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Investment Treaty Arbitration Policy in Australia, New Zealand and Korea?

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As in some developing countries and more recently some developed countries worldwide and in the Asian region, Australia has faced significant internal opposition and public debate especially over treaty-based investor-state dispute settlement (ISDS). As outlined in ***Part II(1)****, concerns have re-emerged and escalated since the first-ever claim was brought against Australia regarding its tobacco plain packaging legislation, in 2011 by Philip Morris Asia under an old BIT with Hong Kong. However, Australia signed bilateral FTAs with Korea in 2014 and with China in 2015, including ISDS protections, prompting several sets of parliamentary inquiries (****Part II(2)****).*

Australia's close trading partner, New Zealand, had already concluded an FTA with China in 2008 that included more expansive ISDS-backed investor protections. In 2015, the New Zealand Parliament has been debating ratification of its own FTA with Korea, with ISDS also now attracting growing scrutiny, as elaborated in ***Part III*** *below.*

In both bilateral FTA negotiations, the present Korean government seems to have reverted to a strong preference for concluding investment agreements with extensive ISDS protections, despite public and parliamentary debate around 2011 in the context of ratifying its FTA with the United States. As mentioned briefly in the concluding ***Part IV****, Korea's stance has significant implications for the future trajectory of treaty-based ISDS – and indeed international arbitration more generally – in the Asia-Pacific region, and perhaps even globally.*

Key Words : Investment Treaty Arbitration, ISDS, Australia, New Zealand, Korea

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Ⅰ. Introduction

Widespread public debate over treaty-based investor-state dispute settlement (ISDS), especially binding investor-state arbitration (ISA), continues to escalate. Globally, for several years developing countries in South America have been reassessing their bilateral investment treaties (BITs) containing ISDS provisions. Some have even withdrawn from the framework 1965 Washington Convention establishing the International Centre for the Settlement of Investment Disputes (ICSID), which further facilitates ISA proceedings and enforcement of awards.[1)]

More recently, among developed countries, the European Union (EU) is developing a new template to frame negotiations particularly with the United States (US), for the Trans-Atlantic Trade and Investment Partnership (TTIP).[2)] Disparate critics of ISDS argue that foreign investors do not need to be able to make direct claims against host states based on substantive commitments set out in international treaties, but instead can rely on protections provided to all (local and foreign) investors through national courts.[3)] In response, international law specialists argue that shared international norms should be followed, providing a back-up if national law falls short even in developed countries, and that investment treaty commitments reinforced by ISDS do not overly impinge on state sovereignty and capacity to regulate in the national interest.[4)]

1) Ricardo Dalmaso Marques and Pinheiro Neto Advogados, "Notes on the Persistent Latin American Countries' Attitude Towards Investment Arbitration and ICSID", (July 24, 2014), available at 〈http://kluwerarbitrationblog.com/blog/2014/07/24/some-notes-on-the-latin-american-countries-attitude-towards-investment-arbitration-and-icsid/〉 (last visit on July 20, 2015).

2) Cecilia Malmström, "European Commission Blog Post: Investments in TTIP and beyond - towards an International Investment Court", (May 5, 2015), available at 〈https://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en〉 (last visit on 20 July, 2015).

3) Alliance for Justice, "ISDS Letter", (2015), available at 〈http://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf〉 (last visit on July 20, 2015).

In the Asian region, major economies including Thailand, Vietnam and India have never ratified the ICSID Convention, although they have agreed to BITs, or more recently investment chapters in Free Trade Agreements (FTAs), which do provide for ISDS enforceable mainly through the 1958 New York Convention.[5] India released a draft Model BIT this year, to frame its future treaty negotiations. If approved, it would drastically limit access to ISDS (by requiring the foreign investor first to get its home state to obtain further consent from the home state) as well as restricting the substantive protections offered to foreign investors.[6] Indonesia declared last year that it would not be renewing its BIT with the Netherlands, and would similarly seek to review provisions in other BITs as their terms expired, based on a new set of preferred provisions. Some have even called for Indonesia to withdraw from the ICSID Convention.[7] These developments are partly in reaction to recent claims brought against both Indonesia and India under older BITs respectively with Australia.[8]

Australia itself faced significant internal opposition and public debate especially over ISDS, as explained further in **Part II** below. This has re-emerged and escalated since the first-ever claim was brought against Australia regarding its tobacco plain packaging legislation, in 2011 by Philip Morris Asia under another older BIT with Hong Kong. The international tobacco group, founded in the US, is claiming a very large sum for "expropriation" of intellectual property rights and violation of "fair and equitable treatment". The 1993 BIT lacks detailed provisions on such core substantive protections or indeed an express general exception for bona fide public health measures, as found in other treaties (especially FTAs) concluded subsequently by Australia, but the

4) "An open letter about investor-state dispute settlement", (April, 2015), available at 〈https://www.mcgill.ca/fortier-chair/isds-open-letter〉 (last visit on July 20, 2015).

5) 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 *International Investment Law,* Marc Bungenberg, Joern Griebel, Stephan Hobe and August Reinisch (eds.), Hart, 2015, p. 283 at p. 297; Vivienne Bath and Luke Nottage, "Asian Investment and the Growth of Regional Investment Agreements," in *Routledge Handbook of Asian Law,* Christoph Antons (ed.), Routledge, forthcoming 2016.

6) "Draft Indian Model Bilateral Investment Treaty Text", (2015), available at 〈https://mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text/〉 (last visit on July 20, 2015).

7) Antony Crockett, "Indonesia's Bilateral Investment Treaties: Between Generations?", *ICSID Review,* Vol. 30 No. 2, 2015, p. 437.

8) Luke Nottage, "Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis and Regional Implications", *Transnational Dispute Management,* Vol. 1, 2015, available at 〈http://ssrn.com/abstract=2424987〉.

Australian government is still vigorously defending the claim based on general principles of treaty interpretation and customary international law.[9] Despite this high-profile claim, Australia went on to sign bilateral FTAs with Korea in 2014 and with China in 2015, including ISDS. Its close trading partner, New Zealand, had already concluded an FTA with China in 2008 that included more expansive ISDS-backed investor protections. In 2015, the New Zealand Parliament has been debating ratification of its own FTA with Korea, with ISDS attracting more scrutiny, as outlined in **Part Ⅲ** below.

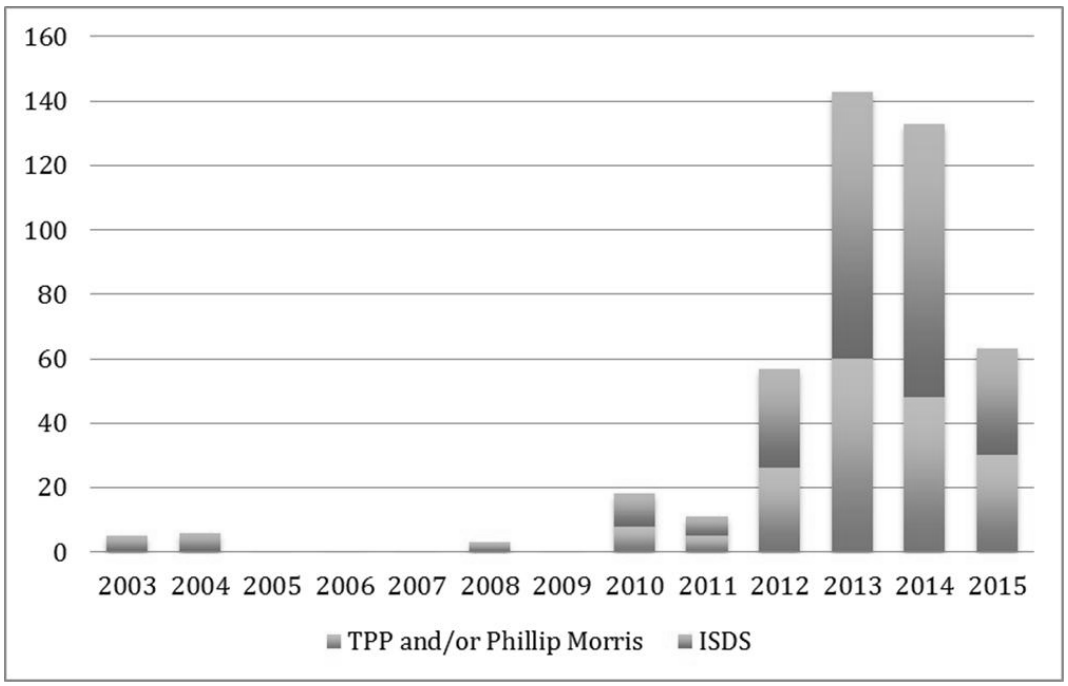
In both bilateral FTA negotiations, the present Korean government seems to have reverted to a strong preference for concluding investment agreements with extensive ISDS protections, as mentioned briefly in the concluding **Part Ⅳ**. Such a stance has significant implications for the future trajectory of ISA – and indeed international arbitration more generally – in the Asia-Pacific region. It will play a significant role, for example, in the pending negotiations for the Regional Comprehensive Economic Partnership (RCEP, or "ASEAN+6") FTA involving Korea, Australia, New Zealand, India, China, Japan, Indonesia, Vietnam, and eight other Southeast Asian states.

Ⅱ. ISDS Developments in Australia

Among developed economies in the Asian region, Australia is comparatively unusual in displaying public concerns about ISDS for almost two decades. This has evolved in three phases, involving successively more intense public and political debate (**Part Ⅱ (1)** below). The last phase, since 2010, has been characterized by extensive parliamentary scrutiny (**Part Ⅱ(2)**), as well as media coverage as indicated below:

9) Luke Nottage, "Investor-State Arbitration Policy and Practice after *Philip Morris Asia v Australia*" in *Regionalism in International Investment Law,* Leon Trakman and Nicola Ranieri (eds.), Oxford University Press, 2013, p. 452; "Tobacco plain packaging-investor-state arbitration", available at 〈http://www.ag.gov.au/tobaccoplainpackaging〉; *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia,* available at 〈http://www.pca-cpa.org/showpage3619.html?pag_id=1494〉 (last visit on August 31, 2015).

Figure 1. Articles in main Australian newspapers referring to ISDS (2003-May 15, 2015)[10]



1. Three Phases of Discontent over ISDS in Australia

A *first* phase of public discontent dates back to the late 1990s, although it was quite limited. In the early days of the internet, various non-governmental organizations (NGOs) joined with counterparts in North America and other parts of the world to object to a Multilateral Agreement on Investment (MAI) being negotiated through the Organization for Economic Cooperation and Development (OECD). Consistently with the investment treaty practice of the OECD's (developed economy) members, including Australia at that time, the ISDS mechanism had initially been envisaged for that Agreement.[11] It aimed to provide another way for foreign investors to claim against host states that violate substantive commitments, if the investor's home state does not

10) This media analysis derives from a FACTIVA database search of major Australian newspapers, for articles (and some letters or op-eds) containing at least one of the following terms: "ISDS", "investor-state", "investor state", "investment arbitration". (A few results may cover investment and/or arbitration, without necessarily or specifically referring to treaty-based ISDS.)

11) See Joachim Karl, "The Negotiations on the OECD Multilateral Agreement on Investment," in *International Investment Law, supra* (fn. 5), p. 342 at p. 351.

use the inter-state arbitration protections also given in the treaty, for political or diplomatic reasons. ISDS was seen as especially useful when the host state's laws and procedures did not meet commonly-accepted minimum international standards, as in many (but not necessarily all) less developed economies.

