11) before Australia can ratify that agreement. Because the ISDS-backed investment protections are more extensive than in the ChAFTA (even in conjunction with the underlying BIT),¹²⁷ and involve developed countries with which Australia has treaties that omit ISDS (the United States, New Zealand and Japan) as well as Canada, the parliamentary and media scrutiny will be particularly intense.¹²⁸ Interestingly, however, Australia and New Zealand released side letters proposing to carve out ISDS bilaterally upon signing the TPP,¹²⁹ as they did earlier when AANZFTA signed in 2009 (albeit partly then on the basis that the two countries were planning to add an investment protocol to their longstanding FTA, subsequently signed in 2011).¹³⁰

One new dimension emerging already from the Senate Inquiry into the Treaty-Making Process, from late 2014 until June 2015, was that Choice (Australia's peak association for consumers) made a submission and gave evidence at hearings that argued ISDS should not be included in future trade and investment agreements, or otherwise only subject to the following limitations:

...[6] Robust carve-out clauses drafted to protect the right to regulate in the public interest must be included with any ISDS clause. This right must be given priority over the right for corporations to access ISDS mechanisms.

[7] ISDS should not enable action to be taken in instances of indirect expropriation.

[8] Corporations should be prevented from moving investments to different jurisdictions for the primary purpose of taking advantage of a trade agreement containing an ISDS clause.

- 125 See Minister for Trade and Investment, Media Release, "ChAFTA legislation passes the Senate" (9 November 2015), online: <trademinister.gov.au/releases/Pages/2015/ar_mr_151109.aspx>; Austl, Commonwealth, Senate Foreign Affairs, Defence and Trade Committee, *China-Australia Free Trade Agreement* (6 November 2015), online: <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/China-Aust_Free_Trade/Report>. The majority report noted the author's submission that the ISDS-backed protections were narrow (at para 4.11), and the submission by Lexbridge Lawyers (including ex-DFAT officials) that ChAFTA included an additional public welfare notice safeguard not found in any prior Australian agreement (at para 4.12). Despite recommending ratification of ChAFTA, the report recommended that the government "utilise the review of the [ISDS] provisions to further enhance the safeguards for Australia" (at para 5.11). Greens Senator Whish-Wilson issued a dissenting report.
- 126 The little-known article 14.19(2) states: The Parties shall also conduct such a review if, following the entry into force of this Agreement, Australia enters into any multilateral or bilateral international agreement providing for a mechanism for the settlement of an investment dispute between Australia and an investor of another or the other party to that agreement, with a view to establishing an equivalent mechanism under this Agreement. The Parties shall commence such review within three months following the date on which that international agreement entered into force and will conduct the review with the aim of concluding it within six months following the same date.
- 127 For the Australian government's summaries of outcomes achieved with the TPP, including investment chapter protections such as ISDS, see "TPP outcomes and background documents", online: Department of Foreign Affairs and Trade <dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/outcomes-documents.aspx>.
- 128 For the JSCOT inquiry into ratifying TPP, see "Treaty tabled on 9 February 2016", online: Parliament of Australia <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016>. In the general media, see, for example, the differing views presented by a lawyer (Donald Robertson) versus an economist (Leon Berkelmans), at "TPP: Will the Trans-Pacific Partnership really benefit Australia?", *Sydney Morning Herald* (7 October 2015), online: <www.smh.com.au/business/the-economy/tpp-will-the-transpacific-partnership-really-benefit-australia-20151006-gk24so.html>; as well as an article by former ABC radio journalist Jess Hill, "TPP's clauses that let Australia be sued are weapons of legal destruction, says lawyer", *The Guardian* (10 November 2015), online: <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> (citing George Kahale III for criticizing the MFN provision in the TPP's investment chapter, while reporting this US lawyer as observing that "many provisions in the TPP investment chapter are a vast improvement on previous trade deals."). Kahale's criticism overlooks an annex carving out Australia's past treaties from the scope of MFN: see Luke Nottage, "The TPP Investment Chapter: Mostly More of the Same" (12 November 2015), *Japanese Law in Asia-Pacific Socio-Economic Context* (blog), online: <http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp_investment_isds.html>.
- 129 "TPP text and associated documents", online: Department of Foreign Affairs and Trade <dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx>. (Other side letters propose to terminate Australia's bilateral investment treaties with Mexico, Peru and Vietnam).
- 130 See further preliminary analysis of the TPP investment chapter, comparing Australia's recent FTAs, in Nottage, *supra* note 128; Luke Nottage, "ISDS in the TPP Investment Chapter" (12 November 2015), *Japanese Law in Asia-Pacific Socio-Economic Context* (blog), 9–11, online: <blogs.usyd.edu.au/japaneselaw/2015/11/tpp_investment_isds.html>. This and a related blog post (Nottage, *supra* note 128) are elaborated in the second half of Luke Nottage, "The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration in Australia", *New Zealand Business LQ* [forthcoming in 2016], online: <ssm.com/abstract=2685941> [Nottage, "The Evolution"].

[9] Action should not be permitted under ISDS unless the party bringing the action has first exhausted all domestic legal avenues.

[10] Proceedings and outcomes of ISDS cases must be published in a timely manner and in an accessible format.

[11] ISDS arbitrators should adhere to a Code of Conduct. This would at a minimum need to include a requirement that decision-makers avoid and report conflict of interest. Decision-makers should not be able to act as advocates or advisors for the duration of their employment.

[12] *Arbitration bodies should develop precedent* (and record it as per Recommendation 9 [sic] [10] In making decisions, weight should be given to the common and statutory law of the host country and to previous Tribunal decisions.

