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Prof. W. Shan
Xi'an Jiaotong University
View profile

Mark Feldman
Peking University School of Transnational Law
View profile

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Locating Australia on the Pacific Rim: Trade, Investment and the Asian Century by L.E. Trakman and K. Sharma

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LOCATING AUSTRALIA ON THE PACIFIC RIM: TRADE, INVESTMENT AND THE ASIAN CENTURY*

Leon E. Trakman and Kunal Sharma*****

The bilateral and regional trade agreements that Australia is currently negotiating (and has recently concluded) highlight Australia's growing recognition that its trade and investment interests are significantly aligned with those of its Pacific neighbours. Australia is currently in bilateral negotiations with China, Indonesia, and India, as well as having a significant stake in the imminent Trans Pacific Partnership Agreement (TPPA).[1] As recently as April 2014, Australia concluded negotiations on the Japan-Australia Economic Partnership Agreement (JAEPA).[2] It also recently signed an FTA with the Republic of Korea (KAFTA).[3] Beyond its own agreements, Australia is affected in practical and economic terms by agreements in which it does not have a direct part to play, such as the China-Japan-Korea trilateral agreement.

A number of Australia's important trading partners are located around the Pacific Rim and, notably, there is considerable inbound investment into Australia by Asian investors.[4] In addition, international trade relations and the ability to negotiate trade agreements are not entirely distinct from diplomatic and cultural exchanges between countries. Thus, in formulating international trade and investment policy, there is more at stake in terms of international comity and regional accord than simply a greater share of the FDI pie.

Our aim in this paper, however, is to briefly analyse Australia's investment policy, particularly in relation to investor state dispute settlement (ISDS), with reference to its regional economic concerns and growing trade relations with the Pacific Rim countries. Australia's goal, understandably, is to maximise trade and investment while maintaining sound foreign relations with the global community, as well as ensuring that its sovereign ability to implement domestic legislation in the public interest is not compromised. In pursuit of the latter aim, the Australian Labor Government's 2011 Policy Statement sought to distance itself from ISDS procedures that supposedly confer greater benefits on foreign businesses than on Australian ones. More importantly, though less explicitly stated, the Government was concerned about its ability to legislate in the public interest. Notably, ISDS provisions were not included

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** B Com, LLB (Cape Town); LLM, SJD (Harvard). Leon E. Trakman is Professor of Law and Past Dean, Faculty of Law, University of New South Wales, Sydney, Australia. This paper is part of ongoing research related to a discovery grant awarded by the Australian Research Council (2014-16).

*** BA, LLB (Hons) (UNSW). Kunal Sharma lectures in private law at the University of New South Wales and is the 2014 Rhodes Scholar elect for New South Wales.

[1] Australia's Trade Agreements, http://www.dfat.gov.au/fta/ (11 April 2014).
[2] Conclusion of Negotiations, http://www.dfat.gov.au/fta/jaepa/ (11 April 2014).
[3] Signature of the Korea-Australia Free Trade Agreement, http://www.dfat.gov.au/fta/kafta/ (11 April 2014).
[4] Department of Foreign Affairs and Trade, *Trade at a Glance 2013* (ISBN 978-1-74322-123-5) 17, 22, https://www.dfat.gov.au/publications/trade/trade-at-a-glance-2013/ (11 April 2014).

in the 2012 Australia-Malaysia FTA.[5] After a change in Australia's Federal Government in 2013, two years after the Policy Statement was announced, the new Liberal Government has retreated from that Policy notably by including ISDS in the KAFTA concluded on 5 December 2013.[6] Indeed, the 2011 Policy statement has been removed from the Department of Foreign Affairs and Trade's official website and, in light of the recent agreements finalised with Korea and Japan, it appears that the Liberal Government is negotiating FTAs on a different basis altogether by considering ISDS in its treaties on a case-by-case basis. It has also categorically stated that Australia's ability to pass public interest legislation, such as in areas of health and environment, will not be compromised.[7] Illustrating this case-by-case approach is the JAEPA, which does not include an ISDS regime.

One of the co-authors of this paper has previously undertaken extensive analysis of the doctrinal foundations and practical usefulness of ISDS as a means of resolving investment disputes.[8] That analysis compared ISDS to other alternatives, particularly resort by foreign investors to the domestic courts of host states. The analysis also took account of the draft and final reports released by the Australian Productivity Commission which significantly influenced Australia's 2011 Policy Statement. The authors do not propose to restate that debate in this paper. Nor does this paper consider whether the preference for ISDS or domestic courts stems from subjective views and particular policy goals, as distinct from the perceived superiority of one institution over the other based on universally accepted standards grounded in normative criteria. This paper rather seeks to balance the goal of maximising FDI and fostering long term trade relations against Australia's need to implement legislation considered essential to the national interest. It is in balancing these goals that Australia might more appropriately reconsider endorsing ISDS in its treaty practice, while also taking account of countervailing public interests.

The focus of this paper is to examine Australia's potential rejection of ISDS in light of its geopolitical and economic interests, given the preference for ISDS articulated by many of Australia's key trading partners notably, but not exclusively, in the Pacific region. First, we consider the importance of FDI and its relationship to ISDS. Next, we set out the Australian government's recent policies and statements in relation to ISDS. We then examine Australia's trade and investments interests within the Pacific region, looking briefly at its relationships with key trading partners there. In doing this, we examine the trends in BIT practice exhibited by Australia and some of its

[5] See Malaysia–Australia Free Trade Agreement, signed 22 May 2012, full text available at http://www.dfat.gov.au/fta/mafta/#full-text (11 April 2014). The omission of ISDS from this Agreement is of limited significance because ISDS is provided for under the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), the first protocol of which was signed on 26 August 2014. See http://www.dfat.gov.au/fta/aanzfta/.

[6] See Korea-Australia Free Trade Agreement, signed 8 April 2014, ch 11, www.dfat.gov.au/fta/kafta/downloads/KAFTA-chapter-11.pdf (11 April 2014) ('KAFTA Investment Chapter').

[7] See Frequently Asked Questions on Investor-State Dispute Settlement (ISDS) http://dfat.gov.au/fta/isds-faq.html (11 April 2014) ('FAQs on ISDS'). For comments on the Policy by the Liberal Government elected in 2013 see e.g., Callick, R., 'Korea Ready to Talk Turkey After FTA Hurdle Removed' (1 November 2013) www.theaustralian.com.au/business/economics/korea-ready-to-talk-turkey-after-fta-hurdle-removed/story-e6frg926-1226750841630# (11 April 2014).

[8] Trakman, L.E., 'Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo' (2012) 35 *Univ. N.S.W. Law Journal* 979; Trakman, L.E. 'Investor State Arbitration or Local Courts: Will Australia Set a New Trend?' (2012) 46 *J. World Trade* 83.

trading partners in relation to ISDS. We also look at the preference for ISDS mechanisms in the Pacific region, and comment on the potential consequences of Australia adhering to its 2011 Trade Policy Statement in light of current negotiations over the multilateral TPPA. Finally, we propose a way forward for Australia with respect to resolving investor-state disputes, namely by way of a model BIT that provides for safeguards in relation to ISDS instead of rejecting it out of hand.