As such, opponents argued that it should not be included in a multilateral agreement that would be concluded at least partly among more developed economies, although their primary objections were aimed at the substantive protections envisaged for foreign investors. NGOs and others prevailed on the Australian government, particularly the federal Treasury which had primary responsibility for foreign investment domestically and in the OECD, to press for the suspension of negotiations a Multilateral Agreement, which occurred formally in December, 1998.[12)]

Nonetheless, Australia then ratified five more (out of then nineteen) BITs – beginning with Pakistan (ratified in October, 1998), then Chile (1999), Lithuania, Egypt and Uruguay (2002)[13)] – as well as its first FTA with an investment chapter (with Singapore, in 2003),[14)] all containing ISDS. A *second* phase of discontent over ISDS only resurfaced in public debate in 2003-4, when the then (centre-right) Coalition Government led by John Howard negotiated an FTA with the US (signed on May 5, 2004). The Howard Government lacked a majority in the upper house (Senate), raising the possibility of the Labor Party (centre-left) Opposition blocking enactment of preferential tariff reduction legislation needed to implement and therefore ratify such an FTA. Australian NGOs again mobilized effectively to object to ISDS and the investment chapter more generally, although the main public criticisms of the Australia-US FTA concerned other areas such as intellectual property rights.

In response, the US government seems to have decided that it was not worth pressing, perhaps because it would have meant conceding on other matters that were unpalatable politically at home (such as more access for Australian sugar imports). The

12) Patricia Ranald, "Disciplining Governments: The MAI Proposals," in *Stopping the Juggernaut: Public Interest Versus the Multilateral Agreement on Investment (MAI),* J. Goodman and P. Ranald (eds.), Pluto Press, 1999, p. 15.

13) The text of Australia's 21 BITs current in force, signed over 1988-2005, can be downloaded via http://www.info.dfat.gov.au/treaties.

14) Official documents and related information on Australia's FTAs, including ten signed with investment chapters since 2003, can be found via 〈http://dfat.gov.au/trade/agreements/pages/trade-agreements.aspx〉 (last visit on July 21, 2015).

US government was also dealing with local concerns about cases such as *Loewen*;[15] and earlier North American FTA proceedings that had resulted in a Joint Commission interpretation limiting the scope of the "fair and equitable treatment" protection, the bipartisan *Trade Act of 2002*[16] (approving negotiation of investment treaties that did not give substantive rights greater than those available under US law), and accordingly the US Model BIT (also clarifying the scope of expropriation).[17] The then President George W Bush was facing "a tightening presidential contest, with … trade and jobs issues coming to the fore politically".[18]

In the end, ISDS was omitted from the Australia-US FTA signed in 2004, with the official reason being that each country was satisfied with the quality of the other's legal system for protecting foreign investments.[19] As well as the political circumstances in both countries, another more inchoate aspect may be a lingering suspicion in Australia about the US, including its government and large corporations, as can be seen from parliamentary debates and media commentary on and around AUSFTA.[20] Certainly,

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

16) 19 USC §§ 3803-5 (2006).

17) Patrick Dumberry, "The Emergence of a Consistent Case Law: How NAFTA Tribunals have Interpreted the Fair and Equitable Treatment Standard", (October 30, 2013), available at 〈http://kluwerarbitrationblog.com/blog/2013/10/30/the-emergence-of-a-consistent-case-law-how-nafta-tribunals-have-interpreted-the-fair-and-equitable-treatment-standard/〉 (last visit on July 20, 2015); and generally Mark Kantor, "Investor-State Arbitration over Investments in Financial Services: Disputes Under New U.S. Investment Treaties", *Transnational Dispute Management,* Vol. 3, 2004, available at 〈http://www.transnational-dispute-management.com/article.asp?key=192〉 (last visit on July 21, 2015).

18) Tony Walker, "Vaile Fights to Save Trade Talks", *The Australian,* February 2, 2004, p.1. In late 2003 seven Democrat members of the US Congress had also written to their trade negotiators arguing that ISDS provisions were intended for counterparties with less developed legal systems and therefore were not needed in AUSFTA: Allesandra Fabro "US Support Over Trade Hitch", *Australian Financial* Review, January 15, 2004, p. 5. My ongoing confidential qualitative research (for the ARC Discovery Project mentioned in the opening footnote) suggests that then US Trade Representative Zoellick consulted major American firms, with interests in Australia, which reported that they were generally secure in their investments there and happy enough with local protections (interview with Australian citizen, Sydney May 28, 2015; notes on file with the author).

19) Thomas Westcott, "Foreign Investment Policy and Australia's International Investment Agreements: Catching the Third Wave", unpublished, 2007, available at 〈http://www.researchgate.net/publication/237376942_Foreign_Investment_Policy_and_Australia%27s_International_Investment_Agreements_Catching_the_Third_Wave〉 (last visit on July 23, 2015); see also William Dodge, "Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement," *Vanderbilt Journal of Transnational Law,* Vol. 39, No. 1, 2006, p. 1, at p. 4.

20) See eg. Parliament of Australia, Joint Standing Committee on Treaties (JSCOT), "Report 61: Australia – United States Free Trade Agreement" (June 23, 2004), available at 〈http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_committees?url=jsct/usafta/report.htm)〉

there was no media commentary when Turkey or Mexico signed BITs the next year (in 2005) with Australia, including ISDS. Nor any real criticism when, after the Labor Party won a landslide general election in 2007, the (centre-left) Rudd Government signed a bilateral FTA with Chile in 2008 (albeit in the context of existing BIT protections) and the regional ASEAN-Australia-New Zealand FTA in 2009, both including ISDS (indeed drawing on US Model BIT provisions).

A *third* phase of much more intense opposition to ISDS has only resurfaced in public discourse from 2010, when Australia commenced negotiations with the US for an expanded Trans-Pacific Partnership (TPP) regional FTA, including an investment chapter, and especially since the Philip Morris Asia claim was filed in 2011. Those who had successfully opposed ISDS around AUSFTA in 2004, especially on the political left, felt vindicated in their concerns and began campaigning against the expanded TPP. They feared that ISDS would come in through the back door and open the floodgates to ISA claims, especially from American multinational corporations.

In addition, in December 2010 Australia's Productivity Commission presented a Report requested by the federal Treasurer regarding Australia's FTAs and international trade policy.[21] The main Report was critical of bilateral and even regional FTAs – urging instead that Australia press for counterparties to undertake unilateral market liberalization, or otherwise multilateral initiatives – as well as of ISDS. The main Report argued primarily that there was no convincing aggregate-level evidence that offering treaty-based ISDS led to significant increases in inbound foreign direct investment, and that there was little evidence that Australia's outbound investors valued ISDS protections or that foreign investors generally were discriminated against even in developing countries. Conversely, it highlighted various problems and costs associated with ISDS, including the possibility of "regulatory chill" on host states (inhibiting welfare-enhancing measures being introduced, such as public health measures). These views attracted a vigorous dissenting report from Associate Commissioner Andrew Stoler (former Deputy Director-General of the World Trade Organization), and

(last visit on July 21, 2015); and Ross Gittins, "The Free Trade in So-called Free Trade Agreement", *Sydney Morning Herald,* July 19, 2004, available at 〈 http://www.smh.com.au/articles/2004/07/18/1090089035863.html〉 (last visit on July 21, 2015).

21) Australian Government, Productivity Commission, "*Bilateral and Regional Trade Agreements – Research Report,* November 2010", (December 13, 2010), available at 〈http://www.pc.gov.au/inquiries/completed/trade-agreements/report〉 (last visit on July 21, 2015).

academic commentators familiar with international investment law also criticised the theoretical and empirical basis of the analysis.[22]

Nonetheless, in April 2011 the then Labor Government (in coalition with the Greens) issued the "Gillard Government Trade Policy Statement",[23] adopting several recommendations from the Productivity Commission's Report. Notably, the Statement indicated that Australia would no longer seek to include ISDS protections in future treaties. Consequently, ISDS was omitted from Australia's FTA concluded with Malaysia in 2012 (although AANZFTA anyway provides for ISDS). But FTA negotiations stalled with major trading partners that had sought some form of ISDS, including Korea, China and Japan – compounding other more familiar impediments to concluding such bilateral agreements, such as market access for Australian agricultural products.

This situation changed when the Abbott (centre-right Coalition) Government gained power in general elections held on September 7, 2013. Consistently with the pre-election policy of the dominant Liberal Party, the website of the Department of Foreign Affairs and Trade (DFAT, coordinating treaty negotiations) was updated to note that Australia's policy was now to include ISDS on a case-by-case assessment.[24] On this basis, which essentially reinstates past treaty practice, Australia has ratified the FTA with Korea on April 8, 2015 and signed the FTA with China on June 17, 2015, both including ISDS, but ISDS was omitted from the FTA ratified with Japan on July 8, 2014.[25] The Abbott Government seems to include ISDS if the counterparty presses hard enough (and is presumably prepared to give something in return, such as enhanced market access for Australian exports), and/or there are doubts about whether

22) 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'" *Transnational Dispute Management Journal,* Vol. 5, 2011, available at 〈http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1860505.〉 (last visit on July 23, 2015); Jurgen Kurtz, "Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication," *ICSID Review,* Vol. 27, No. 1, 2012, p. 65; Leon Trakman, "Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo," *University of New South Wales Law Journal,* Vol. 35, No. 3, 2012, p. 979.

23) It has been removed from the current Australian Government's websites, but is preserved at 〈http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf〉 (last visit on July 21, 2015).

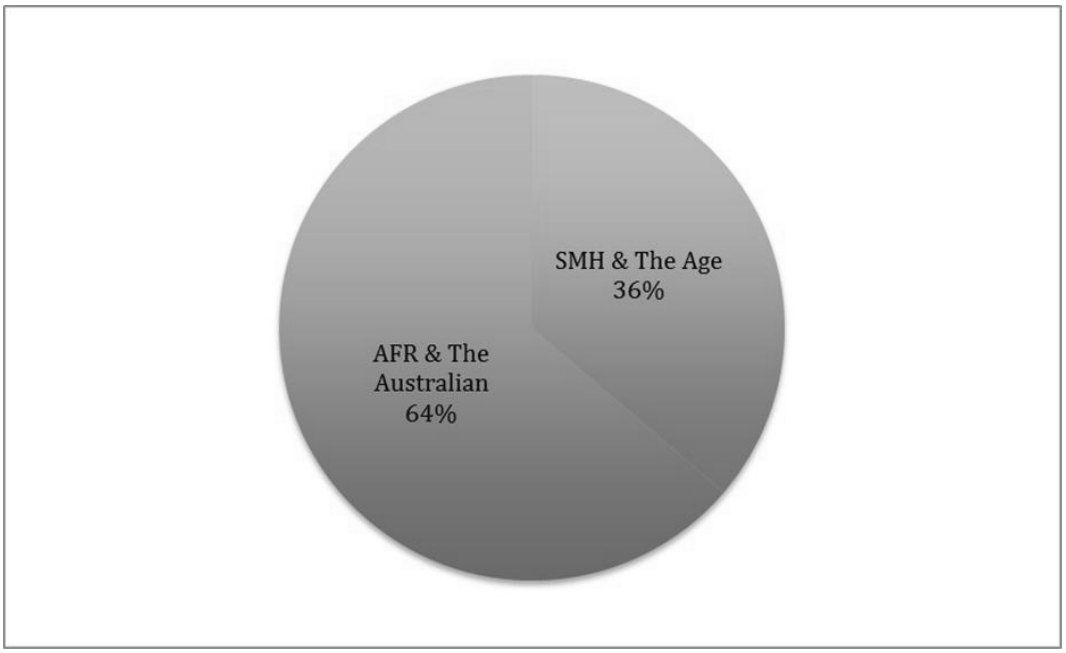
24) Australian Government, Department of Foreign Affairs and Trade (DFAT), "Trade and Investment Topics: ISDS", Retrieved July 21, 2015, available at 〈http://dfat.gov.au/trade/topics/Pages/isds.aspx.〉 (last visit on July 21, 2015).

25) Luke Nottage, "Investor-State Arbitration: Not in the Australia-Japan Free Trade Agreement, and Not Ever for Australia?" *Journal of Japanese Law,* Vol. 19, No. 38, 2014, p. 37 at pp. 38-39.

the protections available through the counterparty's national courts reach commonly-accepted international standards.

