

**Investor-State Arbitration:
Not in the Australia-Japan Free Trade Agreement,
and Not Ever for Australia?**

*Luke Nottage**

- I. Introduction
- II. Why No Investor-State Arbitration Provisions in JAEPA?
- III. The “Anti-ISDS Bill” Before the Australian Senate
 - 1. Public Consultation and Hearings
 - 2. Submission Opposing the Bill
- IV. Conclusions

I. INTRODUCTION

After seven years of negotiations, Australian and Japanese leaders concluded a bilateral Free Trade Agreement (FTA) in Tokyo on 7 April 2014.¹ Formally called the Japan Australia Economic Partnership Agreement (JAEPA), it was signed on 8 July 2014 when Prime Minister Shinzō Abe visited Canberra, and must now be reviewed by the Australian Parliament before ratification and entry into force.² A stumbling block during treaty negotiations was apparently the request from Japan to include investor-state dis-

* Associate Dean (International) and Professor of Comparative and Transnational Business Law, University of Sydney Law School; Director, Japanese Law Links Pty Ltd. This paper is part of an Australian Research Council Discovery Project (DP140102526) funded over 2014–2016 jointly with Dr. Shiro Armstrong and Professors Jürgen Kurtz and Leon Trakman (<http://blogs.usyd.edu.au/japaneselaw/2013/12/arc.html>). Part II is updated from <http://www.eastasiaforum.org/2014/04/09/why-no-investor-state-arbitration-in-the-australia-japan-fta/> (9 April 2014). A version of Part III appeared in *The CI Arb Australia News* (September 2014).

1 See <http://media.smh.com.au/news/federal-politics/japan-free-trade-deal-clinched-5331474.html>; and some of my media commentary here: http://blogs.usyd.edu.au/japaneselaw/2014/04/the_new_japan-australia_fta.html.

2 See <https://www.dfat.gov.au/fta/jaepa/>. Japan prefers to call its FTAs “Economic Partnership Agreements”, ostensibly because they may incorporate matters such as technical cooperation, but probably also because the term seems less threatening for those sceptical about “free trade”. Perhaps for similar reasons, the European Union also has concluded some FTAs called “Partnership Agreements” with certain African and Caribbean countries, but the EU is also presently negotiating with the USA a “Trans-Atlantic Trade and Investment Partnership” – which is in fact a straightforward FTA: see <http://ec.europa.eu/trade/policy/in-focus/ttip/>.

pute settlement (ISDS, especially arbitration) provisions.³ This article discusses the broader context and implications of this type of dispute resolution mechanism, usually found in bilateral investment treaties (BITs) and now investment chapters of FTAs concluded respectively by Japan and Australia.⁴

Part II considers the short-term interests for government negotiators on both sides that could explain why ISDS provisions were ultimately excluded from JAEPA, but points out that this omission may have adverse long-term repercussions for major ongoing regional FTA negotiations involving both countries. Part III examines the further complications caused by a private member's Bill introduced into the federal Senate on 3 March 2014, which would prevent the Australian government entering into any future treaties containing ISDS. Part IV concludes with a call instead for a more balanced assessment of the pros and cons of ISDS, and related substantive protections, offered to foreign investors in future treaties involving Australia or Japan. This topic is also important for the European Union, for example, as it has been negotiating investment chapters in FTAs with Japan (since 2013) as well as the USA, with controversy over ISDS in the EU-USA context resulting in the European Commission holding specific public consultations over 2014.⁵

II. WHY NO INVESTOR-STATE ARBITRATION PROVISIONS IN JAEPA?

Shortly before JAEPA negotiations were successfully concluded in April 2014, some Australian media outlets had prior inklings that the negotiations had achieved significant breakthroughs, especially for agricultural market access into Japan, but a frequent assumption was that Australia must have "given up" something major in return. Concerns were expressed that this included measures favouring Japanese investors into Australia, including protections from ISDS provisions.⁶ These provide an extra avenue for foreign

3 One Australian journalist, whose articles are resolutely opposed to all forms of ISDS, has alleged mistakenly on this point that during the bilateral FTA negotiations: "the Japanese didn't ask. I understand they simply said they recognised that Australia was a country in which the rule of law applied and left it at that" (Peter Martin: see <http://www.smh.com.au/business/free-trading-cards-laid-on-the-table-but-beware-the-ace-up-the-sleeve-20140408-36b6v.html>). Yet in an Australian government's public summary of the 10th negotiation round, it remarked that "a few difficult issues remain, including Japan's request for Investor-State Dispute Settlement (ISDS) provisions" (as preserved at http://web.archive.org/web/20110317020931/http://www.dfat.gov.au/fta/ajfta/newsletter_update/update_10.html). I had also mentioned that statement (originally at http://www.dfat.gov.au/fta/ajfta/newsletter_update/update_10.html) on my Blog at http://blogs.usyd.edu.au/japaneselaw/2012/10/australia-japan_business.html (20 October 2012).

4 For Japan's FTAs and BITs generally, see <http://www.mofa.go.jp/policy/economy/fta/> and http://www.meti.go.jp/policy/trade_policy/epa/english.html. Specifically on the Japan-EU FTA negotiations, see http://www.meti.go.jp/policy/trade_policy/epa/epa_en/eu/.

