

# THE TPP INVESTMENT CHAPTER AND INVESTOR–STATE ARBITRATION IN ASIA AND OCEANIA: ASSESSING PROSPECTS FOR RATIFICATION

LUKE NOTTAGE\*

*The Trans-Pacific Partnership ('TPP') was signed in February 2016 by 12 Asia-Pacific economies that already account for 37 per cent of world GDP, including the United States, Japan and Australia. If ratified, economists model significant economic growth prospects, especially for smaller and/or less-developed member states, with a considerable impetus coming from greater cross-border investment. Further economic benefits are expected if others join the existing signatories, with expressions of interest already coming from leaders in several Asian states. However, whether the treaty will be ratified and come into force remains unclear, partly because of some ongoing opposition to the TPP's investment chapter provisions even among existing signatories, for example from some quarters within Australia. One focus of criticism is the extra option of investor–state dispute settlement ('ISDS'), aimed at more credibly enforcing the substantive protections and liberalisation commitments of host states. The first part of this article therefore assesses prospects for ratification in light of investment trends and treaty practices in Asia and Oceania, including current and possible future TPP states. It shows how many have now weathered occasional claims from foreign investors, without abandoning ISDS from subsequent treaties. The second part introduces the ISDS-backed substantive provisions of the TPP investment chapter, particularly compared to other recent Australian free trade agreements ('FTAs'). These provisions continue a trend for over a decade, following the lead of the United States and evident in the FTA practice of many other Asia-Pacific states, of including provisions more favourable to host states compared to an earlier era of standalone bilateral investment treaties, which often followed a simpler European template. As such, the investment chapter seems less likely to prevent ratification of the TPP, although the broader politics in countries like Australia remain complex. In addition, the article concludes with a wider question as to whether and how investment treaties in the region may develop an even more pro-host-state stance. This is now being promoted by the European Union in negotiations with the US, but also by several Asia-Pacific states, both in terms of substantive provisions and an 'investment court' in lieu of ad hoc ISDS arbitration panels.*

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\* Professor of Comparative and Transnational Business Law, University of Sydney Law School. This article was originally presented as a paper at the GELN Biennial Symposium, 'The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL', at the University of Melbourne on 19 May 2016. Thanks are due to co-panellists and participants as well as Andrea Bjorklund, Chester Brown, Mark Kantor, Amokura Kawharu, Jaemin Lee, Andrew Mitchell, Daniela Pérez-Salgado and Tania Voon, as well as the anonymous reviewers for helpful information and/or feedback on earlier drafts, and to Luca Moretti for research and editorial assistance. Any errors or misconceptions remain my sole responsibility. This paper also draws on support from an Australian Research Council Discovery Project (Project No DP140102526) for 2014–16, jointly with Dr Shiro Armstrong and Professors Jürgen Kurtz and Leon Trakman. Much shorter versions of Parts III(A) and III(B) were earlier made available at <[http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp\\_investment.html](http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp_investment.html)> and <[http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp\\_investment\\_isds.html](http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp_investment_isds.html)> respectively.

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## I INTRODUCTION

On 5 October 2015, the *Trans-Pacific Partnership* ('TPP')<sup>1</sup> free trade agreement ('FTA') was substantially agreed among 12 Asia-Pacific countries (including Japan, the US and Australia). The lengthy text was released publicly on 5 November 2015 and signed on 4 February 2016.<sup>2</sup> Commentators soon began speculating on its prospects for ratification,<sup>3</sup> as well as pressure already for countries such as Indonesia, the Philippines, Thailand, Korea and even China to join the TPP, and/or accelerate negotiations for their *Regional Comprehensive Economic Partnership* ('RCEP' or 'ASEAN+6') FTA.<sup>4</sup> There was also considerable (and typically quite polarised) media commentary in Australia on the TPP's investment chapter, especially the investor–state dispute settlement ('ISDS') provisions. *The Sydney Morning Herald*, for example, highlighted a remark by an intellectual property ('IP') rights expert that Australia 'could get sued for billions for some change to mining law or fracking law or God knows what else'.<sup>5</sup> Other preliminary responses have been more measured.<sup>6</sup>

<sup>1</sup> The current 12 TPP partners are: Brunei, Chile, New Zealand and Singapore (the original four from 2004); Australia, Malaysia, Peru, the United States and Vietnam (which had joined negotiations from 2008); plus Canada, Japan and Mexico (which joined negotiations from 2012–13). See generally Australian Government, Department of Foreign Affairs and Trade, *Trans-Pacific Partnership Agreement* <<https://perma.cc/7HE2-YFDK>>; *Trans-Pacific Partnership Agreement*, signed 4 February 2016, [2016] ATNIF 2 (not yet in force) ('TPP').

<sup>2</sup> For chapter summaries, see Australian Government, Department of Foreign Affairs and Trade, *Trans-Pacific Partnership Agreement* <<http://dfat.gov.au/trade/agreements/tpp/summaries/Pages/summaries.aspx>>.

<sup>3</sup> Luke Nottage and Leon Trakman, 'The Trans Pacific Partnership FTA's Investment Chapter: What's Next?' on *Japanese Law and the Asia-Pacific* (20 November 2015) <<https://perma.cc/YU3K-SKFV>>, with a shorter version at Luke Nottage and Leon Trakman, 'As Asia Embraces the Trans-Pacific Partnership, ISDS Opposition Fluctuates', *The Conversation* (online), 20 November 2015 <<https://perma.cc/3RT7-7LGT>>.

<sup>4</sup> Jayant Menon, 'The TPP Isn't a Done Deal Yet' on *East Asia Forum* (29 October 2015) <<https://perma.cc/B6Z7-PJGC>>. Du provides an earlier analysis of the pros and cons of China joining the TPP, concluding that it was premature to join the then ongoing negotiations: Ming Du, 'The Case against China's Joining the Trans-Pacific Partnership (TPP)' [2015] (1) *Transnational Dispute Management* (online). Wang provides a current perspective: Heng Wang, 'China and the TPP' (Paper presented at the GELN Biennial Symposium, 'The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL', The University of Melbourne, 20 May 2016).

<sup>5</sup> Gareth Hutchens, 'Australia "Could Be Sued for Billions" by Foreign Companies under TPP', *The Sydney Morning Herald* (online), 6 November 2015 <<https://perma.cc/SSY7-5F43>>, citing Associate Professor Kimberlee Weatherall. See also Kyla Tienhaara, 'The TPP Has Been Released and Our Concerns Have Been Vindicated' on *The Drum* (6 November 2015) <<https://perma.cc/47QG-8LJ8>>.

<sup>6</sup> Rowan Callick and Joe Kelly, 'Experts Test Robb Safeguard Claims', *The Australian* (Canberra), 6 November 2015, 4, citing the present author; Manny Tsigas, 'Calls for Trans Pacific Partnership to Be Independently Assessed', *SBS News* (online), 6 November 2015 <<https://perma.cc/H7Q6-FCZB>>, citing Professor Tania Voon. For a recent defence of ISDS, from a politically conservative think-tank, see Patrick Carvalho, 'Investor–State Arbitration and the Rule of Law: Debunking the Myths' (Research Report No 13, Centre for Independent Studies, 13 April 2016) <<https://perma.cc/H8BF-P5FZ>>.

To assess such concerns about the TPP investment chapter, Part II of this article first outlines the development of investment treaties and investor–state arbitration in the wider Asia-Pacific region, especially East Asia. This includes some recent policy responses by current and potential further TPP partners, particularly in the wake of often high-profile ISDS claims. Overall, they have mostly so far overcome concerns about offering ISDS-backed protections in investment treaties, although some sensitivities remain especially in Indonesia. This augurs quite well for ratification of the TPP, including by Australia, which otherwise might be more cautious — so as not to be seen as forcing such investment protections onto reluctant TPP-neighbouring states.

Part III(A) then briefly sketches the scope of the main substantive protections offered to foreign investors in the TPP, compared to other FTAs recently ratified by Australia (especially with Korea and China).<sup>7</sup> Part III(B) compares the ISDS provisions themselves.<sup>8</sup> It ends by introducing two further provisions that have not been widely discussed in Australia, although they may impact on liability exposure for host states:

- allowing ISDS based on certain investment agreements concluded between the host state and foreign investors (found otherwise only in the FTA with Korea); and
- addressing whether and how minority shareholders in an investment vehicle in the host state can bring ISDS claims.

This analysis concludes that the risks of ISDS claims are generally similar to those under Australia’s FTAs (and significantly less than some of its earlier generation of standalone investment treaties), which should also make ratification easier. However, some specific novelties and omissions become evident and other issues remain that need to be debated more broadly, such as the interaction between the investment and IP chapters.<sup>9</sup>

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<sup>7</sup> For an earlier sketch, see Luke Nottage, ‘The TPP Investment Chapter: Mostly More of the Same [Substantive Commitments]’ on *Japanese Law and the Asia-Pacific* (11 November 2015) <<https://perma.cc/J9ED-XPUP>>. Australia’s FTAs with Korea and China are available via Australian Government, Department of Foreign Affairs and Trade, *Free Trade Agreements* <[http://dfat.gov.au/trade/agreements/Pages/trade agreements.aspx](http://dfat.gov.au/trade/agreements/Pages/trade%20agreements.aspx)>.

<sup>8</sup> For an earlier sketch, see Luke Nottage, ‘The TPP Investment Chapter: Mostly More of the Same [ISDS Procedure]’ on *Japanese Law and the Asia-Pacific* (12 November 2015) <<https://perma.cc/PQ78-WSYD>>. See also Andrew Mitchell, ‘ISDS in the TPP’ (Paper presented at the GELN Biennial Symposium, ‘The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL’, The University of Melbourne, 19 May 2016).

<sup>9</sup> As indeed raised by both Kimberlee Weatherall and myself in the 2014 Senate inquiry into the ‘Anti-ISDS Bill’: Luke Nottage, ‘The “Anti-ISDS Bill” before the Senate: What Future for Investor–State Arbitration in Australia?’ (2015) 18 *International Trade and Business Law Review* 245. Contrasting Australia’s early BITs with FTAs, see Tania Voon, ‘Protecting Regulatory Autonomy: The Evolution of Australia’s Trade and Investment Treaties’ (Paper presented at the GELN Biennial Symposium, ‘The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL’, The University of Melbourne, 19 May 2016).

Overall, as mentioned in Part IV, the wording of the TPP's investment chapter derives primarily from US investment treaty and FTA practice.<sup>10</sup> This, in turn, has influenced many other Asia-Pacific countries (including Australia) in their own international negotiations. Yet the European Union is now developing some interesting further innovations to recalibrate investment commitments. These include a standing investment court with a review mechanism to correct substantive errors of law. The feature was developed especially for its ongoing FTA negotiations with the US (the *Transatlantic Trade and Investment Partnership* or 'TTIP'), but was recently accepted in the EU's FTAs with Canada and even Vietnam (which had agreed to a more traditional ISDS procedure in the TPP).<sup>11</sup> In addition, the wording contained in the FTA between the EU and Canada (substantially agreed in August 2014, with modifications after a 'legal review' completed on 29 February 2016),<sup>12</sup> and now proposed for TTIP, arguably protects the regulatory autonomy of host states somewhat more strongly than TPP's substantive provisions.<sup>13</sup> This should not necessarily impede TPP ratification, but does raise broader questions about whether an emergent EU-style or the current US-style model will ultimately prevail in other bilateral or mega-regional negotiation forums.

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<sup>10</sup> See Wolfgang Alschner and Dmitriy Skougarevskiy, 'The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe' 17 *Journal of World Investment & Trade* 339 (with manuscript available at <<https://perma.cc/QBB2-PG8P>>). As one anonymous reviewer has pointed out, however, the TPP's chapter on regulatory coherence may also have been influenced by that in the Pacific Alliance (signed already on 3 July 2015 and including Chile, Mexico and Peru). See Alianza del Pacífico, *First Amending Protocol to the Framework Agreement of the Pacific Alliance* (Draft, 2015) <<https://perma.cc/PK5R-ZNWJ>>.

<sup>11</sup> European Commission, *The Transatlantic Trade and Investment Partnership*, European Commission: Trade <<http://ec.europa.eu/trade/policy/in-focus/ttip/>>; European Commission, 'CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement' (Press Release, 29 February 2016) <<https://perma.cc/2YMQ-KHNT>>; Michael P Daly and Jawad Ahmad, 'The EU-Vietnam FTA: What Does it All Mean? What Does it Mean for the Future?' on *Kluwer Arbitration Blog* (14 December 2015) <<https://perma.cc/U39U-6GTQ>>. See also August Reinisch, 'The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court' (Paper No 2, Centre for International Governance Innovation, March 2016) <<https://perma.cc/6NMV-453J>>.

<sup>12</sup> European Commission, Directorate-General for Trade, *EU-Canada Comprehensive Economic and Trade Agreement* (3 August 2016) <<http://ec.europa.eu/trade/policy/in-focus/ceta/>>.

<sup>13</sup> Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA and TTIP' (2016) 19 *Journal of International Economic Law* 27; Charles-Emmanuel Côté, 'From Sea to Sea: Regulatory Space of Federal and Provincial Governments in Canada under CETA and TPP Investment Chapters' (Paper presented at the GELN Biennial Symposium, 'The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL', The University of Melbourne, 20 May 2016). See also Catharine Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 26 *European Journal of International Law* 639, 654-7.

## II ASIA-PACIFIC INVESTMENT TRENDS, TREATIES AND ISDS CLAIMS

A *Investment and Treaty Arbitration Trends*

The Asian region has long been a major destination for foreign direct investment ('FDI'). It has also emerged as a major source of outbound FDI.<sup>14</sup> The latter tendency began with investors from Japan in the 1980s,<sup>15</sup> followed by investment out of Korea from the late 1990s,<sup>16</sup> and more recently China<sup>17</sup> and economies like Singapore within the Association of Southeast Asian Nations ('ASEAN').<sup>18</sup> By 2013, a quarter of the top 20 host countries for inbound FDI were located in East Asia and the Pacific ('EAP'), but also more than a quarter of the top 20 economies for outbound FDI worldwide. Transnational companies also considered that eight of the 17 top prospective host countries for FDI over 2014–16 were in EAP.<sup>19</sup>

Notably, FDI into Southeast Asia rose for the third consecutive year, from USD117 billion in 2013 to USD136 billion in 2014, despite a 16 per cent decline in FDI flows worldwide in 2014. ASEAN member states collectively received the largest amount of FDI among developing countries, with inflows exceeding those into China since 1993. Intra-ASEAN investment (mostly from or via Singapore) jumped by 26 per cent to comprise now almost one-fifth of all inbound FDI, making Southeast Asian countries the second-largest investor group in their region. A major driver is the business sector's aim to develop a stronger regional presence due to the completion of the ASEAN Economic

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<sup>14</sup> Vivienne Bath and Luke Nottage, 'Asian Investment and the Growth of Regional Investment Agreements' in Christoph Antons (ed), *Routledge Handbook of Asian Law* (Routledge, 2016) 182.