[13] Decisions should be reviewable through an appropriate appellate mechanism.¹³¹

Some of these recommendations (italicized above) are remarkably novel. One is the blanket exclusion of indirect expropriation claims — something not found even in the very pro-host state draft Indian Model BIT released in May 2015.¹³² Another is the proposed incorporation of “precedent,” which is not further explained in the submission. Yet Choice is quite an influential organization, with 160,000 subscribers to its monthly magazine and online subscription (devoted primarily to comparison tests and recommendations for various consumer goods and services, but a growing proportion of campaign- or issue-related shorter articles) and over 50,000 members registered for its various campaigns. One campaign objects to “TPP secretly trading away your rights,” and it reports, for example, on “how the Australian government could become more vulnerable to lawsuits from multinational corporations,” later highlighting the Philip Morris dispute as well as claims brought by US investors against Canada (regarding Quebec’s moratorium on fracking, now also a highly charged political issue in Australia), and Mexico (an award regarding its restrictions on importing high-fructose corn syrup).¹³³ In addition, the CEO’s editorial in the April 2015 issue of Choice’s magazine begins by affirming that “when free trade works in the way it’s meant to, it’s good for consumers,” but later states: “Perhaps the most alarming element of many new agreements — including the TPP — is the inclusion of Investor-State Dispute Settlement (ISDS) provisions. These allow corporations to take action against a government for loss of profits. The current action by tobacco giant Phillip Morris against the Australian government’s plain packaging legislation provides a live example of this....CHOICE believes that ISDS clauses have no legitimate role in trading agreements to which Australia is party.”¹³⁴

Such views are significant because Choice has developed effective working relationships with various parts of the government to improve consumer protection outcomes over several decades. It prides itself on being “evidence-based” and pragmatic in its approach, and has a large membership base. (By contrast, for example, AFTINET is very small and focused on trade agreements in general.) As such, Choice is often followed by other consumer groups. Indeed, the Consumers’ Federation of Australia submitted a short submission to the treaty-making inquiry that simply adopted Choice’s position

131 Available online: <www.aph.gov.au/DocumentStore.ashx?id=aae4cf8b-b0d8-416f-b189-b66138d09a1e&subId=304040>.

132 Cf. “Draft Indian Model Bilateral Investment Treaty Text”, online: Government of India <<https://mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text/>>. The only other example along these lines is perhaps Brazil: see generally Martin Dietrich Brauch, “The Brazil-Mozambique and Brazil-Angola Cooperation and Investment Facilitation Agreements (Cifas)”, *Investment Treaty News* (21 May 2015), online: <<https://www.iisd.org/itm/2015/05/21/the-brazil-mozambique-and-brazil-angola-cooperation-and-investment-facilitation-agreements-cifas-a-descriptive-overview/>>. Its past policy was to allow investment treaty protections only for direct expropriations, plus state-to-state dispute resolution. But some new agreements seem to allow also for indirect expropriation claims, although still only through interstate dispute resolution (which Choice has not opposed).

133 Zoya Sheftalovich, “Have you even heard of the Trans-Pacific Partnership?”, online: Choice <<https://www.choice.com.au/shopping/consumer-rights-and-advice/your-rights/articles/tpp-secretly-trading-away-your-rights>>. This case involving coal seam gas regulation is expected to be heard in September 2016: see Jarrod Hepburn, “Arbitrators in NAFTA Fracking Case Confirm Open Hearings, and Resolve Dispute Between Parties as to Whether Proceedings Shall be in French or English”, *Investment Arbitration Reporter* (1 May 2015).

134 Sheftalovich, *supra* note 133, 2. Alan Kirkland has also publicly voiced concerns about ISDS recently: Michael Janda, “Trans-Pacific Partnership leaked chapter raises health, environment concerns”, *ABC News* (26 March 2015), online: <www.abc.net.au/news/2015-03-26/trans-pacific-partnership-leaked-chapter-raises-regulatory-conc/6350584>.

— including on ISDS.¹³⁵ Choice’s present problem is that it lacks expertise and understanding of the broader picture regarding international investment treaty law, but if its policy officers can develop a more complete and nuanced understanding, it may become a considerable force in Australia’s ongoing policy debate and treaty-making practice.

Another new development since late 2014 is the somewhat belated interest in ISDS being expressed by senior judges, especially Chief Justice Robert French of the High Court of Australia. Although his concerns have been seized upon somewhat gleefully by critics from the political left,¹³⁶ a closer examination of Chief Justice French’s extrajudicial comments reveals a targeted analysis that may help open the way for Australia to retain treaty-based ISDS in a sustainable and balanced manner. At the Supreme and Federal Courts Judges’ Conference held on July 9, 2014, Chief Justice French noted the growing numbers of investment treaties with ISDS being concluded (including by Australia), and their “rule of law” implications. After outlining as a “case study” the domestic and international law claims over Australia’s 2011 plain packaging legislation, Chief Justice French identified some recent challenges under investment treaties regarding domestic court decisions:

- by Eli Lilly regarding drug patent invalidations in Canada (pending)
- by Saipem against Bangladesh for non-enforcement of a commercial arbitration award (noting also some other similar cases, but curiously not mentioning the White Industries claim against India)
- by Al Jazeera Media Network against Egypt, for harassment and imprisonment of its journalists

Chief Justice French seemed to accept that the perceived legitimacy of such claims may depend on the level of development of the host state’s legal system: “Opinions about the desirability of ISDS processes may depend upon opinions about the judicial system whose decisions are in question — although *ad curiam* perspectives do not form a particularly solid foundation for considering questions of principle.”¹³⁷

He then went on to discuss the TPP, viewed as central to the current debate in Australia over ISDS, and the differing views expressed in the Anti-ISDS Bill inquiry: blanket opposition from Dr. Thomas Faunce, for example, compared to those like the author who identify some benefits, or the Law Council of Australia, which favoured a case-by-case assessment including safeguard provisions.¹³⁸ Chief Justice French then pointed out that the National Centre for State Courts in the United States has pressed its government to “recognise and support the sovereignty of state judicial systems and the enforcement and finality of state court judgments and to clarify that under existing trade agreements, foreign investors shall enjoy no greater substantive and procedural rights than US citizens and businesses,” noting that AUSFTA “does not contain [ISDS] because the Australians objected on the grounds that both Australia and the US have well-developed court systems that can provide fair decisions in disputes between investors and governmental entities.”¹³⁹ He also noted that these statements were apparently in reaction to the NAFTA proceedings in *Loewen*, which the United States won on a jurisdictional point but where the tribunal denounced a Mississippi court trial involving the Canadian investor as a disgrace and the proceedings as infected by gross discrimination.¹⁴⁰ Chief Justice French concluded that in Australia:

135 “RE: Endorsement of CHOICE’s submission to the inquiry into the Commonwealth’s treaty-making process”, Submission from the Consumers’ Federation of Australia to the Senate Foreign Affairs, Defence and Trade Committee (6 March 2014), online: <www.aph.gov.au/DocumentStore.ashx?id=28a7c1d9-4a31-477a-a693-67600cb9416e&subId=304362>. See also “CHF on the Trans-Pacific Partnership Agreement negotiations” (5 August 2014), online: Consumers’ Federation of Australia <consumersfederation.org.au/chf-on-the-trans-pacific-partnership-agreement-negotiations/>.

136 See Korea-Australia FTA Report, *supra* note 112 at para 4.19; see especially Penny Wright, “Why ISDS Clauses are one of the most Insidious Trends in Modern Trade Deals” (12 February 2015), online: The Australian Greens <greensmps.org.au/content/speeches-parliament/why-isds-clauses-are-one-most-insidious-trends-modern-trade-deals>; Melissa Parke, “Why Support the TPP when it will let Foreign Corporations take our Democracies to Court?”, *The Guardian* (29 October 2014), online: <www.theguardian.com/commentisfree/2014/oct/29/why-support-the-tpp-when-it-will-let-foreign-corporations-take-our-democracies-to-court>; Patricia Ranald, “Senate Inquiry Reveals Community Opposition and Dangers of Foreign Investor Rights to Sue Governments Despite Claimed ‘Safeguards’”, (29 August 2014), online: AFTINET <aftinet.org.au/cms/Senate-Inquiry-community-opposition-dangers-investor-rights-sue-govts-isds-2014>.

137 French, “Investor-State Dispute Settlement — A Cut Above the Courts?”, *supra* note 110.

138 *Ibid* at 10–12.

139 *Ibid* at 12, citing “Free Trade Agreements”, online: National Center for State Courts, online: <www.ncsc.org/services-and-experts/government-relations/international/free-trade-agreements.aspx>.

140 *Loewen Group Inc v United States*, ICSID Case No ARB(AF)/98/3 (26 June 2003) at para 2040.

the judiciary, as the third branch of government in Australia, has not had any significant collective input into the formulation of ISDS clauses in relation to their possible effects upon the authority and finality of decisions of Australian domestic courts. This is an issue which presently is of small compass. It has the potential to become larger and it is desirable that it be addressed earlier rather than later. One approach would be to examine the possibility of including requirements in ISDS provisions in appropriate cases for:

- prior exhaustion of remedies in domestic courts of the Contracting State;
- preclusion of any challenge to the decision of a domestic court as constituting a breach of the relevant BIT or FTA provisions; and
- preclusion of any arbitral decision based upon a rejection of a decision on a question of law of a domestic appellate court binding on lower courts.

Those suggestions are offered merely to stimulate thought on the topic. It may be useful for the general question to be given consideration by all of us and perhaps specifically by the Council of Chief Justices.¹⁴¹

Subsequently invited to give the opening address to the Law Council of Australia's annual International Trade Law Symposium, held in Canberra on September 18, 2014, Chief Justice French briefly elaborated similar concerns and noted that in the United States:

the Conference of Chief Justices passed a resolution in 2003 urging the United States Trade Representative to negotiate with the United States Conference to approve provisions in trade agreements that recognise and support the sovereignty of state judicial systems and the enforcement and finality of State court judgments. The Conference of Chief Justices passed a further resolution in 2012 in which they urged the US Trade Representative to adopt as its model for negotiating bilateral investment treaties and free trade agreements, an investor-State dispute resolution clause that would require foreign investors to choose between pursuing claims in the courts or through international arbitration.¹⁴²

His nuanced conclusion was that:

Those observations are not intended to suggest that ISDS clauses have no place in trade law agreements. *They are not intended to argue for the exclusion of such clauses from agreements to which Australia is a party.* In so saying, I recognise that there is a global debate about their effects upon the authority of national legislatures and executive governments and in particular the alleged phenomenon of "regulatory chill". My concern is with the judicial system and its authority and finality of its decisions which is indispensable to the rule of law in this country. That concern can, in all likelihood, be met by careful crafting of such provisions. An approach designed to protect the finality and authority of domestic judicial decisions could consider a limitation on ISDS mechanisms applicable to Australia which would preclude any challenge to the decision of an Australian domestic court as constituting a breach of the relevant BIT or FTA clauses. Such an approach could also consider precluding the canvassing in an arbitral claim of the correctness of a decision of an Australian domestic court and in particular, decisions on questions of law binding on lower courts. There is no doubt a variety of ways of approaching the issue. The Senate Committee [on the Anti-ISDS Bill] which recently reported upon the proposed prohibition of ISDS provisions in trade agreements received strong submissions on their risks and benefits. The terms of such provisions require particular attention by the

141 French, "Investor-State Dispute Settlement — A Cut Above the Courts?", *supra* note 110 at 15. The difference between the last two suggestions is somewhat obscure, although the former could be a reference to claims about domestic court processes (as in *Loewen*), whereas the latter refers to claims such as Eli Lilly contesting court interpretations of domestic patent law. All three suggestions by Chief Justice French were urged by the Senate References Committee inquiry into KAFTA: Report, *supra* note 110, at para 4.19.