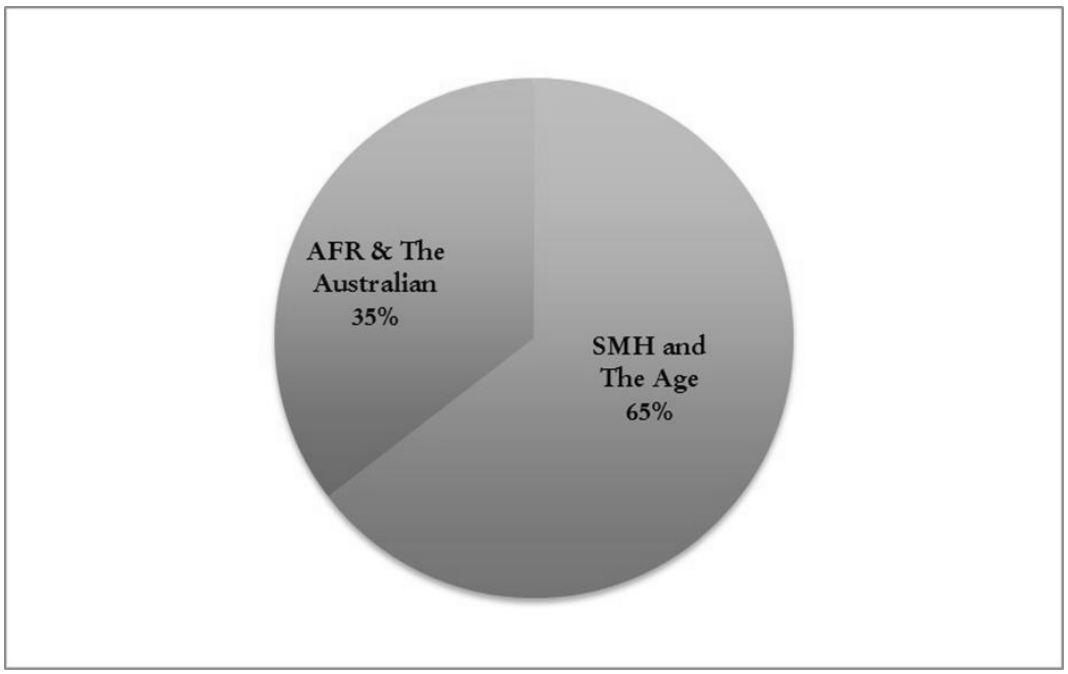
Media coverage of ISDS has become widespread since 2010, compared to the earlier two phases (even around 2003-4). It has also become increasingly polarized, as can be seen below:

Figure 2. Major Newspaper Coverage of ISDS between January 1, 2011 – December 31, 2013



Over 2011-2013, the Australian Financial Review (AFR, the main business-focused newspaper owned by the Fairfax group) and *The Australian* (the centre-right newspaper owned by Rupert Murdoch's Newscorp) ran articles quite critical of the then Gillard Government's Trade Policy Statement, eschewing ISDS. After the new Abbott Government abandoned that policy, *The Age* in Melbourne and the *Sydney Morning Herald* (SMH) ran a higher proportion of articles, but these were critical of the inclusion of ISDS in FTAs with Korea and China – as well as potentially the TPP:

Figure 3. Coverage of ISDS between January 1, 2014 – May 15, 2015



Both the SMH and *The Age* are also owned by the Fairfax group, which does not impose an editorial line comparable to *The Australian*. However, the former may appeal more to a centre-left readership since those more interested in business affairs will often gravitate towards reading the *AFR*.

2. Four Sets of Parliamentary Inquiries Relating to ISDS

Since late 2013, opposition parties have contested the Abbott Government's conclusion of FTAs containing ISDS protections through multiple parliamentary inquiries, especially in the Senate where the Government again lacks an absolute majority.[26)]

The *first* and most direct critique of ISDS came from a private member's Bill introduced by Greens Senator Peter Whish-Wilson on March 3, 2014. *The Trade and Foreign Investment (Protecting the Public Interest) Bill 2014* simply stated: "The Commonwealth must not, on or after the commencement of this Act, enter into an

26) This section draws partly on Jurgen Kurtz and Luke Nottage, "Investment Treaty Arbitration 'Down Under': Policy and Politics in Australia", *ICSID Review,* Vol. 30, No. 2, 2015, p. 465.

agreement (however described) with one or more foreign countries [sic] that includes an investor-state dispute settlement provision". This "Anti-ISDS Bill" attracted 141 submissions – mostly short documents in support of the Bill.[27] The Senate's Foreign Affairs, Defence and Trade Legislation Committee also received "over 11,000 emails from individuals using an online tool asking people to express their opposition" to ISDS. Nine individuals were invited to give evidence, including myself,[28] in public hearings that were held (and recorded) on August 6, 2014.[29]

On August 27, 2014, this Committee issued a main Report written by the (three of six) Coalition Senators, recommending against enactment, arguing that risks alleged regarding ISDS were overstated. Additional Comments provided by the (two) Labor Party Senators agreed that this Bill should not be enacted, primarily on the basis that it "is not desirable to radically constrain the executive's treaty-making power in the manner proposed".[30] However, the Labor Senators insisted that it was unnecessary to include ISDS provisions in any treaties. They reiterated the core arguments from the Productivity Commission against the possible benefits, and contended that:

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

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27) Parliament of Australia, Foreign Affairs, Defence and Trade Legislation committee, "Inquiry into the *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*", (2014), available at 〈http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014〉 (last visit on July 21, 2015).

28) Luke Nottage, "The 'Anti-ISDS Bill' before the Senate: What Future for Investor-State Arbitration in Australia?", *International Trade and Business Law Review,* Vol. XVIII, 2015, p. 245, available at 〈http://ssrn.com/abstract=2483610〉 (last visit on July 21, 2015), incorporating an edited version of my Submission, Responses to Questions on Notice from the hearings (except for a chart comparing Australia's FTAs with Korea, ASEAN and Chile), and my transcript of testimony given at the Senate hearing.

29) Transcripts are available via Parliament of Australia at 〈http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A"committees%2Fcommsen%2F005e1654-540c-4b63-927c-3cb1c149b1a1%2F0000"〉 (last visit on July 21, 2015), with video-recordings at Foreign Affairs Defence & Trade (August 6, 2014) 〈http://parlview.aph.gov.au/mediaPlayer.php?videoID=233409& operation_mode=parlview〉(last visit on July 21, 2015).

30) Parliament of Australia, Foreign Affairs, Defence and Trade Legislation committee, "Inquiry into the *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014,* Report: Labor Senators' Additional Comments", available at 〈http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Report/d01〉 (last visit on July 21, 2015), para. 1.18.

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

The Labor Senators also claimed that: "Governments and groups in Germany, France, Indonesia and South Africa have all expressed their lack of support for future ISDS provision in multilateral agreements". [31] They further emphasised that: "Labor will continue to scrutinize the actions of the Government, including its treaty-making actions, to ensure its conduct is in the national interest and *will give appropriate consideration to enabling legislation*".[32]

Greens and Labor Party parliamentarians then opened a *second* front in the battle on ISDS: over legislation that needed to be passed through both Houses to implement tariff reductions under the Korea-Australia FTA,[33] before it could be ratified by Australia and therefore brought into force. After an inquiry by the Joint Standing Committee on Treaties (JSCOT), comprising members of both Houses of Parliament but with a majority of Government parliamentarians, they dissented in the JSCOT Report of May 13, 2014,[34] which recommended (by majority) that KAFTA should be ratified. The Labor Party had also initiated on March 27, 2014 a separate inquiry into the Korea-Australia FTA, by the Senate's Foreign Affairs, Defence and Trade References Committee, comprising three Labor Party members (and one Greens member) out of six. In a Report dated October 1, 2014, this Committee agreed (with another dissent from the Greens substitute member, Senator Whish-Wilson) that on balance the treaty should be ratified. However, the majority Report from the Labor Senators

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31) *Ibid,* paras. 1.3-1.9.

32) *Ibid,* para. 1.19 (emphasis added).

33) Australian Government, Department of Foreign Affairs and Trade, "Korea-Australia FTA", (2014), available at 〈http://dfat.gov.au/trade/agreements/kafta/pages/korea-australia-fta.aspx〉 (last visit on July 21, 2015).

34) Parliament of Australia, Joint Standing Committee on Treaties, "Report 142: Treaty tabled on 13 May 2014", (2014), Retrieved July 21, 2015, available at 〈http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014/Report_142〉 (last visit on July 21, 2015). One of the Labor Party JSCOT members in dissent, Kelvin Thomson MP, also emphasized opposition to ISDS in the Korea-Australia FTA (calling for its renegotiation to exclude those provisions) when the Report was tabled in the House of Representatives on September 4, 2014. Shortly, however, a government Minister (Scott Morrison MP) simply introduced the two Bills implementing aspects of the treaty. See Parliament of Australia, *Hansard,* House of Representatives, September 4, 2014, pp. 9722-26, available at 〈http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber/hansardr/512317ee-6094-4e3d-88f0-38ac38d28920/0000%22〉 (accessed January 2, 2015).

recommended that the ISDS provisions be narrowed by Side Letter, and not included in future agreements. Specifically, the Report from this Inquiry (initiated by the Labor Party on March 27, 2014) recommended that discussions to narrow the Korea-Australian FTA protections should consider: [35]

- "a narrower definition of 'expropriation';
- a non-exhaustive list of public policy areas covered by the term 'legitimate public welfare objective';
- limitations as suggested by [Chief Justice Robert French], [36] or as subsequently formally recommended by the Council of Chief Justices; and
- that the parties promptly establish a bilateral appealant [*sic*] mechanism as envisaged in Annex 11-E of the agreement".

Additional Comments from the two Coalition Senators rejected these recommendations.

Despite such misgivings, Labor Party members voted in favour of the two Bills that the Coalition Government had introduced on September 4, 2014 to implement tariff reductions and other customs law measures agreed under the Korea-Australia FTA.[37] Despite urging the Government to renegotiate the treaty to omit ISDS provisions, a key

35) Parliament of Australia, Foreign Affairs, Defence and Trade Committee, "Report: Korea-Australia Free Trade Agreement", (October 1, 2014), available at 〈http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Korea-Australia_Free_Trade_Agreement/Report〉 (accessed January 2, 2015), pp. 50 (para. 5.8), 52 (para. 5.15) and 59 (para. 1.3).

36) Speaking at the Supreme and Federal Courts Judges' Conference, 9 July, 2014 ("Investor-State Dispute Settlement — A Cut Above the Courts?", available via 〈http://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac〉 (last visit on July 21, 2015)), Chief Justice Robert French of the High Court of Australia suggested that it might be fruitful to "examine the possibility of including requirements in ISDS provisions in appropriate cases for:
- prior exhaustion of remedies in domestic courts of the Contracting State;
- preclusion of any challenge to the decision of a domestic court as constituting a breach of the relevant BIT or FTA provisions; and
- preclusion of any arbitral decision based upon a rejection of a decision on a question of law of a domestic appellate court binding on lower courts.

Those suggestions are offered merely to stimulate thought on the topic. It may be useful for the general question to be given consideration by all of us and perhaps specifically by the Council of Chief Justices." Speaking at the Chartered Institute of Arbitrators centenary conference held in Hong Kong on March 21, 2015 ("ISDS – Litigating the Judiciary", available via *ibid*), Chief Justice French noted correspondence in November, 2014 between the Council and the federal Attorney-General about the need for care with respect to the possible interaction between ISA tribunals and national courts in Australia.