I. The preference for ISDS

Australia's commitment to ISDS and its overall approach to investment treaty negotiation are important because they have a direct impact on trade and investment in Australia as well as the ability of Australians to invest in foreign states. In addition, a healthy flow of FDI into and out of regional and global investment markets impacts markedly on a range of economic sectors.[9] FDI is also a key means of facilitating economic growth, as an increase in FDI share ordinarily leads to "higher additional growth in financially developed economies."[10] Further, international trade has a direct effect on employment, with the Australian Department of Foreign Affairs and Trade estimating that, in 2012, one in five jobs was related to international trade.[11] There is consensus that greater trade liberalisation will allow Australia to align its interests with its Asian neighbours and grow its domestic economy.[12]

On a global scale, FDI has gained even further significance following the Global Financial Crisis of 2008 and the worldwide economic slowdown that followed. Market-based competition is growing among states to attract cross-border investment, including capital and infrastructure investments directed at promoting the financial stability and liquidity of international investments.

While increased FDI is generally beneficial, it necessarily involves cross-border investment flows and may lead to disputes between investors and the states where they invest. As a method of resolving investor-state disputes, ISDS is arguably directed at promoting a healthy cross-border flow of FDI and providing investors with a viable and fair platform for dispute resolution.[13] A foreign investor can lodge a claim against a host state to be resolved through a specialized and expert international investment tribunal, without the need to mobilise its home state to take diplomatic action or pursue inter-state dispute resolution, including through the WTO.

ISDS has been increasingly incorporated into bilateral and regional trade agreements worldwide, including countries in Asia, which have traditionally resisted ISDS due to

[9] *See generally* Trakman, L.E and Ranieri, N. (eds), *Regionalism in International Investment Law* (OUP, 2013) 1, 24.
[10] Alfaro, L., Chanda, A., Kalemli-Ozean S. and Sayek, S., 'Does Foreign Direct Investment Promote Growth? Exploring the Role of Financial Markets on Linkages' (2010) 91(2) *J. Dev. Econ*. 242.
[11] Trans-Pacific Partnership Agreement Negotiations, https://www.dfat.gov.au/fta/tpp/ (11 April 2014).
[12] Ibid.
[13] See Trakman, 'Choosing Domestic Courts', above n 8; Trakman, 'Investor State Arbitration or Local Courts', above n 8; Nottage, L. 'Throwing the Baby Out with the Bathwater: Australia's New Policy on Treaty-Based Arbitration and its Impact in Asia' (2013) 37 *Asian Studies Review* 253; Burch, M., Nottage, L. and Williams, B., 'Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century' (2012) 35 *Univ. N.S.W. Law Journal* 1013.

various marked-based ideological and economic development considerations.[14] It is a commonly used method of investor-state dispute resolution, and is perceived to have some distinct benefits over the alternatives, as are outlined immediately below.

ISDS that is provided for by treaty can insulate states from diplomatic involvement in investment disputes by giving investors an alternative pathway to resolve their grievances against host states. ISDS can obviate the need for foreign investors to seek domestic law remedies which they may view as less impartial than international investment arbitration.[15] ISDS can also confer substantive protections on foreign investors by treaty or investor-state contract, such as most-favoured-nation or national treatment guarantees under international investment law. In addition, ISDS can limit the inconsistent effect that the decisions of domestic courts can have upon investors operating within different legal systems with dissimilar legal traditions and cultures.[16] ISDS can also reduce reliance on competing domestic rules of evidence and procedure, such as adversarial evidentiary rules in common law systems and inquisitorial methods of adducing evidence in civil law systems.[17] In addition, ISDS can limit the perceived social and political costs associated with domestic litigation by allowing investor-state parties to control public access to proceedings. As a result, ISDS can serve as a "delocalized" process of resolving disputes between foreign investors and host states. Outbound investors can rely on ISDS provided for in BITs and FTAs and avoid having to rely on the domestic courts and laws of host states about which they have qualms.

A rejection of ISDS does not simply exclude that *process* of dispute settlement, but rather excludes the substantive protections that investment treaties often confer on foreign investors in light of their vulnerable position. Australia, which has a dualist system, does not provide for international laws to be directly applied in domestic courts. Clauses such as providing for most favoured nation treatment cannot be enforced in domestic courts unless there is domestic legislation providing for such protections. It is therefore important to bear in mind always that a rejection of ISDS is a rejection of many of the substantive protections that a community of nations has invested decades in developing.[18] Such a position proceeds on the subtext that foreign investors should not be given additional protections or incentives for investment, even where their investments are subject to unfair government interference or expropriation. The impugned conduct will often not be unlawful under the domestic laws of the host country engaged in such interference.

Of course, the above is not intended to suggest that ISDS is without shortcomings or critics. Indeed, in recent years a number of developing states, including in Asia, have

[14] *See* Nottage, L. and Weeramantry, J.R., 'Investment Arbitration in Asia: Five Perspectives on Law and Practice (2012) 28(1) *Arb. Int.* 19.
[15] *See* Kurtz, J., 'Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication' (2012) 27(1) *ICSID Rev*. 65; Trakman 'Investor State Arbitration or Local Courts', above n 8.
[16] On the significance of legal cultures, including regionally, in international investment law see Picker, C.B., 'International Investment Law: Some Legal Cultural Insights' in Trakman and Ranieri, above n 9, ch 3, 120.
[17] See Trakman, L.E., 'Legal Traditions and International Commercial Arbitration' (2006) 17 *Am. Rev. Int. Arb.* 1, 119–120, 126–128.
[18] See Trakman, L.E., 'Investor-State Arbitration: Evaluating Australia's Evolving Position' (2014) 15 *Journal of World Investment and Trade* 152, 173.

become critical of ISDS and rejected the process as well as the tribunals that deliver it, in favour of alternative dispute resolution models.[19] Certainly, the power imbalance between states and investors is not always in favour of host states. Many developing countries do not have the resources that wealthy investors have. However, criticisms of ISDS should not be universally adopted without close examination. Particularly, the problems faced by developing countries are unlikely to justify Australia's broad rejection of ISA, given its status as a developed country seeking to forge lasting relationships with its Pacific neighbours.