142 "Trade Law and the Australian Courts" (Address delivered at the Law Council of Australia 2014 International Trade Law Symposium, National Portrait Gallery, Canberra, 18 September 2014) at 9, online: <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj18sep2014.pdf>>.

negotiators when considering any implications they may have for the authority of the Australian domestic judicial system.¹⁴³

Finally, at the Chartered Institute of Arbitrators centenary conference held in Hong Kong on March 21, 2015, Chief Justice French began by noting the recent public differences on ISDS policy between the White House and Senator Elizabeth Warren, a (then) presidential candidate for the Democrats. He observed that:

The issue of interest from the perspective of national judiciaries is the extent to which court decisions and processes may be called into question, directly or indirectly, by arbitral tribunals. *That does not involve a critique of ISDS clauses generally.* The debate on that topic is well joined by experts and policy makers around the world. However, their potential interaction with national judicial systems should be an important feature of any trade negotiations. That specific concern was reflected in a letter sent [on November 6, 2014] to the Commonwealth Attorney-General on behalf of the Council of Chief Justices of Australia. The Council considered it desirable that officers of the Commonwealth negotiating international investment agreements should have regard to the possibility that, absent suitable qualifications, arbitral processes might be invoked to call into question the decisions of domestic courts either by submissions that such decisions are breaches of an investment treaty or alternatively seeking findings based upon propositions inconsistent with such decisions. In so saying, the Council accepted that it was ultimately a matter for the Government to determine the scope of such provisions in agreements which it entered.

The Attorney-General quite properly answered [by letter of November 21, 2014] that the Government was conscious of the challenges entailed in including ISDS mechanisms in its agreements and that it considered whether to do so on a case-by-case basis. In such cases, Australia seeks appropriate safeguards to allow for the proper functioning of all branches of government. That includes, so the Attorney advised, clear substantive obligations and procedural safeguards in the ISDS mechanism. He pointed out that, for Australia, ISDS clauses can promote investor confidence by providing a further means for Australian investors to protect their interests. However, the Government was aware of the concerns raised by the Council of Chief Justices and when entering into the agreements would seek to appropriately balance promoting investment with protecting Australia's sovereign interests.¹⁴⁴

Chief Justice French also then acknowledged criticisms made of blanket eschewal of ISDS provisions in the PC's 2010 report and 2011 TPS,¹⁴⁵ the Coalition government's new policy and inclusion of ISDS in KAFTA, and the Senate inquiries into the Anti-ISDS Bill and treaty making generally. After noting that international investment treaty protections are not presently judiciable under Australian domestic law (as mentioned above in "Investment Treaties with and without ISA"), he remarked that:

One possible approach to increasing the attractiveness of resort to appropriately qualified domestic courts is for the host State to enact legislation conferring jurisdiction upon those courts to hear and determine disputes arising under investment agreements. If an international investment agreement contains an ISDS clause such a law in a State party, coupled with an exhaustion of remedies or perhaps a fork in the road clause, might provide an incentive to resort to the domestic jurisdiction. The strength of the incentive will no doubt depend upon the perceived independence, impartiality and competence of the domestic court. Such a provision, if coupled with a fork in the road clause, would leave it to the market to determine the choice of forum. There may be domestic political costs associated with legislation appearing to privilege foreign over local investors. That...is a complaint already made about ISDS clauses.

143 *Ibid* at 10-11 [emphasis added, footnote reference to Senate Committee omitted].

144 "ISDS — Litigating the Judiciary" (Address delivered at the Chartered Institute of Arbitrators Centenary Conference, Hong Kong, 21 March 2015) at 3, online: <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21mar15.pdf>> [emphasis added].

145 *Ibid* at 5 (referring, for example, to Kurtz and Nottage, *supra* note 13).

These ideas for reforming ISDS protections, especially in and among developed countries, certainly deserve closer analysis.¹⁴⁶ Given that the chief justice has been careful not to advocate completely eliminating ISDS in future treaties (as emphasized above), the recent emergence of the Australian judiciary in this policy debate may create more scope for a less polarized way forward.

CONCLUSIONS AND FUTURE DIRECTIONS

In his September 2014 speech, Chief Justice French also noted that the United States has a model BIT, although the 2012 version “does not appear to address the concern of the United States State courts about claims which complain about their decisions,” whereas at present “Australia does not have a model bilateral investment treaty or free trade agreement” — citing the author’s submission to the Anti-ISDS Bill inquiry, where the author had suggested developing a model treaty or provisions.¹⁴⁷ Indeed, the Senate Committee’s Report on August 27, 2014, agreed “with Professor Nottage and others that the risks associated with ISDS can and should be managed more effectively and in ways which do not require legislation, including careful treaty drafting (of both old and new agreements) and development of a well-balanced Model Investment Treaty.”¹⁴⁸

Accordingly, the author wrote on November 3, 2014, to the federal attorney-general and (then) trade minister, offering to assist in developing such a model treaty or provisions. The latter’s chief of staff replied on October 23, 2014, stating that officials were focusing on concluding the negotiations for the bilateral FTA with China and the TPP but were expected to be in a better position to consider the proposal in 2015. On March 19, 2015, the author wrote again, pointing out that the ChAFTA negotiations were now concluded and noting that the author had reiterated this suggestion also in the Senate’s inquiry into treaty making. The author also observed that the Law Council of Australia’s submission in that inquiry had noted the EU’s emerging practice of releasing position papers setting out core concepts and rationales, and had recommended that “the Australian Government should adopt a similar practice of publishing position papers and proposals of text.”¹⁴⁹ On August 21, 2015, a DFAT official responded on behalf of the trade minister indicating that although they were focused on concluding the TPP negotiations, the government remained interested in discussing proposals for a model investment treaty or provisions after the finalization of the negotiations. The reply added that the author would be included on a list of interested persons that they would contact when the government is in a position to consider this issue. The author held a more general discussion about Australia’s investment treaties with this DFAT official and others in late 2015.