37) *Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014* (Cth); and *Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014* (Cth).

figure in the Labor Party conceded that the treaty remained overall in the national interest and therefore should be ratified.[38] The implementing legislation consequently passed both Houses by October 1, receiving Royal Assent on October 21. The FTA (including the unchanged ISDS provisions) entered into force on December 12, 2014, after an exchange of Notes between the Korean and Australian Governments on December 3 (the day after Korea's National Assembly agreed to ratification).[39]

Undeterred, a *third* but more indirect challenge to ISDS was launched on December 2, 2014. The Senate requested that the Foreign Affairs References Committee conduct an Inquiry into the Commonwealth's Treaty-Making Process, "particularly in light of the growing number of bilateral and multilateral trade agreements Australian governments have entered into or are currently negotiating". The Terms of Reference included an "*exploration of what an agreement which incorporates fair trade principles would look like*, such as the role of environmental and labour standard chapters" as well as "related matters".[40] Consequently, ISDS was mentioned in many of the ninety-five Submissions provided by the end of February, 2015. It was also mentioned directly in twelve of the fifteen sessions (including one involving myself) in public hearings held over May 4-5.[41] Indeed, ISDS was often discussed in response to questions raised by Greens Senator Whish-Wilson, if those called to give evidence based on their Submissions did not volunteer any view on this topic.

On June 25, 2015, the References Committee tabled its Report. The three (out of six) Labor Senators presented an extensive majority Report, entitled "Blind agreement: reforming Australia's treaty-making process".[42] Senator Whish-Wilson presented a short

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38) See Parliament of Australia, *Hansard,* Senate, October 1, 2014, pp. 7548-7551 (Senator Penny Wong, Leader of the Opposition in the Senate), available at *〈http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber/hansards/4630d1fc-e7c9-4b04-8c13-d1aa918c703f/0000%22〉* (last visit on July 21, 2015).

39) Australian Government, Minister for Trade and Investment Media Release, "Robb announces Korea FTA to take effect in 9 days", (December 3, 2014), available at 〈http://trademinister.gov.au/releases/Pages/2014/ar_mr_141203.aspx〉 (last visit on July 21, 2015).

40) Parliament of Australia, Foreign Affairs, Defence and Trade Committee, "The Commonwealth's treaty-making process", (2015), available at 〈http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process〉 (last visit on July 21, 2015).

41) Luke Nottage, "The 2015 Senate Inquiry into the Commonwealth's Treaty Making Process – and ISDS Policy for Australia", *ACICA Review,* June 2015, p. 48, at p. 49.

42) Parliament of Australia, Foreign Affairs, Defence and Trade Committee, "Blind agreement: reforming Australia's treaty-making process", (2015), available at 〈http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report〉 (last

Dissenting Report urging more wide-ranging reforms to enhance public participation and parliamentary scrutiny of the negotiation and implementation of trade agreements. The (two) Coalition Senators also issued a short Dissenting Report, arguing instead for the adequacy of the present system of public consultation by current government politicians and officials as well as scrutiny by the JSCOT, conducting an inquiry and making recommendations to Parliament after the treaty is signed and tabled but before Australia takes binding treaty action (such as ratification).

The majority Report noted that: "While a number of issues specific to individual trade agreements, such as inclusion of [ISDS] clauses and intellectual property … and copyright chapters, are controversial and the subject of public debate, they are only considered in this report to the extent that they shed light on the treaty-making process".[43] However, the majority Report did later mention ISDS and indeed recommended that Australia develop a model investment treaty or chapter including indicative provisions. The majority Report noted, for example, that the "increasing complexity of international trade agreements can sometimes have unintended consequences, especially with regard to intellectual property provisions negotiated in the context of bilateral or regional trade deals", and quoted the Australian Digital Alliance's evidence that this can be exacerbated by such intellectual property rights being subject to ISDS.[44]

Later, in Chapter 5 on treaty "Agenda-Setting and Post-Implementation Issues", the majority Report stated (citations omitted):

> *Model investment treaty*
>
> 5.19 One proposal put to the committee that seeks to address inconsistency between agreements, while at the same time facilitating public and stakeholder consultation, was that Australia develop a model investment treaty or model treaty text.
>
> 5.20 In a submission to the committee's 2014 inquiry into the *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014* (Cth), Professor Luke Nottage proposed that Australia develop a 'model investment treaty' to address the public's concern over the inclusion of

visit on July 21, 2015).

43) *Ibid.* at para. 1.7.

44) *Ibid.* at para. 2.33.

investor-state dispute settlement (ISDS) clauses in treaties.[14] The committee's report to that inquiry noted that such an approach could be a valuable way of managing the controversial issue of ISDS.[15]

5.21 In the hearing for this inquiry, Professor Nottage restated his support for a model investment treaty:

Australia should consider developing a model investment treaty or particular provisions on matters of public interest for the parliament and Australian citizens and, indeed, other parts of trade and investment agreements that are also of broader public interest—so, for example, intellectual property chapters or separate IP treaties.[16]

5.22 Professor Nottage told the committee that it was unusual that Australia does not have draft text in relation to investment:

In relation to investment, nowadays it is quite unusual, in the sense that dozens of economies, including all the major ones, both developed and developing, have a template that they start with, and which they elaborate, and sometimes update quite regularly, based on public consultation.[17]

5.23 According to Professor Nottage, putting in place a procedure for developing model text on controversial treaty provisions 'could be a useful compromise mechanism to enhance public understanding and input into subsequent treaty negotiations'.[18]

5.24 The proposal that Australia develop model text on controversial areas such as ISDS and intellectual property (IP) was also supported by Associate Professor Weatherall. Along similar lines, the ADA proposed that an 'overarching framework' be developed in the area of IP.[19] ACCI, due to concerns that every agreement 'starts with a blank sheet of paper',[20] favoured developing a model trade agreement:

…based on international standards that is fully transparent to Australian Industry and to international Governments, so that all stakeholders are aware of what Australia sees as the ideal procedural outcome from a trade treaty…this template would be used as a basis for all future negotiations, and will drive a level of consistency and improved

> confidence as to what is included in the negotiations.[21]
>
> 5.25 Witnesses agreed that, although actual agreements would be expected to depart from the model treaty text, having a template as a starting point could be useful for both consistency between agreements and transparency.
>
> *Committee view*
>
> …
>
> Recommendation 9
>
> 5.35 The committee recommends that the government develop a model trade agreement that is to be used as a template for future negotiations. The model agreement should cover controversial topics such as investor state dispute settlement, intellectual property, copyright, and labour and environmental standards and be developed through extensive public and stakeholder consultation.

In his Dissenting Report, Greens Senator Whish-Wilson expressed no view on Recommendation 9. In their Dissenting Report, the Coalition Senators briefly "disagree with all of the findings and recommendations of the majority report", without addressing specific Recommendations – including the possibility of public consultations to develop a model investment treaty or provisions for Australia.

A few weeks later, the *fourth* and latest set of parliamentary inquiries relating to ISDS got underway. On June 17, 2015, Australia signed and therefore publically disclosed its bilateral FTA with China, having announcing last November that negotiations had been concluded – including ISDS. The Senate's Foreign Affairs References Committee has called for Submissions by August 28, 2015,[45] and this FTA will also be considered by JSCOT.[46] Predictably, those who have voiced opposition to any form of ISDS in past inquiries as well as others will lodge similar objections before these inquiries. This time, it is possible that Labor Party parliamentarians will take a

45) Parliament of Australia, Foreign Affairs, Defence and Trade Committee, "Proposed China-Australia Free Trade Agreement", (2015), available at 〈http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/China-Aust_Free_Trade〉 (last visit on July 21, 2015).

46) See "Joint Standing Committee on Treaties", (2015), available at 〈http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties〉 (last visit on July 21, 2015).

stronger line than under the Korea FTA last year, and seek to block tariff reduction legislation in the Senate in order to prevent the Abbott Government from ratifying the China FTA. As well as concerns expressed about ISDS, this FTA is attracting concerns over provisions that allow Chinese workers preferential access to work on large-scale projects in Australia.[47)]

The inclusion of ISDS in the China FTA has already attracted attention in the Australian media. Predictably and consistently, the *Sydney Morning Herald* (like the *Melbourne Age*) is opposed. Citing the Australian Fair Trade and Investment Network (which has criticised ISDS in all the recent parliamentary hearings),[48)] Peter Martin objected on June 22 that the provisions "are less open than the provisions in other agreements, including the Australia-Korea free trade agreement, not being subject to a requirement that the dispute hearings and associated documents be made public".[49)] Academics based in Canberra and Toronto made a similar critique.[50)]

Yet, under the China FTA's Investment chapter Article 9.17 on "transparency", respondent (host) states must publicize the notice of arbitration and the tribunal's decisions etc. They may publicize pleadings and transcripts of hearings. They may also publicize submissions from the home (non-disputing) state if the latter agrees. The main difference with Article 11.21 of the Korea-Australian FTA is that hearings themselves shall be public only if the host state agrees (as with inter-state WTO proceedings, incidentally). But Australia would probably agree in the (unlikely) event of being subject to a claim. And proceedings under other recent investment treaties allowing for open hearings attract few spectators - especially if the host state can

47) "FactCheck: could the China-Australia FTA lock out Australian workers?", *The Conversation,* June 22, 2015, available at 〈https://theconversation.com/factcheck-could-the-china-australia-fta-lock-out-australian-workers-43470〉 (last visit on July 21, 2015).

48) Australian Fair Trade & Investment Network Ltd, "Analysis of temporary migrant worker arrangements and Investment Chapter of the ChAFTA", (2015), available at 〈http://aftinet.org.au/cms/node/977〉 (last visit on July 21, 2015).

49) "Australia-China free trade agreement favours Chinese investors", *The Sydney Morning Herald,* June 22, 2015, available at 〈http://www.smh.com.au/business/australiachina-free-trade-agreement-favours-chinese-investors-20150621-ghthjr.html〉 (last visit on July 21, 2015).

50) Kyla Tienhaara and Gus Van Harten, "Half-baked China-Australia Free Trade Agreement is lopsided", *The Sydney Morning Herald,* June 19, 2015, available at 〈http://www.smh.com.au/comment/halfbaked-chafta-is-lopsided-20150619-ghs8fm〉 (last visit on July 21, 2015). Incidentally, their broader observation that Australia may have provided less liberalization than China in this FTA can be readily explained by Australia already having a much more liberalized economy in general.

publicize transcripts and pleadings anyway. Interestingly, the ISDS procedures under the China FTA include a Code of Conduct for arbitrators (Annex 9-A), not elaborated in other Australian treaties but similar to requirements for arbitrators of inter-state disputes.

The more important point about the China FTA is that it limits substantive commitments protected by ISDS anyway, compared to say the Korea FTA. At present, the only ISDS-backed protection is "national treatment", so a discriminatory tax cannot be imposed on Australian investments once made in China, for example. Another protection under the treaty is "most favoured nation" treatment, so Australian investments can benefit from stronger protections that China may offer other countries' investors under future treaties. But this is not currently enforceable via ISDS, only an inter-state arbitration process. Unlike the Korea FTA, China's FTA with Australia does not commit to "fair and equitable treatment", including "denial of justice" by local courts. Fortunately this protection is available under a 1988 bilateral investment treaty, but it can only be enforced under an inter-state arbitration process. It is possible that the Australian government did not want its investors embarrassingly making direct ISDS claims against China if they find themselves being egregiously treated in courts there. Australians have already had disturbing run-ins with the Chinese courts.[51)]

Also writing for the *Sydney Morning Herald*, on June 20, 2015,[52)] Michael West was worried about Chinese investors bringing ISDS claims if Australia refuses to grant a mining permit due to environmental concerns. But this would only be possible under this FTA if the refusal was discriminatory, and anyway investment chapter Article 9.8 provides an express general exception for proper environmental protection measures (similar to Article 11.9(4) of the Korea FTA investment chapter). Article 9.11 of the China FTA investment chapter also adds the following innovative provisions (not found

51) John Garnaut, "A Chinese prisoner's dilemma as man begging for release from Australian prison risks upsetting the delicate relationship with China", *The Sydney Morning Herald,* April 4, 2015, available at 〈http://www.smh.com.au/business/china/a-chinese-prisoners-dilemma-as-man-begging-for-release-from-australian-prison-risks-upsetting-the-delicate-relationship-with-china-20150404-1m6gmc.html〉 (last visit on July 21, 2015).