II. Australia and ISDS

In 2011, the Federal Government of Australia led by the Australian Labor Party released a Trade Policy Statement indicating that Australia would no longer agree to the inclusion of investor-state arbitration in its future bilateral and regional trade agreements (BRTAs), choosing instead to rely on alternatives to ISDS.[20] Specifically, the Policy Statement provided that Australia would no longer negotiate treaty protections "that confer greater legal rights on foreign businesses than those available to domestic businesses" or rights that would "constrain the ability of the Australian Government to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses."[21]

One of the aims of the Policy was to disable foreign investors from invoking ISDS to challenge Australian sovereignty over public safety, health and the environment.[22] Australia has experienced an increase in FDI flows, particularly in the resources and energy sectors,[23] but there is also significant potential for investors to institute claims against Australia where environmental and health legislation seeks to constrain foreign investment in these areas. By declining to incorporate ISDS in its BRTAs, Australia would have greater latitude in designing sustainable measures to preserve its public interests, thereby avoiding pressures created by the so-called "regulatory chill" arising from having to defend itself against costly and intrusive ISDS claims.[24]

These concerns are illustrated in part by Philip Morris's ISDS claim against Australia under the Hong Kong-Australia BIT over Australia's decision to require the plain packaging of cigarettes on public health grounds[25] and the recent WTO challenges

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[19] For a more detailed discussion, see Trakman, above n 18. For a general overview of this trend see Waibel, M. (ed), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010).

[20] Emerson, C., *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity*, www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state (11 April 2014) (hereafter "Policy").

[21] Ibid 1–2.

[22] See Nottage, L., 'Investor-State Arbitration Policy and Practice after *Philip Morris Asia v Australia*' in Trakman, and Ranieri, above n 9, ch 15, 452.

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

[24] Ibid.

[25] On Philip Morris' ongoing action against Australia under the Australia-Hong Kong Free Trade Agreement *see* Phillip Morris International, *News Release: Philip Morris Asia Initiates Legal Action Against the Australian Government Over Plain Packaging* <www.pmi.com/eng/media_center/press_releases/pages/PM_Asia_plain_packaging.aspx> (11 April

against Australia initiated by Ukraine and a number of other countries over this same issue.[26] While the Philip Morris case provides a good illustration of the challenges envisaged by the critics of ISA, certainly one ISDS claim is not sufficient to show that a systemic problem exists, jeopardising Australia's ability to legislate in the national interest. Aside from the fact that it is the very purpose of ISDS to facilitate challenges against host states where other avenues are not available, it is unusual to reject the institution of ISDS on the basis of one claim that the Government may perceive to be unsubstantiated. Certainly, few of Australia's regional neighbours and trading partners who are parties to BITs providing for ISDS have reacted so strongly when a claim has been brought against them.[27]

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

The proposition underlying the Gillard Government's policy was that Australian courts would be more likely to protect domestic public policy in cases brought by foreign investors against the Australia Government than international ISDS tribunals. Ancillary to this view is the proposition that domestic courts in Australia are more likely to take account of national security legislation, administrative regulations and prior domestic court decisions in Australia in so deciding, whereas international ISDS tribunals are less likely to so respond to such domestic requirements or expectations.

In providing for domestic courts to decide investor-state disputes, the Government would need to weigh the risk that foreign courts may subject Australian investors to expansive domestic public policy restrictions against the benefit of Australian courts

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2014); On Philip Morris' unsuccessful litigation against the Prime Minister of Australia *see Philip Morris Limited v Prime Minister* [2011] AATA 556; On the earlier claim brought against the Republic of Uruguay under the Switzerland-Uruguay BIT *see FTR Holdings S.A. (Switzerland) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Request for Arbitration, 19 February 2010. FTR Holding S.A. is a subsidiary of Philip Morris International Inc (PMI). PMI's Operation's Centre is in Switzerland. See also Mitchell, A.D. and Wurzberger, S.M. 'Boxed in? Australia's Plain Tobacco Packaging Initiative and International Investment Law' (2011) 27 *Arb. Int.* 623; Voon, T. and Mitchell, A., 'Implications of WTO Law for Plain Packaging of Tobacco Products' in Mitchell, A., Voon, T. and Liberman, J. (eds), *Public Health and Plain Packaging of Cigarettes: Legal Issues* (Edward Elgar, 2012) ch 6, 109.

[26] See Dispute Settlement DS434, *Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm (11 April 2014). A recent and notable WTO challenge against Australia has been brought by Indonesia. On the WTO challenges by Ukraine, Honduras, Dominican Republic, Cuba and Indonesia, see http://www.mccabecentre.org/focus-areas/tobacco/dispute-in-the-world-trade-organization.

[27] Nottage, above n 13, 257.

[28] On the PBS see Australian Government: Department of Health and Ageing, *Pharmaceutical Benefits Scheme: PBS News Updates*, www.pbs.gov.au (11 April 2014).

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

protecting national security, public health and the environment from inbound investors to Australia. It is likely that the other party to the agreement will legitimately require concessions and carve outs that are favourable to its own national interest.

The current Liberal Government appears to have adopted a more tempered approach to ISDS. Whereas the Labor Government took an in principled approach in indicating that it would not agree to the incorporation of ISDS into its future BRTAs, the Liberal Government has indicated that it will take a contextual or "case-by-case" approach towards whether to include ISDS in future BITs.[30] In this spirit, it has adopted ISDS in its recent bilateral investment treaty with the Republic of Korea.[31] Notably, however, an ISDS regime was not agreed to as part of the agreement with Japan.[32]

In abstract terms, the Liberal Government's policy appears to be quite diplomatic. By articulating a "case-by-case" approach, the Government has not resigned itself to an ideological position with respect to ISDS. In practical terms, the Government's approach presumably presupposes that, in deciding whether to adopt ISDS on a case-by-case basis, the Australian Government will consider discrete national interests, such as the nature of national security, environmental or public health protection in relation to each treaty it negotiates. It will also pay heed to the kind of treaty partner in issue, including the political system, economic development and treatment accorded to foreign investors by the particular negotiating partner state in the past.

While it appears superficially attractive, this case-by-case approach can be challenging. The approach assumes that, while negotiating a treaty, the Australian Government will be able to determine in advance the nature of investor-state disputes that are likely to eventuate, and whether the Government ought to negotiate for ISDS or domestic courts in anticipating such disputes. It is unclear how the Government will decide, in relation to inbound investment, whether investors from a particular state party will be more likely to invoke ISDS against Australia. It also unclear, in relation to outbound investment, what protections courts of foreign states are likely to confer upon Australian outbound investors. Generally speaking, the nature of the state party and its historical actions are insufficient bases upon which to determine whether ISDS or domestic courts should be the chosen method of dispute settlement in the future. Further, such practice highlights Australia's variable views about particular states' laws and legal systems and renders inbound and outbound investor decisions prospectively uncertain.

When Mr Abbott came into power, he made a commitment to conclude trade agreements with Australia's three biggest Asian trading partners – China, Japan and

[30] See FAQs on ISDS, above n 7.
[31] See KAFTA Investment Chapter, above n 6.
[32] See above n 2; Martin, P., 'ISDS: The Trap that Australia–Japan Free Trade Agreement Escaped', *Sydney Morning Herald*, 10 April 2014, http://www.smh.com.au/federal-politics/political-opinion/isds-the-trap-the-australiajapan-free-trade-agreement-escaped-20140407-zqrwk.html; Crowe, D. 'Tony Abbott Concludes Free Trade Agreement with Japan', *The Australian*, 7 April 2014, http://www.theaustralian.com.au/national-affairs/policy/tony-abbott-concludes-free-trade-agreement-with-japan/story-fn59nm2j-1226877009701#.