In fact, a Treasury official had already remarked in 2007 that “Australia’s BITs [were] based on model text approved by the Cabinet, though treaties reflect negotiated outcomes.”¹⁵⁰ JSCOT inquiries also indicate that DFAT appears to have negotiated its BITs using an internal model, even as late as 2005 when Australia signed treaties with Mexico and Turkey.¹⁵¹ In addition, it is possible to reverse-engineer Australia’s FTAs to discern its negotiating template and approach, since 2004 in particular. Broadly, FTA investment chapters are based closely on AUSFTA,¹⁵² albeit with differences, especially in the third FTA signed with Thailand (in 2004) and Australia’s first FTA with Singapore (signed in 2003). More generally, the practice seems to involve taking one or more of the last few treaties concluded by Australia, removing some changes that may have been made to accommodate the earlier counterparty, but keeping others

146 See also e.g. Daniel Kalderimis, “Back to the Future: Contemplating a Return to the Exhaustion Rule”, (2015) 1 Transnational Dispute Management, online: <www.transnational-dispute-management.com/article.asp?key=2055>. Cf Christian Campbell, Sophie Nappert & Luke Nottage, “Assessing Treaty-Based Investor-State Dispute Settlement: Abandon, Retain or Reform?”, 1 Transnational Dispute Management, online: <ssrn.com/abstract=2280182>, finding more divergence among reformists about introducing simply an exhaustion of local remedies requirement (as originally mooted by Chief Justice French CJ in his July 2014 speech, and now included in India’s revised model BIT).

147 French, *supra* note 110 at 10.

148 *Supra* note 99, at para 2.59.

149 “The Commonwealth’s Treaty-Making Process”, Submission from the Law Council of Australia to the Senate Foreign Affairs, Defence and Trade Committee (5 March 2015) at 11, online: <www.aph.gov.au/DocumentStore.ashx?id=6b7b6944-57a8-4f56-a691-307f99ccfc3&subId=304358>. See further, regarding TTIP, “EU negotiating texts in TTIP” (10 February 2015), online: European Commission Trade News Archive <trade.ec.europa.eu/doclib/press/index.cfm?id=1230> (including a May 2015 concept paper on ISDS, with proposals for an appellate review mechanism and/or international investment court).

150 Westcott, “Foreign Investment Policy”, *supra* note 5 at 26, n 64.

151 See *supra* note 60; regarding Turkey, see “Agreement with the Republic of Turkey for the Promotion and Protection of Investments” in Austli, Commonwealth, Joint Standing Committee on Treaties, *Report 72: Treaties Tables on 29 November 2005 (2)* (28 March 2006) para 5.12, online: <www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jscot/29november2005/report2/chapter5.pdf>.

152 See e.g. the match-up of the Chile, AANZFTA and Korea FTAs: Nottage, *supra* note 12.

where perhaps these clarify matters or update for new developments (including case law under treaties concluded by third parties). The author's preliminary interview research also suggests that Australia has not necessarily been disadvantaged by arriving at the negotiating table without one fixed or publicly available model investment treaty.

However, until 2005 there remained significant discrepancies between the provisions of BITs (based on an older model) and FTA investment chapters (for example, with respect to definitions of expropriation), and even among the provisions of Australia's first three FTAs.¹⁵³ Australia's approach also risks entrenching drafting errors — or at least very awkward wording — as illustrated arguably by the interpretations given to the Indonesia BIT (and potentially many others) by the ICSID tribunal in the Planet Mining dispute (discussed above in "Investment Treaties with and without ISA").¹⁵⁴ The approach also lacks transparency even for experts in the field, let alone the general public, which means less opportunity for meaningful public consultation. These aspects are increasingly problematic, as evident from various recent parliamentary inquiries (not just into Australia's treaty-making process) as well as public campaigns especially regarding the TPP (discussed above in "Opposition to ISA: From Left, Right and Perhaps Centre").¹⁵⁵ A more structured and open process aimed at developing a model treaty or provisions for Australia might assuage such concerns. Before the Senate inquiry into treaty making in 2015, I suggested that this might also involve setting out two or more options, each of which might be more agreeable to different (especially major) political parties in Australia — and/or counterparties to the negotiations. Given that so many countries (both developed and developing) now have model treaties, the author's interview research also suggests there would be little downside to antagonizing counterparties or overly entrenching positions.

Nonetheless, such a new approach for Australia would need to emphasize that not all treaties need to adopt or even be closely aligned with all aspects of any model that might be adopted. Politicians (even in the Opposition) as well as government officials must retain flexibility to reach and implement agreements. There will also be a need to keep a model treaty updated.¹⁵⁶ It may be best, therefore, to begin with (increasingly elaborate) concept or position papers, but involving public consultation on drafts from the government. There should also be prior engagement with a range of experts, including those on the record in related parliamentary inquiries as well as (ex-) judges.

Developing concept papers and/or model provisions in this way may pave the way toward renewed bipartisan support for trade and investment treaties in Australia, especially now that the TPP has been agreed and signed. This has broader importance because support for foreign investment has had a checkered history, with Labor and the Coalition reaching a broad consensus in the 1980s that may now well be fraying.¹⁵⁷ More broadly, Australia seems to have increasingly favoured domestic politics and expediency over principled diplomacy and engagement with international law, especially in recent years.¹⁵⁸ However, restoring more consensus must be well managed, as the question of ISDS in particular has become increasingly polarized over recent years — with commentators seemingly becoming more and more entrenched in their views.¹⁵⁹ This is especially evident in the Australian media, as can be seen by the *Sydney Morning Herald's* adverse coverage of the ChAFTA in 2016 — despite the narrow scope of

153 On divergences among ISDS provisions, see e.g. Nottage and Miles, *supra* note 5. See generally Kristen Bondietti (2008), *Inconsistencies in the Treatment of Foreign Investment in Trade Agreements*, Australian APEC Study Centre AOIF Paper 5 (December 2008), online: <https://www.ipa.org.au/library/publication/1229471497_document_bondietti_paper.pdf> (see especially summary table 1 on page 10).

154 Using an undisclosed model BIT also perhaps made it harder to align provisions in Australia's BITs (as with Mexico in 2005: *supra* note 60) with new approaches being incorporated into its FTAs (such as the annex on indirect expropriation, introduced in AUSFTA).