5 See http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179.

6 E.g. my radio interview here: <http://www.thewire.org.au/storyDetail.aspx?ID=11412>.

investors to enforce the substantive treaty rights limiting a host state's capacity to illegally interfere with foreign investments (e.g. through expropriation). They add to the (more politicised) inter-state arbitration procedure invariably included in investment treaties, as well as any rights under domestic law available through the host state's court system – particularly problematic in developing countries.⁷

ISDS provisions had been added to the Korea-Australia FTA concluded in December 2013 (KAFTA, signed on 8 April 2014) by the Abbott Government, which took power on 7 September 2013 and subsequently declared (in a low-key manner) that it was reverting to a case-by-case approach to ISDS.⁸ This contrasted with the position taken by the 2011 Gillard Government Trade Policy Statement,⁹ which had reversed Australia's longstanding treaty practice by declaring (very prominently) that it would not agree to any form of ISDS in future treaties – even with developing countries. The 2012 Malaysia-Australia FTA omitted ISDS, although that was meaningless in practice as ISDS remains available to enforce similar substantive rights under the 2009 Australia-New Zealand FTA with the Association of Southeast Asian Nations (ASEAN).¹⁰ Curiously, however, the new Australia-Japan FTA ultimately omitted ISDS provisions as well.¹¹ Why is this, and what are some broader implications?

We will never really know the full reasons, as treaty negotiations are kept confidential, but presumably Japan (the net capital exporter, especially for FDI) did not push very hard for ISDS – even though such protections are included in almost all Japan's other investment treaties, including recently with Switzerland.¹² The government would have consulted with key Japanese business groups, including the *Nippon Keidanren* which since 2000 has been pushing for ISDS, but large-scale Japanese investment into Australia (dating back to the 1960s) has not encountered major adverse treatment by Australian government authorities. More generally, Japanese investors are still risk averse and prefer to take a long-term view if disputes arise, so they have not yet directly availed themselves of ISDS provisions provided in any Japanese treaty – even with developing coun-

7 Such as Indonesia: see <http://www.eastasiaforum.org/2012/05/14/indonesian-investments-and-international-treaty-law/>.

8 <http://www.eastasiaforum.org/2014/01/01/arbitration-rights-back-for-the-south-korea-australia-fta/>.

9 No longer available on Australian government websites, but reinstated here: http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf.

10 For these and other FTAs concluded or under negotiation by Australia, see <http://www.dfat.gov.au/fta/>.

11 <http://www.smh.com.au/federal-politics/political-opinion/isds-the-trap-the-australiajapan-free-trade-agreement-escaped-20140407-zqrwk.html>.

12 S. HAMAMOTO/L. NOTTAGE, Foreign Investment in and out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution, in: Sydney Law School Research Paper 10/145 (2010), available at <http://ssrn.com/abstract=1724999> (updated in: S. HAMAMOTO/L. NOTTAGE, Japan, in: Brown (ed.), Commentaries on Selected Model Investment Treaties (Oxford 2013) 347–391).

tries. Japanese investors tend still to negotiate amicable settlements directly with the host state or through the informal good offices of their own government – although perhaps now more often “in the shadow of the law”, including international investment law, as evidenced by a Japanese aluminium joint venture’s recent claim settled with Indonesia (albeit based on an arbitration clause in their contract, not a treaty).¹³

In the FTA negotiations with Australia, the Japanese government may also have not wanted to press too hard to secure ISDS protections because this would probably have involved conceding even more access to Japan’s politically sensitive sectors such as agricultural markets. Prime Minister Abe will already face fire domestically from rural voters, especially as the commitments made in this bilateral FTA will form a new benchmark for negotiating the expanded Trans-Pacific Partnership Agreement (TPPA), involving Japan as well as major agricultural products exporters including Australia, New Zealand and the USA. The Japanese government probably also expected ISDS protections to be included in the TPPA anyway, at the strong insistence of the USA. Abe would also have been conscious of some recent popular concern in Japan about ISDS generally, epitomised by a TV Asahi program in 2013,¹⁴ although those worries may stem mainly from Opposition party members and supporters, and do not seem as strong as in South Korea (in the context of its FTA with the US and a pending ICSID arbitration claim indirectly from a US investor).¹⁵

13 http://www.ashurst.com/publication-item.aspx?id_Content=10053.

14 http://blogs.usyd.edu.au/japaneselaw/2013/06/what_do_australia_and_others_e.html. See also e.g. Japan House Standing Committee on Agriculture, Forestry and Fisheries, “Resolution on Japan’s participation in the TPP negotiations (provisional translation)”, 17 June 2013, available at www.sangiin.go.jp/eng/report/standing-committee/20130617-TPP.pdf (recommending: “No stipulation of investor-state dispute settlement with prejudice to national sovereignty should be made unless measures to prevent rampant litigation are provided”).

15 The claim was filed in November 2012 by a subsidiary of Lone Star Funds, under Korea’s BIT with Belgium and Luxemburg: LSF-KEB Holdings SCA and others v. Republic of Korea (ICSID Case No. ARB/12/37), with further details updated at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=ViewAllCases>. The core claim is that the Korean government unjustifiably delayed the investor’s acquisition of Korean Exchange Bank. In October 2013, the Administrative Court in Seoul declined a request for public access to documents concerning the case: see <http://www.businesskorea.co.kr/article/1589/lone-star-funds-korean-court-rules-international-arbitration-application-not-intended#sthash.tlxe2vBw.dpuf>. Lone Star Funds has also been impacted by other Court proceedings recently in Korea, as backers of an investment company whose attempts to enforce arbitral award relating to a shareholders’ agreement with a state-run company has been rebuffed by the Seoul High Court on 16 August 2013: see <http://hsfnotes.com/arbitration/2013/09/23/south-korean-courts-twice-refuse-to-enforce-international-arbitral-awards/>. Overall, however, since Korea’s presidential elections in December 2012, concerns about ISDS appear to have abated, as indicated also by its inclusion in its FTA with China substantially concluded on 10 December 2014 (see generally: <http://www.voanews.com/content/china-south-korea-reach-free-trade-agreement/2514313.html>).

