JUMPING BACK AND FORTH BETWEEN DOMESTIC COURTS AND ISDS MIXED SIGNALS FROM THE ASIA-PACIFIC REGION

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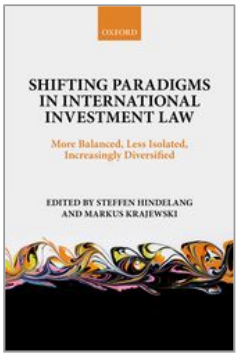

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Jumping Back and Forth between Domestic Courts and ISDS

Mixed Signals from the Asia-Pacific Region

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Abstract and Keywords

The chapter deals with the tension between investor–State disputes being resolved by investor–State arbitrators or domestic courts of law. That tension includes significant and perceptible shifts in policy adopted by different States, including across Asia, that have materially different political, economic, and legal consequences. The chapter examines these shifts, possible reasons for them, and their potential significance. It places particular emphasis on Australia's shifting bilateral and multilateral treaty practices in regard to ISDS, as reflected in its trade and investment policies, and its recent treaties such as with Korean, with Japan, and the impending TPPA with various countries across the Pacific. It also examines recent treaty developments in other Asian

States, such as Indonesia. The chapter concludes with a series of recommendations on treaty negotiating, including the prospects of multi-tiered dispute resolution processes being developed and ways of refining investor–State arbitration to build on its strengths and redress its weaknesses.

Keywords: Asia-Pacific, Australia, ISDS, foreign investment, public interest, public policy

I. Introduction

It is uncontroversial that cross-border investments engender the possibility of disputes arising between investors and host States. What is unclear is whether such disputes should be characterized as being unique or distinctive because they involve foreign investors. What is further in controversy is whether there should be a customized mechanism to resolve such disputes. The institution of investor–State dispute settlement (ISDS), which has for some time enjoyed popularity as a way of resolving investor–State disputes, has come under renewed scrutiny over the past few years as a result of dissatisfaction articulated by a number of countries.

Many South American and Asian countries have expressed concerns over the nature of ISDS and the organizations that facilitate it.[1] This includes Nicaragua and Venezuela signalling an intention to terminate existing bilateral investment treaties (BITs),[2] and Ecuador denouncing the International Centre for Settlement of Investment Disputes (ICSID) established by the World Bank, which is the primary source of investment arbitration.[3] In 2007, the Philippines negotiated to exclude ISDS in its free trade (p.317) agreement with Japan.[4] In March 2014, Indonesia indicated that it would terminate its BIT with the Netherlands and likely implement a scheme of terminating all of its remaining BITs as they become due to expire.[5]

In 2011, the Commonwealth Government of Australia stated in a Trade Policy Statement (‘the Policy’) that Australia would no longer agree to the inclusion of ISDS in its future bilateral and regional trade agreements (BRTAs), choosing instead to rely on alternatives to ISDS.[6] After a change in Australia’s Government in 2013, two years after the Policy was

announced, the new Liberal–National Coalition Government has retreated from that Policy notably by including an ISDS regime in the Korea–Australia Free Trade Agreement (KAFTA) concluded on 5 December 2013, and the China–Australia Free Trade Agreement (ChAFTA) concluded on 17 June 2015.[7] References to the Policy have been removed from the Department of Foreign Affairs and Trade's official website, which indicates instead that it will consider the inclusion of ISDS on a case-by-case basis.[8] Further, the Government has categorically stated that Australia's ability to pass public interest legislation, such as in the areas of national security, public health, and environmental protection, will not be compromised. Notably, the Japan–Australia Economic Partnership Agreement (JAEPA), concluded in April 2014, does not include an ISDS regime.[9] Australia is currently in bilateral negotiations with Indonesia and India, as well as having a stake in the imminent Trans Pacific Partnership Agreement (TPPA).[10] It is not clear what negotiation stance the Australian Government is likely to take with respect to these instruments.

In formulating national investment policy, including with respect to ISDS, governments should seek to adopt measures that pursue broader economic development, encourage responsible investor behaviour, and are practical in ensuring policy effectiveness. These principles, addressing concerns about investment policy generally and ISDS in particular, are reflected in the global debate over (p.318) sustainable development, notably in the UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD).[11]

In light of a broader framework for sustainable development of investment policy, this chapter will consider the value of ISDS in resolving disputes between host States and foreign investors, particularly in the Asia Pacific region. It will argue that the oscillation between ISDS and domestic courts serves to destabilize international commerce as well as comity between states. It will recommend, in response, potential developments to the substantive and procedural execution of ISDS provisions. The chapter will focus on the policies articulated by Australia in its Policy Statement in 2011 and then in 2013. The chapter will also construe the positions

adopted by a number of Asian countries as examples of developments taking place within the region and the potential future of ISDS regionally as well as internationally.

II. The Practical Value of ISDS

Domestic policies and international accord in relation to ISDS have a direct impact on trade and investment, both within the region and globally.[12] Countries within the Asia Pacific region have the capacity to influence each other's investment regimes, as well as having an impact on investment practices outside the region.[13] As a method of resolving investor–State disputes, ISDS is arguably directed at promoting a healthy cross-border flow of FDI and providing investors with a viable and fair platform for dispute resolution.[14] A foreign investor can lodge a claim against a host State to be resolved through a specialized and expert international investment tribunal, without the need to mobilize its home State to take diplomatic action or to pursue inter-State dispute resolution, including through the WTO.

ISDS has been increasingly incorporated into trade and investment agreements worldwide, including countries in Asia, which historically resisted ISDS due to (p.319) various ideological and economic considerations.[15] It is now a commonly used method of investor–State dispute resolution in the region, and is perceived to have some distinct benefits over the alternatives.

ISDS can insulate States in general from diplomatic involvement in investment disputes by giving their investors an alternative pathway to resolve their grievances against host States. ISDS can also obviate the need for outbound investors to seek domestic legal remedies in foreign States which they may view as less impartial than international investment arbitration.[16] As a result, foreign investors may be attracted to invest in certain markets, including countries in the Asia Pacific region, because of the availability of ISDS mechanisms, on the assumption that they would not be exposed to unfair or unprincipled treatment at the hands of domestic courts.[17] In addition, ISDS can confer substantive protections on foreign investors, such as most-favoured-nation or national treatment

guarantees under international investment law. As such, a rejection of ISDS by States in the Asian region does not simply exclude that *process* of dispute settlement; it excludes the substantive protections that investment treaties and international law more generally often confer on foreign investors in light of their vulnerable position, including when facing the domestic courts of host States in Asia.

A country such as Australia, which has a dualist system, does not provide for international laws to be directly applied in domestic courts. Clauses such as those providing for most-favoured-nation treatment cannot be enforced in its domestic courts unless there is domestic legislation providing for such protection. Thus, a rejection of ISDS in a treaty between Australia and an Asian treaty partner is also a rejection of many of the substantive protections that a community of nations has invested decades in developing.[18] Such a position proceeds on the subtext that foreign investors should not be given additional protections or incentives for investment beyond those given to domestic investors, even where their inbound investments could be exposed to unfair government interference or expropriation. Problematically, the impugned conduct may often not be unlawful under the domestic laws of the host country engaged in such interference, including through changes in legislation effected for that very purpose. Certainly, Australia and other countries within the Asia Pacific region are unlikely to target foreign investors in this manner, particularly where robust protections are entrenched in the State's constitutional framework. The potential for this occurrence, however, is not far-fetched.

(p.320) The above is not intended to suggest that ISDS is without shortcomings or critics. Certainly, the power imbalance between States and investors is not always in favour of host States. Many developing countries do not have the resources that wealthy investors have. As a result, in recent years a number of developing States, including in Asia, have become critical of ISDS and rejected the process as well as challenging the tribunals that deliver it on procedural grounds, not least of all for conflicts of interest: these States have also adopted alternative dispute resolution models to ISDS.[19]

This chapter contends that criticisms of ISDS, however justified in particular cases, should not be universally adopted as a means of rejecting it, without close further examination. The merits of ISDS relative to resolution of disputes by domestic courts are considered in section IV below.