155 See e.g. "The dirtiest deal you've never heard of", online: GetUp! Action for Australia <<https://www.getup.org.au/campaigns/tpp/tpp/the-dirtiest-deal-youve-never-heard-of>>.

156 Westcott notes that "a template treaty approach poses obvious difficulties for a middle power like Australia to pursue and will not always be in its interest": "Foreign Investment Policy", *supra* note 5 at 26. He then provides three examples of "why Australia may want to depart from [AUSFTA's investment] chapter 11 in future negotiations," including that ISDS "will almost certainly feature in future Australian [FTAs]. It is difficult to imagine that in future agreements the Australian Government would deny Australian investors recourse to the option of taking their disputes before an international tribunal."

157 Compare Uren (*supra* note 32) with the considerable stand-off still over ISDS, outlined in this paper, and Nottage, "The Evolution", *supra* note 130.

158 See e.g. Tom Allard and Sarah Whyte, "Refugee policies give Australia's global reputation a beating", *Sydney Morning Herald* (20 June 2015), online: <www.smh.com.au/national/refugee-policies-give-australias-global-reputation-a-beating-20150619-ghs7xt.html>.

159 For example, Ranald (*supra* note 24) and Tienhaara (*supra* note 34) have persisted their critiques of all forms of ISDS, despite highlighting risks from reported claims that were subsequently dismissed. Compare also Faunce (*supra* note 23) and Thomas Faunce, "Australia's Embrace of Investor State Dispute Settlement: A Challenge to the Social Contract Ideal?" (2015) 69:5 *Australian J Intl Affairs* 595 with Tom Faunce and Ruth Townsend, "Big Pitfalls and Fewer Freedoms in New Trade Agreement with the US", *Canberra Times* (15 March 2010) 9.

its ISDS-based substantive commitments.¹⁶⁰ Criticism of ISDS predominates in that newspaper despite Australia subsequently prevailing in its jurisdictional challenge to the BIT claim initiated by Philip Morris in 2011.¹⁶¹ Further politicization is evident from a recent report from an economist in a politically conservative think tank, strongly favouring ISDS-backed treaty protections and subtitled “debunking the myths.”¹⁶²

Research into the psychology of “cultural risk cognition” shows not only that people typically assess risks based on strongly held but recognizable “worldviews,” but also that providing “objective” information and assessments tends to create *greater* divergences. One way of *diminishing* divergences and reducing polarization, however, is for a person clearly associated with one such worldview to present that same information.¹⁶³ This provides a further reason to open up more broadly the consultations leading to concept papers or model provisions on Australia’s preferred positions on ISDS and related issues in investment treaties.

POSTSCRIPT (SEPTEMBER 27, 2016)

On June 7, 2016, in the run-up to Australia’s tightly contested general election, the Opposition spokesperson for trade, Senator Penny Wong, made a major public speech indicating that if a Labor government were elected it would not agree to ISDS in future agreements. This would mean reverting to the Gillard Government TPS approach of 2011–2013, although leaving open some possibility of ratifying the TPP if interpreted as not “new” or of signing on to agreements that contain an innovative EU-style “investment court” procedure.¹⁶⁴ In addition, she announced that a Labor Government would approach counterparties to remove ISDS from existing treaties, or otherwise add further safeguards.¹⁶⁵ A similar policy position was contained in the Labor Party’s national platform, adopted at its forty-seventh national conference in July 2015.¹⁶⁶ However, it was not widely publicized and indeed did not prevent the Labor Opposition parliamentarians from voting in favour of legislation allowing ratification of ChAFTA.¹⁶⁷

In the double-dissolution election of July 7, 2016, the Coalition government was returned to power but with only a razor-thin majority in the lower House of Representatives, and a reduced minority in the

160 Compare, for example, Peter Martin (“Australia-China free trade agreement favours Chinese investors”, *Sydney Morning Herald* (22 June 2015), online: <www.smh.com.au/business/australiachina-free-trade-agreement-favours-chinese-investors-20150621-ghthjr.html>), Michael West (“Trade deals acronym really translates to ‘we lose’”, *Sydney Morning Herald* (20 June 2015), online: <www.smh.com.au/business/comment-and-analysis/trade-deals-acronym-really-translates-to-we-lose-20150619-ghrqm8.html>), Kyla Tienhaara and Gus van Harten (“Half-baked China-Australia Free Trade Agreement is lopsided”, *Sydney Morning Herald* (19 June 2015), online: <www.smh.com.au/comment/halfbaked-chafta-is-lopsided-20150619-ghs8fm>); with Luke Nottage (“Compromised ISDS-backed investment commitments in the China-Australia FTA” (26 June 2015), *Japanese Law in Asia-Pacific Socio-Economic Context* (blog), online: <blogs.usyd.edu.au/japaneselaw/2015/06/compromised_isds_china.html>).

161 “Tobacco plain packaging”, *supra* note 4; Kyla Tienhaara “The Dismissal of a Case Against Plain Cigarette Packaging is Good News for Taxpayers”, *Sydney Morning Herald* (20 December 2015) (warning again against ISDS generally, after repeating an unsubstantiated report that “Australia has spent \$50 million defending plain packaging in arbitration”). Cf Rowan Callick, “Free-trade Legal Fears in Philip Morris Claim Up in Smoke”, *The Australian* (28 December 2015). However, compared to earlier coverage (see e.g. Hill, *supra* note 25), the ABC recently appears to be taking a more considered approach to ISDS — see e.g. “Fact File: Your Questions on the Trans-Pacific Partnership Answered — Corporations Suing Governments”, online: ABC News <www.abc.net.au/news/2015-12-18/trans-pacific-partnership-your-questions-answered/7037500>; “Fact Check: Can a Poker Machine Manufacturer Use the TPP to Challenge Changes to Gambling Laws” (5 February 2016), online: ABC News <www.abc.net.au/news/2016-02-05/can-poker-machine-manufacturers-sue-the-government-under-tpp/7101798>. On social media, The Conversation has published numerous commentaries critical of ISDS, FTAs and the TPP over recent years (see e.g. Gleeson, Tienhaara & Friel, *supra* note 97; Gleeson, *supra* note 118) but has now published an assessment by Nottage and Trakman: “As Asia embraces the Trans-Pacific Partnership, ISDS opposition fluctuates”, *The Conversation* (20 November 2015), online: <<https://theconversation.com/as-asia-embraces-the-trans-pacific-partnership-ids-opposition-fluctuates-50979>>.