Korea – by the end of 2014.[33] The Liberal Government is well on its way to achieving that goal, with the KAFTA concluded in December 2013 and JAEPA concluded in April 2014. The former contains ISDS provisions while the latter does not. So far, the Liberal Government's negotiating process indicates that, while the Government might be averse to including ISDS, it will concede on the issue if the other party insists on it, as Korea insisted under the KAFTA, or will require it in return for making a particular concession.[34]

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

III. Investment and trade along the Pacific Rim

Australia has developed a competitive, economically efficient and technologically advanced resource sector. In 2012, Australia's top three exports were in the resources sector (iron ore, coal and gold).[35] Australia has also become a global supplier of agricultural goods and raw materials, thanks significantly to inbound FDI flows. In formulating its 2011 Policy, the Australian Government may have been guided by Australia's considerable and mining boom that continued at least until 2011, leading to the view that its rich natural resources will continue to attract inbound investment even without ISDS protections. If such a view is perpetuated, it should be considered with caution. Australia should seek a long-term approach to creating trade and investment synergies with its neighbours and key economic partners. This caution should recognise that trade and investment flows in the Pacific Rim are likely to change, suggesting the virtue of Australia modifying its trade and investment policies including prospectively in relation to ISDS.

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[33] Murphy, K. 'Tony Abbott to Reassure China on Investment at Crunch Trade Talks', *The Guardian*, 8 April 2014, http://www.theguardian.com/world/2014/apr/08/abbott-china-trade-pact- (11 April 2014). On opposition to the KAFTA, see http://blogs.usyd.edu.au/japaneselaw/2014/09/kafta_2.html.

[34] The Government has not expressly voiced this aversion to including ISDS. The official position is that the Government will approach ISDS on a case-by-case basis: see above n 7. This was what the Liberal Party had promised in its electoral campaign prior to coming into power. The Government has, however, been cautious in its approach to ISDS. The ISDS provisions in the KAFTA were evidently included upon Korea's insistence: The Joint Standing Committee's on Treaties' Report on KAFTA (tabled 13 May 2014) cited evidence from DFAT that 'Korea had refused to sign the Agreement without the inclusion of an ISDS mechanism' (at [4.5]); see also Callick, above n 7. No such provisions were included in the JAEPA – presumably in return for a negotiating concession – despite evidence that Japan had initially sought the inclusion of an ISDS regime. After taking up his role as Minister for Trade in September 2013, Andrew Robb stated that, at least with respect to the TPPA, Australia might seek to resist ISDS, continuing to adhere to the Labor party's 2011 Policy: Martin, P., 'Trade Treaty Stance the Same, despite Promise', *Sydney Morning Herald*, 23 September 2013, http://www.smh.com.au/business/trade-treaty-stance-the-same-despite-promise-20130922-2u7wm.html.

[35] *Trade at a Glance*, above n 4, 6.

The Pacific Rim countries, which include a number of Asian countries and the US, are integral to Australia's trade relations. In 2012, Australia's top five two-way trading partners (China, Japan, US, Korea and Singapore) were located along the Pacific Rim.[36] Australia's top three export markets were China, Japan and South Korea,[37] and top three import sources were China, US and Japan.[38] Indeed two-way trade with the Asian region accounted for 60.8% of Australia's total trade in 2012.[39] Needless to say, China is integral to Australian trade and investment, given that it is Australia's largest two-way trading partner. While there are healthy two-way trading links between Australia and the Asian region as well as the US, longer term outbound investments in Asian countries by Australian investors could be improved,[40] and so could longer term inbound investment by Asian investors in Australia.[41]

It would be sensible for Australia to devise its trade policy in light of this economic framework. Notably, countries in the Asian region have increasingly provided for ISDS protection, even if some countries continue to remain cautious.[42] Given that Australia's aim has been to consolidate its trade relations with Asian countries, it would make sense for Australia to formulate its trade policy in light of not only its economic ties but also the geopolitical and cultural pressures it faces.

Significantly, the Australia–Japan trade agreement, negotiations for which spanned at least from 2007 to 2014, ultimately had as two of its key sticking points reduction in Australian tariffs on the import of Japanese cars into Australia and Japanese tariffs on the import of Australian beef into Japan.[43] Among a host of other outcomes, the key economic outcome of JAEPA for Australia is going to be the reduction in Japanese tariffs on Australian frozen and fresh beef, the tariffs on the former being reduced almost by half over the next 15 years.[44] The key economic outcome for Japan is going to be the reduction in Australian tariffs on Japanese electronic goods and cars.[45] Given that passenger motor vehicles are the second highest goods imported into Australia,[46] Australia had a significant interest in ensuring that the tariffs it forewent in this respect were well compensated for by the benefits its investors received in Japan. It is estimated that over the next 20 years the Australian beef industry will grow by $2.6-2.8 billion as a result of JAEPA.[47]

The agreement with Japan, hailed as being supremely advantageous for both the Australian and Japanese economies,[48] does not include an ISDS regime. Certainly,

[36] Ibid 16.
[37] Ibid 13.
[38] Ibid 15.
[39] Ibid 17.
[40] Ibid 21.
[41] Ibid 22.
[42] Nottage, above n 13, 257.
[43] Coorey, P, 'Trade Deal Signed as Japan Relents on Beef', *The Australian Financial Review* 7 April 2014, http://www.afr.com/p/national/trade_deal_signed_as_japan_relents_j8KDhVp41W3YUT8dplwWOJ (11 April 2014).
[44] See Crowe, above n 32;
[45] Ibid; Coorey, above n 43.
[46] *Trade at a Glance*, above n 4, 9.
[47] Crowe, above n 32; Coorey, above n 43.
[48] See Crowe, above n 32.

Japan had requested ISDS at least until the tenth round of negotiations[49] and dispute settlement was still a point of concern until the sixteenth round.[50] Japan has also clearly favoured ISDS in its other investment treaties in the recent past, preferring to allow for resolution of investor-state disputes through independent channels.[51] Ultimately, however, Japan agreed to conclude JAEPA without an ISDS regime, potentially because it considered that insistence on ISDS was not worth any additional concessions it may have to provide.[52] There has been suggestion that Japan was satisfied that Australia's rule of law tradition would secure sufficient protections for its investors rendering an ISDS regime unnecessary,[53] though this seems entirely speculative, particularly in light of Japan's earlier requests for ISDS. Certainly, whatever else may be extrapolated from the JAEPA negotiation process, it cannot be said that Japan now holds ISDS in disfavour. Its willingness to exclude ISDS from JAEPA shows at best that the economic and political advantages of securing a trade agreement with Australia were greater than insistence on ISDS. The fact that Australia's legal system is generally regarded as being independent, transparent and reliable may have given some comfort to Japanese negotiators, though this view is not going to be universally adopted.