Australian government negotiators presumably were happy enough with existing concessions, deciding that any extras offered from Japan in exchange for ISDS protections were not worth it. By not agreeing to ISDS, the Abbott Government also could signal that it expected better trade-offs to be offered in Australia's other ongoing negotiations for bilateral FTAs negotiations (especially with China) and regional FTAs – the Regional Comprehensive Economic Partnership (RCEP or “ASEAN+6” FTA) and the TPPA. In addition, it could deflect some domestic political pressure from those cautious about foreign investment generally (linked to the Government's rejection recently of a major US agri-business investment proposal)¹⁶ as well as ISDS itself (evident from *The Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*, brought before federal Senate by a minority Australian Greens Party Senator from Tasmania).¹⁷ Conversely, omitting ISDS holds little downside for Australia's investors into Japan, as they have limited existing and likely flows of FDI into Japan, which anyway has a high-quality court system and domestic law protections for all investors.¹⁸

Nonetheless, omitting ISDS from the Australia-Japan FTA may have significant long-term consequences. What happens if Australia also ends up doing so with developed country negotiating partners in regional agreements such as the TPPA, having done so already in its bilateral FTAs – as with the USA (2004), New Zealand (2011), Malaysia (2012) and now Japan? If this occurs also with Singapore, Chile and Canada, which also have robust domestic law systems, then the other TPP negotiating partners may also seek exclusion of ISDS – arguing that what is “good for the goose is good for the gander”.¹⁹

An “anti-ISDS” mood might spread throughout other parts of Asia too, impeding also the RCEP negotiations, despite the gradual acceptance of treaty-based arbitration within the region – epitomised by the 2009 ASEAN Comprehensive Investment Agreement.²⁰ After all, in 2013 India announced a “review” of ISDS in their treaties,²¹ as did Indone-

16 <http://www.smh.com.au/federal-politics/political-opinion/any-way-the-wind-blows-tony-abbotts-conflicting-messages-to-business-20131206-2ywpb.html>.

17 http://blogs.usyd.edu.au/japaneselaw/2014/04/bill_vs_isds.html. See further Part III below.

18 HAMAMOTO/NOTTAGE, *supra* note 12.

19 <http://blogs.usyd.edu.au/japaneselaw/2010/08/pc.html>.

20 V. BATH/L. NOTTAGE, *The ASEAN Comprehensive Investment Agreement and ‘ASEAN Plus’ – the Australia-New Zealand Free Trade Area (AANZFTA) and the PRC-ASEAN Investment Agreement*, in: Bungenberg et al. (eds.), *International Investment Law* (Oxford 2014) forthcoming.

21 http://articles.economictimes.indiatimes.com/2013-04-17/news/38616367_1_canada-india-business-council-indian-high-commissioner-protection-agreement. More generally, there is concern that the benefits from FTAs concluded by India over the last decade have not been obvious: <http://www.eastasiaforum.org/2014/10/10/are-free-trade-agreements-a-dead-end-for-india/#more-43761>. However, the new Modi government appears keen to attract more inbound investment: <http://www.eastasiaforum.org/2014/09/29/modi-connects-with-the-american-dream/>.

sia a year later²² – although without mentioning the latter’s regional treaties or FTAs. Such postures may have been related to domestic politics, including then-pending elections in both countries, which are each negotiating bilateral FTAs with Australia. But it should also not be forgotten that India, Vietnam, Thailand and Laos are still not among around 150 states that have ratified the 1965 ICSID Convention,²³ which provides further support for ISDS procedures.

Thus, ultimately, including or not including ISDS may not have held much significance for the Australia-Japan FTA itself. Yet its omission will have wider repercussions for the broader treaty-based arbitration and international investment law system, including ongoing regional agreement negotiations involving both Australia and Japan. This risk is further heightened by the broader public debate over ISDS that persists in Australia, particularly in the form of the “anti-ISDS Bill”, because states already hesitant about ISDS may refer to that policy discussion as a justification for resisting incorporation of such protections in future treaties of their own.

III. THE “ANTI-ISDS BILL” BEFORE THE AUSTRALIAN SENATE

1. *Public Consultation and Hearings*

On 6 August 2014, the Australian Senate’s Foreign Affairs, Defence and Trade Legislation Committee held public hearings on *The Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*,²⁴ introduced on 3 March by the Senator for Tasmania, Peter Whish-Wilson.²⁵ As mentioned above, his Bill seeks to prevent the Australian government from entering into any future treaties containing ISDS provisions, which are designed to provide an additional option for foreign investors to directly enforce substantive commitments made by host states.²⁶ Australia now has ISDS provisions with 29 economies, derived from:

22 <http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz2yGcfJXCQ>; cf. L. NOTTAGE, Do Many of Australia’s Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis and Regional Implications, in: *Transnational Dispute Management* (2014), available at <http://ssrn.com/abstract=2424987>.

23 <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Contractingstates&ReqFrom=Main>.

24 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014. The Senate referred the Bill to the Committee on 6 March 2014. The reporting date was 11 April 2014, but on 16 June the Senate extended this until 27 August 2014.