52) "Trade deals acronym really translates to 'we lose'", *The Sydney Morning Herald,* June 20, 2015, available at 〈http://www.smh.com.au/business/comment-and-analysis/trade-deals-acronym-really-translates-to-we-lose-20150619-ghrqm8.html〉 (last visit on July 21, 2015).

in any other Australian FTAs) contained in Section B related specifically to ISDS:

> 4. Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under this Section.
>
> 5. The respondent may, within 30 days of the date on which it receives a request for consultations (as provided for in paragraph 1), state that it considers that a measure alleged to be in breach of an obligation under Section A is of the kind described in paragraph 4, by delivering to the claimant and to the non-disputing Party a notice specifying the basis for its position (a 'public welfare notice').
>
> 6. The issuance of a public welfare notice shall trigger a 90 day period during which the respondent and the non-disputing Party shall consult. The dispute resolution procedure contemplated by this Section shall be automatically suspended for this 90 day period.
>
> 7. The issuance of a public welfare notice is without prejudice to the respondent's right to invoke the procedures described in Article 9.16.5 or Article 9.16.6.[53] The respondent shall promptly inform the claimant, and make available to the public, the outcome of any consultations.
>
> 8. In any proceeding brought pursuant to this Section, the tribunal shall not draw any adverse inference from the non-issuance of a public welfare notice by the respondent, or from the absence of any decision between the respondent and the non-disputing Party as to whether a measure is of a kind described in paragraph 4.

53) These provisions deal with expedited objections regarding matters of law or jurisdiction of the tribunal, and track Article 11.20(5)-(6) of the *Korea-Australia Free Trade Agreement,* Republic of Korea-Australia, signed April 8, 2014 [2014] ATS 43 (entered into force December 12, 2014).

In addition, Article 9.18 later states:

> … 2. A joint decision of the Parties, acting through the Committee on Investment, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal *of any ongoing or subsequent dispute*, and any decision or award issued by such a tribunal must be consistent with that joint decision.
>
> 3. A decision between the respondent and the non-disputing Party that a measure is of the kind described in Article 9.11.4 shall be binding on a tribunal and any decision or award issued by a tribunal must be consistent with that decision.

The italicized wording in Article 9.18(2) shows that the joint Committee, comprising representatives of both states, can agree on how to interpret any uncertainty in the provisions of this FTA even with respect to ISDS proceedings already filed by the home state's investor. If they declare that the scope of the protection is not as alleged by the investor, the latter's claim should not succeed before the tribunal. This mechanism, helping primarily to safeguard host state interests, is broader than the innovative "public welfare notice" mechanism added in Article 9.11 and Article 9.18(2). It does have parallels with provisions contained in earlier Australian FTAs (including Article 11.22(3) of the Korea FTA), in turn influenced by US treaty practice.[54] But those provisions lacked the italicized wording and therefore can give rise to the question of whether the joint Committee's interpretation can bind presently-constituted tribunals dealing with pending disputes, or instead only future tribunals.[55]

In his *Sydney Morning Herald* article, West also fretted over other claims if a Chinese mining venture's costs blow out in Australia, but the China FTA does not provide relief just for that. He also warns generally about the risks of ISDS for Australia, citing a French company's claim versus Egypt. But he did not mention a more pertinent claim: Al Jazeera claimed last year that Egypt had closed down its

54) See the comparative table appended in Nottage (supra fn. 28); and generally Micah Burch, Luke Nottage, and Brett Williams, "Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century", *UNSW Law Journal,* Vol. 35, No. 3, 2012, p. 1013 at pp. 1035-36.

55) Tomoko Ishikawa, "Keeping Interpretation in Investment Treaty Arbitration 'on Track': The Role of States Parties", *Transnational Dispute Management,* Vol. 1, 2014, available at 〈http://www.transnational-dispute-management.com/article.asp?key=2048〉 (last visit on July 21, 2015).

media operations and detained (regime-critical) journalists. Other media companies have brought ISDS claims against Chile (after Pinochet's coup), Hungary, Ukraine and the Czech Republic.[56] ISDS-backed commitments therefore can help enhance good governance in host states, as well as cross-border trade and investment.

Both Martin and West were also worried that the China FTA's investment chapter is not "finalized", particularly regarding ISDS. Article 9.9 does indeed provide for negotiations after a work program reviewing the chapter (and the 1988 BIT) is completed within 3 years of the FTA entering into force. This will consider adding provisions such as fair and equitable treatment, compensation for expropriation (partially covered by ISDS in the 1988 bilateral treaty), "application of investment protections and ISDS to services supplied through commercial presence", as well as "scheduling of investment commitments by China on a negative list basis". This actually presents a good opportunity for broader public consultation on the compromise achieved between investor and host state rights reinforced through ISDS in this FTA, alongside the protections under the 1988 treaty due for renewal again anyway in 2018, or on whether the protections go too far in some respects but not far enough in others.[57]

Finally, if and when the China FTA comes into force containing any form of ISDS-backed protections, Australia's FTA in force with Japan (which presently lacks ISDS protections) does contain an unusual Article 14.19.2. This requires bilateral negotiations to be commenced within 3 months, and a report within 6 months, if "Australia enters into any multilateral or bilateral international agreement providing for a mechanism for the settlement of an investment dispute between Australia and an investor of another or the other party to that agreement, with a view to establishing an

56) Luke Eric Paterson, "Analysis: As Al Jazeera Media Network notifies Egypt of possible arbitration claim, what legal arguments loom in such a case?", *Investment Arbitration Reporter,* April 28, 2014, available at 〈http://www.iareporter.com.ezproxy1.library.usyd.edu.au/articles/analysis-as-al-jazeera-media-network-notifies-egypt-of-possible-arbitration-claim-what-legal-arguments-loom-in-such-a-case/〉 (last visit on July 21, 2015). Cf the French company's claim, referred to by West (*supra* fn. 52): *Veolia Propreté v. Arab Republic of Egypt* (ICSID Case No. ARB/12/15).

57) Foreign investors concerned about the limited protections under the present bilateral FTA, even in conjunction with the 1988 BIT, may seek to channel their investments via a third country with more extensive treaty protections. However, such treaties may limit this possibility through "denial of benefits" or other provisions, or this strategy may not be feasible due to tax or other commercial considerations.

equivalent mechanism". This is another good reason for Australia to undertake wider public consultations to develop a model investment treaty or chapter, or at least model provisions, in order to improve public debate particularly over ISDS. Otherwise, misapprehensions and concerns are likely to keep proliferating.

Ⅲ. ISDS Developments in New Zealand

Australia's close neighbour, New Zealand, is also starting to experience parliamentary scrutiny and public debate over ISDS, especially since it signed a bilateral FTA with Korea on March 23, 2015.[58] Compared to Australia, which now has ISDS protections in most of its treaties and involving 29 economies, New Zealand has signed a few less FTAs but far fewer BITs, and many of them do not include ISDS protections (as summarized below[59]):

Agreement	In force from:	ISDS?
Australia-New Zealand Closer Economic Relationship	1983 (for trade in goods), March 1, 2013 (for the Investment Protocol)	No
Hong Kong Investment ands Protection Agreement[60]	1995	Yes
Chile Investment and Protection Agreement[61]	(signed in 1999, but never ratified)	*(Conditional, but never in force)*
Argentina Investment and Protection Agreement[62]	(signed in 1999, but never ratified)	*(Conditional, but never in force)*
New Zealand-Singapore Closer Economic Partnership	2001	*Conditional* (unlike Singapore-Australia FTA, in force from 2003)
New Zealand-Thailand Closer Economic Partnership	2005	*Conditional* (unlike Thailand-Australia FTA, in force from 2005)
Trans-Pacific Strategic Economic Partnership (P4: with Brunei, Chile and Singapore)	2005	*No* (and no investment or services chapter)

58) "New Zealand-Korea free trade agreement", available at 〈https://korea.fta.govt.nz/〉 (last visit on July 21, 2015).

59) Adapted mainly from New Zealand Ministry of Foreign Affairs & Trade, "Trade Relationships and Agreements", available at 〈http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/index.php〉 (last updated August 21, 2014).

Agreement	In force from:	ISDS?
New Zealand-China Free Trade Agreement	2008	Yes
ASEAN-Australia-New Zealand Free Trade Agreement	2010 (for most states)	Yes, but *excluded by side letters as between Australia and New Zealand*
New Zealand-Malaysia Free Trade Agreement	August 1, 2010	Yes (unlike Malaysia-Australia FTA)
New Zealand-Hong Kong, China Closer Economic Partnership	2011	Yes (envisaged-see below)
Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation (ANZTEC)[63]	December 1, 2013	*Conditional*
New Zealand-Korea Free Trade Agreement	(not yet in force; signed March 23, 2015)	Yes (like Korea-Australia FTA)

Intriguingly, the two BITs signed with South American countries in 1999 were never ratified and so did not come into force. More research is needed into the reasons for this. Argentina may have got cold feet after its economic crisis in 2001, but it took several years for ISDS claims to be filed and resolved under its investment treaties with other countries.[64] Chile had signed a BIT with Australia in 1996 that was ratified in 1999, and subsequently concluded FTAs with Australia and other countries, which all included ISDS. It therefore seems likely that it was the then (centre-left) Clark Labour Government in New Zealand that did not press for ratification of its BITs with Chile

60) United Nations Conference on Trade and Development – Investment Policy Hub, "Hong Kong, China SAR – New Zealand BIT (1995)", available at 〈http://investmentpolicyhub.unctad.org/IIA/country/150/treaty/1868〉 (last visit on July 21, 2015).

61) *Ibid,* "Chile – New Zealand BIT (1999)", available at 〈http://investmentpolicyhub.unctad.org/IIA/country/150/treaty/858〉 (last visit on July 21, 2015).

62) *Ibid,* "Argentina – New Zealand (1999)", available at 〈http://investmentpolicyhub.unctad.org/IIA/country/150/treaty/143〉 (last visit on July 21, 2015).

63) See New Zealand Commerce and Industry Office, "What is ANZTEC?", available at 〈http://nzcio.com/node/249/〉 (last visit on July 21, 2015).

64) See eg. Crina Baltag, "Argentinian Crisis Revisited", (January 27, 2013), available at 〈http://kluwerarbitrationblog.com/blog/2013/01/27/argentinian-crisis-revisited/〉 (last visit on July 21, 2015); Ignacio Torterola and Diego Brian Gosis, "Argentina" in *Latin American Investment Protections: Comparative Perspectives on Laws, Treaties, and Disputes for Investors, States and Counsel*, Jonathan C. Hamilton, Omar E. Garcia-Bolivar, Hernando Otero (eds.), Brill, 2012, pp. 15-43.

and Argentina, which had originally included ISDS. It would be interesting to investigate whether this could have been linked, for example, to fledgling opposition within New Zealand as well to the OECD's Multilateral Agreement on Investment, which was abandoned in late 1998.