A clear illustration is the KAFTA concluded in December 2013, which does include ISDS provisions and upon which Korea reportedly insisted.[54] Given Korea's position as a key trading partner and the potential it offers for significant investment opportunities, it was certainly prudent for the Australian government to seek a balanced ISDS outcome.

The final trade deal Mr Abbott hopes to strike is with China,[55] which is a particularly noteworthy example of Australia's growing investment relationships within Asia. China is a major investor in Australia and is heavily involved in its natural resources sector. While Australia's investment in China still lags behind other states in the

[49] Department of Foreign Affairs and Trade, 'Newsletter Update 10: Australia-Japan Free Trade Agreement, Tenth Negotiating Round' (17-25 November 2012), https://www.dfat.gov.au/fta/jaepa/newsletters/update_10.html (11 April 2014).
[50] Department of Foreign Affairs and Trade, 'Sixteenth round of negotiations – 13-15 June 20', https://www.dfat.gov.au/fta/jaepa/#news (11 April 2014).
[51] See eg, Agreement between the Government of Malaysia and the Government of Japan for an Economic Partnership, signed 13 December 2005, article 85; Agreement between Japan and the Republic of Indonesia for an Economic Partnership, signed 20 August 2007, article 69; Comprehensive Economic Partnership Agreement between Japan and the Republic of India, signed 16 February 2011, article 96. Japan's FTAs are available at Ministry of Foreign Relations of Japan, 'Japan–Asia Relations', http://www.mofa.go.jp/region/asia-paci/index.html (11 April 2014). See also, Hamamoto, S. and Nottage, L., 'Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-based Investor-State Dispute Resolution' (2011) 8(5) *Transnational Dispute Management* 1.
[52] Nottage, L., 'Why No Investor-State Arbitration in the Australia-Japan FTA?', *Japanese Law and the Asia Pacific* (8 April 2014), http://blogs.usyd.edu.au/japaneselaw/2014/04/why_no_isarb_with_japan.html (11 April 2014).
[53] Martin, P., 'Free Trading Cards Laid on the Table, but Beware the Ace Up the Sleeve', *Sydney Morning Herald*, 9 April 2014, http://www.smh.com.au/business/free-trading-cards-laid-on-the-table-but-beware-the-ace-up-the-sleeve-20140408-36b6v.html (11 April 2014).
[54] See above n 34.
[55] See Murphy, above n 33.

region, in 2010 Australia's FDI in China reached AUD 17 billion.[56] Although China only invested AUD 19 billion in Australia at that time, this rate is three times higher than what it was in 2007.[57] FDI flows from China into Australia are growing exponentially and are making a major contribution to Australia's recent high economic growth, commonly referred to as the natural resources boom. Considering China's demand for natural resources, it is unlikely that this trend will be reversed in the near future as China acquires more of Australia's natural resources. Even more broadly, China's desire to increase its investments in Australia is seen in its argument that the Foreign Investment Review Board threshold for its investments should be increased to match the thresholds available to US and New Zealand investors (equivalent concessions were extracted by Japan and Korea as part of their respective agreements relating to investments by private entities in non-sensitive industries).[58] The difference with China is that much of the investment is likely to come from state-owned enterprises (SOEs),[59] though the Abbott Government no longer appears to be very resistant to investment from SOEs.[60]

Over the past two decades, China has shown a trend towards trade liberalisation, even if this movement has been slow, as proffered by some western countries.[61] According to unconfirmed reports, Australia is under pressure from China to include access to ISDS in the current free trade agreement under negotiation.[62] If pursued, China's position would be understandable. Chinese investors have made a number of high profile investments in Australia and it is reasonable to surmise that China wants to ensure independent protections for them. This is especially so in sensitive matters concerning national security, public health and the environment, which are closely related to investment in natural resource sectors and which the Australian government has strong eco-political reasons to protect. Indeed, Asian investors generally may have good reason to anticipate that Australian courts, however strenuously they apply

[56] Australian Government, *Australia in the Asian Century, Foreign Direct Investment Fact Sheet*, October 2012, www.asiancentury.dpmc.gov.au/sites/default/files/fact-sheets/20.-Foreign-investment-in-Australia.pdf (11 April 2014).
[57] Ibid.
[58] See Janda, M., 'Investment Threshold Lifted above $1b under Korea – Australia FTA', *ABC News*, 17 February 2014, http://www.abc.net.au/news/2014-02-17/government-releases-details-of-korea-australia-fta/5264840 (11 April 2014); Kenny, M and Wen, P., 'Japan, Korea and Now a Free Trade Deal with China Is in Sight', *Sydney Morning Herald*, 10 April 2014, http://www.smh.com.au/federal-politics/political-news/japan-korea-and-now-a-free-trade-deal-with-china-is-in-sight-20140409-36djp.html (11 April 2014).
[59] Murphy, K., 'Tony Abbott Goes to China "to Be a Friend", Not to Chase Deals' *The Guardian*, 10 April 2014, http://www.theguardian.com/world/2014/apr/10/tony-abbott-goes-to-china-to-be-friend-not-chase-deals (11 April 2014).
[60] Murphy, K., 'Tony Abbott Says China's State-Owned Enterprises Are Welcome in Australia', *The Guardian*, 11 April 2014, http://www.theguardian.com/world/2014/apr/11/abbott-says-chinas-state-owned-enterprises-welcome (11 April 2014); Coorey, P., 'Side Deal May Open Door for China State-Owned Firms', *Australian Financial Review*, 12 April 2014, http://www.afr.com/p/national/side_deal_may_open_door_for_china_0TUDkjLssijS9698OcJqEO (12 April 2014).
[61] Trakman, L.E., 'China and Foreign Direct Investment: Does Distance Lend Enchantment to the View?' (2013) *Chinese Journal of Comparative Law* 1; Trakman, L.E., 'China and Investor State Arbitration', *University of New South Wales Faculty of Law Research Series*, No 48 (2012).
[62] See Wallace, R., 'Free-trade Push May Open Door to China', *The Australian*, 18 July 2013 www.theaustralian.com.au/national-affairs/foreign-affairs/free-trade-push-may-open-door-to-china/story-fn59nm2j-1226681027576 (11 April 2014).

the 'rule of law', will be sensitive to Australia's public policies, including by purposively interpreting domestic legislation.

On the flip side, while the Asian region has immense economic opportunities, Australia's outbound investment into some Asian countries is not without risks. According to the 2012 Transparency International Corruption Perceptions Index, the majority of countries in Asia scored between 10 and 50 points out of a possible 100.[63] Other studies conducted by the World Justice Project provide similarly troubling assessments.[64] The World Bank's Ease of Doing Business rankings of East Asia and the Pacific paints an even bleaker picture: only four countries in the region managed to score in the top 20, with other key regional economic partners of Australia falling behind by a significant margin and others like Korea displaying an uneven record notably in regard to the quality of public and private institutions.[65] While the methodology of these rankings is not without controversy,[66] these surveys portray a similar story: Asia is still lagging behind other parts of the world in the development of its legal institutions and in the protections accorded to foreign investors.