25 Before entering Parliament, the Senator was a banker and broker (1992–2003), wine grower and business owner (2004–2012) and lecturer at the University of Tasmania (2005–2012): see <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22handbook%2Fallmps%2F195565%22;querytype=;rec=0>.

26 For an overview of Australia’s treaties including ISDS, see M. MANGAN, Australia’s Investment Treaty Program and Investor-State Arbitration, in: Nottage/Garnett (eds.) *Interna-*

- all 21 bilateral investment treaties (BITs) presently in force, signed since 1988;
- four out of eight bilateral free trade agreements (FTAs), signed since 1982; and
- Australia’s sole regional FTA, signed in 2009 with ASEAN (thus adding ISDS protections between Australia and four more states – Brunei, Cambodia, Malaysia and Myanmar).²⁷

The Gillard Government negotiated the omission of ISDS in the investment chapters in FTAs with New Zealand (signed in 2011) and Malaysia (2012), but the new Abbott Government agreed to ISDS in KAFTA (2014) and then a bilateral FTA with China (substantially agreed on 17 November 2014, but not yet signed).²⁸ Even if Senator Whish-Wilson’s present private member Bill passes the Senate, it will have no chance of passing the lower House of Representatives unless the Abbott Government abandons its current policy. Yet this discussion in the Australian Parliament may anyway impact on the FTA with Korea (KAFTA), which was tabled on 13 April 2014 and reviewed by the Joint Standing Committee on Treaties (JSCOT).²⁹

Accordingly, the recent Committee hearings on the Bill have broader national and international significance.³⁰ I was invited to give evidence based on my written Submission dated 2 April 2014, opposing the Bill and edited in *Part 2* below.³¹ The video-

tional Arbitration in Australia (Federation Press, Sydney, 2010) 191–221. For an overview of Japan’s treaties, compare HAMAMOTO / NOTTAGE, *supra* note 12.

- 27 J. MORRISON/L. NOTTAGE, Australia, in: Greenberg et al. (eds.), *International Commercial Arbitration: An Asia-Pacific Perspective* (Alphen aan den Rijn 2015) forthcoming (with a longer version at <http://ssrn.com/abstract=2514124>).
- 28 See, respectively, <http://www.eastasiaforum.org/2014/01/01/arbitration-rights-back-for-the-south-korea-australia-fta/> and http://www.trademinister.gov.au/releases/Pages/2014/ar_mr_141117.aspx?ministerid=3.
- 29 Submissions on KAFTA were due by 13 June 2014: see http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014, and JSCOT reported back on 4 September (as mentioned in Part IV below). The JSCOT will also consider JAEP, before ratification by the Australian government, after the Australian Trade Minister tabled the treaty in Parliament on 14 July 2014. However it is less controversial as it does not include ISDS provisions.
- 30 In the EU, for example, see *supra* note 5. For a detailed response to the European Commission’s public consultation, for the Dutch Government and co-authored by two professors expert in international investment law, see C. TEITJE/F. BAETENS, *The Impact of Investor-State Dispute Settlement (ISDS) in the TTIP* (26 June 2014, available at <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.html>), which I provided to the Committee as “correspondence” along with my Responses. Their 153-page Report provides well-reasoned and well-evidenced arguments in favour of retaining ISDS with appropriate safeguards in future treaties, paralleling many of the points made in the present paper with respect to Australia.
- 31 Submission 21 (with all Submissions available via http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Submissions).

recording of public hearings held on 6 August 2014 is available online,³² together with transcripts – including my own oral evidence.³³ My subsequent written Responses to Questions on Notice for the Committee, including an appendix comparing key ISDS and investment chapter provisions of KAFTA with two concluded by the former Rudd Government (namely with Chile in 2008 and ASEAN in 2009), can also be found on the Senate Committee’s website.³⁴

The Committee heard oral evidence from 9 witnesses,³⁵ based on 141 Submissions – including many short ones from private individuals. The internet was also mobilised by supporters of the Bill.³⁶

“The committee has received over 11,000 emails from individuals using an online tool asking people to express their opposition to investor state dispute settlements under trade agreements to the committee. Due to the large number of emails received, it is not possible for the committee to accept them as submissions and publish them on the committee’s website. The committee, however, has agreed to accept the emails as correspondence.”

32 At http://parlview.aph.gov.au/mediaPlayer.php?videoID=233409&operation_mode=parlview (beginning from around 2.08 hours). My evidence was given by videolink together with that of my colleague Associate Professor Kimberlee Weatherall (through to 3.09 hours), who opposes ISDS to the extent that intellectual property rights are protected by investment treaties (Submission 88). We were preceded in the hearings by Tracey Tipping of Eternal Source Pty Ltd (Submission 84), then ANU’s Dr. Kyle Tienhaara (Submission 86) and Dr. Matthew Rimmer (Submission 104). Afterwards, this video records the evidence of Dr. Patricia Ranald for the Australian Fair Trade and Investment Network (Submission 105). All four supported the Bill. A separate video, at <http://parlview.aph.gov.au/mediaPlayer.php?videoID=233460>, records the evidence later given by Mr. Andrew Percival for the Law Council of Australia (Submission 90) and two officials from the Department of Foreign Affairs and Trade (Submission 135), both essentially opposing the Bill.