III. Domestic Policies—Australia and the Asia Pacific

a) Australian Labor Party's 2011 trade policy

The Australian Government, led by Prime Minister Julia Gillard, articulated its aversion to ISDS in the 2011 Policy, providing that Australia would no longer negotiate treaty protections 'that confer greater legal rights on foreign businesses than those available to domestic businesses' or rights that would 'constrain the ability of the Australian Government to make laws on social, environmental, and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses'.[20]

One of the aims of the Policy was to prevent foreign investors from invoking ISDS to challenge Australia's regulatory autonomy over public safety, health, and the environment.[21] The Policy was informed, to some degree, by an increase in FDI flows into Australia, particularly in the resources and energy sectors,[22] and by the significant potential for investors to institute claims against Australia challenging domestic environmental and health legislation. By declining to incorporate ISDS in its BRTAs, Australia would have greater latitude in designing sustainable measures to preserve its public interests, thereby avoiding pressures created by the so-called 'regulatory chill' arising from the perceived threat of having to defend against costly and intrusive ISDS claims.[23]

(p.321) These concerns are reflected in wider global concerns, notably in UNCTAD's IPFSD, which recognizes that 'ISDS claims can be used by foreign investors in unanticipated ways'. Noting that '[a] number of recent cases have challenged measures adopted in the public interest (for example, measures to promote social equity, foster environmental protection or protect public health)', the IPFSD observes that 'the borderline between protection from political

risk and undue interference with legitimate domestic polices is becoming increasingly blurred'.[24] They are also illustrated in part by Philip Morris' ISDS claim against Australia under the Hong Kong–Australia BIT over Australia's decision to require the plain packaging of cigarettes on public health grounds[25] and recent WTO challenges against Australia initiated by Ukraine and now including, among others, Indonesia, over the same issue.[26] While the Philip Morris case provides a good illustration of the challenges envisaged by the critics of ISDS, certainly one ISDS claim is not sufficient to show that a systemic problem exists, jeopardizing Australia's ability to legislate on public health grounds in the national interest. Aside from the fact that it is the very purpose of ISDS to facilitate challenges against host States where other avenues are not available, it is unusual to reject the institution of ISDS on the basis of one claim that the Government may perceive to be unsubstantiated. Certainly, few of Australia's regional neighbours and trading partners who are parties to BITs providing for ISDS have reacted so strongly when a claim has been brought against them.[27]

Australia has further concerns that foreign drug companies could invoke ISDS to contest restrictions on foreign manufactured drugs under Australia's Pharmaceutical Benefits Scheme (PBS), which selectively restricts public access to some pharmaceuticals while subsidizing others.[28] Such concerns have been articulated with renewed emphasis in the context of the TPPA negotiations.[29] The (p.322) Government also has ongoing disquiet about foreign investors securing a controlling interest in the Australian media and in core financial markets such as the stock exchange (exemplified by Australia's refusal to permit the takeover, expressed as an amalgamation, of the Australian Stock Exchange by its Singaporean counterpart).[30]

The proposition underlying the Gillard Government's policy in 2011 was that Australian courts would be more likely to protect domestic public policy in cases brought by foreign investors against the Australian Government than international ISDS tribunals. Ancillary to this view was its supposition that domestic courts in Australia are more likely to

take account of national security legislation, administrative regulations, and prior domestic court decisions in Australia in so deciding, whereas international ISDS tribunals are less likely to so respond to such domestic requirements or expectations.

b) The Coalition Government's current policy

The current Liberal–National Coalition Government appears to have adopted a more tempered approach to ISDS. Whereas the Gillard Government took an in-principle approach in indicating that it would not agree to the incorporation of ISDS into its future BRTAs, the Coalition Government has indicated that it will take a contextual or 'case-by-case' approach regarding the incorporation of ISDS in future BITs.[31] In this spirit, it has adopted ISDS in its recent BIT with the Republic of Korea.[32] Illustrating the case-by-case approach, the agreement with Japan that soon followed did not include an ISDS regime.[33] This may, however, be of limited significance if an ISDS mechanism is ultimately included in the Trans-Pacific Partnership Agreement (TPPA), and if neither Japan nor Australia, as TPPA negotiating parties, are exempted from ISDS.

The fact that JAEPA does not include ISDS provisions intially gave rise to renewed criticisms of ISDS, including comments that it is no longer being sought by Asian countries.[34] However, this is far from established, particularly in light of the ISDS inclusions in KAFTA and ChAFTA. Certainly, ISDS is an important negotiating point in the TPPA, which remains one of the most significant regional agreements ever contemplated. As such, it is difficult to accept that Australia can abandon ISDS without repercussions.

(p.323) The Coalition Government's approach presumably presupposes that, in deciding whether to adopt ISDS on a case-by-case basis, the Australian Government will consider discrete national interests, such as the nature of national security, environmental, or public health protection in relation to each treaty it negotiates. It will also pay heed to the kind of treaty partner in issue, including the political system, economic development, and treatment accorded to foreign

investors by the particular negotiating partner State in the past.

While it appears superficially attractive, this case-by-case approach can be challenging for treaty partners, foreign investors, and domestic interests. The approach assumes that, while negotiating a treaty, the Australian Government will be able to determine in advance the nature of investor–State disputes that are likely to eventuate, and whether the Australian Government ought to negotiate for ISDS or domestic courts in anticipating such disputes. It is unclear how the Government will decide, in relation to inbound investment, whether investors from a particular State party will be more likely to invoke ISDS against Australia. It is also unclear, in relation to outbound investment, what protections courts of foreign States in Asia are likely to confer upon Australian outbound investors. Generally speaking, the nature of the State party, such as its developing economic status or high corruption index, and its historical actions are insufficient bases upon which to determine whether ISDS or domestic courts should be the chosen method of dispute settlement in the future. There is simply insufficient evidence to predict with any confidence how differently ISDS and domestic courts will resolve investor–State disputes in Asia.

The current contextual approach is nevertheless an improvement on the seemingly rigid stand articulated by the Gillard Government in its 2011 Policy. It at least facilitates negotiation around ISDS and domestic courts, and enables the negotiating parties to weigh up the risks and benefits of each. Admittedly, it does not eliminate predictive uncertainty, notably in how Australian or foreign domestic courts are likely to adjudicate public policy debates. It does however enable reflection on such factors as pre-existing national legislation in negotiating treaty States that demonstrate protectionism.

c) Australia’s regional investment interests

The countries of the Asia Pacific region have strong trade relations. In 2013, Australia’s top five two-way trading partners were China, Japan, the US, Korea, and Singapore.[35] Australia’s top three export markets were China, Japan, and South Korea,[36] and top three import sources were China, the

US, and Japan.[37] Indeed two-way trade with the Asian region accounted for 62.8 per cent of Australia's total trade in 2013.[38] Needless to say, China is integral to Australian trade and (p.324) investment, given that it is Australia's largest two-way trading partner. While there are healthy two-way trading links between Australia and the Asian region as well as the US, longer-term outbound investments in Asian countries by Australian investors could be improved,[39] and so could longer-term inbound investment by Asian investors in Australia.[40]

Australia should recognize its regional interests in formulating its policy on ISDS. In addition to having a considerable bearing on Australia's international trade and investment, it is noteworthy that countries in the Asian region have increasingly provided for ISDS protection in treaties, though admittedly some, such as India and Indonesia, continue to remain cautious.[41]

Significantly, the final version of the Australia–Japan trade agreement, hailed as being supremely advantageous for both the Australian and Japanese economies,[42] does not include an ISDS regime. Notably, however, Japan had requested ISDS at least until the tenth round of negotiations[43] and dispute settlement was still a point of concern until the sixteenth round.[44] Japan has also favoured ISDS in its other investment treaties in the recent past, preferring to allow for resolution of investor–State disputes through independent channels.[45] Ultimately, however, Japan agreed to conclude JAEPA without an ISDS regime, potentially because it considered that insisting on ISDS was not worth any additional concessions it may have to provide.[46] There has been suggestion that Japan was satisfied that Australia's rule of law tradition would secure sufficient protections for Japan's investors, rendering an ISDS regime unnecessary[47] (though this seems entirely speculative, particularly in light of Japan's earlier requests for ISDS).