A more plausible reason for New Zealand not pursuing ratification of both BITs or negotiating new ones from the late 1990s, unlike Australia, could have been that New Zealand is a small economy that has long favoured multilateral initiatives. Yet in 2000 it became clear that the World Trade Organization system was not going to develop a comprehensive regime for investment liberalization, and New Zealand in fact began concluding FTAs even before Australia – also beginning with Singapore. New Zealand then negotiated a bilateral FTA with Thailand, and a regional FTA with three other small economies (Singapore, Brunei and Chile): the original TPP (formally, the Trans-Pacific Strategic Economic Partnership, also known as the "P4"). New Zealand had originally hoped to involve the US (creating the "P5" FTA),[65] but the latter had generally remained cool towards closer relations with New Zealand after the then Lange Labour Government had refused to allow in American nuclear vessels from 1985.[66] In any event, the P4 FTA omitted an investment chapter, so that it contained no provisions on ISDS. Nor was full advance consent to ISDS agreed in the investment chapters in New Zealand's prior bilateral FTAs with Singapore and Thailand – in contrast to those countries' FTAs concluded with Australia around the same time. Instead, New Zealand's first two FTAs limited access to ISDS by allowing the host state

65) In 2008, the US expressed interest in joining negotiations scheduled under the original P4 to add provisions on financial services and investment, and then to negotiate accession to an expanded TPP as did then Australia, Peru and Vietnam. See New Zealand Ministry of Foreign Affairs & Trade, "Trans-Pacific Partnership (TPP) Negotiations", (last updated May 25, 2015), available at 〈http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/index.php〉 (last visit on July 23, 2015). The idea of New Zealand formalizing closer economic relations with the US (and Canada) dated back to the early 1990s, when the North American FTA was being finalized: see eg. Holmes Frank and Crawford Falconer, *Open Regionalism? NAFTA, CER and a Pacific Basin Initiative*, Institute of Policy Studies, 1992; Chris Nixon and John Yeabsley, *New Zealand's Trade Policy Odyssey: Ottawa, Via Marrakech, and On*, New Zealand Institute of Economic Research, 2002.

66) See James M. McCormick , "Healing the American Rift with New Zealand", *Pacific Affairs*, Vol. 68, No. 3, 1995, p. 392. Cf. eg. Amy L. Catalinac, "Why New Zealand Took Itself out of ANZUS: Observing 'Opposition for Autonomy' in Asymmetric Alliances", *Foreign Policy Analysis*, Vol. 6, No. 4, 2010, pp. 317-338, available at 〈http://scholar.harvard.edu/files/amycatalinac/files/catalinac_fpa.pdf〉 (last visit on July 23, 2015).

to withhold consent in the event of a claim by a foreign investor.[67]

Importantly, in economic terms but also with respect to unconditional advance consent to ISDS, New Zealand signed a bilateral FTA with China on April 7, 2008, after three years of negotiations under the third Clark Labour Government, which contained a comprehensive investment chapter.[68] It extended ISDS fully to expropriation (not the "amount of compensation", as under the 1988 China-Australia BIT) as well as many other substantive protections, such as fair and equitable treatment (not yet enforceable by ISDS under the China-Australia FTA signed in 2015, as mentioned in Part II(2) above). New Zealand's next major FTA was with the 10 ASEAN member states and Australia (AANZFTA), signed in 2009 alongside the bilateral FTA with Malaysia. Both included ISDS but it was excluded in AANZFTA as between Australia and New Zealand, ostensibly as they were still negotiating an Investment Protocol to add to their longstanding Closer Economic Relationship FTA. That Protocol was agreed in 2011, and also omitted ISDS, in line with a very close economic and political relationship between the two countries.[69] New Zealand's FTA with Hong Kong omitted an investment chapter but Side Letters committed both economies to complete negotiations, within two years of the FTA coming into force, for an Investment Protocol "to be broader in scope" than the 1995 BIT and containing "provisions drafted with reference to" the 2008 China FTA.[70] The latter two treaties include ISDS, so the governments seemed to have envisaged this being incorporated into the New Zealand

67) David Williams and Amokura Kawharu, *Williams & Kawharu on Arbitration*, LexisNexis, 2011, at pp. 878-888. They add that that similar conditional consent to ISDS was found in the non-ratified BITs with Argentina and Chile. To like effect, investment chapter Article 20 of the 2011 ANZTEC agreement with Taiwan (available at 〈http://www.nzcio.com/webfm_send/59〉 (last visit on July 23, 2015) requires "the disputing investor obtains the disputing Party's written consent to arbitration". Interestingly, a recent ICSID tribunal quite controversially argued that Australia's 1992 BIT with Indonesia (and potentially therefore other earlier treaties) allowed for the host state to withhold consent to ISDS: see Nottage (*supra* fn. 8).

68) New Zealand Ministry of Foreign Affairs & Trade, "The Agreement", (2015), available at 〈http://www.chinafta.govt.nz/1-The-agreement/〉 (last updated on February 17, 2015).

69) See generally Luke Nottage, "Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era" in *Trade Agreements at the Crossroads*, Meredith Kolsky Lewis and Susy Frankel (eds.), Routledge, 2014, p. 114.

70) See New Zealand Ministry of Foreign Affairs & Trade, "New Zealand – Hong Kong, China Closer Economic Partnership Agreement", available at 〈http://mfat.govt.nz/downloads/trade-agreement/hongkong/NZ-HK-CEP-Investment-EOL.pdf〉 (last visit on July 23, 2015). This is an interesting parallel to the "work program" aimed at a more comprehensive investment chapter in the China-Australia FTA, which may extend ISDS-based protections, as mentioned in Part II(2) above.

– Hong Kong FTA.[71] ISDS provisions were also included in the 2013 FTA with Taiwan, albeit only on a conditional basis.

The next big development for New Zealand was to conclude the FTA with Korea, signed on March 23, 2015, some three months after the entry into force of the Korea-Australia FTA. A parliamentary Select Committee commenced an inquiry, involving extensive discussion of ISDS, and reported on May 22.[72] Parliamentarians from the ruling National Party urged ratification, as indeed did those from the main opposition Labour Party despite somewhat greater misgivings about ISDS. By contrast, parliamentarians from the smaller Greens and NZ First parties objected strongly to ISDS and ratification of the FTA.

The National Party then introduced tariff reduction legislation into Parliament. During First Reading speeches on June 16, 2015,[73] Labour Party members declared that they would support the Bill to allow ratification, although they voiced concerns particularly over the capacity for the New Zealand government to introduce new types of regulation over foreign investment (eg for residential land sales) under the Korea FT A.[74] David Parker MP also remarked:[75]

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71) Negotiations are currently recorded as "ongoing, having commenced in November, 2010": see New Zealand Treaties Online, "Investment Protocol to the New Zealand – Hong Kong, China Closer Economic Partnership Agreement", available at 〈http://www.treaties.mfat.govt.nz/search/details/p/20〉 (last visit on July 24, 2015). On April 19, 2011, New Zealand's Trade Minister had also announced that substantive negotiations were expected to get underway from the following month: see Tim Groser, "NZ launches Investment Protocol negotiations with Hong Kong", (19 April, 2011) available at 〈http://www.beehive.govt.nz/release/nz-launches-investment-protocol-negotiations-hong-kong〉 (last visit on July 24, 2015).

72) New Zealand Parliament, "International Treaty Examination of the Free Trade Agreement between New Zealand and the Republic of Korea", (May 22, 2015), available at 〈http://www.parliament.nz/en-nz/pb/sc/business-summary/00DBSCH_ITR_62590_1/international-treaty-examination-of-the-free-trade-agreement〉 (last visit on July 21, 2015).

73) Parliament of New Zealand, *Hansard (debates)*, June 16, 2015, Vol. 706, p. 4389, available at 〈http://www.parliament.nz/en-nz/pb/debates/debates/51HansD_20150616_00000024/tariff-free-trade-agreement-between-new-zealand-and-the〉 (last visit on July 21, 2015).

74) They referred to evidence given on that point by Amokura Kawharu. The argument is also detailed in Amokura Kawharu, "The Investment Chapter of the New Zealand - Korea Free Trade Agreement: A Portent of Things to Come?," *New Zealand Universities Law Review,* forthcoming 2015. See also David Parker, "Nats Bet House on Trade Deals", *The New Zealand Herald*, July 21, 2015, available at 〈http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11484069〉 (last visit on July 23, 2015) (making no reference to ISDS).

75) New Zealand Parliament, (*supra* fn. 73), emphasis added.

> "I know we have got [ISDS] clauses in the New Zealand - China free-trade agreement, and that is a good agreement, but *we have reached the point in the Labour Party where we would be happy to have free-trade agreements with First World countries without [ISDS] clauses.* It is interesting that in countries such as in Europe, Australia, and, indeed, the United States there seems to be an appetite for that too."

Phil Goff MP (a former Trade Minister in the previous Labour Government) also noted concerns that had been raised about ISDS, including that:[76]

> "the United States is a litigious country and it might make use of that procedure, so those members of the select committee started their opposition to it under the Korea agreement. Even though we are not really against the Korea agreement, that fires our shots across the bow of the Trans-Pacific Partnership should it go ahead.
>
> I think the select committee procedure on the treaty examination was really useful … because it brought out the reality rather than the hype and rather than the scaremongering. The reality is that in some trade agreements—the North America Free Trade Agreement probably being one of them—the wording for ISDS procedures was pretty loose. There have been cases taken that people have interpreted as being a United States corporation being able to sue, for example, Canada, because it has put environmental protection in place. Well, the reality is slightly different from that.
>
> Any country has the right to put in place environmental protections, but when it does so it has got to make sure that it is non-discriminatory between the nationals in that country and those that are trying to trade into the country, such as Canada. We found in examining some of

76) *Ibid.* For more critical views of the recent *Bilcon* award, from Australian commentators, see Patricia Ranald, "Investor Rights to Sue Governments Pose Real Dangers", *The Conversation*, April 16, 2015, available at 〈http://theconversation.com/investor-rights-to-sue-governments-pose-real-dangers-40004〉; Deborah Gleeson, Kyla Tienhaara and Sharon Friel, "**Leaked TPP Investment Chapter Shows Risks to Australia's Health**", *The Conversation*, April 10, 2015, available at 〈https://theconversation.com/leaked-tpp-investment-chapter-shows-risks-to-australias-health-39799〉 (last visit on July 23, 2015).

> those decisions and, I think, looking at the minimum standard of treatment provisions that have been used by corporations to sue countries—*Bilcon* and Canada was a prominent example—that a North America Free Trade Agreement investment tribunal explained in its decision what the standard of the problem, of the grievance, had to be in order to succeed when an investor-State dispute settlement procedure was invoked. The actions of the Government needed to be "arbitrary, grossly unfair … [lacking in] due process leading to an outcome which offends judicial propriety—". That is not a low standard; that is a very high standard.
>
> So I am satisfied, and I think the officials satisfied everybody on the committee, that they have built into the wording of the [ISDS] procedure sufficient safeguards that enable New Zealand to retain its sovereign right to legislate for the public good. For example, in public health areas like plain packaging of cigarettes, I would not support an agreement that took away our sovereign right to stop tobacco companies promoting a product that causes death among 50 percent of New Zealanders who use those products. So I think there are safeguards built in there."

Phil Goff MP also criticised the Greens and NZ First parliamentarians on the select committee for conceding that the Korea FTA overall presented net benefits for New Zealand, yet insisting that they would not vote for implementation legislation – "making a symbolic gesture because there are aspects, including the [ISDS] procedure, that they do not like".[77]

Indeed, a legislator from the minority NZ First Party has introduced his own Anti-ISDS Bill.[78] The experienced leader of this populist party, former Foreign Minister Winston Peters MP, had already co-signed in 2012 an Open Letter objecting to the inclusion of ISDS in the TPP.[79] However, the Labour Party does not appear to have

77) New Zealand Parliament, (*supra* fn. 73).

78) *Fighting Corporate Control Bill*, introduced March 19, 2015, available at 〈http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL62503_1/fighting-foreign-corporate-control-bill〉; Duncan Cotterill, "Bill Drawn from Members' Ballot Seeks to Stifle TPPA", (March 24, 2015), available at 〈https://duncancotterill.com/news/bill-drawn-from-members-ballot-seeks-to-stifle-tppa〉 (last visit on July 21, 2015).

a policy opposed to all forms of ISDS. It therefore seems unlikely to agree to allow this Anti-ISDS Bill to proceed even to a Select Committee, which is a necessary step before any Bill can be voted on in New Zealand's (unicameral) House of Representatives.