33 See <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommsen%2F005e1654-540c-4b63-927c-3cb1c149b1a1%2F0003;query=Id%3A%22committees%2Fcommsen%2F005e1654-540c-4b63-927c-3cb1c149b1a1%2F0000%22>.

34 All Responses to Questions on Notice can be found under “Additional Documents” 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/Additional_Documents. My Responses and an edited version of my transcript of Evidence are included in: L. NOTTAGE, The “Anti-ISDS Bill” Before the Senate: What Future for Investor-State Arbitration in Australia?. Sydney Law School Research Paper No. 14/76 (20 August 2014), available at SSRN: <http://ssrn.com/abstract=2483610> (with a shorter version forthcoming in Vol. XVIII of the International Trade and Business Law Review).

35 The Program and all witnesses’ Submissions can be conveniently accessed via http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Public_Hearings.

36 *Supra* note 24. The EU Public Consultation on ISDS (*supra* note 5) also attracted over 150,000 public comments, overwhelmingly short ones provided online from private individuals.

It is also instructive to view the Senator's Second Reading Speech, introducing the Bill into Parliament,³⁷ along with a critique by Dr. Sam Luttrell and Dr. Romesh Weeramantry (experts in international arbitration who also opposed the Bill).³⁸ The Chief Justice of Australia has weighed in recently on this topic as well,³⁹ referring to the Bill and my Submission extracted below.

2. *Submission Opposing the Bill*

The Bill before the Australian Senate simply provides, in clause 3, that:

“The Commonwealth must not, on or after the commencement of this Act, enter into an agreement (however described) with one or more foreign countries that includes an investor-state dispute settlement provision.”

The Explanatory Memorandum provides no guidance as to the background to this proposal, or its pros and cons. However it seems to be aimed at reinstating the policy shift announced by the April 2011 “Gillard Government Trade Policy Statement” that is no longer found on Australian government websites and is inconsistent with the present Government's policy on ISDS, which allows for such provisions on a case-by-case basis (as evidenced by the recent Korea-Australia FTA).⁴⁰

The Bill, like the previous Trade Policy Statement in this respect, may be well-intentioned, but it is premature and misguided. Treaty-based ISDS is not a perfect system, but it can be improved in other ways – mainly by carefully negotiating and drafting BITs and FTAs.⁴¹ This may also have the long-term benefit of generating a well-balanced new investment treaty at the multilateral level,⁴² which is presently missing and unlikely otherwise to eventuate.

The treaty-based ISDS system is particularly important when dealing with developing countries, where local courts and substantive rights may not meet widely-accepted global standards, although ISDS is also now found in some treaties among developed

37 Via <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs951%22>.

38 Submission 106, available at <http://www.aph.gov.au/DocumentStore.ashx?id=dbe0ec67-1000-4e62-8226-849d31104c3d&subId=251223>.

39 At <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>. See also M. HAN, Arbitration Threat to the High Court, in: Australian Financial Review (15 August 2014) 32.

40 *Supra* note 9 and <https://www.dfat.gov.au/fta/isds-faq.html>.

41 For specific proposals, see e.g. L. NOTTAGE/K. MILES, ‘Back to the Future’ for Investor-State Arbitrations: Revising Rules in Australia and Japan for Public Interests, in: Journal of International Arbitration 26 (2009) 25–58; and C. CAMPBELL et al., Assessing Treaty-Based Investor-State Dispute Settlement: Abandon, Retain or Reform?, in: Transnational Dispute Management 1 (2014), available at <http://ssrn.com/abstract=2280182>.

42 Cf. generally G. HUFBAUER/S. STEPHENSON, The Case for a Framework Agreement on Investment, in: Columbia FDI Perspectives, No. 116, (3 March 2014), available at <http://www.vcc.columbia.edu/content/case-framework-agreement-investment>.

countries. Reflecting concerns about the capacity of national courts to deal with specialized cross-border investment disputes, BITs and FTAs also commonly include inter-state arbitration procedures. However, these are very infrequently invoked, because they require the home state to run the case for its investor against the host state that has illegally interfered with the investment. This involves financial costs to the home state as well as delays and potential diplomatic embarrassment. Due to similar problems, Australia and other countries (including Japan) have recently begun to conclude double-tax treaties that *require* the two states to resolve the matter by arbitration if the double-taxed firm so requests.⁴³

Because of its advantages over other existing and immediately foreseeable international dispute resolution mechanisms, the treaty-based ISDS system is increasingly accepted by Australia's major existing and potential treaty partners, including both developed and developing countries in the Asia-Pacific region.⁴⁴ It is more responsible therefore for Australia to keep engaging with the system by negotiating specific improvements in future treaties. This is also the approach taken recently by the European Commission and US government,⁴⁵ which have been reassessing ISDS as well.

Otherwise, there is also a serious risk of preventing – or at least seriously delaying – the conclusion of any future FTAs. Those include several major treaties currently being negotiated by Australia, including the TPPA and RCEP.⁴⁶

Opposition to ISDS in Australia appears to derive from an uneasy alliance between many on the (political) left and some on the (economic) right. The latter, epitomized by the majority opinion in the Productivity Commission's 2010 report on trade policy,⁴⁷ argue in particular that (i) there is no clear evidence that offering ISDS significantly increases inbound FDI, and (ii) Australia's outbound investors do not rely on or need treaty-based ISDS protections. However, regarding (i) the econometric evidence remains mixed, and should anyway be focused on Australia's actual and potential treaty partners (rather than aggregate world-wide FDI). Regarding (ii) there is now evidence that Australian outbound

43 M. BURCH/L. NOTTAGE, Novel Treaty-Based Approaches to Resolving International Investment and Tax Disputes in the Asia-Pacific Region, in: Sydney Law School Research Paper 11/66 (2011), available at <http://ssrn.com/abstract=1938758>. Future developments in such tax treaty arbitration may also be jeopardised if Australia's "anti-ISDS Bill" is enacted.