As a result, whatever else may be extrapolated from the JAEPA negotiation process, it cannot be said that Japan now holds ISDS in disfavour. Its willingness to exclude ISDS from JAEPA shows at best that the economic and political advantages of

securing a trade and investment agreement with Australia were greater (p.325) than insistence on ISDS. The fact that Australia's legal system is generally regarded as being independent, transparent, and reliable may have given some comfort to Japanese negotiators, but this view is not likely to be universally convincing.

A converse illustration to JAEPA is the KAFTA concluded in December 2013, which does include ISDS provisions and upon which Korea reportedly insisted.[48] Given Korea's position as a key trading partner of Australia and the potential it offers for significant investment opportunities, it was certainly prudent for the Australian Government to endorse a balanced ISDS outcome.

Australia has also recently concluded a trade agreement with China,[49] which includes an ISDS regime. China is a particularly significant regional trading partner of Australia. It is a major investor in Australia and is heavily involved in its natural resources sector. While Australia's investment in China still lags behind other States in the region, in 2010 Australia's FDI in China reached AU$17 billion.[50] Although China only invested AU$19 billion in Australia at that time, this rate is three times higher than what it was in 2007.[51]

FDI flows from China into Australia are also growing exponentially and are making a major contribution to Australia's recent high economic growth, commonly referred to as the natural resources boom. Considering China's demand for natural resources, it is unlikely that this trend will be reversed in the near future as China acquires more of Australia's natural resources. Even more broadly, China's desire to increase its investments in Australia is seen in its insistence during the ChAFTA negotiations that the Foreign Investment Review Board (FIRB) threshold for investments from China should be increased to match the thresholds available to US and New Zealand investors (equivalent concessions were extracted by Japan and Korea as part of their respective agreements relating to investments by private entities in non-sensitive industries); this concession was granted in the final agreement.[52] The sticking point during negotiations was that much of the inbound investment into

Australia was likely to come from State-owned enterprises (SOEs), which China insisted should be treated in the same manner as private enterprises.[53] (p.326) Leading up to the finalization of the agreement, the Coalition Government indicated it was no longer averse to investment from SOEs;[54] however in the final agreement, the relaxation of the FIRB threshold was not accorded to investments by SOEs, this provision to be reviewed by the parties in three years' time.

Over the past two decades, China has shown a trend towards trade liberalization, even if this movement has been slow, at least according to some western countries.[55] The inclusion of ISDS in ChAFTA was understandable. Chinese investors have made a number of high-profile investments in Australia and it is reasonable to surmise that China wants to ensure independent protections for them.

On the flip side, while the Asian region has immense economic opportunities, Australia's outbound investment into some Asian countries is not without risks. According to the 2013 Transparency International Corruption Perceptions Index, the majority of countries in Asia scored between ten and fifty points out of a possible 100.[56] Other studies conducted by the World Justice Project provide similarly troubling assessments.[57] The World Bank's Ease of Doing Business rankings of East Asia and the Pacific paints an even bleaker picture: only four countries in the region managed to score in the top twenty, with other key regional economic partners of Australia falling behind by a significant margin.[58] While the methodology of these rankings is not without controversy,[59] these surveys portray a similar story: Asia is still lagging behind other parts of the world in the development of its legal institutions and in the protections accorded to foreign investors.

In the absence of ISDS, Australia's outbound investors located in Asia may encounter resistance in securing relief from regulation by host States, including before their local courts. While some investors may move their businesses to intermediary States to avoid the courts of partner States, many smaller Australian investors lack such mobility and will have to resolve their disputes in the local courts of their host

States.[60] Thus, one of the practical challenges that Australia faces, if it (p.327) remains determined to retire ISDS, lies in protecting its outbound investors in Asia who lack the capacity to protect themselves.

d) Australia not alone—Indonesia's apparent aversion to ISDS

Recently, Indonesia, another key regional player, has shown some aversion to the current state of its investment agreements and to ISDS in particular. Early in 2014, the Netherlands embassy in Jakarta announced that the Indonesian Government had informed the Netherlands that it intended to terminate the Netherlands–Indonesia BIT,[61] from 1 July 2015, which is when the BIT expires.[62] The Netherlands embassy also stated that the Indonesian Government had mentioned it intended to terminate all of its sixty-seven BITs.

In the aftermath of that announcement, there was widespread discussion around the intentions of the Indonesian Government and what may have motivated its decision to cancel the Netherlands BIT. It was proposed that, in part at least, the *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* cases[63] may have motivated the Indonesian Government to review its current treaty portfolio.[64] The Churchill claim, which has caused some concern in Indonesia, is for over $1 billion, not including interest.[65] Certainly, there have been emphatic calls for Indonesia to immediately withdraw from the ICSID and continue to treat BITs with caution.[66] Some of the reasons articulated are comparable to those expressed by the Australian Government as part of its 2011 Policy. These include equal treatment of foreign and domestic investors and the restraints placed on the Government as a result of having international claims lodged against it. More particularly, however, there is a view that, in light of the economic power it now has, Indonesia no longer needs to forsake its regulatory autonomy to attract foreign investment.

Termination of its BITs by Indonesia would not mean a complete withdrawal from all investment protection obligations and mechanisms. Existing investors would continue to be protected by the 'survival clauses' that have

been included (p.328) in many of the BITs. For example, under the Netherlands BIT, the investments under the BIT will be protected by a sunset period of fifteen years after the BIT's termination.[67] Further, even if all of its BITs were terminated, Indonesia would still be subject to its obligations under the ASEAN Comprehensive Investment Agreement and the ASEAN–Australia–New Zealand Free Trade Agreement.[68]

In any case, the more likely view is that Indonesia does not intend to withdraw from its regime of investment agreements altogether. It is undertaking a termination programme so that it can renegotiate its BITs with greater State protections. Indonesia is now economically stable and powerful enough to assert its regulatory autonomy. It has been suggested that Indonesia intends to renegotiate its BITs to provide greater capacity to regulate in the 'public interest for health, the environment or financial reasons'.[69] Again, Indonesia's motivations in this respect are analogous to Australia's position enunciated in its 2011 Policy Statement. As stated previously, the Australian Government made it clear that it would not limit its ability to legislate in the public interest. Despite having moved away from the 2011 Policy considerably, the Coalition Government elected in 2013 has expressed analogous sentiments about not restricting its ability to legislate in the public interest. Even the ISDS regime it recently negotiated as part of the KAFTA includes carve-outs to allow State parties some freedom of regulating in the public interest, subject to investment arbitrators construing those carve-outs restrictively.[70]

e) Regional concerns—the Trans-Pacific Partnership Agreement

The potential for a multilateral accord promised by the TPPA is a considerable one, not least because the TPP countries represent 39 per cent of the world GDP, account for 25.8 per cent of world trade, and, for Australia, include five of its top ten trading partners.[71]

There had been some optimism that the TPPA would be concluded by early 2015,[72] but this has not come to pass. After the latest meeting of Chief Negotiators in May 2015, followed by a meeting of the Ministers in July 2015, the agreement has not yet been finalized.

Indonesia is unlikely to join negotiations at this late stage, though it may seek to ratify it in its agreed form. Certainly, the TPPA poses a significant geopolitical (p.329) challenge for Australia, which is a negotiating party. The challenge lies in the contest between Australia potentially favouring domestic courts over ISDS and other TPPA member countries, in particular the US, favouring ISDS.[73] JAEPA, expressed by Australia and Japan as creating significant economic opportunities for both countries, has apparently been dismissed by the US as detracting from the TPPA.[74] The US has observed that the benefits created by JAEPA are 'significantly less ambitious' than those envisaged for the TPPA.[75]

Australia's new bilateral relationships with Asian countries have tended to reinforce a somewhat populist view that Australia does not need to worry about the TPPA, given it now has bilateral or regional treaties with most of the countries who are parties to the TPPA.[76] However, aside from the fact that Australia does not have trade agreements with Canada, Mexico, and Peru, all parties to the TPPA, the value of a multilateral regional accord should not be underplayed.

