

# The TPP Investment Chapter & Investor- State Arbitration in Asia & Oceania

**Dr Luke Nottage**

Sydney Law School

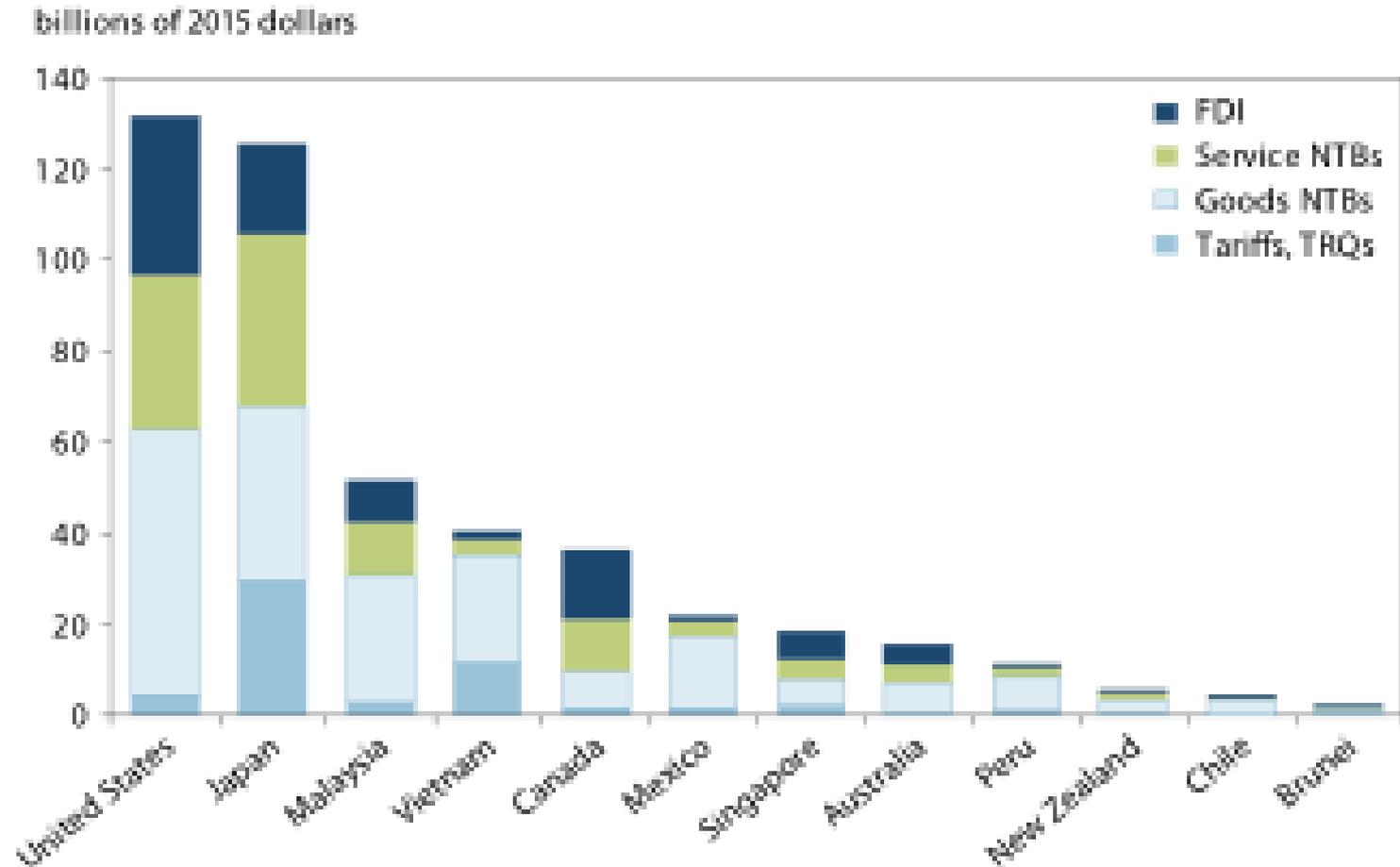
(supported also by ARC DP140102526 )

# 1. Overview

- TPP: ag'd 10/15, signed 2/16; ratified ... by 2/18?
  - Concerns re inv. ch9, esp. ISDS procedure [cf GDP: pto]
- Prospects for ratification (& expansion)?
  - Existing signatories in Asia/Oceania (excl. Nth Am.)
  - Potential extras: Indonesia, Philippines, Thailand...
- Experience/policy re ISDS: still mostly positive
- & in Australia: TPP similar to other FTAs
  - Re both ISDS and substantive provisions
- But: EU-style innovations may impact RCEP etc

# National inc. effects from TPP (by '30)

<http://www.iie.com/publications/wp/wp16-2.pdf>



## 2. Investment trends, treaties, claims

- Post-GFC rebound in FDI inflows (incl. growing intra-ASEAN), yet shortage (eg infrastructure)
- Growing outbound investors (Japan, Korea, PRC, Singapore/Malaysia, even Thailand)
- Most current (& potential) TPP signatories have many investment treaties (with more ISDS) & have weathered a few claims
  - which generally lead to slowdowns in signing treaties or even abandoning ISDS (Sth Africa, Aust '11-13)!