<sup>15</sup> See generally Shotaro Hamamoto and Luke Nottage, 'Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor–State Dispute Resolution' (Research Paper 10/145, Sydney Law School, 26 December 2010) <<https://perma.cc/44B5-AXCB>>.

<sup>16</sup> See generally Joongi Kim, 'The Evolution of Korea's Modern Investment Treaties and Investor–State Dispute Settlement Provisions' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 211.

<sup>17</sup> See generally Vivienne Bath, 'China Companies and Investment — The Balance between Domestic and International (Paper presented at Society of International Economic Law, 4<sup>th</sup> Biennial Global Conference, Singapore, 9 July 2012) <<https://perma.cc/K6J8-7NXF>>; Vivienne Bath, 'The South and Alternative Models of Trade and Investment Regulation — Australia, China and the Regional Comprehensive Economic Partnership' (Research Paper 15/58, Sydney Law School, 13 August 2015) <<https://perma.cc/PS46-XWBQ>>.

<sup>18</sup> Jean Ho, 'Singapore' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013) 623.

<sup>19</sup> Claudia T Salomon and Sandra Friedrich, 'Investment Arbitration in East Asia and the Pacific' (2015) 16 *Journal of World Investment and Trade* 800, 834, referring to UNCTAD's *World Investment Report 2014*. See also Martina Francesca Ferracane, 'Investor–State Dispute Settlement Cases in APEC — The Record' in Australian APEC Study Centre at RMIT (ed), *Current Issues in Asia Pacific Foreign Direct Investment* (2015) 61 <<https://perma.cc/ARS8-GQ8S>>.

Community by the end of 2015. Infrastructure investment remains a priority area for FDI.<sup>20</sup>

The dramatic expansion of FDI within or involving Asian economies has been paralleled by the emergence of an extensive network of investment treaties.<sup>21</sup> Standalone bilateral investment treaties ('BITs') mostly aim to *protect* existing investments, especially against discrimination compared to local or third-country investors, expropriation without adequate compensation or denial of justice or other violations of 'fair and equitable treatment'. Such protections have also long been considered to indirectly encourage cross-border investment, especially FDI where the larger amounts and control involved for foreign investors often makes their sunk investments more politically sensitive and open to host state intervention. In addition, provisions against discrimination — 'national treatment' and/or 'most-favoured nation' ('MFN') treatment — can be extended to the pre-establishment or investment admission phase, albeit typically with some agreed carve-outs for specific sectors or types of investment. Such BITs can also *liberalise* market access for foreign investors and thus directly promote greater FDI.

More recently, Asia-Pacific countries have tended to negotiate fewer BITs, instead including investment chapters in FTAs. The latter almost always include substantive protections, but also increasingly pre-establishment liberalisation commitments. FTA investment chapters go beyond multilateral agreements, notably under the aegis of the World Trade Organization in operation since 1995. These WTO agreements only offer liberalisation and then national treatment and/or MFN protection for individually agreed service sector investments (under the *General Agreement on Trade in Services*), and protection against discriminatory 'local content' and other specific performance requirements targeting foreign investors (under the *Trade Related Investment Measures Agreement*).<sup>22</sup> Some WTO member states sought to add broader investment protection and liberalisation commitments, but these initiatives were shelved after strong objections from civil society groups around 2000. The subsequent and more narrowly circumscribed Doha Development Round does not include

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<sup>20</sup> See generally ASEAN, *Investment Report 2015: Infrastructure Investment and Connectivity* (2015) <<https://perma.cc/9XM7-9TYR>>. See also ASEAN, *Invest in ASEAN* (2016) <<http://investasean.asean.org/>>; Australian Government, Department of Foreign Affairs and Trade, *Why ASEAN and Why Now?* (2015) 51–9 <<https://perma.cc/JL5C-FLCB>>. On the ASEAN Economic Community project underway since 2007, see also ASEAN, *ASEAN Economic Community* <<https://perma.cc/D2GP-28LN>>; Luke Nottage and Sakda Thanitcul, 'Introduction' in Luke Nottage and Sakda Thanitcul (eds), *ASEAN Product Liability and Consumer Product Safety Law* (Winyuchon, 2016) 1. Manuscript also available at Luke Nottage and Sakda Thanitcul, 'Economic Integration and Consumer Protection in Southeast Asia: ASEAN Product Liability Law and Safety Regulation' (Legal Studies Research Paper No 15/100, Sydney Law School, December 2015) <<https://perma.cc/5L7M-2HAP>>.

<sup>21</sup> Vivienne Bath and Luke Nottage, 'Foreign Investment and Dispute Resolution Practice in Asia: An Overview' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 1; Bath and Nottage, 'Asian Investment and the Growth of Regional Investment Agreements', above n 14. The Asia Pacific Economic Cooperation ('APEC') forum has tried to help systematise this development, after earlier issuing non-binding 1994 recommendations for its member economies to promote and protect inbound investment through voluntary unilateral measures.

<sup>22</sup> See generally Michael Hahn, 'WTO Rules and Obligations Related to Investment' in Marc Bungenberg et al (eds), *International Investment Law* (Hart, 2015) 653.

such investment proposals, and initiatives within the Organisation for Economic Co-operation and Development (‘OECD’) to develop a multilateral agreement on investment were also suspended in 1998.<sup>23</sup>

Admittedly, recent research casts some doubt on whether offering treaty-based investment protections in fact leads to significantly more cross-border investment. For example, Lauge Skovgaard Poulsen’s archival research and interviews of treaty negotiators in various developing countries suggests that ‘motivated learning’ was a significant factor. That is, they *wanted* to believe in this benefit from signing BITs, without undertaking much investigation or rationally processing contrary evidence.<sup>24</sup> Christian Bellak’s recent ‘meta-analysis’ of econometric studies acknowledges that investment treaty implementation had an average impact on FDI ranging from 4–13 per cent (with median increases of 2–19 per cent) but argues that publication selection biases reduce aggregate effects on both flows and stocks to statistically negligible levels.<sup>25</sup> To assist with more accurate quantitative analysis, which can furthermore be linked up to country-specific qualitative research, Julien Chaisse and Christian Bellak have gone on to develop a ‘BITSel Index’ that assesses the overall strength of investment treaties by combining their breadth or scope, liberalisation effect, protections against discrimination, other constraints on regulation (compensation for expropriation, fair and equitable treatment) and access to international dispute settlement.<sup>26</sup> Partly applying this measure, Shiro Armstrong and Luke Nottage present preliminary econometric results finding weaker-form ISDS (and/or certain substantive) provisions seem to have stronger and more robust impact, especially since the turn of this century; but there has still been a positive and significant impact from stronger provisions, including from full-scale ISDS provisions in promptly ratified treaties concluded between

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<sup>23</sup> See generally Joachim Karl, ‘The Negotiations on the OECD Multilateral Agreement on Investment’ in Marc Bungenberg et al (eds), *International Investment Law* (Hart, 2015) 342.

<sup>24</sup> Lauge N Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press, 2015). This has been reviewed by Nottage: Luke Nottage, ‘Rebalancing Investment Treaties and Investor–State Arbitration: Two Approaches’ (2016) 17 *Journal of World Investment and Trade* (forthcoming) (manuscript available at <<https://perma.cc/M6MH-DD3M>>).

<sup>25</sup> Christian Bellak, ‘Survey of the Impact of Bilateral Investment Agreements on Foreign Direct Investment’ in Australian APEC Study Centre at RMIT (ed), *Current Issues in Asia Pacific Foreign Direct Investment* (2015) 71 <<https://perma.cc/ARS8-GQ8S>>. However, Bellak remarks (at 76) that these ‘results should not be read as implying that BITs are useless, as investor protection may enhance the effects of other types of investment policies and location factors, not least incentives, on FDI’; and ‘BITs may contribute substantially to the *sustainability* of FDI, as they allow taking legal action against the host country’ (usually even after treaty termination, due to sunset clauses). On the first point, see also Catherine A Rogers, ‘International Arbitration, Judicial Education, and Legal Elites’ (2015) 1 *Journal of Dispute Resolution* 71, giving country studies — and signalling ongoing joint econometric research — suggesting that investment treaty arbitration combines with national reforms to international commercial arbitration regimes to generate significant effects on cross-border investment.

<sup>26</sup> Julien Chaisse and Christian Bellak, ‘Navigating the Expanding Universe of International Treaties on Foreign Investment Creation and Use of a Critical Index’ (2015) 18 *Journal of International Economic Law* 79.

OECD and non-OECD states. However, the methodological challenges in such empirical work remain formidable.<sup>27</sup>

Another recent study provides a comprehensive overview of both BITs and FTAs or other investment treaties concluded so far by EAP economies — in East Asia, Pacific Islands, New Zealand and Australia. As of December 2014, 24 EAP economies had concluded 712 BITs (with 541 in force) out of around an estimated 3000 BITs worldwide, as well at least 69 other investment agreements (such as bilateral or regional FTAs) out of around 330.<sup>28</sup> The proportions of treaties signed by the most active EAP states (and numbers of formal ISDS claims filed) were as follows:<sup>29</sup>

Table 1: Investment Treaties and ISDS Claims Involving East Asia and Pacific States

States	BIT proportion (out of 541)	FTA proportion (out of 69)	ISDS claims received (including number and year first filed, where consent under treaty)
<b>1. China</b>	20.4%	17.4%	2 (under treaty: first filed in 2011 but settled)
<b>2. South Korea</b>	13.8%	15.9%	2 (1 under treaty: filed 2012)
<b>3. Indonesia</b>	10%	2.9%	7 (3 under treaties: first filed in 2004, but also under contract and settled)
<b>4. Malaysia</b>	10%	10.1%	3 (2 interrelated: filed in 1994 and 1999)
<b>5. Vietnam</b>	8.7%	1.4%	4 (first filed in 2003 but settled)
<b>6. Singapore</b>	6.5%	17.4%	-
<b>7. Mongolia</b>	6%	1.4%	4 (first filed 2004)
<b>8. Thailand</b>	5.6%	5.8%	1 (filed 2005)
<b>9. Philippines</b>	5.3%	1.4%	4 (first filed 2002 but settled)
<b>10. Laos</b>	3.5%	N/A	2 (both, interrelated, filed in 2012)
<b>11. North Korea</b>	3.4%	N/A	-
<b>12. Australia</b>	3.2%	23.2%	1 (filed 2011)

<sup>27</sup> Shiro Armstrong and Luke Nottage, 'The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis' (Research Paper No 16/74, Sydney Law School, August 2016) <<https://perma.cc/GS54-NVSD>>.

<sup>28</sup> Salomon and Friedrich, 'Investment Arbitration in East Asia and the Pacific', above n 19, 802–3. For a second treaty dispute notified to Thailand in 2015, see Luke Nottage and Sakda Thanitcul, 'The Past, Present and Future of International Investment Arbitration in Thailand' (Research Paper No 16/31, Sydney Law School, April 2006) pt 3.3 <<https://perma.cc/A592-8TPP>>.

<sup>29</sup> Table adapted from Salomon and Friedrich, and (for investment agreements other than BITs) its online annex: Salomon and Friedrich, 'Investment Arbitration in East Asia and the Pacific', above n 19, 804; Claudia Salomon and Sandra Friedrich, *Annex Materials: Investment Arbitration in East Asia & Pacific — A Statistical Analysis of Bilateral Investment Treaties, Other International Investment Agreements and Investment Arbitrations in the Region* (15 April 2015) <<https://perma.cc/9EF9-KEBA>>. Lightly shaded columns in Table 1 are potential additional TPP partners; more heavily shaded columns are current partners.



<b>13. Japan ...</b>	3.2%	18.8%	-
<b>18. Brunei ...</b>	0.8%	N/A	-
<b>20. New Zealand</b>	0.6%	2.9%	-

EAP economies began to sign BITs from the early 1960s, with Thailand, Malaysia and Indonesia as well as Korea concluding seven — all with European states. Over the 1970s, Singapore and the Philippines as well as Japan began signing BITs too, generating a total of 26 treaties — also mostly still with Europe. In the 1980s, Laos as well as China, Australia, New Zealand and Papua New Guinea began their BIT programs, resulting in 48 BITs concluded by all 11 EAP economies. Their counterparties were increasingly diversified, and in 1985 Thailand and China signed the first intra-regional BIT. But BIT activity really took over the 1990s, with 21 EAP economies signing 369 treaties, including almost one-fifth involving former Eastern Bloc countries in Europe. Another 234 BITs were signed over the 2000s, led again by China. By contrast, only 28 BITs were concluded over 2010–14 by 12 EAP economies; 12 others had not continued to sign BITs. This pattern tracks the rapid growth in BITs concluded worldwide, which also peaked in the 1990s.<sup>30</sup>

Claudia Salomon and Sandra Friedrich argue that the reduced popularity of BITs reflects: ‘saturation’ (as treaties come to be concluded between the major trade and investment partners); the move away from standalone BITs as many economies started to negotiate instead broader FTAs; but also some reluctance or concerns about BITs after treaty-based investor–state dispute settlement claims started to be filed.

Illustrating the latter point, they highlight how the Philippines had concluded 37 BITs before the International Centre for the Settlement of Investment Disputes (‘ICSID’) registered a claim by a Swiss investor, but only signed one more after that ISDS case was settled in 2008.<sup>31</sup> From interviews conducted by Poulsen and Emma Aisbett over 2009–11, government officials in 12 of 13 developing countries worldwide reported that it was only after the first claim against their own country that they realised that BITs exposed them to serious liability. Their broader econometric analysis of 138 developing countries showed that while average signing rates for BITs over 1990–2009 were already declining

<sup>30</sup> Salomon and Friedrich, ‘Investment Arbitration in East Asia and the Pacific’, above n 19, 804–7.