There is an indication that the TPPA negotiating parties are likely to favour the inclusion of an ISDS regime.[77] Officially, Australia commenced negotiating the TPPA with the understanding that it would be exempt from any ISDS provisions in the TPPA. It is difficult to speculate whether the Coalition Government will agree to ISDS in the TPPA, though it may do so, subject to securing trade and investment concessions from the treaty partners, such as gaining access to the US beef and dairy markets.

On the other hand, if pursued, an exemption for Australia from ISDS would not itself be extraordinary. Country-specific reservations and exemptions are part and parcel of multilateral negotiating processes. Furthermore, the parties negotiating the TPPA have rejected a one-size-fits-all TPPA in order to accommodate the domestic interests of negotiating States.[78] Thus, on the surface, the exemption (p.330) that Australia originally sought from ISDS could be justified in light of exemptions from other provisions in the TPPA potentially

sought by the other parties. Nevertheless, the costs of Australia securing an exemption from ISDS may outweigh its anticipated benefits.[79]

First, reservations and exemptions from treaties are often strategically determined by State parties to such treaties in general and by States seeking specific reservations and exemptions in particular. As a result, participating countries are likely to grant exemptions depending on the perceived benefit to them of doing so. However, a TPPA that is replete with country-specific exemptions can neutralize its value as an umbrella agreement, undermine its uniformity, and lead to multiple side-agreements that are inconsistent with it.

The potential drawback of a TPPA that obfuscates a one-size-fits-all agreement is that it will be downgraded to a loose framework agreement with multi-tiered exemptions and side agreements. Such an eventuality could seriously undermine its economic and legal stature as a multilateral agreement purporting to rival in part a faltering WTO. For many observers, the TPPA represents an attempt to reinvigorate the Doha Round of trade negotiations and promote greater harmonization among the various standards that were created in the spaghetti bowl of BRTAs. While the TPPA falls short of a WTO-style agreement, its proponents envisage that it will lead to greater harmony in trade and investment, offsetting disparities among pre-existing investment treaties, improving dispute resolution processes, and involving key States, including in Asia, in these decision-making processes.

IV. ISDS or Domestic Courts

A move away from ISDS does not automatically mean that foreign investors can have resort only to the domestic courts of host States, including in countries of the Asia Pacific. There are likely to be other avenues, both for dispute resolution and avoidance. These could include political risk insurance, diplomatic intervention by home States, investor–State contracts, as well as other mechanisms of mediation and negotiation that might be available in particular contexts. However, these avenues are likely to be onerous or inaccessible for many investors. In practice, therefore,

domestic courts are going to be the most likely alternative to ISDS.

Before setting out the debate briefly, it is worth reiterating that the contest is perhaps more formal than substantive. ISDS and domestic courts are not simply different forums, but rather have different tools available to them. As noted above, if investment disputes are to be resolved by domestic courts, as when foreign investors are required to submit investor–State disputes to the courts of the host State, (p.331) in a country such as Australia that subscribes to a dualist system, the courts would apply domestic law including its substantive law rules. They would not directly apply investor protections provided for by treaty except insofar as domestic laws incorporate international investment law, such as standards of protection embodied in investment treaties, into domestic law. As such, we truly are comparing apples and oranges.

Further, by choosing resort to domestic courts as the preferred manner of resolving investment disputes, a country such as Australia would presumably accept that foreign courts will apply their own laws to Australian investors in those foreign countries, whatever those laws may be. In declining to agree to ISDS in investment treaties, the Australian Government could not effectively draw a distinction between countries that apply a 'rule of law' jurisprudence that is comparable to that applied in Australia and those countries that do not subscribe to such a tradition.[80]

Certainly, ISDS is far from perfect and numerous objections can be raised with respect to it. Some of these criticisms were identified by the Australian Productivity Commission (APC) in its draft and final reports, on which the Gillard Government based its 2011 Policy. These included the large size of investor claims, the latitude of investment tribunals in determining the amount of compensation, the lack of rigorous rules governing the conduct of ISDS, the absence of an appeals process, and the threat of 'institutional biases and conflicts of interest, inconsistency and matters of jurisdiction, a lack of transparency and the costs incurred by participants'.[81] The APC concluded that 'experience in other countries

demonstrates that there are considerable policy and financial risks arising from ISDS provisions'.[82]

In addition, it could be argued there are numerous reasons for preferring resort to domestic courts over ISDS. First, on principled grounds, it could be said that investors ought to be subject to the territorial sovereignty of the State in which they invest.[83] Second, a domestic court of a State party is the appropriate forum to resolve an investment dispute, in the same manner as it resolves other disputes between that State and other private or corporate claimants.[84] Third, foreign (p.332) investors should not receive investment benefits beyond those provided to domestic investors. Such treatment is conceivably unfair, as is evidenced historically by the privileges accorded by less developed countries to multinational corporations at the expense of local subjects who were competitively disadvantaged.

Finally, domestic courts are bound by established forum procedures and rules of evidence to protect the rights of foreign investors in accordance with domestic public policy that usually includes a right of appeal to a higher court. Arguably, ISDS is not subject to comparable procedural and substantive constraints as domestic courts. Investment arbitrators may decide in favour of foreign investors on grounds that undermine the public interest of home States. There are no appeals from ISDS awards, except for an arbitrator's failure to exercise, or abuse of, jurisdiction (leading to a review by the ICSID Annulment Committee where ISDS is conducted under the ICSID).[85] Annulment proceedings are an extraordinary process and more limited in scope than appeals to a domestic court.

Attacking a plethora of domestic legal systems and courts is more challenging than impugning ISDS as a mechanism, especially where foreign investors may be subject to a multitude of domestic legal systems with divergent procedures and substantive investment jurisprudence. However, this multiplicity of domestic legal options is itself problematic, in forsaking uniformity among inevitably divergent legal systems including across Asia. These deficiencies of domestic legal systems stand starkly in contrast to ISDS institutions that seek

to limit the proliferation of international investment laws. As such, ISDS serves as a unifying framework within which multiple BITs are subject to largely uniform ISDS provisions that derive significantly from the global experience of foreign investors, as well as host and home States. Acting as a levelling force, ISDS is founded on principles, standards, and rules of investment jurisprudence that, formally at least, are not (p.333) ordinarily sublimated by domestic legal systems and rules of procedure. ISDS is also conceived as more certain and stable than a myriad of different domestic laws and rules that might otherwise govern direct foreign investment.[86]

Notwithstanding the absence of judicial precedent in ISDS as common lawyers conceive of it, ISDS is still likely to be more coherent than a multiplicity of different State laws applied by local courts to foreign investment. However difficult it is to identify cohesive ISDS principles out of ad hoc and sometimes unpublished arbitration awards, and however arbitrators may fragment standards of treatment under different BITs, ICSID and UNCITRAL arbitration have been used over a considerable period of time to resolve investment disputes in often complex investment cases.[87] That task of investment arbitration is accomplished notwithstanding the plethora of BITs in existence and their susceptibility to different kinds of interpretation.[88] Nor should institutions like the ICSID be blamed for inconsistent reasoning that is sometimes adopted by ISDS tribunals that, while guided by ICSID and UNCITRAL rules, exercise independent discretion in deciding investment disputes.