Overall, the Labour Party seems distinctly more conciliatory than its Australian counterpart. David Parker MP began his First Reading speech on the Korea FTA by noting that "there is a high level of agreement across the House, between the two main parties, that New Zealand is a trading nation that has economic advantages from facing fewer barriers to that trade abroad". Declaring that the Labor Party is "proud to be a pro-trade party", he claimed "some substantial credit, most of which goes to the Hon Phil Goff, for the Chinese free-trade agreement", and noted a dramatic increase in exports and bilateral trade since 2008.[80] Phil Goff MP acknowledged later that the Korea FTA does contain disappointments for New Zealand regarding some agricultural market access issues, but also that the practical reality is that in such negotiations New Zealand has "very little negotiating coin, because we have very few export barriers to, for example, trade from Korea coming in. We do have the ability, of course, to facilitate Korea's entry into something like the Trans-Pacific Partnership, and I am sure that that was used to give leverage to our negotiators".[81] Offering ISDS presumably is another bargaining chip for New Zealand. Anyway, until Phil Goff MP retires from parliament, it seems difficult politically for the Labour Party to resile from any form of ISDS given that it had been included in the 2008 China FTA.

Other differences from Australia are that the (centre-right) National Party has subsequently remained quite firmly in power, and there is no second House of Parliament allowing more scope for Opposition parties to block FTA implementation legislation or initiate multiple inquiries (as outlined in Part II(2) above).[82] In addition,

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79) TPP Legal, "An Open Letter from Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement", (May 8, 2012), available at 〈https://tpplegal.wordpress.com/open-letter/〉 (last visit on July 21, 2015).

80) New Zealand Parliament, (*supra* fn. 73). See also Parker (*supra* fn. 74), arguing that the China FTA provided more flexibility with respect to foreign investment rules than the Korea FTA.

81) New Zealand Parliament, (*supra* fn. 73). However, it seems unlikely that New Zealand would have any substantial influence over Korea's eventual inclusion in the TPP (mentioned further in Part IV below).

82) However, one further forum available in New Zealand is the Waitangi Tribunal, established in 1975 as a "permanent commission of inquiry charged with making recommendations on claims

New Zealand has not yet been subject to any treaty-based ISDS claims,[83] which helps defuse criticisms from the political left. There is also no criticism of ISDS and FTAs generally from the economic right, along the lines of Australia's Productivity Commission – a Commission has only recently been set up, in 2011, and has not conducted inquiries into New Zealand's international trade policy.[84] In fact, one right-wing think-tank favours FTAs, as a means to liberalize foreign investment regulation generally, and seems to view ISDS as consistent with robust protection of property rights.[85]

Finally, the general media in New Zealand seems less polarized concerning FTAs and ISDS, although critical commentary is emerging. For example, an editorial in the *Dominion Post* (in the nation's capital) recently fretted over ISDS because the mechanisms ostensibly "give big companies an opaque new forum to sue governments that pass laws they don't like".[86] Nonetheless, coverage of ISDS in major newspapers

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brought by Māori relating to actions or omissions of the Crown, which breach the promises made in the Treaty of Waitangi" concluded with indigenous groups in 1840: 〈http://www.justice.govt.nz/tribunals/waitangi-tribunal/about/introduction〉. Claimants have requested an urgent inquiry into the impact of concluding the TPP: see Laura Carter and Lynell Tuffery Huria, "Waitangi Tribunal Claim over New Zealand's Participation in the TPPA", *Lexology*, July 20, 2015, available at 〈http://www.lexology.com/library/detail.aspx?g=51ca4a7c-e019-4159-a124-0e88b6ac91e0〉 (last visit on July 23, 2015).

83) As noted also in the Select Committee's (main) report, available at 〈http://www.parliament.nz/resource/en-nz/51DBSCH_SCR62982_1/514ee77ec5f6ff977dd37c40679e58431134ebaf〉 (last visit on July 23, 2015), p. 6:
"no ISDS claim has ever been brought against the New Zealand Government. This gives us some comfort that the risks to New Zealand are low, and would not outweigh the benefits of a free trade agreement with Korea.
We also note that in the 20 years since the creation in 1995 of binding [WTO] dispute settlements, which are State to State, New Zealand has never been subject to a WTO dispute settlement claim in over 450 initiated disputes."
However, New Zealand has long had very few trade barriers and is very careful to limit the prospect of being challenged under the WTO, since it relies on that regime to facilitate its export trade in goods. Investment treaty issues may also raise quite different issues than WTO disputes, which typically centre on alleged discrimination.

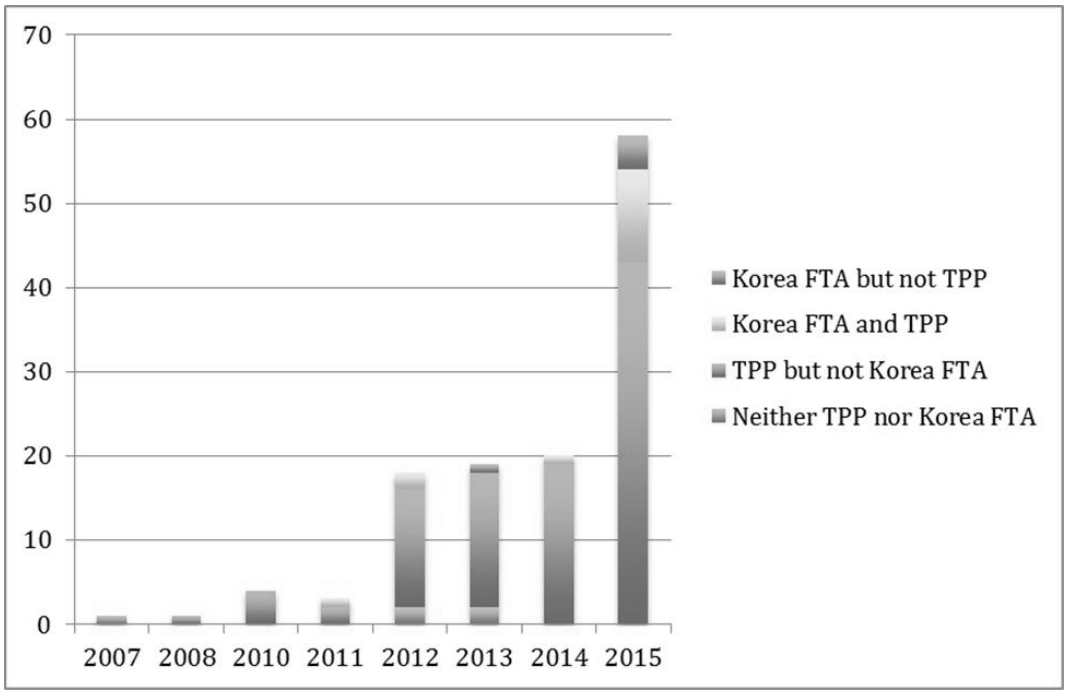
84) See New Zealand Productivity Commission, at 〈http://www.productivity.govt.nz/〉 (last visit on July 21, 2015).

85) Khyaati Acharya and Bryce Wilkinson, "Open for Business: Removing the Barriers for Foreign Investment", *The New Zealand Initiative, Research Report 9 (RR9) – Foreign Investment Series 1 – Report 3*, 2014, pp. 30-31, available at 〈http://nzinitiative.org.nz/site/nzinitiative/files/Open%20for%20business.pdf〉 (last visit on July 20, 2015).

86) "NZ Must Tread Carefully on TPP", *Dominion Post*, July 6, 2015, p. A6. But see Phil O'Reilly, "Investor-State Rules Nothing to Fear", *Dominion Post*, July 11, 2015, p. A4; and generally eg.

certainly remains less extensive than in Australia, as can be seen from the following Figure:

Figure 4. Articles in main New Zealand newspapers referring to ISDS (2007 – July 20, 2015)[87]



Further, from a more doctrinal perspective, New Zealand's recent FTA investment chapters – with China signed in 2008 through to the FTA with Korea signed in 2015 – include various provisions aiming to balance investor and host state interests, drawing on drafting in the other treaties of the counterparties and/or other major economies (such as the US) with greater contemporary experience in treaty drafting and ISDS proceedings. These include:

Gerard Hutching, "TPP 'Worth Extra 2pc to Economy'", *Dominion Post*, July 3, 2015, p. B5.

87) This media analysis derives from a FACTIVA database search of major New Zealand newspapers, especially *The New Zealand Herald*, *Dominion Post* and *National Business Review* for articles (and some letters or op-eds) containing all of the following terms: "ISDS", "investor-state", "investor state", "investment arbitration"; and alternately at least one/none of these words "Trans-Pacific Partnership" or "TPP" or "Trans Pacific Partnership" or "Trans-Pacific Strategic Economic Partnership" or "TPPA"; and at least one/none of these words "Korea". (A few results may cover investment and/or arbitration, without necessarily or specifically referring to treaty-based ISDS.)

- Exclusion from ISDS of the national screening regime for investments from abroad;
- Special provisions addressed at frivolous or jurisdictional claims, as well as transparency provisions for ISDS proceedings;
- More detailed definitions of key substantive provisions such as expropriation, customary international law standards of protection, and legitimate public welfare measures.

Such provisions can help ally public concerns about the risks of ISDS claims, albeit in combination with the happy circumstance of no treaty-based claim having yet been filed against New Zealand under any of its recent FTAs or (very few) earlier BITs,

Ⅳ. ISDS Developments in Korea

Many readers of this journal will probably be more familiar with the situation in Korea, but it seems similar to Australia in many ways. Most of its many BITs came into force after 1988, when Korea became fully democratized. A few early BITs were with developed European countries, but from the 1980s the focus moved to counterparties in Asia, as Korea emerged as a major capital exporter. After the turn of the century, Korea concluded FTAs initially with smaller economies such as Chile and Singapore, but then India, ASEAN, and both the EU and the USA. As of January, 2011, Korea had 90 BITs or FTAs with investment chapters in force, applying to 95 economies, and almost all included ISDS.[88)]

The Korea-US FTA was actually signed in 2007, but was only approved by the US Congress on October 12, 2011 (after a further amendment regarding market access and automobile manufacturing, formalized in February 2011).[89)] The arrangement then faced continued opposition in Korea's National Assembly, notably with respect to ISDS.

88) Joongi Kim, "The Evolution of Korea's Modern Investment Treaties and Investor-State Dispute Settlement Provisions," in *Investment Law and Dispute Resolution Law and Practice in Asia*, Vivienne Bath and Luke Nottage (eds)., Routledge, 2011, p. 211. Korea has also ratified FTAs with EFTA (2006), Peru (2011), Turkey (2013), Australia (2014), and Canada (2015): Joongi Kim, "The Moscow Convention and the First Korean Investment Treaty Arbitration Award [Working Title]," *Pepperdine Dispute Resolution Law Journal,* Vol. 15, forthcoming 2015.

89) Office of the United States Trade Representative, "US – Korea Free Trade Agreement: New Opportunities for U.S. Exporters Under the U.S.-Korea Trade Agreement", available at 〈https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta〉 (last visit on July 21, 2015).

Yet the ruling Grand National Party pointed out that in 2007 "its inclusion was endorsed under the leadership of then president Roh Moo-hyun and his [Democratic Party] before it came to lead the opposition", and argued that ISDS would not overly impinge on Korea's autonomy. However, national and local politics generated persistent criticism of ISDS and the Korea-US FTA, in conjunction with some "ideational shift in South Korea since the 2008 global financial crisis" that questioned free-market policies.[90] There was far less concern about ISDS in the far-reaching Korea-EU FTA (ratified in 2011), suggesting that many Koreans saw the US as particularly problematic.