<sup>31</sup> Ibid 808–9 (referring to *SGS Société Générale de Surveillance SA v Philippines (Decision on Jurisdiction)* (2004) 8 ICSID Rep 515; also noting that the Philippines has only included one FTA subsequently, with Japan in 2006, which omits ISDS despite ISDS being included in all other investment treaties concluded by Japan). See also M Sornarajah, ‘Review of Asian Views on Foreign Investment Law’ in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 242, 249–50 (arguing that the tribunal’s finding of liability against the Philippines for violating an umbrella clause, in contrast to a subsequent decision brought by SGS against Pakistan, led to the Philippines becoming disenchanted with investment arbitration; also highlighting the *Fraport* claim brought before ICSID from 2003 under the BIT with Germany); Sam Luttrell, ‘ISDS in the Asia-Pacific: A Regional Snap-Shot’ (2016) 19 *International Trade and Business Law Review* 20, 40 (noting a pending claim filed in 2011 under the Netherlands BIT), 45–6 (summarising the resolution of the *Fraport* arbitration in favour of the Philippines in 2014, but noting that its Supreme Court ultimately awarded compensation for annulment of the concession contract).

before the first BIT claim was registered, the downward trend then accelerated significantly; and the upward trend in BITs signed each year is reversed in the year after the first claim against the developing country.<sup>32</sup>

Chaisse similarly tracks the proliferation of BITs, and more recently FTA investment chapters, in the wider Asia-Pacific region (extending to the Americas and South and Central Asia). He found 1265 such investment treaties, but went on to focus his own analysis on 167 'intra-regional' treaties as opposed to 1088 'cross-regional' treaties. These arguably reflect the interests of capital-exporting countries (mostly from outside Asia and the Pacific Basin).<sup>33</sup>

Both these empirical studies also highlight the emergence of investor claims generally against host states in Asia, following in part from the inclusion of ISDS provisions in ever more treaties and the growth in cross-border FDI. ISDS offers an additional, more direct option for investors seeking to enforce substantive rights guaranteed by host states under investment treaties. They sit alongside the indirect interstate arbitration mechanism almost always also provided in treaties, but which requires the home state to incur resources and potential diplomatic embarrassment in pursuing a treaty claim on behalf of its investor. Both types of treaty-based dispute resolution processes are seen as particularly valuable when the domestic courts and substantive protections of the host state are in developing countries or otherwise perceived as not meeting widely accepted minimum international standards. The ISDS mechanisms, especially investor–state arbitration generating a decision that binds the host state, have become commonly included in treaties concluded by Asian economies, after a cautious start, notably by socialist countries such as the People's Republic of China.<sup>34</sup> In addition, host states can consent to ISDS through investment contracts or authorisations,<sup>35</sup> or even domestic legislation applicable to foreign investors generally.<sup>36</sup>

Until around 2010, the number of claims filed against Asian host states appeared comparatively low, and even more so regarding Asian investors

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<sup>32</sup> Lauge N Skovgaard Poulsen and Emma Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65 *World Politics* 273, 276, 282. They argue that these trends are best explained by actors constrained by bounded rationality, including for example the 'availability heuristic' (underestimating low probability risks until a high-profile instance eventuates). This heuristic is identified as possibly operating in the context of the first ever claim against Australia, filed in 2011 under its early BIT with Hong Kong: see Luke Nottage, 'Consumer Product Safety Regulation and Investor–State Arbitration Policy and Practice after *Philip Morris Asia v Australia*' in Leon E Trakman and Nicola W Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press, 2013) 452. See also Poulsen, above n 24, referring instead to 'salience bias'.

<sup>33</sup> Julien Chaisse, 'The Shifting Tectonics of International Investment Law — Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region' (2015) 47 *George Washington International Law Review* 563.

<sup>34</sup> See, eg, Manjiao Chi and Xi Wang, 'The Evolution of ISA Clauses in Chinese IIAs and Its Practical Implications' (2015) 16 *Journal of World Investment and Trade* 869.

<sup>35</sup> See, eg, Luke Nottage, 'Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor–State Arbitration? Analysis of *Planet Mining v Indonesia* and Regional Implications' [2015] (1) *Transnational Dispute Management* (online). The tribunal upheld ICSID jurisdiction on the basis of a mining investment authorisation from Indonesia, not the provisions of its BIT with Australia.

<sup>36</sup> Cf early draft revisions of the 2012 Foreign Investment Law of Myanmar. However, the most recent draft does not in itself provide for advance consent to ISDS: see Investment Law (Draft) 2016 (Myanmar) <<https://perma.cc/G26E-SCNG>>.

bringing ISDS claims against host states. Drawing on theoretical paradigms used to analyse low levels of civil lawsuits formally filed in Japan, Nottage and Weeramantry suggested that the most plausible explanation for comparatively few Asia-related ISDS claims was an array of ‘institutional barriers’, including costs and a paucity of experienced counsel and arbitrators in Asia, rather than some general cultural aversion to arbitration.<sup>37</sup> Building on this hypothesis, Joongi Kim highlighted an increase in ISDS claims against Asian host states from 2011, as well as more claims filed by Asian investors, and anticipated more of both.<sup>38</sup> Salomon and Friedrich also noted eight claims against EAP states in 2011 and five in 2012, albeit only two each (closer to the usual number before the 2011 spike) in each of 2013 and 2014. This generated a total of 35 claims since 1981, including 30 cases where the host state had consented to ISDS under investment treaties, mostly against developing countries in Asia (as also indicated in Table 1 above).<sup>39</sup> They also find 29 investors from EAP states, including 19 treaty-based claims and 22 administered by ICSID under the framework 1965 *ICSID Convention*,<sup>40</sup> which has been adopted by almost all Asian states and facilitates enforcement of resultant awards.<sup>41</sup> Salomon and Friedrich do admit that initially these EAP investors

mostly were involved as locally-incorporated subsidiaries of Western European and North American parent companies. However, EAP investors quickly brought investment claims without the involvement (at least on the record) of any non-EAP parent entity. While investors from one of the region’s few developed countries, Australia, have been the most active in pursuing their investment claims in arbitration, nearly two thirds of the region’s investment claims were brought by EAP investors from developing countries (19 cases, 65.5%).<sup>42</sup>

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<sup>37</sup> Luke Nottage and J Romesh Weeramantry, ‘Investment Arbitration in Asia: Five Perspectives on Law and Practice’ (2012) 28 *Arbitration International* 19. On the spread of international commercial arbitration in Asia especially over the last decade, undermining some earlier opinions that this was inconsistent with cultural preferences for negotiated or mediated settlements, see also Luke Nottage, ‘In/formalization and Glocalization of International Commercial Arbitration and Investment Treaty Arbitration in Asia’ in Joachim Zekoll, Moritz Bälz and Iwo Amelung (eds), *Formalisation and Flexibilisation in Dispute Resolution* (Brill, 2014) 211.

<sup>38</sup> Joongi Kim, ‘A Pivot to Asia in Investor–State Arbitration: The Coming Emergence of Asian Claimants’ (2012) 27 *ICSID Review* 399.

<sup>39</sup> Salomon and Friedrich, ‘Investment Arbitration in East Asia and the Pacific’, above n 19, 835–6. The authors also remark that *Amco Asia Corp v Indonesia (Award)* (ICSID Arbitral Tribunal, Case No ARB/81/1, 20 November 1984) (*‘Amco Award’*) was not only the first against an EAP state — albeit based on consent in a contract rather than a treaty with Indonesia — but also only the 10<sup>th</sup> ICSID arbitration ever filed.

<sup>40</sup> *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

<sup>41</sup> Salomon and Friedrich, ‘Investment Arbitration in East Asia and the Pacific’, above n 19, 837.

<sup>42</sup> *Ibid* 839–40 (citations omitted), identifying in the 1980s, *Amco Award* (ICSID Arbitral Tribunal, Case No ARB/81/1, 20 November 1984) and *Mobil Oil Corp v New Zealand* (ICSID Arbitral Tribunal, Case No ARB/87/2). More recently, however, *Cambodia Power Company v Cambodia* (ICSID Arbitral Tribunal, Case No ARB/09/18) also involved a US-owned subsidiary: see, eg, Simon Lewis, ‘Arbitration Court Backs Government in Power Deal with US Firm’, *The Cambodia Daily* (online), 29 April 2013 <<https://perma.cc/RW2R-A7YH>>.

Overall, Salomon and Friedrich observe that ISDS arbitrations involving EAP parties have been lagging somewhat compared to global trends. However, the growth rate in the ICSID case proportion since 2000 has been twice as significant as the overall growth rate in ICSID cases, which comprises most investment arbitrations.<sup>43</sup> The last column in Table 1 above highlights how the most active EAP signatories to BITs have now been subjected to at least one treaty-based ISDS claim, either under ICSID rules or ad hoc, although a few such pioneering claims were settled by the host state.

Extending the analysis to South and Central Asia as well as the Pacific Islands, Chaisse finds 70 ISDS claims brought against 25 Asia-Pacific states, including 14 against India.<sup>44</sup> He too notes a sharp jump in 2011 (10 claims filed, compared to around five each year over the previous decade), maintained in 2012 and 2013 (13 claims each), although only five again were filed in 2014.<sup>45</sup> Chaisse also explains such growth by increased FDI and investment treaties, combined with better understanding of such instruments, and expects ‘a likely intensification of international investment arbitration practice in the Asia Pacific region in the coming years’.<sup>46</sup>

However, there has been lingering discontent in parts of Asia over foreign investment generally,<sup>47</sup> and a backlash against ISDS remains possible. After all, that backlash has been evident in South America over many years, following a wave of claims against Argentina and then other high-profile cases against other states in that region.<sup>48</sup> The growing numbers of ISDS claims worldwide, exceeding 600 by the end of 2014,<sup>49</sup> have even given rise to some concerns among some developed countries in Europe and North America. So far, the ISDS

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<sup>43</sup> Salomon and Friedrich, ‘Investment Arbitration in East Asia and the Pacific’, above n 19, 840.

<sup>44</sup> Chaisse, above n 33, 608–9. Pakistan was subjected to eight claims and Sri Lanka to four. But Central Asian states were also involved in significant numbers of cases: Georgia (seven), Kyrgyzstan (seven), Turkmenistan (six), Uzbekistan (six) and Kazakhstan (four).

<sup>45</sup> Ibid 611.

<sup>46</sup> Ibid 612. See also Julien Chaisse, ‘Assessing the Exposure of Asian States to Investment Claims’ (2013) 6 *Contemporary Asia Arbitration Journal* 187; Loretta Malintoppi, ‘Is There an “Asian Way” for Investor–State Dispute Resolution?’ (2015) 19 *Kuala Lumpur Regional Centre for Arbitration Newsletter* 12 <<https://perma.cc/XC6X-ZEKP>>. Ferracane, above n 19, finds 103 claims against APEC economies by the end of 2014, especially against Canada and Mexico under *NAFTA*, as well as 203 claims initiated by investors in APEC economies, especially in the US but also Canada. She also notes a reduction since 1998 in the disparity between APEC FDI stock and ISDS claims, as a proportion of global totals (although the APEC proportions are heavily influenced by the US, and the proportion of APEC to global FDI is still higher than the proportion of ISDS cases compared to worldwide ISDS cases).

<sup>47</sup> Sornarajah, above n 31.

<sup>48</sup> Rodrigo Polanco Lazo, ‘Is There a Life for Latin American Countries after Denouncing the *ICSID Convention*?’ [2014] (1) *Transnational Dispute Management* (online). See also generally Michael Waibel et al (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer, 2010).

<sup>49</sup> UNCTAD, ‘Investor–State Dispute Settlement: Review of Developments in 2014’ (International Investments Agreements Issues Notes No 2, May 2015) 2 <<https://perma.cc/NK9N-F6AH>>.

system has survived,<sup>50</sup> but it remains quite unstable and many reform options are being discussed.<sup>51</sup>

### B *ISDS Policy Developments in East Asia and the Pacific*

In Southeast Asia, ASEAN as a whole has arguably gone through three phases in protecting and liberalising investments through treaties.<sup>52</sup> Over the 1950s–70s, the logic was mainly ‘Hobbesian’, viewing foreign investors (and traders) as adversaries and with member states consequently signing few BITs. Over the 1980s–90s, the logic became more ‘Lockean’, driven by neoliberalism to instead compete for and welcome FDI, resulting in a proliferation of BITs as well as the *1987 ASEAN Agreement for Promotion and Protection of Investments*. The latter instrument did provide for ISDS, but was limited in scope to ‘investments specifically approved in writing’ and with respect to national treatment obligations. Those obligations were instead introduced (albeit without ISDS) through the *1998 Framework Agreement on the ASEAN Investment Area*, aiming to bolster the declining share of intra-ASEAN FDI, after the Asian financial crisis of 1997 and the rise of China as a competing manufacturing powerhouse. In this third (partly ‘Kantian’) era, with ASEAN committing to deeper community, there nonetheless remain several significant Hobbesian or sovereigntist tendencies.

Turning to individual member states and their attitudes towards ISDS, only Singapore, now a very large net capital exporter, has long been committed to negotiating investment treaties that include broad ISDS-backed protections.<sup>53</sup> By contrast, as mentioned above, the Philippines has been cautious for over a decade.<sup>54</sup> In Vietnam, the Ministry of Justice also raised the possibility of limiting ISDS provisions after a few more recent claims, but the Ministry of Planning and Investment prevailed and instead an inter-agency protocol was

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<sup>50</sup> Leon E Trakman and David Musayelyan, ‘The Repudiation of Investor–State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor–State Arbitration’ (2016) 30 *ICSID Review* 194. See also Mahdev Mohan, ‘Asian Perspectives on Investment Agreements and Arbitration: An Evolving Marcottage’ in Andrea K Bjorklund (ed), *Yearbook of International Investment Law and Policy 2014–2015* (Oxford University Press, 2016) 317.

<sup>51</sup> Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor–State Dispute Settlement System* (Brill, 2015); UNCTAD, ‘Taking Stock of IIA Reform’ (International Investment Agreements Issues Note No 1, March 2016) <<https://perma.cc/5VPJ-ZJ8R>>.

<sup>52</sup> Sungjoon Cho and Jürgen Kurtz, ‘International Cooperation and Organizational Identities: The Evolution of the ASEAN Investment Regime’ (2016) 36 *Northwest Journal of International Law & Business* (forthcoming). See also Julien Chaisse and Sufian Jusoh, *The ASEAN Comprehensive Investment Agreement: The Regionalisation of Laws and Policy on Foreign Investment* (Edward Elgar, 2016).

<sup>53</sup> See generally Ho, above n 18.

<sup>54</sup> Sornarajah, above n 31. Sornarajah adds that a provision in the 2009 *ASEAN Comprehensive Investment Agreement* required further post-dispute consent to ISDS for claims against the Philippines. A year after the adverse *Fraport* Annulment Committee decision in 2010, the Philippines also complained to and sought procedural improvements through the ICSID Administrative Council: see Lars Markert and Catharine Titi, ‘States Strike Back — Old and New Ways for Host States to Defend Against Investment Arbitrations’ in Andrea Bjorklund (ed), *Yearbook of International Investment Law and Policy 2013–2014* (Oxford University Press, 2015) 401, 431.

introduced in 2014 to better anticipate and respond to investor claims.<sup>55</sup> Nonetheless, Vietnam has never acceded to the framework 1965 *ICSID Convention*, and recently agreed to a new FTA with the EU. That adopts the latter's international investment court mechanism, to be staffed by permanent judges (rather than ad hoc arbitrators) and providing for appellate review for errors of law.<sup>56</sup> Indonesia, like India (which, like Vietnam and Thailand, has moreover never acceded to the *ICSID Convention*),<sup>57</sup> is reviewing its many existing BITs with the aim of negotiating new ones in accordance with a model BIT limiting access to ISDS as well as host state liability exposure.<sup>58</sup> However, it remains uncertain what the position is concerning FTAs, with both Indonesia and India, for example, still negotiating bilateral FTAs with Australia.