162 See Patrick Carvalho, *Investor State Arbitration and the Rule of Law: Debunking the Myths*, Centre for Independent Studies Research Report (April 2016), online: <<https://www.cis.org.au/product/investor-state-arbitration-and-the-rule-of-law-debunking-the-myths>>.

163 See generally the Cultural Cognition Project, online: <www.culturalcognition.net/>, discussed further in Luke Nottage & Souichirou Kozuka, “Lessons from Product Safety Regulation for Reforming Consumer Credit Markets in Japan and Beyond” (2012) 34:1 *Sydney L Rev* 129; and Shiro Armstrong & Luke Nottage, “Mixing Methodologies in Empirically Investigating Investor-State Arbitration” (Paper delivered at the PluriCourts Book Project Conference on Empirical Perspectives on Legitimacy of International Investment Tribunals, Oslo University, 27 August 2015) [unpublished].

164 Luke Nottage and Leon Trakman, “How Would a New Labor Government in Australia (Re)Negotiate Trade and Investment Agreements?” (22 June 2016) CIGI Commentary, online: <www.cigionline.org/publications/how-would-new-labor-government-australia-renegotiate-trade-and-investment-agreements>.

165 See, with extensive further references, Luke Nottage, “US vs EU vs Other Models for Investment Treaties in the Asian Region” (10 June 2016), *Japanese Law in Asia-Pacific Socio-Economic Context* (blog), online: <http://blogs.usyd.edu.au/japaneselaw/2016/06/us_vs_eu_vs_other_models.html>.

166 “A Smart, Modern, Fair Australia”, Labor Party National Platform, at paras 70–71, online: <https://cdn.australianlabor.com.au/documents/ALP_National_Platform.pdf>.

167 See *supra* note 125.

upper house (30 out of 76 senators).¹⁶⁸ It would therefore need votes from at least nine other senators to pass tariff reduction legislation before being able to ratify the TPP. However, the (nine) Greens senators will never vote with the government, given their party's implacable opposition to ISDS, and indeed to FTAs more generally. Of the 11 other cross-bench senators, Pauline Hanson's "One Nation" (four) senators are notoriously xenophobic, while the Nick Xenophon Team (three) senators favour more support for local manufacturing.¹⁶⁹ Accordingly, the government will more likely seek to court the Labor vote, despite its pre-election stance reiterating opposition to ISDS in FTAs and standalone investment treaties.

A JSCOT committee (with a majority of government members, from both houses) commenced an inquiry into ratifying the TPP in February 2016, but it lapsed due to the general election, and has only just resumed public hearings¹⁷⁰. On September 15, the Senate Foreign Affairs, Defence and Trade References Committee commenced a parallel inquiry.¹⁷¹ As the chairperson and two other senators are from the Labor Party, alongside a Greens senator and with only two Coalition senators, a majority report objecting to the ISDS provisions and even opposing ratification is quite foreseeable. Submissions were requested by October 28, but its report is due only by February 7, 2017, after the US presidential elections in November 2016. One non-governmental organization persistently opposed to FTAs has welcomed this timing, remarking that "Labor has not yet made any decision about how they will vote when the TPP legislation comes through Parliament. A senate inquiry will both delay the vote in Parliament and help to bring the TPP into focus."¹⁷²

Nonetheless, speaking on September 18 in the United States, Prime Minister Turnbull urged US President Barack Obama to put the TPP to a vote in Congress even during its "lame duck" session (after the election and before inauguration of the new US president). Turnbull argued that ratification was important not only to counter growing protectionism worldwide, but also for geopolitical reasons.¹⁷³ If and when the United States ratifies the TPP, Japan is expected to follow suit, but whether the Coalition government itself would then be able to secure sufficient votes in Parliament is a very open question. One possible way forward may be for the government to agree to commence a review of old BITs, as prefigured before the election by Labor, in exchange for the latter agreeing to vote in favour of the tariff reduction legislation needed before ratifying the TPP. There are good policy and strategic reasons in any case for such a review. It could also provide a platform to smooth Australia's ongoing FTA negotiations — bilaterally, and regionally via the Regional Comprehensive Economic Partnership — with Indonesia and India, both already adapting their own existing approaches toward investment treaties.¹⁷⁴

AUTHOR'S NOTE

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168 Australia, Parliament of Australia, "Composition of the 45th Parliament: a quick guide" (29 August 2016), online: <www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/45th_Parliament_Composition>.

169 Australian Fair Trade and Investment Network Ltd, "Election 2016: Trade policy comparison" (June 2016), online: <aftinet.org.au/cms/1606-2016-election-policy-scorecard>.

170 See submissions online: <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016>.

171 See www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TPP.

172 AFTINET, at aftinet.org.au/cms/node/1250.

173 www.smh.com.au/federal-politics/political-news/malcolm-turnbull-urges-us-to-ratify-trans-pacific-partnership-in-face-of-populist-protectionism-20160919-grj8c8.html

174 See generally Amokura Kawharu and Luke Nottage, "Models for Investment Treaties in the Asian Region: An Underview" (28 September 2016) Sydney Law School Research Paper No. 16/87, online: <<http://ssrn.com/abstract=2845088>>.