The principled argument that the domestic courts of sovereign States ought to decide investment disputes based on domestic laws and judicial procedures is offset by the observation that international arbitrators are also subject to domestic laws that are encompassed within a BIT or investor–State agreement. Far from being insulated from domestic laws and procedures, ISDS principles and standards of treatment accorded to foreign investors inhere not only in international jurisprudence, but both evolve from and are incorporated into domestic law as well.[89] As a result, ISDS arbitrators cannot summarily disregard domestic laws that are expressly or

impliedly integrated into applicable BITs or investor–State agreements.[90]

The rationale that domestic courts are expert in law including investment law is counterbalanced by the contention that investment arbitrators are expert in international investment law in a manner that domestic judges, even courts of (p.334) commercial jurisdiction, are not.[91] Even the rationale that domestic courts are subject to tried and tested rules of evidence and procedure is offset in part by the observation that investment arbitration is guided by ICSID or UNCITRAL rules that take into account the complexities of investment law. Insofar as the decisions of domestic courts are subject to appeal, the awards of investment arbitrators are subject to extraordinary challenge or annulment proceedings for non-compliance albeit constrained by limited powers of review.[92]

V. The Future of ISDS for Australia

What can be said in defence of ISDS is that, while it does not lead to judicial precedent as common lawyers conceive of it, ISDS is likely to be more stable in nature than a plethora of different local laws and procedures that domestic courts apply to foreign investment. However fragmentary may be the application of international standards of treatment to foreign investors and however difficult it may be to identify cohesive principles out of ad hoc and sometimes unpublished arbitration awards, an international investment jurisprudence has evolved, inconsistencies notwithstanding.[93] Given the multitude of BITs currently in existence and their disparate clauses, ICSID and UNCITRAL arbitrations have promoted the successful resolution of investment disputes in a series of complex cases. As such, ISDS has helped to develop a more cohesive construction of BITs internationally than has the jurisprudence of divergent domestic legal systems and their courts.

However, it cannot be contended that investment arbitration is beyond reproach. What can be said is that it has considerable practical value in resolving investment disputes, and has the capacity to be transformed and developed further. As such, it

would be profitable to endeavour to improve ISDS rather than abandon it.[94]

A preferable approach for a State like Australia would be to pursue a programme of multi-tiered, qualified access to ISDS including in its treaties with partner States in the Pacific Rim. This would be embodied in an overarching Australian BIT policy that would serve as a flexible template for negotiating FTAs and BITs, including with dominant States that have their own model BITs. Australia could also develop (p.335) model clauses to incorporate into its BITs that encourage dispute prevention and avoidance measures, such as requiring investor–State parties to undertake negotiations and/or conciliation prior to resorting to either domestic litigation or ISDS.

Australia should also develop model rules of procedure to apply during formal ISDS proceedings that include: setting limits on the standing of foreign investors to bring ISDS claims; requiring public notice of ISDS complaints; providing for public participation in ISDS proceedings; and requiring publication of ISDS awards. It may also design model BIT clauses that provide for interim measures; create budgetary limits on the costs of ISDS in order to avoid cost overruns; and address dilatory ISDS processes including lengthy adjournments. In addition to modification of the procedural rules regulating ISDS, Australia may provide for the stay of ISDS proceedings to allow for investor–State settlement. In addition, to ensure that ISDS proceedings do not produce absurd or unjust decisions, it could provide for bilateral challenge committees to hear challenges to ISDS decisions, such as on grounds of a denial of due process, including rules to govern the functioning of such challenge committees.[95]

This multi-tiered approach to resolving investor–State disputes has the advantage of allowing the Australian Government to redress many of the limitations associated with ISDS, while avoiding the problems arising from a complete rejection of it. For example, one of the broader benefits of resorting to illustrative BIT rules and clauses governing ISDS is a greater commitment to transparency, not only for foreign States and their foreign investors, but also for Australians expressing

their rights in a democracy, beyond protecting the economic interests of Australian investors abroad. A comprehensive BIT policy could also serve as a signal to both States and investors that Australia has adopted a balanced approach to dispute resolution in its BITs, including support for stable trade and investment relations, which it shares with other States and impacted investors.

Importantly, Australia's adoption of a BIT policy and illustrative BIT clauses could provide inducements for foreign investment in the domestic Australian economy such as by adopting a market-based definition of 'investment' and by espousing an investor-sensitive conception of a 'direct or indirect expropriation'. Conversely, it could provide for Australia's public interest defences to foreign investor claims in order to protect its predominately resource-based economy from foreign investor incursions.

Such a proposed BIT policy has strategic benefits for Australia, encouraging further economic integration between Australia and its key economic allies in the region. Such a policy would also make it easier for Australia to engage in TPPA negotiations in which the majority of members have opted for ISDS.

The purpose of the proposed BIT policy would be to identify Australia's preferred position in negotiating BITs—including BIT variations to meet specific (p.336) domestic and/or foreign party requirements—not unlike, but with more flexibility than, the US Model BIT. It would also assist Australian negotiators to frame BIT provisions, and would provide domestic courts and ISDS tribunals with a point of reference when applying treaties to specific investor–State disputes. In addition, it would enable Australia to negotiate for its preferred dispute avoidance provisions in concluding BITs with other States.

The authors have previously made specific recommendations on the framework of a potential BIT policy.[96] While the adoption of a detailed BIT policy is encouraged, the policy should be neither uncompromising nor mechanically applied to all of Australia's ensuing treaties. Some States, like the US, strongly adhere to a Model BIT template in negotiating BITs

with partner States. Other States, like China, sometimes diverge extensively from their Model BITs when they negotiate individual BITs. This was the case in China's BIT with Canada, concluded in 2012,[97] and will most likely be repeated in China's investment treaty negotiations with the EU, launched in November 2013.[98]

Australia should adopt a middle position by utilizing a BIT policy that includes illustrative and non-binding BIT clauses, given the likelihood that it will conclude negotiations with different kinds of BIT partners in the foreseeable future. Thus, Australia's BIT policy should not be drafted as a declaration upon which Australia's national identity is inextricably dependent.

Furthermore, the policy should be subject to ongoing examination and refinement. In particular, to ensure that the proposed BIT policy is properly adopted and implemented, it would need to be monitored on a continuing basis in light of its application to particular BITs and the subsequent interpretation of those BITs by domestic courts and ISDS tribunals. The policy would also need to be regularly re-evaluated in light of its impact on national policy and the flow of FDI into and out of Australia.

VI. Conclusion

This chapter has discussed a trend of oscillation between ISDS and domestic courts to resolve investment disputes, with a perceptible shift towards a preference for the (p.337) latter, both within and outside the Asia Pacific region. This shift is most noticeable in the Policy Statement adopted by the Australian Government in 2011, which the subsequent Coalition Government has tempered to apply on a case-by-case basis. This has led to the exclusion of ISDS from the 2014 JAEPA and its potential exclusion from the impending TPPA. Further marking this shift away from ISDS is Indonesia's decision in 2014 to terminate its BIT with the Netherlands and to undertake a termination and renegotiation programme in general, in light of its recent experiences with ISDS.

The central argument in this chapter is not that ISDS is inherently superior to litigation before domestic courts of host States, or the converse. Indeed, both options have limitations, whether in protecting foreign investors from regulation by host States or in insulating host States from regulating in the public interest. All other factors being constant, domestic courts on balance are more likely than ISDS tribunals to recognize national security, public health, and environmental protection invoked by host States. Conversely, ISDS tribunals, on balance, are more likely to recognize and apply investor protections in BITs that favour foreign investors. However, these likelihoods are nowhere close to being guarantees. Much will depend on the nature of the BIT or FTA in issue, the State parties to it, and the manner in which domestic courts or ISDS tribunals apply the protections available.

One central argument in this chapter is that, notwithstanding its imperfections, ISDS has key systemic advantages over domestic courts in deciding investor–State disputes, all other factors being constant. These include an extensive ISDS jurisprudence that has evolved to regulate international investment practice; specialist institutions such as the ICSID whose rules regulate such practice; and expert ISDS tribunals that decide investor–State disputes between a range of foreign investors and host States. Nevertheless, these benefits of ISDS are not self-determining. Nor are they invariably superior to determinations by domestic courts. The second central argument, therefore, is in favour of a BIT policy that includes different and graduated dispute resolution options, not limited to either domestic courts or ISDS.