Also unclear is the attitude of Malaysia. It has also been subjected to a few ISDS claims;<sup>59</sup> the impact of a 'new economic model' announced in 2010 remains uncertain;<sup>60</sup> and the country is now going through considerable political turmoil.<sup>61</sup> However, Malaysia is a significant outbound investor, including through government-linked companies.<sup>62</sup> The scope of Malaysia's treaties has also in fact widened: from (a) BITs protecting only specifically 'approved projects'; to (b) treaties (from 1993) protecting investments admitted in

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<sup>55</sup> Thanh Tu Nguyen and Thi Chau Quynh Vu, 'Investor-State Dispute Settlement from the Perspective of Vietnam: Looking for a "Post-Honeymoon" Reform' [2014] (1) *Transnational Dispute Management* (online). See also Hop Dang, 'Legal Issues in Vietnam's FDI Law: Protections under Domestic Law, Bilateral Investment Treaties and Sovereign Guarantees' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 225.

<sup>56</sup> See European Commission, 'The EU and Vietnam Finalise Landmark Trade Deal' (Press Release, 2 December 2015) <<https://perma.cc/6ZKS-MRD3>>; Daly and Ahmad, above n 11.

<sup>57</sup> Grant Hanessian and Kabir Duggal, 'The 2015 Indian Model BIT: Is This Change the World Wishes to See?' (2015) 30 *ICSID Review* 729. See also Prabhash Ranjan, 'Comparing Investment Provisions in India's FTAs with India's Stand-Alone BITs' (2015) 16 *Journal of World Investment and Trade* 899.

<sup>58</sup> Antony Crockett, 'Indonesia's Bilateral Investment Treaties: Between Generations?' (2015) 30 *ICSID Review* 437; Nottage, 'Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration?', above n 35.

<sup>59</sup> Sornarajah, above n 31, 246, 250. Sornarajah remarks that the tribunal declined jurisdiction by finding no 'approved investment' as required under the relevant BIT, in *Grueslin v Malaysia (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/99/3, 27 November 2000); but had difficulties in *Malaysian Historical Salvors v Malaysia (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/05/10, 17 May 2007), where the sole arbitrator focused instead on economic development as a criterion for determining an actionable 'investment' (going on to decline jurisdiction in 2007, only to have his award overturned by an ICSID Annulment Committee in 2009). See also Govert Coppens, 'Treaty Definitions of "Investment" and the Role of Economic Development: A Critical Analysis of the *Malaysian Historical Salvors* Cases' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 174.

<sup>60</sup> See Salim Farrar, 'Foreign Investment Laws and the Role of FDI in Malaysia's "New" Economic Model' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 153.

<sup>61</sup> See Meredith Weiss, 'No Easy Solutions for Malaysia's Mess' on *East Asia Forum* (10 November 2015) <<https://perma.cc/6PC8-TQB3>>.

<sup>62</sup> See, eg, Lu Wang, 'State Controlled Entities as Qualified "Investors": Implications for the Pacific Region Investment Treaty Making' [2015] (1) *Transnational Dispute Management* (online).

accordance with the host state's laws; to (c) recent FTA investment chapters adding reference to assets having certain characteristics of an investment.<sup>63</sup>

Thailand is another intriguing country study within ASEAN.<sup>64</sup> BITs until 1993 did not provide for ISDS at all, or only if both states were party to the 1965 *ICSID Convention* — signed by Thailand in 1985, but never ratified. BITs containing effective (ad hoc) ISDS provisions then were increasingly signed, but the Thai government may have considered that its liability exposure remained limited by requirements for covered investments to be specifically approved in writing. It had also been quite successful in Thai court challenges to contract-based arbitration awards with foreign investors. However, a major adverse contract-based arbitration award in 2004 prompted a Cabinet Resolution requiring prior approval of concession and other contracts with public authorities, further tightened in 2009, when Thailand lost its first ever treaty-based arbitration initiated by Walter Bau in 2005 (and then continued by its liquidator) under a revised BIT with Germany signed in 2002. Soon after that treaty (allowing for ISDS) had been ratified and came into force in 2004, directors appointed by majority (government and local) joint-venture partners in a highway concession project outvoted the German directors to approve toll reductions that further impacted on the project's profitability. The adverse investment arbitration award attracted enormous public attention in Thailand in mid-2011, when the liquidator obtained a German court order seizing the Crown Prince's plane at Munich airport.

However, the Thai government has vigorously resisted enforcement in German, Swiss and US courts, raising, for example, objections that the original investment was not specifically approved (which were rejected by the arbitral tribunal in its jurisdictional award in 2007). Although it has not signed any further BITs since 2008, in 2013 Thailand revised its 2002 Model BIT to incorporate less pro-investor provisions, and has concluded several bilateral FTAs and ASEAN investment treaties retaining ISDS provisions. Part of the context for this incremental reform package is that Thailand became a net FDI exporter from 2012.

This ongoing variance in ISDS experiences and policy developments within Southeast Asia complicates negotiations underway since late 2012 for the RCEP or ASEAN+6 FTA. This is despite the intra-ASEAN *Comprehensive Investment Agreement* of 2009 and ASEAN+ treaties with six significant neighbouring countries almost all including investment chapters containing ISDS. The exception is the ASEAN–Japan FTA signed in 2008. Japan has been rather passive or reactionary when negotiating (relatively few) investment treaties — agreeing, for example, to omit ISDS in the FTA signed with the Philippines in 2006.<sup>65</sup> Since 2011, when it became likely that Japan would also join negotiations for an expanded TPP FTA including the US, the issue of ISDS

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<sup>63</sup> Lucy Reed and Kenneth Wong, 'Evolution of the Formal Requirements for Investment Treaty Protection of "Investments" in Malaysia' (2015) 20 *Kuala Lumpur Regional Centre for Arbitration Newsletter* 17.

<sup>64</sup> Nottage and Thanitkul, 'The Past, Present and Future of International Investment Arbitration in Thailand', above n 28; Vanina Sucharitkul, 'From *Walter Bau* to *Hopewell*: Pathways to Bangkok Don Muang Airport' (2015) 1 *Asia Pacific Arbitration Reporter* 309.

<sup>65</sup> See generally Shotaro Hamamoto and Luke Nottage, 'Japan' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013) 347.

has been seized upon by centre-left politicians in opposition to the present government, although parliamentary and media scrutiny has not prevented the government concluding further treaties containing ISDS (including the TPP).<sup>66</sup>

More so than Japan, Korea went through some soul-searching in the context of ratifying its FTA with the US, exacerbated by its first ever treaty-based ISDS claim in 2011, brought by a US-based financial institution via Korea's BIT with Belgium and Luxembourg.<sup>67</sup> However, it has since reverted to pressing strongly for ISDS in recent treaties, including bilateral FTAs with Australia and New Zealand.<sup>68</sup> Having accepted ISDS in the Korea–US FTA, the government may not want to appear weak domestically by omitting it in subsequent treaties. Korean investors have also now begun filing BIT claims against host states in the Middle East and beyond.<sup>69</sup>

The position remains more confused in Australia. In 2011, the (centre-left) Gillard government Trade Policy Statement abandoned past treaty practice by eschewing ISDS for all future treaties, even with developing countries. This was partly in response to the first ever claim against Australia, formally filed later that year by (originally US) tobacco company Philip Morris under an old BIT with Hong Kong, challenging Australia's tobacco plain packaging laws.<sup>70</sup> Following criticism from business groups and others, the new (centre-right) Abbott government reverted to including ISDS on a case-by-case assessment after it gained power on 7 September 2013, subsequently including it in FTAs with Korea and China — but not with Japan.<sup>71</sup> However, parliamentary and media discussion of ISDS remains intense, especially as the current (Turnbull) government does not have a majority in the upper house, which must approve

<sup>66</sup> Shotaro Hamamoto, 'Recent Anti-ISDS Discourse in the Japanese Diet: A Dressed-Up but Glaring Hypocrisy' (2015) 16 *Journal of World Investment and Trade* 931. See also Luke Nottage, 'ISDS in the Japanese Diet' on *Japanese Law and the Asia-Pacific* (2 December 2015) <<https://perma.cc/4BFM-SXQK>>.

<sup>67</sup> Hi-Taek Shin and Liz (Kyo-Hwa) Chung, 'Korea's Experience with International Investment Agreements and Investor–State Dispute Settlement' (2015) 16 *Journal of World Investment and Trade* 952.

<sup>68</sup> Luke Nottage, 'Investment Treaty Arbitration Policy in Australia, New Zealand and Korea?' (2015) 25 *Journal of Arbitration Studies* 185, 215–21.

<sup>69</sup> 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 *Pepperdine Dispute Resolution Law Journal* 549.

<sup>70</sup> See Australian Government, Attorney-General's Department, *Tobacco Plain Packaging — Investor–State Arbitration* <<https://perma.cc/TS6G-TEUJ>>. See generally Nottage, 'Consumer Product Safety Regulation and Investor–State Arbitration Policy', above n 32. In December 2015, the tribunal finally rejected the claim on jurisdictional grounds: see Rowan Callick, 'Free-Trade Legal Fears in Philip Morris Claim Up in Smoke', *The Australian* (online), 28 December 2015 <<https://perma.cc/Z737-UZCV>>; Jarrod Hepburn and Luke R Nottage, 'Case Note: *Phillip Morris Asia v Australia*' (Research Paper No 16/86, University of Sydney Law School, September 2016) <<https://perma.cc/2WFG-T2J6>>. This outcome has not assuaged longstanding critics of ISDS: see, eg, Kyla Tienhaara, 'The Dismissal of a Case against Tobacco Plain Packaging Is Good News for Taxpayers', *The Sydney Morning Herald* (online), 20 December 2015 <<https://perma.cc/L9R2-S56M>>. Cf Nikos Lavranos, 'The Deafening Silence of the Anti-ISDS Groups after the *Phillip Morris* Decision' on *Kluwer Arbitration Blog* (24 February 2015) <<https://perma.cc/6WKM-7BYM>>.

<sup>71</sup> See generally Luke Nottage, 'Investor–State Arbitration: Not in the *Australia–Japan Free Trade Agreement*, and Not Ever for Australia?' (2014) 38 *Journal of Japanese Law* 37.



preferential tariff reduction legislation before Australia can ratify FTAs (including now the TPP).<sup>72</sup>

Interestingly, Australia and New Zealand excluded ISDS by side letter when they signed the TPP, as they did bilaterally when signing their FTA with ASEAN in 2009, ostensibly because the two countries have very familiar and developed domestic court systems to preserve investor protection. This was also the official reason given for excluding ISDS in the 2004 FTA between Australia and the US. However, no proposal for a side letter between those two countries (or any other treaty partners) was formally tabled in relation to the TPP.<sup>73</sup>

By contrast, despite a sharp increase in public debate over ISDS in 2015, the New Zealand government continues to negotiate and ratify major FTAs containing ISDS provisions. It never embarked on an active program of negotiating BITs, and has not been subject to a treaty-based claim.<sup>74</sup> The government argues that the wording of contemporary FTAs, inspired mostly by US treaty practice (as indeed in Australia and many other Asia-Pacific states), sufficiently preserves regulatory space for host states compared to older-style BITs. The New Zealand government offers ISDS protections to secure better access to agricultural and other product markets in its treaty counterparties. So far, such arguments have largely been accepted by the main opposition Labour Party, which had in any case also consented to ISDS when it negotiated New Zealand's FTA with China, signed in 2008.<sup>75</sup>

For its part, China has remained committed to including strong ISDS-backed protections in its current generation of investment treaties.<sup>76</sup> However, the watered-down provisions in its recent FTA with Australia, superimposed on an older-generation BIT, suggests that China also is open to some flexibility concerning ISDS.<sup>77</sup> If and when it is subjected to either more, or successful, arbitration claims, China may further reassess its position. After all, recent empirical research confirms a significant impact on treaty practice after a state is subjected to an initial ISDS claim.<sup>78</sup>

Already, the concerns over ISDS being expressed more or less within parts of Southeast Asia, as well as in at least some major neighbouring economies, make it difficult to assess the prospects for strong ISDS-backed protections being included in RCEP, despite their incorporation already in most other ASEAN treaties. It seems unlikely that the present signatories of the expanded TPP will

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<sup>72</sup> See Jürgen Kurtz and Luke Nottage, 'Investment Treaty Arbitration "Down Under": Policy and Politics in Australia' (2015) 30 *ICSID Review* 465; Luke Nottage and Leon Trakman, 'As Asia Embraces the Trans-Pacific Partnership, ISDS Opposition Fluctuates', *The Conversation* (online), 20 November 2015 <<https://perma.cc/2BEQ-BXEG>>; Luke Nottage, 'Investor–State Arbitration Policy and Practice in Australia' (Research Paper No 16/57, Sydney Law School, June 2016) <<https://perma.cc/E3PR-PW3N>>.

<sup>73</sup> See generally Nottage, 'The TPP Investment Chapter', above n 8.

<sup>74</sup> The claim by Mobil Oil (see above n 42) was based on consent to ICSID contained in an investment contract.

<sup>75</sup> The Labour Party's opposition to the TPP is presently focused instead on arguably limited capacity reserved for New Zealand to add new types of restrictions on foreign interests in land: see Daniel Kalderimis and Kate Yesberg, *A House Divided over the Trans-Pacific Partnership*, Chapman Tripp (3 February 2016) <<https://perma.cc/G8CX-4RKT>>.

<sup>76</sup> Chi and Wang, above n 34.

<sup>77</sup> See also Axel Berger, 'Hesitant Embrace: China's Recent Approach to International Investment Rule-Making' (2015) 16 *Journal of World Investment and Trade* 843.

<sup>78</sup> Poulsen and Aisbett, above n 32; Poulsen, above n 24.

not proceed to ratification solely because of the investment chapter, although it may add to concerns about other parts of the FTA that are particularly salient during this election year in Australia and the US.<sup>79</sup> More difficult to assess is the likelihood of countries like the Philippines and especially Indonesia being able to follow through in joining the existing 12 TPP signatories.<sup>80</sup> By contrast, Thailand seems to have weathered the small storm stirred up by its first adverse treaty arbitration award in 2009, and faces large two-way FDI flows and major economic opportunity costs in not joining a further expanded TPP.<sup>81</sup> However, the issue remains sensitive in domestic politics.<sup>82</sup> The prospects for Korea and China are more straightforward, given their renewed support for ISDS: the TPP's investment chapter should not be a major impediment to accession.

### III HIGHLIGHTS FROM THE TPP INVESTMENT CHAPTER

From the review above of evolving treaty practice and occasional experience with ISDS in Asia and Oceania, it is therefore improbable that the TPP investment chapter — at least in itself — will prove to be a major stumbling block to ratification by existing signatories. Nor will it be so for likely future TPP partners, except perhaps Indonesia. Developing-country members may indeed have been over-optimistic in acceding to BITs, especially from the 1990s, hoping thereby to attract significantly more cross-border investment, without recalibrating treaty provisions in light of the emerging ISDS experiences of other countries.<sup>83</sup> But the advent of mostly US-style FTAs in the Asian region over the last decade, and their own experiences with ISDS, have allowed for a more careful assessment of investment treaty provisions. In considering whether or not to ratify the TPP, Australia therefore need not be too concerned about current or potential future TPP partners feeling overly pressured into agreeing to the investment chapter.