In the absence of ISA, Australia's outbound investors located in Asia may encounter resistance in securing relief from host states, including before local courts. While some investors may move their businesses to intermediary states to avoid the courts of partner states, many smaller Australian investors lack such mobility and will have to resolve their disputes in the local courts of their host states.[67] Thus, one of the practical challenges that Australia faces, if it remains determined to retire ISA, lies in protecting its outbound investors in Asia who lack the capacity to protect themselves.

IV. The Trans-Pacific Partnership Agreement

A particular geopolitical challenge for Australia relates to its position as a negotiating party to the TPPA. The potential for a multilateral accord promised by the TPPA is a considerable one, not least because the TPP countries represent 39% of the world GDP, account for 25.8% of world trade, and include five of Australia's top ten trading partners.[68]

The challenge lies in the contest between Australia potentially favouring domestic courts over ISDS and TPPA member countries favouring ISA, in particular the US.[69]

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[63] See Transparency International, *2012 Corruption Perception Index Results*, cpi.transparency.org/cpi2012/results/ (11 April 2014).
[64] See The World Justice Project, *2012-2013 Rule of Law Index Scores and Rankings*, http://worldjusticeproject.org/rule-of-law-index-data (11 April 2014).
[65] See The World Bank, *Ease of Doing Business 2012 Rankings*, www.doingbusiness.org/rankings (11 April 2014). See World Economic Forum, The Global Competitiveness Report, 2013-2014 http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf (on Korea's overall ranking, see p 34).
[66] See e.g., Thompson, T. and Shah, A., 'Transparency International's Corruption Perceptions Index: Whose Perceptions Are They Anyway?' World Bank Discussion Draft 2005, http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/TransparencyInternationalCorruptionIndex.pdf (11 April 2014).
[67] Investors may base these decisions on various grounds, including but not limited to corruption, transparency and rule of law indices. *See supra* notes 63-64.
[68] Trans-Pacific Partnership Agreement Negotiations, https://www.dfat.gov.au/fta/tpp/ (11 April 2014).
[69] See Lewis, M.K., 'The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?' (2011) 34 *B. C. Int'l & Comp. L. Rev* 27, 34; Ranald, P., 'The Trans-Pacific Partnership Agreement:

Certainly, JAEPA, expressed by Australia and Japan as creating significant economic opportunities for both countries, has apparently been dismissed by the US as detracting from the TPPA.[70] The US has observed that the benefits created by JAEPA are "significantly less ambitious" than those envisaged in the TPPA.[71] Certainly, the reduction in Japanese tariffs on Australian beef will be gradual, taking a period of 15 years, and even then substantial tariffs will remain. The US, like Australia, is eager to get access to Japanese agricultural markets, though the Japanese government has committed to protecting five key agricultural areas.[72]

Australia's new bilateral relationships with Asian countries have tended to reinforce a somewhat populist view that Australia does not need to worry about the TPPA, given it now has treaties with most of the countries who are party to the TPPA.[73] However, aside from the fact that Australia does not have trade agreements with Canada, Mexico and Peru, all parties to the TPPA, the value of a multilateral regional accord should not be underplayed.

There is indication that most of the TPPA negotiating parties have – so far at least – favoured inclusion of an ISDS regime.[74] Officially, Australia commenced negotiating the TPPA with the understanding that it would be exempt from any ISDS provisions in the TPPA. Current speculation is that the new Australian Government will agree to ISDS in the TPPA, subject to securing some trade and investment concessions from its TPPA treaty partners, such as gaining access to the US's beef and dairy markets.

Given Australia's recent agreements with Korea and Japan, Australia's current TPPA position is far from clear. In any case, granting Australia an exemption from ISDS is not itself exceptional. Country-specific reservations and exemptions are part and parcel of multilateral negotiating processes. Furthermore, the parties negotiating the TPPA have rejected a one-size-fits-all TPPA in order to accommodate the domestic interests of negotiating states.[75] Thus, on the surface, the exemption which Australia originally sought from ISDS is justifiable, given the likelihood of other country-specific exemptions from other provisions in the TPPA. Nevertheless, the costs of Australia securing an exemption from ISDS may outweigh its anticipated benefits.[76]

Contradictions in Australia and in the Asia Pacific Region' (2011) 22(1) *Econ. Lab. Relat. Rev.* 81. On the US negotiating position generally, see Gantz, D., *Trans-Pacific Partnership Negotiations: Progress, But No End in Sight*, kluwerarbitrationblog.com/blog/2012/06/22/trans-pacific-partnership-negotiations-progress-but-no-end-in-sight/ (11 April 2014); see also the US position on ISDS generally: Office of the United States Trade Representative, 'The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors' (27 March 2014), http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors (11 April 2014).

[70] Donnan, S., 'Japan-Australia Trade Deal Is Dismissed by the US', *Financial Times*, 7 April 2014, http://www.ft.com/intl/cms/s/0/5e4023b6-be43-11e3-b44a-00144feabdc0.html#axzz2yehuWuKc (11 April 2014).

[71] Ibid.

[72] Ibid.

[73] Martin, above n 53.

[74] See above n 69.

[75] State-by-state negotiations notwithstanding, each "round" of TPPA negotiations includes all participating countries. The 18th Round of TPP Negotiations will take place in Kota Kinabalu, Malaysia on July 15-24, 2013. See further Trakman, L.E., 'The Transpacific Partnership Agreement: Significance for International Investment' (2013) 4(4) *J. Int'l Commercial Law* 1.

[76] For arguments in support of Australia opting out of investor-State arbitration see e.g, Tienhaara, K., *Submission to the Department of Foreign Affairs and Trade: Investor-State Dispute Settlement in the*

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

The potential drawback of a TPPA that obfuscates a one-size-fits-all agreement is that it will be downgraded to a loose framework agreement with multi-tiered exemptions and side agreements. Such an eventuality could seriously undermine its economic and legal stature as a multilateral agreement purporting to rival in part a faltering WTO. For many observers, the TPPA represents an attempt to revive the Doha Round of trade negotiations and promote greater harmonization among various standards that were created in the spaghetti bowl of BRTAs. While the TPPA falls short of a WTO style agreement, its proponents envisage that it will lead to greater harmony in trade and investment, offsetting disparities among pre-existing investment treaties, improving dispute resolution processes, and involving key states in these decision-making processes. If Australia secures an exemption from ISDS in the TPPA, it risks isolating itself from other negotiating parties who want to maintain ISDS in their treaties with all significant trade and investment partners.