The chapter concludes with recommendations for a graduated method of resolving investor–State disputes. Whether States will adopt variants of these recommendations will depend on how they perceive economic, social, and political benefits arising from such a graduated approach in negotiating BITs and FTAs. The goal should be to ensure that investment policy is devised in a manner that pursues sustainable development as outlined in the IPFSD.

The evidence to date is that some States in the Pacific Rim, such as Australia, may resist ISDS selectively in favour of

domestic courts, asserting that domestic courts are more likely to comply with the rule of law, to recognize domestic public policy, and to avoid the allegedly high costs of ISDS proceedings. Other States, such as Indonesia, are likely to resist ISDS due to the more explicit concern that inbound investors will secure ISDS remedies that undermine domestic public policy, and lead to crippling awards against host States. This concern, of losing ISDS cases to foreign investors, is not entirely novel, tracing back to positions (p.338) adopted by Ecuador, Venezuela, and Bolivia between 2008 and 2010, whereby they all rejected ISDS. What is different from those cases is the economic, social, and political context in which the Pacific Rim states find themselves today, including investment disputes that have taken place since 2010, as well as prospective future developments that may include one of the largest trade pacts attempted in the Pacific region, the Trans-Pacific Partnership.

Notes:

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(1) See LE Trakman, ‘Choosing Domestic Courts over Investor-State Arbitration: Australia’s Repudiation of the Status Quo’ (2012) 35 UNSW LJ 979; LE Trakman, ‘The ICSID under Siege’ (2012) 45 Cornell Intl LJ 603.

(2) For commentary on these events, as well as investment arbitration in Latin America generally, see S Appleton, *Latin American Arbitration: The Story Behind the Headlines*, International Bar Association <www.ibanet.org/Article/Detail.aspx?ArticleUid=78296258-3B37-4608-A5EE-3C92D5D0B979> accessed 20 October 2014.

(3) See ICSID in Crisis: Straight-Jacket or Investment Protection?’ *Bretton Woods Project* (10 July 2009) <www.brettonwoodsproject.org/art-564878>. See also S Hamamoto and L Nottage, ‘Foreign Investment in and out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution’ (2011) 5

Transn Disp Mgmt <www.transnational-dispute-management.com/article.asp?key=1766> accessed 11 July 2014.

([4]) See Hamamoto and Nottage (n 3).

([5]) Netherlands Embassy in Jakarta, Indonesia, 'Termination Bilateral Investment Treaty' <http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html> accessed 11 July 2014.

([6]) Department of Foreign Affairs and Trade (Australia), 'Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity' (April 2011).

([7]) Korea–Australia Free Trade Agreement (signed 8 April 2014, entered into force 12 December 2014) (KAFTA) [2014] ATNIF 4, ch 11; China–Australia Free Trade Agreement (signed 17 June 2015, not yet entered into force) ch 9.

([8]) Department of Foreign Affairs and Trade (Australia), 'Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)' <http://dfat.gov.au/fta/isds-faq.html> accessed 11 July 2014. For comments on the Policy by the Coalition Government elected in 2013 see R Callick, 'Korea Ready to Talk Turkey After FTA Hurdle Removed' *The Australian* (1 November 2013) <www.theaustralian.com.au/business/economics/korea-ready-to-talk-turkey-after-fta-hurdle-removed/story-e6frg926-1226750841630#> accessed 11 July 2014.

([9]) Japan–Australia Economic Partnership Agreement (signed 8 July 2014, entered into force 15 January 2015) (JAEPA) [2014] ATNIA 14. See also Department of Foreign Affairs and Trade (Australia), 'Conclusion of Negotiations' <www.dfat.gov.au/fta/jaepa/> accessed 11 July 2014.

([10]) Department of Foreign Affairs and Trade (Australia), 'Australia's Trade Agreements' <www.dfat.gov.au/fta/> accessed 11 July 2014.

([11]) See UNCTAD, Investment Policy Framework for Sustainable Development (IPFSD) <http://unctad.org/en/

Pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/IIA-IPFSD.aspx> accessed 20 October 2014.

([12]) See R Abbott, F Erixon, and M Francesca Ferracane, 'Demystifying Investor-State Dispute Settlement (ISDS)' (2014) ECIPE Occasional Paper 5/2014, <www.ecipe.org/media/publication_pdfs/OCC52014__1.pdf>; Seventh Annual Forum of Developing Countries Investment Negotiators, sponsored by the International Institute for Sustainable Development, the Ministry of Foreign Affairs for Indonesia and the South Centre, Jakarta, 4–6 November 2013 <www.iisd.org/pdf/2013/7th_annual_forum_report.pdf>.

([13]) On the extent to which global economic and political norms are adopted regionally, such as in Asia, or lead to norm diffusion, see D Capie, 'When Does Track Two Matter? Structure, Agency and Asian Regionalism' (2010) 17 Rev Intl Pol Econ 291.

([14]) See Trakman, 'Choosing Domestic Courts' (n 1); LE Trakman, 'Investor State Arbitration or Local Courts: Will Australia Set a New Trend?' (2012) 46 JWT 83; L Nottage, 'Throwing the Baby Out with the Bathwater: Australia's New Policy on Treaty-Based Arbitration and its Impact in Asia' (2013) 37 Asian Stud Rev 253; M Burch, L Nottage, and B Williams, 'Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century' (2012) 35 UNSW LJ 1013.

([15]) See L Nottage and R Weeramantry, 'Investment Arbitration in Asia: Five Perspectives on Law and Practice (2012) 28(1) Arb Int 19.

([16]) J Kurtz, 'Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication' (2012) 27(1) ICSID Rev 65; Trakman 'Investor State Arbitration or Local Courts' (n 14).

([17]) On treaty provisions for ISDS across Asia, including a critique of the practice, by the Chief Justice of Australia, see R S French, 'Investor State Dispute Settlement: A Cut Above the Courts?', Speech at the Supreme and Federal Courts Judges' Conference (Darwin 9 July 2014) <www.hcourt.gov.au/assets/

publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>.

([18]) See LE Trakman, 'Investor-State Arbitration: Evaluating Australia's Evolving Position' (2014) 15 J World Inv & Trade152, 173.

([19]) See Trakman (nn 1, 14, 18). For a general overview of this trend see M Waibel (ed), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

([20]) ibid 1–2.

([21]) See L Nottage, 'Investor-State Arbitration Policy and Practice after *Philip Morris Asia v Australia*' in LE Trakman and N Ranieri (eds), *Regionalism in International Investment Law* (OUP 2013) ch 15, 452.

([22]) K Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2012) ch 26, 606.

([23]) ibid.

([24]) UNCTAD (n 11) 40.

([25]) On Philip Morris' ongoing action against Australia under the Australia–Hong Kong Free Trade Agreement, see Philip Morris International News Release, 'Philip Morris Asia Initiates Legal Action Against the Australian Government Over Plain Packaging' (27 June 2011) < www.pmi.com/eng/media_center/press_releases/pages/PM_Asia_plain_packaging.aspx> accessed 11 July 2014. On Philip Morris' unsuccessful action against the Australia Government, see *Philip Morris Limited and Prime Minister* [2011] AATA 556. See also *JT International SA v Commonwealth of Australia* [2012] HCA 43. On the earlier claim brought against the Republic of Uruguay under the Switzerland–Uruguay BIT, see *FTR Holdings SA (Switzerland) v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7,

Request for Arbitration (19 February 2010). FTR Holding SA is a subsidiary of Philip Morris International Inc (PMI). PMI's Operation's Centre is in Switzerland. See also AD Mitchell and SM Wurzberger, 'Boxed in? Australia's Plain Tobacco Packaging Initiative and International Investment Law' (2011) 27 Arb Int 623; T Voon and A Mitchell, 'Implications of WTO Law for Plain Packaging of Tobacco Products' in A Mitchell, T Voon, and J Liberman (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar 2012) ch 6, 109.