However, what about concerns expressed especially by citizens' groups and some media commentators within Australia? Part III(A) assesses these by comparing the TPP investment chapter's substantive provisions with recent Australian FTA practice, while Part III(B) focuses on the ISDS procedure.

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<sup>79</sup> See Raj Bhala, *TPP Objectively — Law, Economics, and National Security of History's Largest, Longest Free Trade Agreement* (Carolina Academic Press, 2016).

<sup>80</sup> See generally Menon, above n 4. See also Antony Crockett, 'Could Indonesia Join the TPP?' on *Kluwer Arbitration Blog* (23 February 2016) <<https://perma.cc/8PKD-H2XF>>.

<sup>81</sup> Yingluck Shinawatra (Prime Minister from 2011, and sister of Thaksin Shinawatra who served as Prime Minister from 2001 until deposed by a coup in 2006) expressed the intention for Thailand to join TPP negotiations in November 2012: International Centre for Trade and Sustainable Development, 'Thailand Expresses Interest in Joining Trans-Pacific Trade Talks, as TPP Leaders Set New Deadline' (2012) 16(40) *Bridges* 7 <<https://perma.cc/J8N5-JQZJ>>. However, Yingluck Shinawatra and her government were deposed by a military coup in 2014, and it remains unclear whether Thailand will seek to join itself to the TPP agreement reached in October 2015. Cf Nopporn Wong-Anan and Prangthong Jitcharoenkul, 'US "Welcomes" Thailand to Join TPP', *Bangkok Post* (online), 31 October 2015 <<https://perma.cc/6LT9-WNF8>>; Phusadee Arunmas, 'Support Growing for Thai TPP Membership', *Bangkok Post* (online), 25 January 2016 <<https://perma.cc/BM99-MU9Q>>; 'Editorial: Forget about Joining TPP', *Bangkok Post* (online), 9 February 2016 <<https://perma.cc/6KCCZ-KPFN>>.

<sup>82</sup> Peter A Petri and Michael G Plummer, 'The Economic Effects of the Trans-Pacific Partnership: New Estimates' (Working Paper No 16/2, Peterson Institute for International Economics, January 2016) <<https://perma.cc/6P93-Y2P6>>.

<sup>83</sup> Poulsen, above n 24.

The analysis reveals incremental changes in drafting, with differential impacts on liability exposure for host states, which again seem unlikely to impede ratification prospects — at least by a Coalition government in Australia. Nonetheless, certain phrasings and omissions in the TPP investment chapters raise broader questions of the future trajectory of investment treaty negotiations in the region, especially now that the EU is taking a more proactive role, as sketched further by way of conclusion in Part IV below.

### A *Substantive Provisions*

The TPP investment chapter follows US treaty practice in adopting an asset-based definition of ‘investment’. Following the somewhat tighter definition in the 2004 and 2012 US Model BITs (compared to the 1984 Model), it must have ‘the characteristics of an investment’, such as ‘commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk’ (TPP art 9.1). This clarification has also come into Australia’s FTAs agreed since 2014 with Korea (art 11.28), Japan (art 14.2(f)) and China (art 9.1(d)) but curiously not in its 2012 FTA with Malaysia, which had faced an ISDS claim where investment ‘characteristics’ were extensively canvassed.<sup>84</sup>

The TPP also brings into the main text (and therefore highlights) a US Model BIT footnote expressly excluding ‘an order or judgment entered in a judicial or administrative action’. This appears aimed at preventing claims about local decisions that are allegedly *substantively* unfair, but it might still be arguable that egregious decisions evidence denial of *procedural* justice or fair and equitable treatment, and in any case the TPP provision leaves open the possibility of treaty claims for non-enforcement of arbitral awards.<sup>85</sup> By contrast, the TPP does not carry clarifications found in Korea’s recent FTAs with Australia and New Zealand restricting the scope to bring treaty claims for debts owed under commercial supply contracts,<sup>86</sup> although this issue has arisen in ISDS claims

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<sup>84</sup> Coppens, above n 59. The source critically discusses the *Malaysian Historical Salvors* decisions.

<sup>85</sup> On denial of justice or FET claims, and more generally, see Christoph Liebscher, ‘Monitoring of Domestic Courts in BIT Arbitrations: A Brief Inventory of Some Issues’ in Christina Binder et al (eds), *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 105. In response to a recent claim against Canada, see also Kathleen Liddell and Michael Waibel, ‘Fair and Equitable Treatment and Judicial Patent Decisions’ (2016) 19 *Journal of International Economic Law* 145. Arguments regarding non-enforcement of commercial arbitration awards were raised against India (by an Australian investor, White Industries) and Bangladesh, for example, with tribunals adopting various approaches. See generally Andrea Bjorklund, ‘The Arbitral Award as Investment’ in Stavros Brekoulakis, Julian Lew and Loukas Mistelis (eds), *The Evolution and Future of International Arbitration* (Kluwer, 2016) 97.

<sup>86</sup> *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014). Article 11.28 states in the main text: ‘a claim to payment that arises solely from the commercial sale of goods and services is not an investment, unless it is a loan that has the characteristics of an investment’. *Free Trade Agreement between New Zealand and the Republic of Korea*, signed 23 March 2015 (entered into force 20 December 2015) <<https://perma.cc/P5H4-ER7Z>>. Article 10.2 instead has footnote 1: ‘forms of debt such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics’ of an investment.

against Malaysia and the Philippines as well as several other countries.<sup>87</sup> Nor does the TPP expressly clarify, as in the Korea–NZ FTA, that ‘market share, market access, expected gains, and opportunities for profit making are not, by themselves, investments’.<sup>88</sup> However, that footnote is ‘for greater certainty’ and is indeed arguably well accepted anyway, at least among government negotiators and experts in international investment law — although not necessarily the general public.<sup>89</sup>

More importantly, the TPP does not limit covered investments to those admitted in accordance with host state’s domestic laws. This qualification was a feature of Malaysia’s BITs from 1993, substituting for coverage only for ‘approved projects’ under earlier treaties. But the former wording is also found in the Malaysia–India FTA signed in 2011 (adding reference also to investments needing ‘characteristics of an investment’) and the ASEAN–India investment agreement of 2013 mentions that it applies to investment that ‘where applicable, has been admitted’ by the host state. Lucy Reed and Kenneth Wong note that whereas Thailand, Cambodia and Vietnam have qualified protection under this agreement to investments specifically approved in writing, Malaysia did not. Nor are there similar qualifications under the TPP investment chapter, which only restricts investments to assets having characteristics as such.<sup>90</sup> Amokura Kawharu adds that wording to restrict protection to investors that did not comply with the host state’s laws when initially making the investment were proposed in a leaked draft TPP text of 2012, but were dropped by at least 2015.<sup>91</sup> This outcome may be challenging for Thailand to accept, without more, if it wants to join the TPP. After all, Thailand has tried to limit coverage in its treaties (even ASEAN+ FTAs) to foreign investments specifically approved in writing, or at least admitted in accordance with its laws.<sup>92</sup>

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<sup>87</sup> Regarding the first two, see Sornarajah, above n 31. For claims against other states, see *Global Trading Corp v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/09/11, 1 December 2010), cited by Amokura Kawharu, ‘TTPA: Chapter 9 on Investment’ (Expert Paper No 2, Trans-Pacific Partnership Agreement New Zealand Expert Paper Series, 2015) 6 <https://perma.cc/USV6-6ZJ9>; *Nova Scotia Power Inc v Venezuela (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/11/1, April 30, 2014).

<sup>88</sup> Kawharu, ‘TTPA: Chapter 9 on Investment’, above n 87, 6.

<sup>89</sup> Cf Australian Government, Department of Foreign Affairs and Trade, *Investor–State Dispute Settlement* <<https://perma.cc/M3MC-DCG6>> (remarking that: ‘It is not enough that an investor does not agree with a new policy or that a policy adversely affects its profits’).

<sup>90</sup> Reed and Wong, above n 63, 21.

<sup>91</sup> Kawharu, ‘TTPA: Chapter 9 on Investment’, above n 87, 6.

<sup>92</sup> Reed and Wong, above n 63, 20–1. Note that Thailand has expressly required specific approval in the ASEAN–Australia–New Zealand FTA (as did Vietnam), the ASEAN–China FTA and ASEAN–India Investment Agreement; Nottage and Thanitcul, ‘The Past, Present and Future of International Investment Arbitration in Thailand’, above n 28. Observe that Thailand’s 2013 Model BIT applies to investments that have obtained specific approval but only ‘if required’ (similar to the 2009 *ASEAN Comprehensive Investment Agreement*), as well as admission ‘in accordance with the laws’ of the host state. For a general argument that approval (or admission) and legality provisions should be interpreted differently rather than conflated, as by some investment tribunals, see Chester Brown, ‘The Regulation of Foreign Direct Investment by Admission Requirements and the Duty on Investors to Comply with Host State Law’ (2015) 21 *New Zealand Business Law Quarterly* 297 (with a version also presented at the GELN Biennial Symposium, ‘The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL’, The University of Melbourne, 20 May 2016).

Turning from coverage of investments under the TPP, its substantive commitments by host states to foreign investors include the main protections now familiar from Australia’s investment treaties:

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

By contrast, the Australia–China FTA signed on 17 June 2015 (and ratified after a change in the Australian Prime Minister and a change of heart by the main opposition Labor Party),<sup>93</sup> had more limited non-discrimination commitments from China.<sup>94</sup> It also lacked a commitment to fair and equitable treatment, although some protection remains available (not enforceable through ISDS) under the 1988 BIT. The latter will be reconsidered along with the new FTA’s investment chapter during a work program after it comes into force.<sup>95</sup>

The TPP’s main substantive commitments try to build in public welfare considerations, for arbitral tribunals to assess if foreign investors allege violations, for example by further elaborating what constitutes ‘in like circumstances’ as well as the now familiar annex (9-B, derived from US domestic law and then treaty practice) on what constitutes indirect expropriation. An innovation for treaty practice in Australia (and indeed other TPP partners, including the US) is a ‘Drafter’s Note’ issued by government negotiators alongside the TPP, aimed at restating at least some *North American Free Trade Agreement* (‘NAFTA’) case law and guiding future interpretation. It elaborates on footnote 14 of the investment chapter, which requires non-discrimination ‘in like circumstances’ to be assessed on ‘the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives’. Specifically, Caroline Henckels has pointed out that according to the Note:

the purpose of the obligation is ‘to ensure that foreign investors or their investments are not treated less favourably on the basis of their nationality’. This indicates that only intentionally discriminatory measures would breach national treatment, and that measures with legitimate objectives that happen to place a greater burden on foreign investors would not.

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<sup>93</sup> Luke Nottage, ‘The Evolution of Foreign Investment Regulation, Treaties and Investor–State Arbitration in Australia’ (2015) 21 *New Zealand Business Law Quarterly* 266 <<https://perma.cc/7VEC-ZXFV>>.

<sup>94</sup> Richard Braddock, ‘Scope of the China–Australia FTA Investment Chapter’ (News Update, Lexbridge Public International Lawyers, 17 June 2015) <<https://perma.cc/XDH4-RK89>>.

<sup>95</sup> Luke Nottage, ‘Compromised ISDS-Backed Investment Commitments in the China–Australia FTA’ on *Japanese Law and the Asia-Pacific* (26 June 2015) <<https://perma.cc/CP4Y-3E7M>>.

The Note also clarifies that a claimant must be in a competitive relationship with a domestic investor or investors for the purpose of comparison of treatment accorded by the measure, and provides that tribunals should take into account the measure's objective, the applicable legal and regulatory frameworks and whether investors or investments are subject to like legal requirements when determining whether the treatment has been afforded to foreign and domestic investors or investments in like circumstances. Moreover, the Note indicates that to avoid liability, differential treatment of foreign and domestic investors or investments must be plausibly or reasonably connected to a legitimate public welfare objective and have been applied in a non-discriminatory manner.

The text of the provision and Note do not, however, address whether foreign investors or investments as a group should be compared with their domestic counterparts in terms of the benefits and burdens of the measure, or whether the more favourable treatment of a single domestic investor compared to the claimant would suffice for a finding of breach. Most tribunals to date have taken the latter approach, which is a relatively easy hurdle for a claimant to overcome.<sup>96</sup>

TPP art 9.15 adds that a host state may use measures 'that it considers appropriate to ensure that investment ... is undertaken in a manner sensitive to environmental, health or other regulatory objectives', but only if 'consistent with this Chapter' (that is, non-discriminatory etc). Some commentators suggest that this proviso negates any protections otherwise added by the provision, but others argue that it can 'pick up both the substantive protections contained in the investment chapter and its various carve-outs and clarifications — including those concerning the States' right to regulate'.<sup>97</sup> In this respect, in contrast to the US Model BIT, the TPP's Preamble further expressly acknowledges the member states' 'inherent right to regulate'. This is also found in abridged form in Australia's FTA with China,<sup>98</sup> but not those with Korea, Japan, Malaysia or (albeit much earlier) Thailand.<sup>99</sup>

By contrast, investment chapters in Australia's FTAs with Korea (signed in 2014), China and even the ASEAN–NZ FTA (signed in 2009) included a general exception, based on *General Agreements of Tariffs and Trade* ('GATT') art XX

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<sup>96</sup> Henckels, above n 13, 45–6 (citations omitted). See also Richard Braddock, 'Discrimination or Legitimate Government Regulation? Striking a Balance in the TPP' (Paper presented at the GELN Biennial Symposium, 'The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL', The University of Melbourne, 19 May 2016). Braddock locates the Drafter's Note in the context particularly of *NAFTA* case law, and argues that the Drafter's Note has effect under international treaty law.

<sup>97</sup> Sam Luttrell and Romesh Weeramantry, Submission No 167 to Joint Standing Commission on Treaties in respect of the Trans–Pacific Partnership, Parliament of Australia, 15 March 2015, 15. Luttrell and Weeramantry write in response to Johnson and Sachs: see Lise Johnson and Lisa Sachs, 'The TPP's Investment Chapter: Entrenching, Rather than Reforming, a Flawed System' (Policy Paper, Columbia Center on Sustainable Investment, November 2015) <<https://perma.cc/2J96-P8FZ>>. The former also point to the award in: *Al Tamini v Oman (Award)* (ICSID Arbitral Tribunal, Case No ARB/11/33, 3 December 2015). This award took into consideration similar wording under the US–Oman FTA. See also Kawharu, 'TTPA: Chapter 9 on Investment', above n 87.

<sup>98</sup> The states uphold 'rights of their governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare'.