44 M. BURCH / L. R. NOTTAGE / B. G. WILLIAMS, Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century, in: University of New South Wales Law Journal 35 (2014) 1013–1040; Sydney Law School Research Paper No. 12/37. Available at SSRN: <http://ssrn.com/abstract=2065636>.

45 See respectively "Factsheet on Investor-State Dispute Settlement" (3 October 2013) at http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf and <http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors>.

46 See L. NOTTAGE, Throwing the Baby with the Bathwater: Australia's New Policy on Treaty-Based Investor-State Arbitration and Its Impact in Asia, in: Asian Studies Review 37 (2013) 253–272.

47 <http://www.pc.gov.au/projects/study/trade-agreements/report>.

investors do avail themselves of ISDS (e.g. in India, Indonesia and Pakistan), and political risks insurance (or legal technical assistance to developing countries) is an inadequate substitute. In other words, there appear to be more such benefits for Australia in treaty-based ISDS than hypothesized by the Productivity Commission in 2010.

Another potential benefit is to provide fewer incentives for Australia's outbound investors to instead privately "manage" risks by bribing foreign officials or parties. This is often contrary to Australian law and international treaties, but recent cases show that enforcement is still inadequate. Although a bigger "stick" is needed in that respect,⁴⁸ protecting FDI through ISDS-backed investment treaties provides an additional and useful "carrot" for foreign investors and host states to behave properly.

The Commission in 2010 also queried the potential costs or risks involved for Australia as a whole when agreeing to ISDS. This concern is also emphasised by those on the political left keen to preserve national sovereignty and to avoid "regulatory chill". However, there has only ever been one claim brought against Australia (by Philip Morris, regarding our tobacco plain packaging legislation) and it may well fail.⁴⁹ A recent ICSID arbitration tribunal has also held that Australia's 1993 BIT with Indonesia (and indeed, by implication, several other Australian treaties) did not provide full advance consent to ICSID arbitration.⁵⁰ Anyway, the extra potential "regulatory chill" from ISDS is likely to be minimal for a country like Australia which is subject to numerous (often successful) public law claims every year through its national courts.

The concerns raised by the Productivity Commission, as well as other community groups and scholars, are certainly worth exploring further – and risks inevitably associated with ISDS can and should be managed more effectively, especially through more careful treaty drafting. In fact, I have received major federal government funding through the Australian Research Council (with colleagues at UNSW, ANU and UMelbourne) to examine such issues in greater detail, from empirical, theoretical and "black-letter law" perspectives.⁵¹ But it is premature and ill-advised for Australia to reverse its longstanding treaty practice by refusing to include any form of ISDS in future treaties. No other developed country adopts such a stance.

48 Along with several developed countries, Australia has a poor record in enforcing the OECD Anti-Bribery Convention: cf. <http://www.oecd.org/australia/australia-oecdanti-briberyconvention.htm>.

49 L. NOTTAGE, *Investor-State Arbitration Policy and Practice after Philip Morris Asia V Australia*, in: Trakman/Ranieri (eds.), *Regionalism in International Investment Law* (New York 2013) 452–474 (with an earlier version at <http://ssrn.com/abstract=2041680>).

50 https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC4193_En&caseId=C2723. Cf. NOTTAGE, *supra* note 22.

51 S. ARMSTRONG et al., *The Fundamental Importance of Foreign Direct Investment to Australia in the 21st Century: Reforming Treaty and Dispute Resolution Practice*, in: Sydney Law School Research Paper 13/90 (2014), available at <http://ssrn.com/abstract=2362122>.

If anything, the Australian government should seek to improve the drafting of old treaties (especially as they come up for renewal or may be supplanted by FTA investment chapters) and to consider developing and publicising a well-balanced Model Investment Treaty (along the lines of many of our major treaty partners). No Act of Parliament is needed to pursue such alternatives.

Anyway, the present Bill is curiously worded. For example, clause 3 encompasses investor-state mediation as well as investor-state arbitration, even though only the latter process automatically produces a binding outcome – impacting much more on host states. The Bill also only refers to treaties with “foreign countries”, which may not include entities such as the European Union or Hong Kong SAR – potential FTA partners for Australia.

IV. CONCLUSIONS

Among public responses to the “Anti-ISDS” Bill presently before the Australian Senate, the Submission from the Department of Foreign Affairs and Trade (DFAT) adds this further important technical issue concerning the proposed wording:⁵²

“As drafted, it would prevent Australia from entering into a plurilateral agreement which contains ISDS, whether or not Australia agrees to be bound by that particular provision. This does not recognise the possibility that an agreement could contain ISDS provisions which apply between a subset of the parties (and not to Australia). It is not clear if this is the intended operation, however DFAT considers it would be undesirable to prevent Australia from entering into an agreement on this basis.”

Indeed, Australia negotiated such an exemption with respect to New Zealand in their FTA with ASEAN concluded in 2009. The key point with respect to Japan is that it is presently negotiating broader FTAs involving Australia, namely the TPPA and RCEP, but this Bill seems to preclude Australia from reaching agreement on such treaties even if individual states (such as Japan) agree to exclude the application of ISDS vis-à-vis other states (such as Australia).