In this latter respect, parallels can be drawn with Australia around 2003-4 (regarding its bilateral FTA with the US) and again since 2011, as well as in New Zealand (both in the context of negotiations for an expanded TPP, including the US). Another similarity regarding the controversy specifically over ISDS is that in May 2012, a US-based investment fund called Lone Star formally notified the first-ever treaty-based ISA claim against Korea (via a BIT with Luxembourg and Belgium). This investor alleged that the Korean government unlawfully interfered with its rights as the major shareholder of Korea Exchange Bank and other Korean companies that Lone Star acquired in the early 2000s, in the aftermath of the Asian Financial Crisis, which had a major impact on the Korean economy.[91] Another analogue is concern about ISDS expressed publically by some judges in Korea, albeit earlier (in late 2011) compared to Australia, and not at the highest levels of the judiciary.[92]

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90) Kim Chi-Wook, "How a Shift in South Korean Attitudes and Electoral Politics May Trip Up the KORUS FTA – Korea's Election 2012: Public Opinion, Politics, and Implications for U.S.-South Korea Relations", (November, 2011), available at 〈http://www.cfr.org/south-korea/shift-south-korean-attitudes-electoral-politics-may-trip-up-korus-fta/p26446〉 (last visit on July 21, 2015).

91) "Lone Star Funds Notifies South Korean Government of Intent to File Arbitration Claim Regarding Korea Exchange Bank and Other Investments", *PR Newswire*, May 28, 2012, available at 〈http://www.prnewswire.com/news-releases/lone-star-funds-notifies-south-korean-government-of-intent-to-file-arbitration-claim-regarding-korea-exchange-bank-and-other-investments-155203635.html〉 (last visit on July 21, 2015). For details of this very large claim, see *LSF-KEB Holdings SCA and others v. Republic of Korea* (ICSID Case No. ARB/12/37) via 〈https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/12/37〉 (last visit on July 23, 2015). A second (non-ISCID) arbitration has reportedly been initiated in 2015 under the Korea-Iran BIT, regarding a failed attempt to buy a subsidiary of the bankrupt Daewoo Group (chaebol): cited in Kim, 2015 (*supra* fn. 88).

92) The Supreme Court of Korea reportedly later reprimanded the group of Korean judges who had publically declared that ISDS in the US-Korea FTA would undermine national sovereignty, calling for a judicial commission to be established to review such provisions. See Phil Taylor, "South Korea: controversy over free trade agreement", (January 17, 2012), available at 〈http://www.ibanet.org/Article/Detail.aspx?ArticleUid=28f182ef-e2a9-49e9-855c-2d0d19b2d609〉 (last visit on July 21, 2015).

Nonetheless, the Korea-US FTA was ratified by the National Assembly on November 22, 2011, and diplomatic notes were exchanged on February 21, 2012 to bring the agreement into force on March 15, 2012. The question of ISDS more generally continued to be raised during that year, in the build-up to the presidential elections held on December 19, 2012. But it seems to have faded further from public debate after the inauguration of President Park Geun-hye, of the conservative Seanuri Party.

Since 2013, the Korean government has instead continued to press strongly for ISDS in the Australia FTA, and then in the New Zealand FTA.[93] First Australia, then New Zealand, came under pressure to complete negotiations as US exporters (eg. for agricultural products) gained progressively better access to Korean markets under their bilateral FTA. Korea's renewed promotion of ISDS is quite similar to the amenability of the Abbott Government to include ISDS again in Australia's treaties, but on a case-by-case assessment which can involve excluding it altogether (as under the 2014 Japan FTA) or limiting ISDS-based commitments (as under the 2015 China FTA). As also mentioned above (Part II(1)), the Australian media and federal Parliament also continue to subject ISDS to extensive scrutiny, compared for example to New Zealand (as outlined in Part III).

A final and more direct parallel between Korea and Australia is that investors from both countries have now commenced several treaty-based ISA claims. For Korea, these include:

- Ad hoc arbitration over alleged expropriation, under the Korea-Libya BIT (lodged in February, 2013);
- ICSID arbitration under the Korea-China BIT, regarding a regional government's cancellation of a golf course construction project (lodged in August, 2014, only the second known claim against China);
- Ad hoc arbitration under the Korea-Vietnam BIT, regarding non-enforcement of a commercial arbitration award (BIT claim lodged in November, 2014, but discontinued after the Vietnamese courts enforced the award);

Interestingly, the Korean investors in all three cases were represented by the same

93) For evidence of this in Australia, see parliamentary and media commentary cited in Nottage, 2015 (*supra* fn. 25); in New Zealand, the main report of the Select Committee (*supra* fn. 83, p. 5) noted that it understood:
"from officials that Korea would not have signed the free trade agreement without the inclusion of the ISDS provisions. It cites consistency and the precedents of its other free trade agreements as reasons for this requirement."

Korean law firm.[94] As elaborated by Joongi Kim, a Korean investor has also obtained an arbitration award under the *Moscow Convention on Protection of the Rights of the Investor*, signed on March 28, 1997.[95] In addition, on July 20, 2015, Samsung filed an ICSID arbitration claim under the Korea-Oman BIT regarding a refinery improvement project.[96]

Treaty-based claims have also been brought by Australian investors in recent years. Resource companies have filed treaty-based claims against India (ad hoc arbitration, succeeding in 2011 regarding non-enforcement of a commercial arbitration award), Indonesia and Pakistan (expropriation and other claims pending before ICSID).[97]

Ⅴ. Conclusions

Further research is needed to further tease out the similarities and occasional differences noted above regarding ISDS-related policy, politics and practice in Korea, Australia and New Zealand. Overall, they appear to have reached quite similar positions regarding ISDS and indeed substantive protections in investment treaties, but the situation in Australia remains comparatively unstable:

- Korea has had the most expansive treaty program, initially focused on attracting

94) For details, see Kim, 2015 (*supra* fn. 88). According to the searchable ICSID website case law database available at 〈https://icsid.worldbank.org/apps/icsidweb/cases/Pages/AdvancedSearch.aspx?cntly=ST74〉 (last visit on August 31, 2015), the firm of Bae, Kim & Lee is representing the claimant in *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25). This firm is also representing Korea in its first-ever treaty-based investment arbitration, brought by Lone Star (*supra* fn. 91): see 〈http://www.bkl.co.kr/front/law/practice/workFieldView.do?lang=eng&businessNo=2#.VeN1185dE2B〉 (last visit on August 31, 2015).

95) Kim, 2015 (*supra* fn. 88), discussing *Lee Jong Baek and Central Asian Development Corporation v. Kyrgyz Republic*, MCCI, Case No. A-2013/08 (November 13, 2013), available at 〈http://www.italaw.com/cases/2637〉 (last visit on July 23, 2015). Korea is not party to this treaty but Article 3 unusually provides: "[i]nvestors may be states or legal and physical persons both of the Parties and *of third countries*, unless the national legislation of the Parties stipulates otherwise" (emphasis added).

96) *Samsung Engineering Co., Ltd. v. Sultanate of Oman* (ICSID Case No. ARB/15/30). The claimant was represented by a US-based law firm: Sheppard Mullin Richter & Hampton.

97) *White Industries Australia Ltd v Republic of India*, UNCITRAL award of November 30, 2011, via 〈http://www.italaw.com/cases/documents/1170〉 (last visit on July 23, 2015); *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40), via 〈http://www.italaw.com/cases/1479〉 (last visit on July 23, 2015); *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1), via 〈https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/12/1〉 (last visit on July 23, 2015).

inbound investment but now primarily aimed at supporting its extensive network of outbound investors. The latter perceived national interest has allowed Korea to resume negotiations pressing for ISDS in recent treaties, despite some earlier public concerns triggered by KORUS ratification and the (solitary) Lone Star claim. Contemporary treaties (including FTAs with Australia and New Zealand) do incorporate provisions to safeguard host state interests, such as public health and other general exceptions, but these are often increasingly insisted on by treaty counterparties anyway.

- New Zealand has been the most reticent to negotiate investment treaties, partly due to its greater economic dependence on (primary produce) export trade. As a small country, New Zealand has also held a longstanding commitment to multilateral initiatives. However, the stalling of the WTO Doha Round and consequent diffusion of FTAs among countries competing for export markets have generated pressures to conclude trade and investment agreements with major economies such as China and Korea. This suite of agreements benefits from innovations in drafting ISDS and substantive protections compared to the earlier generation of investment treaties, epitomized by NAFTA, which allowed more scope for investor claims. Combined with the lack of treaty-based claims against New Zealand, and its unicameral Westminster system of government, this situation allows considerable bipartisan support for investment treaties and ISDS.
- Since the Abbott Government took power in late 2013, Australia has reverted to a pragmatic approach to including ISDS in investment treaties on a case-by-case assessment, after the Gillard Government in 2011 had declared that it would eschew ISDS based on an unusual combination of economic and political philosophy grounds. The first-ever claim against Australia, lodged in 2011 by the (originally US-based) Philip Morris group over plain packaging legislation, reignited more abstract concerns over ISDS that had resulted in its exclusion from the Australia-US FTA of 2004. Australia maintains a longstanding ambivalance about inbound investment,[98] although its outbound investors are increasingly active abroad. This complex historical and political context leaves

98) David Uren, *Takeover: Foreign Investment and the Australian Psyche*, Penguin Books Australia, 2015.

significant uncertainty for the future trajectory of ISDS in Australia, despite carefully delimited substantive protections in its most recent FTAs and ongoing innovations in drafting in those treaties where ISDS has been accepted.

Especially given their growing economic and geopolitical links among Australia, New Zealand and Korea, there is much scope for mutual learning and improved shared understandings about the pros and cons of this ISDS as a unique and evolving international dispute resolution mechanism. Arbitration bodies in all three countries can and should cooperate in this endeavour, by educating their members and the broader public about ISDS (including how it differs from international commercial arbitration). They might even collaborate in developing tailored arbitration Rules (reflecting various greater public interests involved in ISDS), which investors and host states might agree to choose instead of UNCITRAL or ICSID Rules in the (unlikely) event of a dispute ever arising.[99]

Already, given the strength of its economy and growing broader "soft power" within the Asian region, Korea's present pro-active approach towards treaty-based ISDS will be important beyond its bilateral relationships with Australia and New Zealand. Korea has already expressed interest in joining the expanded TPP,[100] where ISDS remains a hot topic. However, Korea will probably now only join after the existing twelve negotiating parties have concluded that FTA, which seems increasingly likely now that the US Congress has finally enacted fast-track negotiating authority for President Barack Obama.[101] Meanwhile, Korea can be expected to press strongly for ISDS in the (ASEAN+6) Regional Comprehensive Partnership FTA, under negotiation since late 2012.[102] In the longer term, as a member of the OECD, Korea may also play a role

99) Cf. generally Luke Nottage and Kate Miles, "'Back to the Future' for Investor-State Arbitrations: Revising Rules in Australia and Japan for Public Interests," *Journal of International Arbitration,* Vol. 26, No. 1, p. 25.

100) Anna Fifield, "South Korea asks to join Pacific trade deal. Washington says not so fast.", *Washington Post*, April 15, 2015, available at 〈https://www.washingtonpost.com/world/asia_pacific/south-korea-asks-to-join-pacific-trade-deal-washington-says-not-so-fast/2015/04/15/85d7396a-e39e-11e4-ae0f-f8c46aa8c3a4_story.html〉 (last visit on July 21, 2015).

101) "Senate puts Obama on fast-track to TPP", *RT*, June 24, 2015, available at 〈http://rt.com/usa/269497-senate-tpa-obama-tpp/〉 (last visit on July 21, 2015).

102) See generally eg. Australian Government, Department of Foreign Affairs and Trade, "Regional Comprehensive Economic Partnership", available at 〈http://dfat.gov.au/trade/agreements/rcep/Pages/regional-comprehensive-economic-partnership.aspx.〉 (last visit on July 21, 2015).

in supporting the latter's renewed interest in ISDS since 2012,[103] which may eventually translate into some form of multilateral investment treaty.

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103) See eg. OECD, "OECD Working Papers on International Investment", available at 〈http://www.oecd-ilibrary.org/finance-and-investment/oecd-working-papers-on-international-investment_18151957;jsessionid=2mhm1gk003alw.x-oecd-live-03〉 (last visit on July 21, 2015).

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