V. Reforming ISDS

Australia's policy on ISDS needs to balance its domestic interests with its international economic goals as well as its foreign relations with the Pacific Rim countries. The fact that JAEPA does not include ISDS provisions has given rise to renewed criticisms of ISDS, including comments that it is no longer being sought by Asian countries.[77] As noted above, this is far from established, particularly in light of the KAFTA. Certainly, ISDS is an important negotiating point in the TPPA, which remains one of the most significant regional agreements ever contemplated. As such, it is difficult to accept that Australia can abandon ISDS without repercussions.

A preferable approach is for Australia to modify its 2011 Policy Statement to provide for a multi-tiered, qualified access to ISA. This would be embodied in an overarching Australian BIT policy that would serve as a flexible template for negotiating FTAs and BITs, including with dominant states that have their own model BITs. Such a multi-tiered dispute resolution process may include negotiations between states, including possible referral of disputes to the International Court of Justice, should such negotiations fail. Australia could also develop model clauses to incorporate into its BITs that encourage dispute prevention and avoidance measures, such as requiring investor-state parties to undertake negotiations and/or conciliation prior to resorting to either domestic litigation or ISA.[78] Such a pragmatic approach is not inconsistent with

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Trans-Pacific Partnership Agreement, www.dfat.gov.au/fta/tpp/subs/tpp_sub_tienhaara_100519.pdf (11 April 2014).

[77] See Martin, above n 32; Martin, above n 53.

[78] The development of a model investment treaty was recommended in the Report by the *Inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*, Senate Standing Committees on Foreign Affairs and Trade, ch 2 (issues) [2.59]. See also Nottage, L R, 'The "Anti-

international trade and investment practice. Given that ISDS is a party driven process of dispute resolution, treaty signatories are free to design dispute avoidance and resolution measures to suit their needs and those of their investors.

This multidimensional dispute resolution option may further encourage state parties to investment treaties to evaluate different dispute resolution options in light of the costs, timing, duration and effectiveness of each option. It can also help home and host states and disputing investor-state parties to identify their differences and to find common ground. In addition, it may assist disputing parties to consider a wide menu of dispute prevention and resolution options without being locked into any one particular option. Affected parties may opt for negotiations, conciliation and, where appropriate, diplomatic intervention by a home state with a host state partner on behalf of an investor. In doing so, they can avoid protracted litigation, which is costly to all parties involved in an investment dispute.

For comparable reasons, Australia may develop model rules of procedure to apply during formal ISDS proceedings that include: setting limits on the standing of foreign investors to bring ISDS claims; requiring public notice of ISDS complaints; providing for public participation in ISDS proceedings, and requiring publication of ISDS awards. It may also design model BIT clauses that provide for interim measures; create budgetary limits on the costs of ISDS in order to avoid cost overruns; and address dilatory ISDS processes including lengthy adjournments. In addition to modification of the procedural rules regulating ISA, Australia may provide for the stay of ISDS proceedings to allow for investor-state settlement.[79] In addition, to ensure that ISDS proceedings do not produce absurd or unjust decisions, it could provide for bilateral challenge committees to hear challenges to ISDS decisions, including rules to govern the functioning of such challenge committees.[80]

This multi-tiered approach to resolving investor-state disputes has the advantage of allowing the Australian Government to redress many of the limitations associated with ISA, while avoiding the problems arising from a complete rejection of it. For example, one of the broader benefits of resort to illustrative BIT rules and clauses governing ISDS is a greater commitment to transparency, not only for foreign states and their foreign investors, but also for Australian investors abroad. A comprehensive BIT policy could also serve as a signal to both states and investors that Australia has adopted a balanced approach to dispute resolution in its BITs, including support for stable trade and investment relations, which it shares with other states and impacted investors.

ISDS Bill" Before the Senate: What Future for Investor-State Arbitration in Australia? (Sydney Law School Research Paper No 14/76, 20 August 2014), 18. Available at SSRN: http://ssrn.com/abstract=2483610.

[79] See Nottage, L R and Miles, Kate, '"Back to the Future" for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests (June 25, 2008) in Nottage, L and Garnett, R (eds), *International Arbitration in Australia* (Federation Press: Sydney, 2010); (2009) 26(1) *Journal of International Arbitration* 25; Sydney Law School Research Paper No 08/62, available at SSRN: http://ssrn.com/abstract=1151167

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

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

Such a proposed BIT policy has strategic benefits for Australia, encouraging further economic integration between Australia and its key economic allies in the region. The fact that China has adopted a similar multi-faceted process for the resolution of investor-state disputes could help both sides to reach consensus on a trade and investment treaty, which continues to be elusive at the time of writing. Such a policy would also make it easier for Australia to engage in the TPPA negotiations in which the majority of members have opted for ISA.

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

We provide below 16 recommendations for a model Australian BIT policy. These recommendations attempt to accommodate international "good practice" in support of ISA. In presenting our recommendations, we also set out some criticisms or issues that may arise as a consequence of adopting these recommendations. The purpose of presenting these recommendations is to generate discussion and lead the dialogue down a path of modified ISDS rather than blanket acceptance or rejection. As such, the authors invite all readers to consider these points as part of further research and policy-making. These recommendations are:

1. The proposed Australian BIT policy would reflect the desire of the Australian Government to protect its fundamental public policy interests, including its national security, public health, environmental safety and related public interests. This is illustrated to an extent in the KAFTA, where the ISDS provisions are limited to investment disputes with some public policy carve outs.[81] The query is to what extent Australia is happy to provide equivalent concessions to other state parties, for example by including carve outs relating to particular industries or issues sensitive to the other party.
2. The BIT policy would include illustrative clauses providing for investor protections, such as national treatment, most-favoured-nation treatment, and fair and equitable treatment, consistent with the interests of Australia's treaty partners and their investors.

[81] See KAFTA ch 11, Annex-11B(5): "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

3. The BIT policy would provide for the stay of ISDS proceedings to encourage a settlement by creating a waiting period of six months, during which neither party may initiate proceedings either in domestic courts or through ISA. On the other hand, this may cause delay and prolong disputes, including where action is time-critical. This could also cause further loss to investors if they are forced to remain in a state of limbo.
4. The BIT policy would include provision for negotiations and conciliation between investor-state parties. Such dispute avoidance measures are consistent with the proposals for dispute avoidance enunciated by the UNCTAD.[82] While the benefits of dispute avoidance procedures are established, issues of delay and cost could arise if parties engage in behaviour that is not in good faith.
5. The BIT policy would compromise between the complete rejection of ISDS, advocated by some media, academic and political figures,[83] and international investment practice in favour of ISA, by enabling investor parties to elect between submitting their disputes with host states to the domestic courts of the host state or to ISDS processes. Conceived as a "fork in the road", rather than the requirement to exhaust local remedies, foreign investors could choose to submit their disputes to domestic courts. However, in doing so, they would receive no greater substantive legal rights than those accorded to domestic investors. Given that ISDS is usually the result of consent by, and cooperation between, both parties, this may still appear to be a significant concession to investors. On balance, however, the ability to exercise such an 'election' could be beneficial to both parties. The investor party would benefit by having a choice between the two options. The state party would benefit because the investor must elect between the two options – and therefore cannot pursue both (as has been the case with Philip Morris, which is pursuing ISDS after it lost the domestic litigation in the High Court).[84] However, while providing investors with some comfort that either option is available, this avenue could create further uncertainty, including concern by host states relating to the choice of investors in particular cases.
6. The BIT policy should identify established rules of arbitration, such as under the ICSID Convention, the UNCITRAL Rules, or on an ad hoc basis, as being applicable.
7. The BIT policy would set forth rules governing the standing of foreign investors to bring investor-state claims, while denying standing to discourage premature, opportunistic and pernicious claims by foreign investors against host states.
8. The BIT policy would stipulate that arbitration proceedings are open to the public and awards are published, while preserving in confidence the commercial secrets and sensitive information of the direct parties to a dispute. While privacy could be an advantage of arbitration, it appears on balance that transparency of proceedings – at least where very confidential material is not at stake – is to be preferred where state and related public interests are involved.[85]
9. The BIT policy would allow the submission of amici curiae briefs and the participation of third-party interveners on public interest grounds. This is