In oral evidence from DFAT, and also the Law Council of Australia (the peak body for some 60,000 lawyers), it was also pointed out that the Bill’s present wording could also unfortunately prevent Australia renegotiating new ISDS wording as its many investment treaties come up for renewal.⁵³ Such renegotiation would be useful not only for old treaties that are poorly drafted by contemporary standards, such as those concluded

52 DFAT Submission, No. 135, at p. 2 (via http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Submissions).

53 See Transcript at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2F005e1654-540c-4b63-927c-3cb1c149b1a1%2F0000%22>.

with Hong Kong and Indonesia that have recently generated investor claims (against Australia, and by an Australian investor, respectively). Being able to renegotiate Australian treaties that do not presently contain ISDS, with developed countries such as Japan, may also prove useful if necessary to reach a new overall deal in future years. Yet the proposed Bill would again preclude such room to manoeuvre.

In sum, the better alternative for Australia – but also other countries such as Japan, and the EU, where ISDS has recently surfaced in the public eye as well – is to continue down its path of carefully negotiating and drafting both substantive protections and ISDS procedures.⁵⁴ This is especially advisable when concluding agreements with developing countries where there may be concerns about the scope of rights and avenues of recourse offered through local courts. Yet, to set a good example and benefit from the expertise of international arbitrators or to achieve an overall deal, for example, it can be appropriate to include such provisions in regional agreements involving developed countries, and even to apply them between developed countries (as under KAFTA, or the Japan-Switzerland FTA) despite there being much less chance of those provisions being invoked successfully against developed countries.⁵⁵

On 27 August 2014, the Senate Committee published its Report recommending against enactment of the anti-ISDS Bill (albeit with a dissenting report from Senator Whish-Wilson and another Greens Party committee member). Because the Labor Party members agreed with the conclusion of the Coalition government members, albeit emphasising the Bill's drastic attempt at curtailing the executive branch's responsibility to negotiate treaties, the Bill may not even go to a vote in the Senate and anyway would fail.⁵⁶

The main Report acknowledged public concerns in Australia about this dispute resolution procedure (and substantive rights offered to foreign investors) but also benefits from ISDS, and concluded that the Committee was:⁵⁷

“not convinced that legislation is the best mechanism by which to address the concerns raised about risks associated with ISDS provisions. The committee agrees with Professor Nottage and others that the risks associated with ISDS can and should be managed more effectively and in ways which do not require legislation, including careful treaty drafting

54 See Appendix A (comparing KAFTA provisions) in NOTTAGE, *supra* note 34.

55 See <http://kluwerarbitrationblog.com/blog/2014/08/27/the-anti-isds-bill-before-the-australian-senate/>.

56 Interestingly, however, the Bill was still seen as important enough to be debated in the Senate on 30 October 2014: see transcript at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2Fe89a1618-fea8-466d-ab43-821cf296f483%2F0023;query=Id%3A%22chamber%2Fhansards%2Fe89a1618-fea8-466d-ab43-821cf296f483%2F0033%22>

57 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, at para 2.59.

(of both old and new agreements) and development of a well-balanced Model Investment Treaty.”

That approach would also be a useful way forward for Japan in its ongoing treaty negotiations, including the TPP and RCEP. After all, Japan too is unusual among major economies) in not publicising a model treaty, while “reserve engineering” its past agreements reveals some complex and sometimes inappropriate wording by contemporary standards.⁵⁸

Even if the Australian government eventually initiates a public consultation to develop a model treaty, this issue will certainly not go away. Having lost their day in Parliament with respect to this Bill, arch-critics of all forms of ISDS have turned back to the court of public opinion, with *The Age* newspaper in Melbourne already reporting on 30 August: “Trade treaties expose Australia to costly litigation, experts warn”.⁵⁹ ABC National Radio also focused on ISDS in the context of the TPP negotiations, in an extended feature broadcast on 14 and 16 September 2014.⁶⁰

Further, on 4 September 2014 the Senate’s JSCOT issued its Report on KAFTA, with dissenting Reports from two Labor Senators as well as Greens Senator Whish-Wilson recommending against ratification of that treaty partly because of their objections to ISDS.⁶¹ Because the Coalition no longer has a majority in the Senate, to appease Labor Senators and get KAFTA implementation legislation passed,⁶² the Abbott government will need to negotiate agreement with a handful of Senators who are independent or belong to very small parties.⁶³ If unsuccessful, it might even consider trying to seek re-negotiation of its treaty signed with Korea to remove the ISDS provisions. In the unlike-

58 See generally HAMAMOTO/NOTTAGE, *supra* note 12.

59 <http://www.theage.com.au/business/trade-treaties-expose-australia-to-costly-litigation-experts-warn-20140828-109ht7.html>. Cf. e.g. <http://globalarbitrationreview.com/news/article/32936/dont-rule-isds-says-australian-senate-committee/>.

60 <http://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/5734490>.

61 http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014/Report_142. Curiously, Whish Wilson noted (at p. 65) that “Recently the Greens introduced a bill to the Senate to have such clauses banned from all future trade deals”, but did not acknowledge that the Committee heard further evidence specifically on ISDS and recommended on 28 August that this Bill not be passed.