<sup>99</sup> By contrast, preambles in New Zealand's FTAs (including with Korea and Thailand) more consistently add such wording. See Kawharu, 'TTPA: Chapter 9 on Investment', above n 87.

for trade in goods,<sup>100</sup> allowing host states to introduce measures necessary to protect public health etc provided these were not applied in a discriminatory manner or as a disguised restriction on investment. An advantage of this approach may be the extensive jurisprudence from WTO panels applying the *GATT* exception. Disadvantages include some obvious, as well as subtle, differences between trade and investment law, as well as a potentially higher evidentiary burden on the state seeking to justify its measures.<sup>101</sup>

In any case, the TPP limits the scope of protection available to investors in specified areas raising strong public interest concerns, such as public debt claims (annex 9-G) and tobacco-control measures. ISDS claims over the latter can be precluded in advance by member states, under the general exceptions chapter (art 29.5). This is clearly in response to arbitration claims brought by Philip Morris against Australia (and earlier Uruguay), although such a sector-specific exclusion had earlier been resisted by the US as setting a dangerous precedent for future treaty negotiations.<sup>102</sup> The TPP investment chapter also contains the usual ‘denial of benefits’ provision (art 9.14) seeking to limit scope for forum shopping (as was in any case found in the Philip Morris case against Australia). This allows the host state to refuse protection if the investor has no substantial business operations in the home state, although Kawharu recommends further clarifying wording.<sup>103</sup>

Another innovative feature of the TPP, from the Australian perspective, is that each member state commits to ‘encouraging’ its enterprises to ‘voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility’ endorsed or supported by the relevant state (art 9.16). This could extend, for example, to (local and foreign) retailers in Australia with respect to adopting the Accord on Fire and Building Safety in Bangladesh, which then locks firms to a separate enforcement regime underpinned by international arbitration law.<sup>104</sup>

Despite such provisions aimed at rebalancing the interests of foreign investors and host states, one Australian journalist refers to a US lawyer’s opinion in asserting that the MFN provision allows:

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<sup>100</sup> *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948) art XX.

<sup>101</sup> See generally Henckels, above n 13; Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press, 2016).

<sup>102</sup> Department of Foreign Affairs and Trade, *Tobacco Plain Packaging*, above n 70; Constantinos Salonidis, ‘*Philip Morris v Uruguay*’ (Paper presented at the GELN Biennial Symposium, ‘The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL’, The University of Melbourne, 19 May 2016). On some of the interest group politics behind this unique product specific carve out, see Simon Lester, ‘Applying Public Choice Theory to Trade Agreements’ (Paper presented at the GELN Biennial Symposium, ‘The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL’, The University of Melbourne, 20 May 2016).

<sup>103</sup> Kawharu, ‘TPPA: Chapter 9 on Investment’, above n 87. Kawharu argues that some recent cases suggest that states must exercise the right to deny benefits proactively and at least before ISDS proceedings commence, which is less effective than clearly putting an onus on claimant investors to prove they have the requisite connection to the home state.

<sup>104</sup> Accord on Fire and Building Safety in Bangladesh, *About the Accord* <<http://bangladeshaccord.org/about/>>. The arbitration clause in this Accord is awkwardly worded, but arguably not pathological and therefore unenforceable.

foreign corporations from TPP states to make a claim against Australia based on the ISDS provisions in *any other trade deal* Australia has signed ... That means it does not matter how carefully the TPP is drafted: foreign investors can cherry-pick another treaty Australia has signed, and sue the Australian government based on the provisions included in that treaty.<sup>105</sup>

This is incorrect in that they overlook the schedule of Australia for the overarching TPP ‘Annex II — Investment and Cross-Border Trade in Services’, which expressly excludes past treaties from the scope of MFN treatment.<sup>106</sup> That prevents an investor from a TPP state seeking to invoke better treatment extended by Australia to investors from another state that has an existing treaty in force or signed with Australia. (Indeed, this annex also excludes from MFN protection any preferential treatment from future agreements with a Pacific Island Forum member state, or those relating to aviation, fisheries or maritime matters — including salvage). In addition, TPP art 9.3 excludes from MFN ‘international dispute resolution procedures or mechanisms, such as those included in Section B’, thus preventing investors invoking any more favourable procedural provisions to resolve their disputes with Australia. Such misconceived media coverage illustrates the difficulties that the Australian government faces in ensuring passage of TPP related legislation through the Senate in order to be able to ratify this major regional agreement.

### B ISDS Provisions

The ISDS procedure, set out in Section B of TPP ch 9 on investment as an alternative to interstate arbitration (itself found separately in ch 28 of the TPP), emerged as a common extra option for foreign investors to enforce their substantive rights if their home states did not wish to pursue a treaty claim on their behalf, for diplomatic, cost or other reasons. This mechanism has been seen as important for credible commitments particularly by developing or other countries with national legal systems perceived as not meeting international standards for protecting investors. ISDS provisions have gradually come to be accepted in treaties concluded in the Asian region, leading recently to more arbitration claims (albeit off a comparatively low base),<sup>107</sup> as outlined in Part II above.<sup>108</sup>

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<sup>105</sup> Jess Hill, ‘TPP’s Clauses That Let Australia Be Sued Are Weapons of Legal Destruction, Says Lawyer’, *The Guardian* (online), 10 November 2015 <<https://perma.cc/8AE5-H6NA>> (emphasis in original).

<sup>106</sup> See Australian Government, Department of Foreign Affairs and Trade, *TPP Text and Associated Documents: Annex II — Schedule of Australia* <<https://perma.cc/T5MF-VBMN>>. However, complex issues may still arise under international treaty law as to whether and how a tribunal taking jurisdiction on the TPP may apply its provisions, in situations where the relevant states party have not terminated (as will Australia) earlier BITs that may exist between them: see Jarrod Hepburn, ‘Applicable Law in TPP Investment Disputes’ (Paper presented at the GELN Biennial Symposium, ‘The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL’, The University of Melbourne, 20 May 2016).

<sup>107</sup> Luke Nottage and J Romesh Weeramantry, ‘Investment Arbitration in Asia: Five Perspectives on Law and Practice’ in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 25.

<sup>108</sup> See also Malintoppi, above n 46.



The inclusion of ISDS in the TPP is not too surprising given the involvement already of developing countries such as Vietnam, and even a middle-income country like Malaysia with a complicated political and legal system (both already subject to occasional investor–state arbitration claims, as mentioned in Part II above). Incorporating ISDS is also explicable because the TPP aims to attract further partners. These include capital-importing developing countries like Indonesia, whose President has declared that it ‘intends to join the TPP’,<sup>109</sup> although this will be very difficult to achieve domestically and the country is still reviewing old BITs partly due to some recent arbitration claims — including from an Australian investor.<sup>110</sup> Other potential candidates include capital exporting countries like Korea, which pressed strongly for ISDS in bilateral FTAs — even with Australia and New Zealand.<sup>111</sup> China, emerging as a major exporter and importer of capital, has also come to favour ISDS protections. This is important because some already urge it to join a further expanded TPP,<sup>112</sup> and because China already is party to the RCEP FTA negotiations currently involving many existing TPP partners, including Australia and Malaysia.

However, the arguments are more finely balanced for including the ISDS option for treaty commitments between developed countries with strong and familiar national legal systems. Intriguingly, when the TPP was signed Australia and New Zealand exchanged official side letters excluding its ISDS provisions as between themselves.<sup>113</sup> They also obtained such a bilateral carve-out in their FTA with ASEAN signed in 2009,<sup>114</sup> but partly for the reason that that the two countries were then considering adding an investment protocol to their longstanding bilateral FTA for goods and services. That 2011 protocol also ended up excluding ISDS, ostensibly because Australia and New Zealand have strong mutual trust and understanding of each other’s legal systems. This argument does gain force in light of the conclusion in 2008 of a Trans-Tasman treaty on enforcing court judgments (and broader regulatory cooperation), in force from 2013 and unique among Asia-Pacific countries.<sup>115</sup> Australia and New

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<sup>109</sup> ‘Indonesia Will Join Trans-Pacific Partnership, Jokowi Tells Obama’, *The Guardian* (online), 27 October 2015 <<https://perma.cc/XL45-QDZ5>>. Cf Crockett, ‘Indonesia’s Bilateral Investment Treaties’, above n 58; Farrar, above n 60.

<sup>110</sup> Nottage, ‘Do Many of Australia’s Bilateral Treaties Really Not Provide Full Advance Consent to Investor–State Arbitration?’, above n 35.

<sup>111</sup> Nottage, ‘Investment Treaty Arbitration Policy in Australia, New Zealand and Korea?’, above n 68.

<sup>112</sup> Stephen Grenville, ‘TPP: Australia Should Bring in China and Indonesia’ on Lowy Institute for International Policy, *The Interpreter* (3 November 2015) <<https://perma.cc/7UET-XCVC>>.

<sup>113</sup> See Letter from the Australian Minister for Trade and Investment, Andrew Robb, to the New Zealand Trade Minister, Todd McClay (4 February 2016); Letter from Todd McClay to Andrew Robb (4 February 2016) <<https://perma.cc/W3Y9-VWG6>>.

<sup>114</sup> Vivienne Bath and 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* (Hart, 2015) 283.

<sup>115</sup> See *Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement*, Australia–New Zealand, signed 24 July 2008, [2013] ATS 32 (entered into force 11 October 2013).

Zealand have also achieved remarkable economic integration and business law harmonisation in other respects, albeit mainly through non-treaty mechanisms.<sup>116</sup>

Australia also omitted ISDS in its bilateral FTA concluded with Malaysia in 2012, consistently with the Gillard government's Trade Policy Statement of April 2011<sup>117</sup> — abandoned by the new Coalition government after it won the general election on 7 September 2013, and then reverted to — including ISDS in treaties on a case-by-case assessment.<sup>118</sup> However, omitting ISDS protection in the Malaysia–Australia FTA was largely symbolic since protection remained for respective countries' investors under the ASEAN–Australia–NZ FTA.

By contrast, Australia does not propose any TPP side letter with the US carving out ISDS, even though their bilateral FTA in 2004 also omitted ISDS. The official explanation given for the latter development was that both these countries also held great trust in each other's national legal system (despite the *Loewen Group* case brought by a Canadian investor against the US around that time, where a tribunal chaired by a former Chief Justice of Australia sharply criticised an underlying Mississippi court procedure).<sup>119</sup> Nor do there appear to be any other bilateral carve-outs of ISDS envisaged among TPP partners.

In terms of the ISDS procedures themselves, these also tend to follow the provisions in the US Model BIT and its FTAs from around 2004, which in turn have influenced the FTAs drafted by other TPP partners such as Australia.<sup>120</sup> For example, the TPP includes time limits for bringing claims (art 9.20.1). It also has a now standard 'fork in the road' provision (art 9.20.2), requiring investors invoking ISDS to waive rights to henceforth *initiate or proceed with* claims to resolve disputes instead through local courts or administrative tribunals of the host state. This helps preclude situations as in the dispute brought by Philip Morris, which challenged Australia's tobacco plain packaging law before the High Court of Australia under constitutional law as well as an ISDS tribunal under international treaty law.<sup>121</sup> However, Australia did not join Chile, Peru, Mexico and Vietnam, which extend (through annex 9-J) the protection for host states by preventing ISDS if the investor had *already filed* claims

<sup>116</sup> Luke Nottage, 'Asia-Pacific Regional Architecture and Consumer Product Safety Regulation beyond Free Trade Agreements' in Susy Frankel and Meredith Kolsky Lewis (eds), *Trade Agreements at the Crossroads* (Routledge, 2014) 114. For an earlier, longer version of this chapter, see <<https://perma.cc/6XTB-MZ4D>>. However, it could be argued that the bilateral carve out for ISDS goes against this trend towards harmonisation in that Australian investors end up with fewer (procedural) rights against New Zealand, and vice versa, than investors from other TPP states. A similar point was raised when a leaked TPP draft indicated that the (then Gillard) Australian government was negotiating to exclude itself from ISDS provisions altogether: Amokura Kawharu, 'The TPPA and Investment' [2012] *New Zealand Law Journal* 341, 344.

<sup>117</sup> 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] (5) *Transnational Dispute Management* (online).

<sup>118</sup> Department of Foreign Affairs and Trade, *Investor–State Dispute Settlement Investor–State Dispute Settlement*, above n 89.

<sup>119</sup> See *Loewen Group v United States* (2003) 7 ICSID Rep 421.

<sup>120</sup> Luke Nottage and Kate Miles, "'Back to the Future" for Investor–State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests' (2009) 26 *Journal of International Arbitration* 25. See also Alschner and Skougarevskiy, above n 10.

<sup>121</sup> *JT International SA v Commonwealth* (2012) 250 CLR 1; Department of Foreign Affairs and Trade, *Tobacco Plain Packaging*, above n 70.

before local courts or tribunals.<sup>122</sup> The annex qualification reinstates the approach taken under the 1994 US Model BIT. By contrast, the 2004 US Model BIT had adopted wording that is (uncharacteristically) more pro-investor in this respect,<sup>123</sup> which has carried over into US and Australian FTA treaty practice — including now TPP art 9.20.2.

Similarly, following the 2004 Model BIT and US FTA practice, and as in Australia’s FTA with Korea (and to a somewhat lesser extent with China), TPP art 9.23 sets out extensive provisions for transparency in proceeding. These include public hearings (still rare in WTO interstate dispute resolution) and admission of amicus curiae briefs from relevant third parties. Article 9.22 requires arbitral tribunals to decide preliminary jurisdictional objections on a fast-track basis, and may award lawyer and other costs against the claimant after considering whether the claim was frivolous. (However, it does not have to award such costs, and nor is there a general ‘loser pays’ rule for costs as under the recent Canada–EU FTA: compare TPP art 9.28.3).<sup>124</sup> An (interstate) Commission can issue an interpretation of a TPP provision that then binds the arbitral tribunal (art 9.24.3).

However, there is some debate among commentators about whether such a Commission can make such a binding interpretation regarding a pending dispute,<sup>125</sup> and the China–Australia FTA wording has helpfully clarified that it can. That FTA also adds an innovative provision, not found in the TPP (or any other FTA involving Australia) allowing a host state to issue a ‘public welfare notice’ to the home state of the foreign investor, declaring that it invokes the (art 9.11.4) general exception for public health measures etc. This triggers interstate consultations and a requirement on the host state to publicly announce its view on the home state’s invocation of the exception.

Partly offsetting this omission in the TPP, it adds the option (in the general exceptions chapter) of a host state precluding ISDS claims regarding tobacco control measures, as mentioned in Part III(A) above. More generally, the investment chapter adds that the arbitral tribunal can only award limited damages if the foreign investor successfully claims that it was thwarted in attempting to make an initial investment, due to the host state violating substantive treaty commitments. The tribunal must also issue a draft award to the disputing parties for comment (art 9.22.10), albeit not to the public or even the home state of the investor. Release of draft decisions is a feature of WTO interstate dispute resolution, and is found already in the 2004 US Model BIT as well as in Australia’s FTA investment chapters with Chile (signed in 2008) and Korea.

<sup>122</sup> Kawharu, ‘TPPA: Chapter 9 on Investment’, above n 87.

<sup>123</sup> See generally Mark Kantor, ‘The New Draft Model US BIT: Noteworthy Developments’ (2004) 21 *Journal of International Arbitration* 383, 388.