[82] *See* UNCTAD, *Investor–State Disputes: Prevention and Alternatives to Arbitration*, www.unctad.org/en/docs/diaeia200911_en.pdf (11 April 2014).
[83] See, eg, Tienhaara, above n 76; Martin, above n 85.
[84] See above n 25.
[85] See, eg, Martin, above n 32.

consistent with ICSID Rule 37, adopted in 2006, which regulates submissions of non-disputing parties to ISDS disputes.[86]

10. The BIT policy would provide for the admission into ISDS proceedings of social, economic and environmental impact reports that relate both to the protection of investors and the defences of states. They could also take account of net welfare losses arising from domestic protectionism directed against foreign investment.[87] These reports would be publicly available, subject to the requirements of limited confidentiality, as identified in point 8.
11. The BIT policy would provide for interim measures to expedite proceedings and ensure fairness between the parties, such as to impede claimants and host states from engaging in duplicitous, disruptive or otherwise wrongful conduct. Such measures would inhibit host states from implementing fast-track legislation directed at preventing ISDS proceedings from being initiated against it. These measures would also discourage investor-claimants from protracting ISDS proceedings in order to delay the implementation of governmental measures.
12. The BIT policy would provide that challenges to an investor-state arbitrator are decided by a challenge committee and not by arbitrators sitting on the same panel as the arbitrator who is the subject of the challenge.
13. The BIT policy would provide for ISDS costs directed at monitoring legal costs, including but not limited to: the use of contingency fees, the capping of arbitrators' fees, and the allocation of costs between investor and state parties, consistent with the rules regulating monitoring of costs under the 2010 UNCITRAL Rules.[88]
14. The BIT policy would include an illustrative "umbrella clause" by which each BIT party would ensure its observance of any specific undertakings it may have given in relation to investments made by the nationals of another BIT party. The purpose of such an "umbrella clause", often incorporated into BITs, would be to extend treaty protection to investors from BIT partner states in connection with claims which arise from contracts and other dealings between those investors and the host state.[89]
15. The BIT policy would provide for a bilateral interpretative committee to interpret BIT treaty language, including ambiguous wording, and to resolve inconsistent constructions of such treaties. The composition and role of such a committee of course merit more detailed discussion than is possible here.[90]

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[86] International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules*, April 2006, Rule 37, p. 117: icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (11 April 2014). See also Trakman, L.E. 'The ICSID under Siege' (2012) 45(3) *Cornell Int'l L. J.* 603, 663-65; Edward Baldwin, Mark Kantor and Michael Nolan, 'Limits to Enforcement of ICSID Awards' (2006) 23 *J. Int'l Arb.* 1 (discussing "tactics" that may be employed in attempts to "delay" or "avoid" compliance with ICSID Awards).

[87] Consider, eg, KAFTA, art 11.24. See Burch, M, Nottage, L R, and Williams, B G, 'Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century' (2012) 35 *UNSW Law Journal* 1013.

[88] UNCITRAL, *UNCITRAL Arbitration Rules*, www.uncitral.org/uncitral/uncitral_texts/arbitration/2010Arbitration_rules.html (11 April 2014).

[89] See OECD, *Interpretation of the Umbrella Clause in Investment Treaties* (Working Papers on International Investment, number 2006/3), http://www.oecd.org/investment/internationalinvestmentagreements/37579220.pdf (11 April 2014).

[90] See Burch, M and Nottage, L R, 'Novel Treaty-Based Approaches to Resolving International Investment and Tax Disputes in the Asia-Pacific Region' (2011) 18 *Australian International Law Journal* 127.

16. Finally, the BIT policy would be subject to modification and development, in keeping with Australia's evolving national interests and its concerns regarding the protection of foreign investors.

There is already evidence of some discussion in support of a Model Australia BIT, such as in a 2014 Senate Committee Report declining to recommend the rejection of ISDS in BITs. However, the scope of such discussion remains general in nature and in need of further development.[91]

While this paper encourages Australia to adopt a detailed BIT policy, the policy should be neither uncompromising nor mechanically applied to all of Australia's ensuing treaties. Some states, like the US, strongly adhere to a Model BIT template in negotiating BITs with partner states. Other states, like China, sometimes diverge extensively from their Model BITs when they negotiate individual BITs. This was the case in China's BIT with Canada, concluded in 2012,[92] and will most likely be repeated in China's investment treaty negotiations with the EU, launched in November 2013.[93]

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

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

Conclusion

There is no doubt that Australia has increasingly strong relations with countries of the Pacific Rim, particularly key Asian economies and the US. Further, it is on its way to solidifying its relations with other regional players, such as India and Indonesia. In

[91] See above n 78.

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

[93] See Philip Bentley, QC and Frank Schoneveld, *A Giant Leap: EU-China Bilateral Investment Treaty Negotiations to Be Launched Formally*, National Law Review (23 November 2013), http://www.natlawreview.com/article/giant-leap-eu-china-bilateral-investment-treaty-negotiations-to-be-launched-formally (11 April 2014).

light of this, Australia should pursue policies that provide for long-term commitments resulting in economic prosperity as well as harmonious cultural and diplomatic exchanges. One aspect of such a goal is to institute a robust policy to resolve investor-state disputes. This article has sought to canvass Australia's key trading links and the preference for ISDS exhibited by its key trading partners in the recent past. It has also sought to highlight the importance of regional accord, and the danger associated with relegating the TPPA to the backburner as a result of Australia's new bilateral relationships.

Australia has the capacity to be a significant player in the Pacific region. It should invest in sustainable policy development to facilitate long-term, amicable investment flows, instead of rejecting ISDS out of hand. The suggested model BIT policy and the recommendations for its development provided in this paper are a starting point for a broader discussion around ISDS modification. ISDS is not a perfect process, but it has many redeeming factors which make its redevelopment a worthwhile goal.