# Table 1: EAP inv. treaties & claims

States	BIT proportion (out of 541)	FTA proportion (out of 69)	ISDS claims received (including number and year first filed, where consent under treaty)
1. China	20.4%	17.4%	2 (under treaty: first filed in 2011 but settled)
2. South Korea	13.8%	15.9%	2 (1 under treaty: filed 2012)
3. Indonesia	10%	2.9%	7 (3 under treaties: first filed in 2011)
4. Malaysia	10%	10.1%	3 (2 inter-related: filed in 1994 and 1999)
5. Vietnam	8.7%	1.4%	4 (first filed in 2003 but settled)
6. Singapore	6.5%	17.4%	-
7. Mongolia	6%	1.4%	4 (first filed 2004)
8. Thailand	5.6%	5.8%	1 (filed 2005)
9. Philippines	5.3%	1.4%	4 (first filed 2002 but settled)
10. Laos	3.5%	N/A	2 (both filed in 2012)
11. North Korea	3.4%	N/A	-
12. Australia	3.2%	23.2%	1 (filed 2011)
13. Japan	3.2%	18.8%	-
... 18. Brunei	0.8%	N/A	-
... 20. New Zealand	0.6%	2.9%	-

# ISDS policy in Asia & Oceania

- ASEAN: '87 + '98 = '09 ('12) & ASEAN/+ (4/5)
- Some caution: **Philippines, Vietnam** ('14 inter-agency agt), **Thailand** ('09/'15 Cabinet policy limiting arb in public contracts, '13 revd BIT), esp. Indonesia (rev'd model BIT – cf India?)
- < **Malaysia** << **Singapore**
- **China** < **Japan** < **Korea** (yet '11 claim & KORUS)
- **Australia** (esp. '11-13) < **NZ** (but now debated)

# 3.1 TPP – Substantive Provisions

- Similar to Australia's FTAs signed since '03 (sby both Coalition and Labor govts): based on 'NAFTA+' and '04 US Model BIT, eg:
- 'Investment' defn: incl. IP, excl. jts (not: arb awards?), if 'admitted [under] host state laws'
- (Intentional?) discrimination: (pre-est.) NT, MFN
- FET: still broader than Aust domestic law (or EU)
  - Some substantive legit Xptns, or privative clauses

- Compensation for expropriation [CIGI paper]
  - Direct: broader than under Aust. state law
  - Indirect: broader than under fed. constitution (PMA)
- No ‘general exception’ clause (cf AANZFTA etc)
  - But also: right to regulate: Art 9.15 & preamble
  - carve outs for public debt claims & (option) tobacco
- States to encourage (voluntary) CSR

## 3.2 Comparing TPP: ISDS

- Time limits & (ltd) 'fork in the road' provisions
- Transparency [more than WTO!]
- Fast-track jurisdictional objections [cf PMA!] & possible 'loser-pays-party-costs' [but cf EU]
- Inter-state interpretation binding on tribunal
  - But: what about pending dispute? Or 'public welfare notice' procedure? Cf ChAFTA
- Draft award to disputants (but not host state?)

- No appellate review (nor via Commission)
- Not yet: arbitrator ethics (cf ChAFTA)
- ISDS not only for violating substantive provs
  - Also: inv. authorisations (but: FIRB carveout)
  - Some: (post-TPP, some public) inv. Agts (= KAFTA)
    - But then host states can raise counter-claim or set-off
    - And possible consolidation of (overlapping) contract- and treaty-based claims, if parties had ag'd ICSID, UNCITRAL, ICC or LCIA arb rules (cf new SIAC Rules)
- Minority sh/ers can sue too (cf Paez-Salgado '16)
  - Even 'reflexive loss' (reduced value from eg FET breach)
  - If anything, *easier* post '04 Model than NAFTA

# 4. Conclusions

- TPP inv. chapter / ISDS unlikely a deal breaker
  - For existing signatories (even if new govt – Aust?!)
    - Or others (even Indonesia?): weak bargaining pos.
- But US-style TPP provisions are both:
  - Blessing: more balanced than early (also EU!) BITs
  - Curse: hard to move away from this template
    - Status quo bias {Poulson '15} & politics, face, claim risk
- Can & should Aust. etc adopt EU-like innovations?
  - Substantive (eg FET list) & proc. (permanent inv. Ct)?
  - Already in EU-Vietnam FTA; appeal to Indonesia, India?

# Further reading

- My SSRN paper (& 18 July Bangkok conference comparing inv. arb in AMS) [http://blogs.usyd.edu.au/japaneselaw/2016/04/the\\_tpp\\_investment\\_chapter\\_and.html](http://blogs.usyd.edu.au/japaneselaw/2016/04/the_tpp_investment_chapter_and.html)
- Investment Treaty Arbitration Policy in Australia, New Zealand – and Korea? 25(3) Journal of Arbitration Studies ('15) 185-226, <http://ssrn.com/abstract=2643926>
- The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration in Australia, NZBLQ special issue (April '16), <http://ssrn.com/abstract=268594>
- Australia report for CIGI (Canada) thinktank project on ISDS in developed economies (June '16) [www.cigionline.org/activity/investor-state-arbitration](http://www.cigionline.org/activity/investor-state-arbitration)
- Henckels, Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA & TTIP ('16) 19(1) JIEL, <http://ssrn.com/abstract=2721523> (and '15 CUP book on Proportionality in ISA)
- Kawharu, Expert Paper #2, <https://tpplegal.wordpress.com/> ('16)
- Luttrell, ISDS in the Asia-Pacific ('16) XIX ITBusLRev 20