<sup>124</sup> *EU–Canada Comprehensive Economic and Trade Agreement*, above n 12.

<sup>125</sup> See generally Micah Burch, Luke Nottage and Brett Williams, ‘Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21<sup>st</sup> Century’ (2012) 35 *University of New South Wales Law Journal* 1013; Tomoko Ishikawa, ‘Keeping Interpretation in Investment Treaty Arbitration “On Track”: The Role of States Parties’ [2014] (1) *Transnational Dispute Management* (online); Anthea Roberts, ‘Who Should Decide?’ (Paper presented at the GELN Biennial Symposium, ‘The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL’, The University of Melbourne, 19 May 2016).

However, the TPP does not establish an appellate review mechanism to correct errors of law (as opposed to errors in procedure or jurisdiction), as under the WTO regime. There is only a commitment to consider such a mechanism if and when developed for international investment disputes ‘under other institutional arrangements’ (art 9.22.11). This provision again derives from the 2004 US Model BIT, in turn prompted by the *Bipartisan Trade Promotion Authority Act of 2002*.<sup>126</sup> However, the 2004 Model provided more specifically that if a multilateral agreement created an appellate mechanism, the parties would strive to agree to extend its jurisdiction to the BIT (a provision reproduced in the Korea–Australia FTA art 11.20.13);<sup>127</sup> and otherwise the parties would consider adding a bilateral appellate mechanism within three years of the BIT coming into force (with no counterpart in Australian treaties). Yet no appellate review mechanism has ever been added to subsequent US investment treaties, no doubt reflecting the persistent diversity of views on this possible reform to the ISDS system.<sup>128</sup>

Sam Luttrell highlights that TPP ch 27 creates an interstate ‘TPP Commission’, with power not only to issue interpretations of the treaty but also to resolve disputes about its interpretation and application (arts 27.2(2)(e)(f)). He further suggests that ‘some form of appellate or review body will be established if or once the TPP comes into force. However, at least for the first few years, any appellate function is likely to be performed by ad hoc committees formed by the TPP Commission’.<sup>129</sup> However, this sort of institutional arrangement goes back to *NAFTA* signed in 1993 (art 2001 on the ‘Free Trade Commission’),<sup>130</sup> but has never exercised appellate review functions in the way envisaged by Luttrell. Instead, the US BITs and FTAs since 2004 have added specific provisions to encourage the potential development of an appellate mechanism.

As introduced in Part I above and elaborated in Part IV below, the EU is now expressing stronger interest in appellate review, including in its TTIP negotiations with the US, where it has even proposed establishing an international investment court.<sup>131</sup> Indeed, the EU has already agreed on this sort of court (including appellate review for errors of law) in FTAs recently agreed

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<sup>126</sup> 19 USC § 3801 (2002); Kantor, ‘The New Draft Model US BIT’, above n 123, 384, 391–2.

<sup>127</sup> See *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014).

<sup>128</sup> See generally Jaemin Lee, ‘Introduction of an Appellate Review Mechanism for International Investment Disputes Expected Benefits and Remaining Tasks’ [2014] (1) *Transnational Dispute Management* (online); Stephen Bouwhuis, ‘An ISDS Appellate Mechanism: Real World or Quixotic Ideal?’ (Paper presented at the GELN Biennial Symposium, ‘The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL’, The University of Melbourne, 20 May 2016).

<sup>129</sup> Luttrell, above n 31, 27.

<sup>130</sup> *North American Free Trade Agreement* [1994] CTS 2, opened for signature 17 December 1992 (entered into force 1 January 1994) art 2001 (‘*NAFTA*’).

<sup>131</sup> See Reinisch, above n 11; European Commission, *Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations* (16 September 2015) European Commission: Trade <<https://perma.cc/DVJ2-KGFM>>. See also Céline Lévesque, ‘The European Union Commission Proposal for the Creation of an “Investment Court System”: The Q and A That the Commission Won’t Be Issuing’ on *Kluwer Law International*, *Kluwer Arbitration Blog* (6 April 2016) <<https://perma.cc/76DY-XP53>>.

with Canada and Vietnam,<sup>132</sup> despite the latter being also party to the TPP and its more traditional ISDS mechanism.

Article 9.21.6 further envisages that, before the TPP comes into force, member states will ‘provide guidance’ on extending the code of conduct for arbitrators (already in ch 28 for interstate arbitrations) to ISDS disputes, as well as ‘other relevant rules or guidelines on conflict of interest’. The Australian government will presumably point to the Australia–China FTA, where such a code of conduct has already been set out for ISDS arbitrators, and reference may also be made to further proposals now being raised in the EU and beyond.<sup>133</sup>

In addition, TPP art 9.19.1 allows ISDS claims for breaches of:

- (a) the substantive commitments set out in Section A of the investment chapter itself;
- (b) an ‘investment authorisation’ of its foreign investment authority;<sup>134</sup> or
- (c) an ‘investment agreement’ with central government authorities for their natural resources, specified utilities or infrastructure projects for the general public, which is concluded after the TPP comes into force, and is relied upon by the harmed foreign investor in making the covered investment and the claimed subject matter and damages directly relate to it.

The latter two scenarios are also covered in the Korea–Australia FTA, but the TPP goes on to expressly allow the host state then to raise a related counterclaim or set off against the foreign investor (art 9.19.2).

Annex 9-L adds innovative provisions dealing with potential multiple claims where there is a specified ‘investment agreement’. If the authorities have consented therein to arbitration under the arbitration rules of ICSID, the United Nations Commission on International Trade Law (‘UNCITRAL’), the International Chamber of Commerce (‘ICC’) or the London Court of International Arbitration (‘LCIA’), the investor cannot make an ISDS claim under Section B of the TPP investment chapter (para 1). But it does not waive rights to initiate or proceed with arbitration under those agreed rules (para 2) ‘with respect to any measure alleged to constitute a breach’ under art 9.18. Nonetheless, if such claims ‘have a question of law or fact in common and arise out of the same events or circumstances’ as a claim for breach of Section A substantive treaty commitments (or investment authorisations), the disputing

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<sup>132</sup> *EU–Canada Comprehensive Economic and Trade Agreement*, above n 12.

<sup>133</sup> For arbitrator ethics requirements agreed in their FTA with Canada, see *ibid.* On the possibility of also having state nominated rosters of ISDS arbitrators, not yet envisaged for the TPP, see Leon Trakman, ‘Standing Panels in Investor–State Arbitration’ (Paper presented at the GELN Biennial Symposium, ‘The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL’, The University of Melbourne, 20 May 2016).

<sup>134</sup> However, claims are excluded regarding enforcement of authorisation requirements or conditions (footnote 31), and ‘investment authorisation’ excludes for example ‘actions taken by a Party to enforce laws of general application, such as competition, environmental, health or other regulatory laws’ (footnote 10). Ministerial decisions not to approve investment proposals are not subject at all to ISDS or interstate dispute settlement (annex 9-H), consistently with Australia’s past FTA practice. However, Kawharu argues that claims may be possible for a foreign *vendor* of an investment for non-approval, or for administration of foreign investment legislation (such as monitoring of compliance with approval conditions): Kawharu, ‘TPPA: Chapter 9 on Investment’, above n 87.

parties can agree to consolidation of these sets of proceedings or otherwise be subjected to consolidated proceedings under art 9.27.<sup>135</sup> In other words, both contract and treaty-based claims are channelled more efficiently into one forum, benefitting especially host states and addressing a scenario that can arise quite often in practice.<sup>136</sup>

Curiously, however, annex 9-L does not list for such treatment investment agreements containing consent to arbitration of contract based disputes under the arbitration rules of major regional centres, such as the Kuala Lumpur Regional Centre for Arbitration or the Singapore International Arbitration Centre ('SIAC').<sup>137</sup> Perhaps they were considered to have less experience in investment arbitrations than the ICC or LCIA. But it means that parallel treaty claims may still be brought by the claimant under art 9.18.4 before a tribunal constituted by ISCID, UNCITRAL or other agreed arbitration rules.<sup>138</sup> Legal advisors to investors wishing to preserve this option, perhaps to obtain greater leverage in settlement negotiations in the event of a dispute, may therefore seek to conclude investment agreements that provide, for example, for SIAC investment arbitration rules.

Interestingly, on 1 February 2016 SIAC initiated a public consultation on the SIAC investment arbitration rules.<sup>139</sup> Well-advised host states may instead seek to incorporate those into their investment contracts. First, these rules build in some — but not all<sup>140</sup> — features better tailored to public interests associated with investment disputes, such as greater transparency. Secondly, if a

<sup>135</sup> TPP art 9.28(1).

<sup>136</sup> Cf *SGS Société Générale de Surveillance SA v Pakistan (Decision on Jurisdiction)* (2002) 8 ICSID Rep 383; *SGS Société Générale de Surveillance SA v Philippines (Decision on Jurisdiction)* (2004) 8 ICSID Rep 515 (although complicated by the relevant BITs also including an umbrella clause). See generally Matthew Wendlandt, 'SGS v Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes' (2008) 43 *Texas International Law Journal* 523. Various tribunals have accepted jurisdiction to rule on contract based disputes under 'generic treaty dispute settlement clauses' (whereby the host state consents to arbitration of 'any' disputes related to the covered investment). There is far less case law suggesting that tribunals can assume jurisdiction under such clauses (thus applying the applicable contract law, as opposed to international law pursuant to an 'umbrella clause') if the foreign investor is not also claiming violation of substantive treaty commitments. However, the latter tendency has been criticised. See, eg, Anthony Sinclair, 'Bridging the Contract/Treaty Divide' in Christina Binder et al (eds), *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 92. In addition, Stanivukovic argues that general doctrines under international law could be developed so investment tribunals can give preclusive effect to commercial arbitration awards: see Maja Stanivukovic, 'Investment Arbitration: Effects of an Arbitral Award Rendered in a Related Contractual Dispute' [2014] (4) *Transnational Dispute Management* (online).

<sup>137</sup> Since at least 2015, the KLRCA has been building up its capacity in international investment arbitration. See, eg, Kuala Lumpur Regional Centre for Arbitration, *KLRCA International Investment Arbitration Conference (KIAC 2016)* <<https://perma.cc/DGG2-XUXP>>.

<sup>138</sup> In addition, the TPP and annex 9-L do not address the situation where the investor agrees with the host state under an investment contract to bring claims (even exclusively) before a local court. In principle, treaty-based claims operate at a different (international law) level, so are not precluded. For a critique, see Johnson and Sachs, above n 97.

<sup>139</sup> Singapore International Arbitration Centre, *Public Consultation on Draft SIAC Investment Arbitration Rules* (1 February 2016) <<https://perma.cc/8SZF-Z62M>>.

<sup>140</sup> For example, draft article 29.5 allows the chairperson a casting vote to issue an award, whereas the UNCITRAL and ICSID rules require a majority vote of the tribunal. See generally Nottage and Miles, above n 120.

treaty-based claim is ever initiated, it may be easier — although perhaps still difficult — to persuade an investor to agree to one set of arbitration proceedings under the SIAC investment arbitration rules, rather than ICSID or UNCITRAL rules. In addition, SIAC and the Singaporean government may be hoping that SIAC investment arbitration rules may eventually be added to a list similar to annex 9-L in any amendments to the TPP or future FTAs such as RCEP.

A final little-remarked provision of the TPP investment chapter, albeit found in Australia's other FTAs, concerns the possibility of minority shareholders bringing ISDS claims against host states. Under art 9.19, a claimant may submit an 'investment dispute' to arbitration regarding, for example, a violation of Section A substantive commitments by the host state. Under art 9.1, an 'investment' includes shares as an asset 'that an investor owns or controls, directly or indirectly'. (Unlike some investment treaties promoted by other states, there is no exclusion for 'portfolio investment').<sup>141</sup> Article 9.19.1(b) further allows an investor in shares to make a *representative claim* 'on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly'. However, although this may allow a claim by a minority investor, it necessitates a controlling interest in the investment vehicle in that host state, and any relief awarded (such as damages) then goes to that local vehicle (art 9.28.5).

By contrast, it seems that any minority shareholder may seek arbitration 'on its own behalf' if it 'has incurred loss or damage of, or arising out of, that breach' (art 9.19.1(a)). It is accepted, even by those generally critical of claims by minority shareholders under investment treaties,<sup>142</sup> that shareholders can bring a *direct claim* at least for direct interference with their rights, such as host state laws seizing their shares or preventing exercise of their voting rights in the local investment vehicle.

More controversial is whether a minority shareholder can make a *reflective loss claim* for the diminution of the value of their shareholding, due especially to the host state's violation of fair and equitable treatment (as found in the *Walter Bau* case, for example)<sup>143</sup> or expropriation relating to the local investment vehicle. Many such damages claims have been upheld, beginning in fact with the first ever successful ISDS claim for violation of UK BIT commitments, brought by a Hong Kong minority investor in a locally incorporated shrimp farm in Sri Lanka.<sup>144</sup> In particular, several claims were upheld by minority US investors in local companies holding concessions or other

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<sup>141</sup> Cf the recently revised India Model BIT: Government of India, Ministry of Finance, *Model Text for the Indian Bilateral Investment Treaty* (January 2016) art 1.4 <<https://perma.cc/LT3D-WPL5>>.

<sup>142</sup> See, eg, from an Argentinian official, Gabriel Bottini, 'Indirect Claims under the *ICSID Convention*' (2008) 29 *University of Pennsylvania Journal of International Law* 563, 564.

<sup>143</sup> Nottage and Thanitcul, 'The Past, Present and Future of International Investment Arbitration in Thailand', above n 28.

<sup>144</sup> *Asian Agricultural Products Ltd v Republic of Sri Lanka (Award)* (1990) 4 ICSID Rep 246. The majority award (27 June 1990) has been described as a 'silent revolution', but not with respect to allowing a claim from a minority shareholder (for destruction of the investment vehicle by government forces during a civil war): Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed' (2014) 29 *ICSID Review* 372. Nor is this aspect criticised by the strongly worded dissenting award (available at <<https://perma.cc/9BBZ-AFSV>>).

arrangements with Argentina after its economic crisis around 2000, under the 1991 BIT.<sup>145</sup> However, the wording of these treaties is less elaborate than that found in the US Model BITs of 2004 and 2012, in turn derived broadly from *NAFTA*, and which have carried over into the TPP and other US-inspired FTA provisions.

In 2004, a *NAFTA* tribunal rejected a jurisdictional objection by Mexico against a claim under art 1116 by a 15 per cent minority shareholder in a local company operating sugar mills that were allegedly subject to direct expropriation as well as breaches of FET and national treatment obligations,<sup>146</sup> despite acknowledging that in principle such claims might lead to double recovery (if the local company also was able to claim against the host state, for example under host state law).<sup>147</sup> The tribunal upheld the admissibility of the claim for direct expropriation, but ultimately dismissed it because a local court had since rendered judgment neutralising the effect of this. It also upheld the admissibility of the FET claim for reflexive loss, although holding that this substantive violation was not proven.