([26]) WTO, *Australia: Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*' (9 May 2014) WT/DS434 <www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm> accessed 11 July 2014.

([27]) Nottage (n 14) 257.

([28]) On the PBS see Department of Health (Australia) 'Pharmaceutical Benefits Scheme: PBS News Updates' <www.pbs.gov.au>accessed 11 July 2014.

([29]) G Chan, 'Leaked Trade Deal Terms Prompt Fears for Pharmaceutical Benefits Scheme' *The Guardian* (11 June 2015) <www.theguardian.com/business/2015/jun/11/pacific-trade-deal-raises-fears-over-future-of-pharmaceutical-benefits-scheme> accessed 16 August 2015.

([30]) See LE Trakman, 'National Good No Issue in ASX Deal' *The Australian* (2 November 2010) <www.theaustralian.com.au/business/national-good-no-issue-in-asx-deal/story-e6frg8zx-1225946362212> accessed 11 July 2014.

([31]) See 'Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)' (n 8).

([32]) See KAFTA (n 7) ch 11 (Investment).

([33]) P Martin, 'ISDS: The Trap that Australia–Japan Free Trade Agreement Escaped' *Sydney Morning Herald* (10 April 2014) <www.smh.com.au/federal-politics/political-opinion/isds-the-

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([34]) See Martin ibid. See also P Martin, 'Free Trading Cards Laid on the Table, but Beware the Ace Up the Sleeve' *Sydney Morning Herald* (9 April 2014) <www.smh.com.au/business/free-trading-cards-laid-on-the-table-but-beware-the-ace-up-the-sleeve-20140408-36b6v.html> accessed 11 July 2014.

([35]) Department of Foreign Affairs and Trade (Australia), *Trade at a Glance 2014*, 5 <http://dfat.gov.au/about-us/publications/trade-investment/trade-at-a-glance/trade-at-a-glance-2014/Pages/trade-at-a-glance-2014.aspx> accessed 16 August 2015.

([36]) ibid 20.

([37]) ibid 24.

([38]) ibid 27.

([39]) ibid 32.

([40]) ibid 36.

([41]) LE Trakman and K Sharma, 'Locating Australia on the Pacific Rim: Trade, Investment and the Asian Century' (2015) Transn Disp Mgmt 1 (online at <www.transnational-dispute-management.com/article.asp?key=2178> accessed 15 August 2015); Nottage (n 11) 257.

([42]) See Crowe (n 27).

([43]) Department of Foreign Affairs and Trade (Australia) 'Newsletter Update 10: Australia-Japan Free Trade Agreement, Tenth Negotiating Round' (17–25 November 2012) <www.dfat.gov.au/fta/jaepa/newsletters/update_10.html> accessed 11 July 2014.

([44]) Department of Foreign Affairs and Trade (Australia) 'Sixteenth round of negotiations—13–15 June 20' <www.dfat.gov.au/fta/jaepa/#news> accessed 11 July 2014.

([45]) See Agreement between the Government of Malaysia and the Government of Japan for an Economic Partnership (signed 13 December 2005, entered into force 13 July 2006) Art 85; Agreement between Japan and the Republic of Indonesia for an Economic Partnership (signed 20 August 2007, entered into force 1 July 2008) Art 69; Comprehensive Economic Partnership Agreement between Japan and the Republic of India (signed 16 February 2011, entered into force 1 August 2008) Art 96. Japan's FTAs are available at Ministry of Foreign Relations of Japan, 'Japan–Asia Relations' <www.mofa.go.jp/region/asia-paci/index.html> accessed 11 July 2014. See also, Hamamoto and Nottage (n 3).

([46]) L Nottage, 'Investor–State Arbitration: Not in the Australia–Japan Free Trade Agreement, and Not Ever for Australia?' (2014) 19 J Japanese L 37.

([47]) Martin, 'Free Trading Cards' (n 33).

([48]) See Callick (n 8).

([49]) See ChAFTA (n 7) <http://dfat.gov.au/trade/agreements/chafta/official-documents/Pages/official-documents.aspx> accessed 16 August 2015.

([50]) Australian Government, *Australia in the Asian Century, Foreign Direct Investment Fact Sheet*, (October 2012) <www.asiancentury.dpmc.gov.au/sites/default/files/fact-sheets/20.-Foreign-investment-in-Australia.pdf> accessed 11 July 2014.

([51]) ibid.

([52]) See M Janda, 'Investment Threshold Lifted above $1b under Korea–Australia FTA' *ABC News* (17 February 2014) <www.abc.net.au/news/2014-02-17/government-releases-details-of-korea-australia-fta/5264840> accessed 11 July 2014; M Kenny and P Wen, 'Japan, Korea and Now a Free Trade Deal with China is in Sight' *Sydney Morning Herald* (10 April

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([53]) K Murphy, 'Tony Abbott Goes to China "to be a Friend", Not to Chase Deals' *The Guardian* (10 April 2014)<www.theguardian.com/world/2014/apr/10/tony-abbott-goes-to-china-to-be-friend-not-chase-deals> accessed 11 July 2014.

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([56]) See Transparency International, *Corruption Perceptions Index 2013* < http://cpi.transparency.org/cpi2013/results/> accessed 11 July 2014.

([57]) See World Justice Project, *WJP Rule of Law Index 2014* < http://data.worldjusticeproject.org/> accessed 11 July 2014.

([58]) See International Finance Corporation and the World Bank, 'Economy Rankings' *Doing Business* (June 2013) <www.doingbusiness.org/rankings> accessed 11 July 2014.

([59]) See T Thompson and A Shah, 'Transparency International's Corruption Perceptions Index: Whose Perceptions are they Anyway?' World Bank Discussion Draft 2005 <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/TransparencyInternationalCorruptionIndex.pdf> accessed 11 July 2014.

([60]) Investors may base these decisions on various grounds, including but not limited to corruption, transparency, and rule of law indices: see (nn 58–60).

([61]) Agreement between the Government of the Republic Indonesia and the Government of the Kingdom of the Netherlands on Promotion and Protection of Investment (signed 6 April 1994, entered into force 1 July 1995) ('Netherlands–Indonesia BIT').

([62]) 'Termination Bilateral Investment Treaty' (n 5).

([63]) ICSID Case No ARB/12/14 and 12/40 <www.italaw.com/cases/1479> accessed 11 July 2014.

([64]) C Tevendale and V Naish, 'Indonesia Indicates Intention to Terminate all of its Bilateral Investment Treaties?' *Herbert Smith Freehills Dispute Resolution* (20 March 2014) <http://hsfnotes.com/arbitration/2014/03/20/indonesia-indicates-intention-to-terminate-all-of-its-bilateral-investment-treaties/> accessed 11 July 2014; B Bland and S Donnan, 'Indonesia to Terminate More Than 60 Bilateral Investment Treaties' *Financial Times* (26 March 2014) <www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html?siteedition=uk#axzz36C9e5Oos> accessed 11 July 2014.

([65]) Tevendale and Naish (n 65).

([66]) H Juwana, 'Indonesia Should Withdraw from the ICSID Now!' *Jakarta Post* (2 April 2014) <www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html> accessed 11 July 2014.

([67]) Tevendale and Naish (n 65).

([68]) ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 29 March 2012); Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area (signed 27 February 2009, entered into force 1 January 2010) [2010] ATS 1.

([69]) M Ewing-Chow and JJ Losari, 'Indonesia is Letting its Bilateral Treaties Lapse so as to Renegotiate Better Ones' *Financial Times* (15 April 2014) <www.ft.com/intl/cms/s/0/20c6c518-c16c-11e3-97b2-00144feabdc0.html?siteedition=intl#axzz34NvIWeHB> accessed 11 July 2014.