APPENDIX A: AUSTRALIA'S INVESTMENT TREATIES

Name of Agreement	Signature	Entry into Force	Duration and Termination
1. China	11/07/1988	11/07/1988	Automatically renewed after 10-year terms: until 11/07/1998, then 2008, then 2018
2. Papua New Guinea [1991] ATS 38	03/09/1990	20/10/1991	Until 20/10/2006
3. Vietnam [1991] ATS 36	05/03/1991	11/09/1991	Until 11/09/2006
4. *Poland [1992] ATS 10	07/05/1991	27/03/1992	Until 27/03/2007
5. *Hungary [1992] ATS 19	15/08/1991	10/05/1992	Until 10/05/2007
6. Indonesia [1993] ATS 19	17/11/92	29/07/1993	Until 29/07/2008
7. Hong Kong [1993] ATS 30	15/09/1993	15/10/1993	Until 15/09/2008
8. *Romania [1994] ATS 10	21/06/1993	22/04/1994	Until 22/04/2009
9. *Czech Republic [1994] ATS 18	30/09/1993	29/06/1994	Until 29/06/2009
10. Laos [1995] ATS 9	06/04/1994	08/04/1995	Until 08/04/2010
11. Philippines [1995] ATS 28	25/01/1995	08/12/1995	Until 08/12/2010
12. Argentina [1997] ATS 4	23/08/1995	11/01/1997	Until 11/01/2007
13. Peru [1997] ATS 8	07/12/1995	02/02/1997	Until 02/02/2012 <i>[Automatically renewed then, including ISDS, despite Gillard government TPS]</i>
14. *Pakistan [1998] ATS 23	07/02/1998	14/10/1998	Until 14/10/2013 <i>[Automatically renewed under Abbott government]</i>
15. Chile BIT	09/07/1996	16/09/1999	Until 16/09/2014 <i>[But terminated after entry into force of the bilateral FTA]</i>
16. *Lithuania [2002] ATS 7	24/11/1998	10/05/2002	Until 10/05/2017
17. India [2000] ATS 14	26/02/1999	04/05/2000	Until 04/05/2010
18. *Egypt [2002] ATS 19	03/05/2001	05/09/2002	Until 05/09/2017
19. Uruguay [2003] ATS 10	03/09/2001	12/03/2002	Until 12/03/2017
20. Sri Lanka [2007] ATS 22	12/11/2002	14/03/2007	Until 14/03/2022
21. Singapore-Australia Free Trade Agreement	17/02/2003	28/07/2003	Termination subject to 6 months' written notice
22. Australia-United States Free Trade Agreement	18/05/2004	01/01/2005	Termination subject to 180 days' written notice
23. Thailand-Australia Free Trade Agreement	05/07/2004	01/01/2005	Termination subject to 1 year's written notice
24. Turkey [2010] ATS 8	16/06/2005	29/06/2009	Until 29/06/2024

25. Mexico [2007] ATS 20	23/08/2005	21/07/2007	Until 21/07/2017 (10 year period from entry into force; thereafter indefinitely unless 1 year's written notice)
26. Australia-Chile Free Trade Agreement	30/07/2008	06/03/2009	Termination subject to 180 days' written notice <i>[Investment chapter supersedes 1996 BIT]</i>
27. Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) Side letters exclude ISDS between Australia and New Zealand	27/02/2009	01/01/2010 for Australia, New Zealand, Brunei, Myanmar, Singapore Vietnam, Malaysia and the Philippines; 12/03/2010 for Thailand; 01/01/2011 for Laos; 04/01/2011 for Cambodia; 10/01/2012 for Indonesia	Termination subject to 6 months written notice or certain parties withdraw (see further chapter 18 article 8(2))
28. Investment Protocol to CER FTA with New Zealand	16/02/2011	01/03/2013	n/a
29. Malaysia-Australia Free Trade Agreement ISDS omitted but applies under AANZFTA	22/05/2012	01/01/2013	Termination subject to 180 days' written notice
30. Korea-Australia Free Trade Agreement	8/04/2014	12/12/2014	Termination subject to 180 days' written notice
31. Japan-Australia Economic Partnership Agreement	8/07/2014	15/01/2015	Termination subject to 1 year's written notice
32. China-Australia Free Trade Agreement	17/06/2015 (negotiations concluded on 17/11/2014)	n/a (implementation bills passed the Senate on 9/11/2014)	Termination subject to 180 days' written notice
33. TPP Agreement Side letter excludes ISDS between Australia and New Zealand	4/02/2016 (negotiations concluded on 6/10/2015)	n/a	Termination subject to 6 months' written notice

- Bold type: treaties omitting ISDS
- Lightly shaded: treaties partly omitting ISDS
- Asterisked: very limited ISDS scope if Planet Mining ICSID jurisdictional award approach is correct (and no other FTA now or under negotiation that might reinstate ICSID and/or non-ICSID ISDS).

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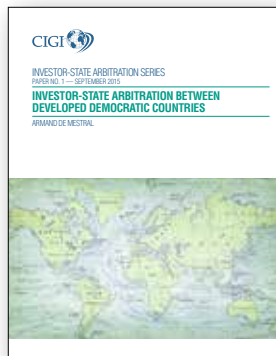
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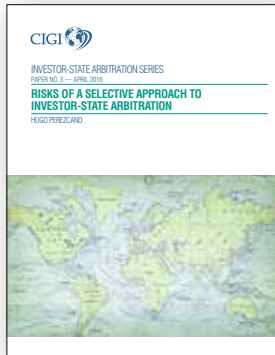
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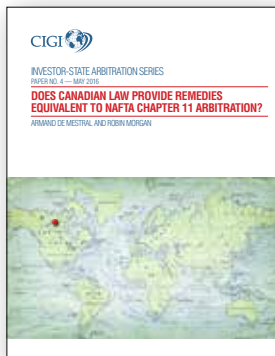


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Shotaro Hamamoto

This paper analyzes critical opinions about investor-state arbitration (ISA) in relation to investment treaties concluded by Japan, with particular emphasis on the Trans-Pacific Partnership (TPP) negotiations. The lack of discussion concerning ISA being included in agreements with Switzerland, the Republic of Korea and the European Union indicates that few people believe that ISA with developed states is problematic. What makes the TPP appear problematic is the presence of the United States, as it is perceived that Japan may be brought to arbitration by US investors.

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