However, before permitting ISDS claims, *NAFTA* art 1121 requires the investor *and the local investment vehicle* to provide waivers of rights to continue other proceedings, regarding claims by an investor on its own behalf for loss arising out of treaty violations (art 1116) as well as by an investor on behalf of its investment vehicle (art 1117). Zachary Douglas points out that this can limit scope for reflexive loss claims by minority shareholders, as the majority shareholders may be satisfied by any relief provided by the host state to the investment vehicle, and therefore not provide the necessary waiver.<sup>148</sup> Daniela Páez-Salgado goes on to argue that the US Model BITs since 2004 and TPP ‘retain the essence of *NAFTA* provisions’, thus providing ‘for direct claims and representative claims, [but] excluding reflective loss claims’.<sup>149</sup>

However, those Model BITs and the TPP (art 9.21.2(b)(i)) require a written waiver regarding other proceedings, prior to ISDS, only from the claimant (such as a shareholder) and *not from the local investment vehicle* in the scenario of claims brought by the investor on its own behalf, as opposed to on behalf of the local vehicle (where double waivers are required: art 9.21.2(b)(ii)). This reinstates the possibility of double recovery, and also leaves open the question of whether reflexive loss claims by a minority shareholder are permitted. Tribunals will need to decide whether it ‘has incurred loss or damage of, or arising out of

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<sup>145</sup> Dolores Bentolila, ‘Shareholders’ Action to Claim for Indirect Damages in ICSID Arbitration’ (2010) 2 *Trade, Law and Development* 87.

<sup>146</sup> *Gami Investments Inc v Mexico (Award)* (2004) 13 ICSID Rep 144. Critically examined in Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) 420–5.

<sup>147</sup> On the policy implications, see generally David Gaukrodger, ‘Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law’ (Working Paper No 2014/02, Organisation for Economic Co-operation and Development, 2014). On complexity in assessing damages, see Jimmy Skjold Hansen, ‘“Missing Links” in Investment Arbitration: Quantification of Damages to Foreign Shareholders’ (2013) 14 *Journal of World Investment and Trade* 434.

<sup>148</sup> Douglas, above n 146, 446.

<sup>149</sup> Daniela Páez-Salgado, ‘Settlements in Investor–State Arbitration: Are Minority Shareholders Precluded from Having Treaty Claims Adjudicated?’ (2016) *Journal of International Dispute Settlement* 1, 22.



that breach’ of the TPP (under art 9.19.1(a)), bearing in mind case law and commentary under various BITs and NAFTA that mostly recognises minority shareholder claims for reflexive loss.<sup>150</sup> Future treaty negotiators may need to reconsider the pros and cons of allowing such treaty claims, contrary to the traditional position under customary international law and despite the possibility of double recovery, as well as the related vexed issue of whether any contractual settlement of a dispute between the investment vehicle and host state should preclude minority shareholder claims.<sup>151</sup>

#### IV CONCLUSIONS

It remains to be seen whether the rather limited innovations in the TPP’s investment chapter will be enough to assuage critics of ISDS and allow ratification of the TPP in Australia, as well as other existing signatory states. But governments that have negotiated and signed this agreement have significant ‘sunk costs’ and reputational incentives to follow through, unless domestic political circumstances or overseas developments interfere significantly in the ratification process. In addition, other major Asian economies now interested in acceding to the TPP have limited bargaining power, especially as their exclusion from the mega-regional agreement may create significant trade diversion and other adverse economic impact.<sup>152</sup> Part II suggests, however, that ISDS-backed investment protections are in any case unlikely to prove a major stumbling block, except perhaps for Indonesia, given evolving treaty practice and experiences now with ISDS claims in the Asian region. Part III further elaborates on how the TPP’s investment chapter’s substantive protections also largely track existing FTAs concluded by and among TPP partners, especially Australia in recent years. Yet this will provide little comfort to those who remain firmly opposed

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<sup>150</sup> Christoph H Schreuer, ‘Shareholder Protection in International Investment Law’ [2005] (3) *Transnational Dispute Management* (online); Abby Cohen Smutny, ‘Claims of Shareholders in International Investment Law’ in Christina Binder et al (eds), *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 363; Andrea K Bjorklund, ‘NAFTA Chapter 11’ in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013) 465, 501 (albeit without specifically addressing the possibility of reflexive loss claims by a minority shareholder under *NAFTA* art 1116); Lee M Caplan and Jeremy K Sharpe, ‘United States’ in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013). (Albeit without specifically addressing the possibility of reflexive loss claims by a minority shareholder under 2012 Model BIT art 24(1)(a)). But for interpretations of treaties and case law to limit minority shareholder reflexive loss claims for violations of FET or indirect expropriation, see Douglas, above n 146; see especially at 415–51.

<sup>151</sup> See generally Páez-Salgado, above n 149; Bentolila, above n 145, 139. The practical difficulties for a foreign minority shareholder are illustrated by the quite recent case of *Walter Bau* (see commentary at above n 64), where the German investor held only 10 per cent whereas local companies held 30 per cent, and the government itself held a majority stake in the vehicle, when the investor finally filed its (ultimately successful) BIT claim for reflexive loss against Thailand in 2005. Various settlements had earlier been reached between the local investment vehicle and Thai authorities, related to prior disputes related to the long term concession agreement: Nottage and Thanitcul, above n 28.

<sup>152</sup> See generally Petri and Plummer, above n 82.

to any form of ISDS,<sup>153</sup> or indeed remain concerned more broadly about cross-border investment.<sup>154</sup>

The wording of many Asia-Pacific FTA investment chapters, derived from US treaty practice, can be seen as a blessing and curse.<sup>155</sup> On the one hand, the wording of the US Model BIT of 2004 (largely maintained in 2012)<sup>156</sup> drew on *NAFTA* drafting and actual experiences with ISDS claims to incorporate provisions that were mainly more favourable to host states,<sup>157</sup> compared to earlier US Models and BIT wording that was more pro-investor even than Western European templates.<sup>158</sup> This shift influenced FTA negotiations by the US with regional partners such as Australia from 2002, and made it easier to sign its two other early FTAs with Singapore and Thailand, which had respectively concluded or begun their own bilateral FTA negotiations with the US. The result is more balanced investment treaty regimes for FTA investment chapters, compared to Australia's BITs (last signed in 2005).<sup>159</sup>

On the other hand, the spread of the US-derived FTA template through subsequent bilateral and more recent regional treaties risks creating a new 'status quo bias'<sup>160</sup> that prevents or limits further significant rebalancing, even if that

<sup>153</sup> Cf Nottage, 'The "Anti-ISDS Bill"', above n 9.

<sup>154</sup> Cf David Uren, *Takeover: Foreign Investment and the Australian Psyche* (Black Inc, 2015); Nottage, 'The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration in Australia', above n 93.

<sup>155</sup> I thank Professor Jaemin Lee for this observation, in private conversation comparing developments in Korea and Australia.

<sup>156</sup> Mark Kantor, 'Little Has Changed in the New US Model Bilateral Investment Treaty' (2012) 27 *ICSID Review* 335.

<sup>157</sup> See generally *ibid*; Kantor, 'The New Draft Model US BIT', above n 123; David Gantz, 'Increasing the Host State's Regulatory Flexibility under the TPP Investment Chapter — US Approaches Beginning with *AUSFTA*' (Paper presented at the GELN Biennial Symposium, 'The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL', The University of Melbourne, 19 May 2016). But see Part III(B) above, on wording that may be more permissive of minority shareholder claims for reflexive loss even compared to *NAFTA*.

<sup>158</sup> Poulsen, above n 24 (highlighting elaborate performance prohibitions, and pre-establishment non-discrimination provisions promoting investment liberalisation as well as protection, as features of US treaty practice.)

<sup>159</sup> See Voon, above n 9; Nottage, 'Investor State Arbitration Policy and Practice in Australia', above n 72. See more generally Elizabeth Sheargold, 'Options for Protecting Regulatory Autonomy in Trade and Investment Treaties' (Paper presented at the GELN Biennial Symposium, 'The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL', The University of Melbourne, 19 May 2016). However, the ICSID tribunal in *Planet Mining v Indonesia* argued that several of Australia's early BITs intentionally contained highly constrained access to ISDS protections. Cf Nottage, 'Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration?', above n 35. Although a questionable conclusion, this would instead make Australia's subsequent FTAs — all clearly providing advance consent when including ISDS protections — significantly more pro-investor. In any case, to clarify the situation Australia arguably needs at least to terminate BITs with new FTA partners (as it was careful to do with Chile in 2008, and now some other TPP partners): see Hepburn, above n 106. This deals with the complex interaction between bilateral and regional treaties, particularly in the Asia-Pacific region, focusing on the TPP. See generally Teerawat Wongkaew, 'Disentangling the Regional Comprehensive Economic Partnership (RCEP) Noodle Bowl: Analysis of Legal and Policy Challenges' [2015] (1) *Transnational Dispute Management* (online); Julien Chaisse and Shintaro Hamanaka, 'Asian Noodle Bowl of International Investment Agreements: How to Mitigate the Problems?' in Australian APEC Study Centre at RMIT (ed), *Current Issues in Asia Pacific Foreign Direct Investment* (2015) 54 <<https://perma.cc/ARS8-GQ8S>>.

<sup>160</sup> Cf Poulsen, above n 24.

can be shown to be optimal. Specifically, it makes it hard for Asia-Pacific states like Australia to develop their treaty practice towards the new approach being pressed by the EU in its TTIP FTA negotiations with the US but also more broadly.<sup>161</sup> Compared to TPP investment chapter wording, that approach arguably provides narrower substantive protections for fair and equitable treatment (by enumerating proscribed behaviours and constraining the concept of legitimate expectations), more guidance on general exceptions, and express reference to proportionality of the adopted measures when assessing indirect expropriations.<sup>162</sup>

In terms of procedural innovations, the new EU approach involves moving away from ad hoc appointment of investment treaty arbitrators to create a standing investment court, which moreover can engage in appellate review. This move is potentially game-shifting, given the predominance so far of ISDS arbitrators with backgrounds in law firms.<sup>163</sup> They would generally start off (at least) with less exposure to key concepts developed in national public law and recently international law, such as proportionality and standards of review of state action. Indeed, other fields of international law that have expanded concepts of proportionality, despite little or no direct textual references, have done so in the context of standing judiciaries. If the EU successfully promotes the institution of permanent investment courts, the latter may feel similarly more confident about developing proportionality doctrine (and the related question of the standard of review) to adjudicate international investment disputes in a more principled way.<sup>164</sup> The EU has already introduced this court institution into its FTA with Vietnam, despite the latter having agreed to more conventional ISDS in the TPP.<sup>165</sup> It is conceivable that something like a permanent investment court could emerge even by side letters among existing TPP signatories,<sup>166</sup> especially if domestic political circumstances impede ratification, or among potential future partners such as Indonesia that are now sceptical about ISDS-based treaty protections. This development is probably even more likely in the context of the

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<sup>161</sup> Daly and Ahmad, above n 11; Stephan W Schill, 'Editorial: US versus EU Leadership in Global Investment Governance' (2016) 17 *Journal of World Investment and Trade* 1.

<sup>162</sup> However, the latter reference might also work in favour of investors, and the TPP is clearer in limiting national treatment and MFN violations to intentional discrimination: see Henckels, above n 13. Compare also the even more far-ranging substantive and procedural treaty law reform proposals from India and Southern Africa. See especially Kyle Naish, 'The Future of ISDS — Three Different Approaches to Investment Obligations' (Paper presented at the GELN Biennial Symposium, 'The Age of Mega-Regionals: TPP & Regulatory Autonomy in IEL', The University of Melbourne, 19 May 2016).

<sup>163</sup> Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus' (2015) 109 *American Journal of International Law* 761.

<sup>164</sup> See generally Caroline Henckels, *Proportionality and Deference in Investor–State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press, 2015). Henckels compares emergent investment treaty case law with the approach of the WTO Appellate Body, the Court of Justice of the European Union and the European Court of Human Rights.

<sup>165</sup> Daly and Ahmad, above n 11; Nottage, 'Rebalancing Investment Treaties and Investor–State Arbitration', above n 24.

<sup>166</sup> After all, Australia and New Zealand have already signed side letters that completely exclude ISDS bilaterally, as mentioned above.

ongoing RCEP negotiations, involving India, and bilateral negotiations commenced by the EU with countries like Thailand and recently Australia.<sup>167</sup>

The potential emergence of a competing EU model for investment treaties,<sup>168</sup> and some uncertainties (such as scope for minority shareholder claims for reflexive loss) or omissions (such as the lack of a ‘public welfare notice’ procedure) mentioned in the analysis of the TPP in Part III(B), reinforce the need for countries like Australia to engage in further robust public consultation — for example by developing a model investment treaty, chapter or provisions.<sup>169</sup> Meanwhile, however, the broader trends outlined in this paper appear unlikely to impede ratification of the TPP in Australia, unless domestic politics shift considerably.

## V POSTSCRIPT

On 22 November 2016, US president-elect Donald Trump announced that on assuming office on 20 January 2017 he would follow through on a pre-election promise to withdraw from the TPP, and instead negotiate ‘fair, bilateral trade deals’.<sup>170</sup> When and how this will occur is unclear, as is the Trump administration’s view specifically relating to ISDS. In any case, RCEP negotiations remain ongoing, with a leaked investment chapter indicating that countries like Australia are still proposing provisions based on the contemporary US model culminating in the TPP, including ISDS.<sup>171</sup> China has also reiterated its earlier calls for a broader-based FTA for the Asia-Pacific,<sup>172</sup> involving all APEC economies including the US, although this would be a long-term project and it may allow even more scope for the competing contemporary EU approach to investment treaties to gain traction in the Asian region. For all these reasons, it remains important to look closely at the TPP investment chapter as well as the regional attitudes and experiences regarding investor–state arbitration.

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<sup>167</sup> See Australian Government, Department of Foreign Affairs and Trade, *Australia–European Union Free Trade Agreement* <<https://perma.cc/XWU7-WPYF>>.

<sup>168</sup> Schill, above n 161.

<sup>169</sup> Nottage, ‘The “Anti-ISDS Bill”’, above n 9.

<sup>170</sup> Matthew Doran, ‘Donald Trump Vows to Withdraw from Trans-Pacific Partnership Trade Deal’, *ABC News* (online), 22 November 2016 <<https://perma.cc/2MDZ-FS8F>>.

<sup>171</sup> Amokura Kawharu and Luke R Nottage, ‘Models for Investment Treaties in the Asian Region: An Underview’ (Sydney Law School Research Paper No 16/87, 28 September 2016) <<https://perma.cc/V723-FAJS>>.

<sup>172</sup> Luke Nottage and Jaivir Singh, ‘Does ISDS Promote FDI? Asia-Pacific Insights from and for Australia and India’ on *Asia-Pacific Forum for International Arbitration*, 17 November 2016 <<https://perma.cc/EN88-3KD2>>.