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([73]) See MK Lewis, 'The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?' (2011) 34 Boston College Intl & Comp L Rev 27, 34; P Ranald, 'The Trans-Pacific Partnership Agreement: Contradictions in Australia and in the Asia Pacific Region' (2011) 22(1) Econ Lab Relat Rev 81. On the US negotiating position generally, see D Gantz, 'Trans-Pacific Partnership Negotiations: Progress, But No End in Sight' *Kluwer Arbitration Blog* (22 June 2014) <kluwerarbitrationblog.com/blog/2012/06/22/trans-pacific-partnership-negotiations-progress-but-no-end-in-sight/> accessed 11 July 2014; see also the US position on ISDS generally: Office of the United States Trade Representative, 'The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors' (27 March 2014) <www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors> accessed 11 July 2014.

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([75]) ibid.

([76]) Martin 'Free Trading Cards' (n 33).

([77]) B Cubitt, 'Potential Investor-State Dispute Settlement Provisions in Trans-Pacific Partnership Agreement—A Change in Policy for Australia?' *Kluwer Arbitration Blog* (14 February 2014) <http://kluwerarbitrationblog.com/blog/2014/02/14/potential-investor-state-dispute-settlement-provisions-in-trans-pacific-partnership-agreement-a-change-in-policy-for-australia/> accessed 11 July 2014.

([78]) State-by-state negotiations notwithstanding, each 'round' of TPPA negotiations includes all participating countries. The most recent round of TPP Negotiations took place in Ottawa, Canada, from 3 to 12 July 2014. See further LE Trakman, 'The Transpacific Partnership Agreement: Significance for International Investment' (2013) 4(4) J Intl Comm L 1.

([79]) For arguments in support of Australia opting out of investor–State arbitration see K Tienhaara, 'Submission to the Department of Foreign Affairs and Trade: Investor-State Dispute Settlement in the Trans-Pacific Partnership Agreement' <www.dfat.gov.au/fta/tpp/subs/tpp_sub_tienhaara_100519.pdf> accessed 11 July 2014.

([80]) LE Trakman, 'Foreign Direct Investment: An Australian Perspective' (2010) 13 Intl Trade & Bus L Rev 31, 39–43. See also T Westcott, 'Foreign Investment Issues in the Australia–United States Free Trade Agreement' (Summer 2004–05) Economic Roundup 69 <http://archive.treasury.gov.au/documents/958/PDF/06_Foreign_investment_policy_AUSFTA.pdf> accessed 11 July 2014.

([81]) Productivity Commission, 'Australian Government, Bilateral and Regional Trade Agreements: Final Research

Report' (13 December 2010) 272 <www.pc.gov.au/projects/study/trade-agreements> accessed 11 July 2014.

([82]) ibid 274.

([83]) On the complexity of sovereignty in international investment law, see, for example, W Shan, P Simons, and D Singh, *Redefining Sovereignty in International Economic Law* (Hart 2008) (see especially Part Four for commentary on the complexity of sovereignty in international investment law); R Stumberg, 'Sovereignty by Subtraction: The Multilateral Agreement on Investment' (1998) 31 Cornell Intl L J491, 503–04, 523–25. See too RH Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (CUP 1990); JH Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (CUP 2000); M Reisman, 'International Arbitration and Sovereignty' (2002) 18 Arb Intl 231; R Jennings and A Watts (eds), *Oppenheim's International Law* (Longman 1992) 927.

([84]) On these arguments in relation to the Australia–United States Free Trade Agreement, see Trakman, 'Foreign Direct Investment: An Australian Perspective' (n 81), 48–53; Westcott (n 81).

([85]) On the absence of an appeal from ICSID arbitration, see Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') Art 53(1). Art 53 provides: 'The award…shall not be subject to any appeal or to any other remedy except those provided for in this Convention.' The most significant remedy under the ICSID is the annulment of an award under Art 53. The ICSID provides instead for a review of an investment award by an Annulment Committee which is set up specifically for that purpose, with the power to modify or nullify an ICSID award on limited procedural grounds under Art 75 of the ICSID Convention. Either party can request that the award be annulled. However, the grounds for such a challenge are restricted and fall short of an appeal. They include that:

((1)) the ICSID tribunal was not properly constituted;

((2)) the tribunal manifestly exceeded its powers;
((3)) there was corruption on the part of a tribunal member;
((4)) there was a serious departure from a fundamental rule of procedure; or
((5)) the award failed to state the reasons on which it was based.

ICSID Annulment Committees traditionally have interpreted these grounds for a challenge liberally, permitting a series of challenges, although such challenges have dissipated in recent years. Resort to domestic courts is not an option under the ICSID. See ICSID Convention, Art 75. For ICSID documents generally, see <http://icsid.worldbank.org/ICSID/Index.jsp> accessed 21 October 2014. See also J Crawford and K Lee, ICSID Reports (2004) vol 6. On the ICSID Additional Facility, see <http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp.> accessed 21 October 2014.

([86]) Vandevelde writes that from 1959 to 1969 only seventy-five BITs were concluded. During the 1970s, nine BITs were negotiated each year; that rate more than doubled in the 1980s and has been increasing geometrically ever since then: see K Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis J of Intl L & Poly157, 172. See also UNCTAD 'World Investment Report 2010' (24 June 2014) UNCTAD/WIR/2014, xxv <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=937> accessed 11 July 2014.

([87]) On such authorities, see, for example, M Sornarajah, 'The Case against a Regime on International Investment Law' in Trakman and Ranieri (n 21) ch 4, 59; C Schreuer and R Dolzer, *Principles of International Investment Law* (OUP 2008), ch 1; SW Schill, *The Multilateralization of International Investment Law* (CUP 2009) chs 1–2.

([88]) See, A Antonietti, 'The 2006 Amendments of the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21 ICSID Rev 427; E Baldwin, M Kantor, and M Nolan, 'Limits to Enforcement of ICSID Awards' (2006) 23 J

Intl Arb 1 (discussing ‘tactics’ that may be employed in attempts to ‘delay’ or ‘avoid’ compliance with ICSID Awards).

([89]) See W Shan, P Simons, and D Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart 2008) ch 11 (Shan), ch 17 (Schneiderman).

([90]) See, C Schreuer, *The ICSID Convention: A Commentary* (CUP 2001) 357.

([91]) On the case for investor–State arbitration, see generally C Dugan, D Wallace, and N Rubins, *Investor-State Arbitration* (OUP 2008); P Muchlinski, F Ortino, and C Schreuer (eds), *Oxford Handbook of International Investment Law* (OUP 2008); C McLachlan, L Shore, and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2008); P Kahn and TW Walde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff 2007); G Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007); RD Bishop, J Crawford, and WM Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer 2005); T Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005); N Horn (ed), *Arbitrating Foreign Investment Disputes* (Kluwer 2004).

([92]) On the ICSID, see (n 87).

([93]) See (n 89).

([94]) See UNCTAD (n 11), 43: The IPFSD recognized that ‘the ISDS system has more recently displayed serious shortcomings’ and proposed a number of ways to reform it. But see 44, where the IPFSD points out that ‘no ISDS’ or ISDS as a last resort may be appropriate in certain situations.

([95]) On such a challenge process, see UNCTAD, ‘Reform of Investor-State Dispute Settlement: In Search of a Roadmap’ *IIA Issues Note* 4 <unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf> accessed 11 July 2014.

([96]) See LE Trakman and K Sharma, (n 40); Trakman, 'Choosing Domestic Courts' (n 1).

([97]) The China–Canada Bilateral Investment Treaty was concluded in September 2012, although Canada has not yet adopted it. See Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, agreed 9 September 2012, <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx?lang=eng> accessed 11 July 2014. See also 'Chinese premier urges Canada to approve investment treaty' *Xinhuanet* (28 October 2013) <http://news.xinhuanet.com/english/china/2013-10/18/c_132811261.htm> accessed 11 July 2014.

([98]) See P Bentley and F Schoneveld, 'A Giant Leap: EU-China Bilateral Investment Treaty Negotiations to Be Launched Formally' *National Law Review* (23 November 2013) <www.natlawreview.com/article/giant-leap-eu-china-bilateral-investment-treaty-negotiations-to-be-launched-formally> accessed 11 July 2014.