62 See <http://www.smh.com.au/business/korean-trade-pact-fails-to-impress-panel-20140904-10cyl6.html>.

63 Such as Ricky Muir from the Australian Motoring Enthusiasts Party, whose policy on ISDS is unknown to this author: see generally <http://www.smh.com.au/comment/jacqui-lambie-throws-in-the-scarf-for-bigger-things-20141121-11qu1o.html>. Similar problems are likely to arise regarding ratification of the China-Australia FTA, including ISDS, once it is signed and presented to JSCOT for recommendations. Before that FTA was substantially agreed on 17 November 2014, for example, labour unions were warning about the possible inclusion of ISDS: see <http://www.theaustralian.com.au/national-affairs/industrial-relations/fta-with-china-could-deal-fatal-blow-to-local-industry/story-fn59n003-1227124987027>.

ly event that Korea had then changed its stance and agreed to exclude ISDS, this would have had significant implications especially for ongoing RCEP treaty negotiations involving both countries as well as Japan.

However, in the Senate on 1 October 2014, Labor Party Senators ultimately agreed to vote in favour of the *Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014*, despite continuing to voice misgivings about ISDS.⁶⁴ The day after the Korean National Assembly approved KAFTA on 2 December, the Australian Government also exchanged Notes confirming that the treaty would come into force from 12 December 2014.⁶⁵ Nonetheless, there may be even more obstacles in the path towards ratification of Australia's FTA with China, which was substantially agreed on 17 November 2014 and apparently also will include ISDS protections,⁶⁶ not to mention regional FTAs such as the TPPA.

SUMMARY

Due to the recent conclusion of the Australian-Japanese Free Trade Agreement, the Japan Australia Economic Partnership Agreement (JAPEA) in 2014, the article analyses the issue of 'Investor-State Dispute Settlement' (ISDS). This is a mechanism that is normally included in trade and investment agreements between States; however, no such provision is included in the JAPEA. The article first discusses the reasons for this exclusion and its future impact.

The new Australian government has returned to a case-by-case approach on the question of including ISDS provisions in trade agreements, and apparently, no such clause was inserted into the JAPEA since the Japanese side did not insist on it, seeing no strong reasons to do otherwise. The future consequences of this omission may be serious, especially if this trend is continued by Australia in negotiating other Free Trade Agreements and thus heightens an "anti-ISDS" mood. This change could then have an impact on other treaty negotiations, leading to further exclusions of ISDS (especially arbitration) provisions.

The article also examines the controversial The Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 and its possible effects. This Bill is basically an "anti-ISDS" Bill, seeking to prevent the Australian government from including ISDS provisions in future trade agreements. Although the Bill may not be passed, it may still impact present and future trade agreement negotiations and has stirred up public opin-

64 For progress of the Bill (including Royal Assent given on 21 October 2014), see http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5330.

65 http://trademinister.gov.au/releases/Pages/2014/ar_mr_141203.aspx.

66 http://trademinister.gov.au/releases/Pages/2014/ar_mr_141117.aspx?ministerid=3.

ion. If it were passed, it could hinder Australia from renegotiating existing treaties that do not include ISDS provisions. A better alternative to prohibiting certain clauses outright includes the careful drafting of trade agreements or perhaps of a model treaty.

(The Editors)

ZUSAMMENFASSUNG

Vor dem Hintergrund des vor kurzem abgeschlossenen australisch-japanischen Freihandelsabkommen, dem Japan Australia Economic Partnership Agreement (JAPEA) von 2014, analysiert der Artikel das so genannte ‚investor-state dispute settlement‘ („Investor-Staat Streitbeilegung“, ISDS). Dies ist ein Mechanismus, der sich üblicherweise in Handelsabkommen von Staaten findet, jedoch findet sich in dem JAPEA keine solche Bestimmung. Der Artikel analysiert die Gründe für diesen Ausschluss und die zukünftigen Auswirkungen.

Die neue Regierung Australiens hat sich für die Frage der Aufnahme von ISDS-Vorschriften in Handelsabkommen einer Einzelfallprüfung zugewendet. Anscheinend wurde keine solche Bestimmung in das JAPEA aufgenommen, weil von japanischer Seite nicht darauf bestanden wurde, da sie keine starken Gründe dafür sahen. Die zukünftigen Auswirkungen dieses Ausschlusses könnten schwerwiegend sein, insbesondere wenn Australien diesen Trend in Verhandlungen von anderen Handelsabkommen weiter führt und somit eine „Anti-ISDS“-Stimmung hervorruft. Dieser Wandel könnte dann andere Abkommensverhandlungen beeinflussen, was zu weiteren Ausschlüssen von ISDS- und Schiedsverfahrensklauseln führen könnte.

Der Artikel untersucht ferner den umstrittenen Gesetzesvorschlag ‚The Trade and Foreign Investment (Protecting the Public Interest) Bill 2014‘ und seine möglichen Folgen. Dieser Gesetzesvorschlag ‚The Trade and Foreign Investment (Protecting the Public Interest) Bill 2014‘ ist quasi ein „Anti-ISDS“-Gesetzesvorschlag, der versucht die australische Regierung daran zu hindern künftig ISDS-Vorschriften in Handelsabkommen einzubeziehen. Obwohl der Gesetzesvorschlag möglicherweise nicht verabschiedet wird, hat er dennoch die öffentliche Meinung geschürt und könnte zukünftige Verhandlungen von Handelsabkommen erschweren. Sollte er verabschiedet werden, könnte er Australien an Neuverhandlungen von bestehenden Abkommen hindern, die keine ISDS-Vorschriften enthalten. Eine bessere Alternative zu einem kompletten Verbot bestimmter Klauseln wäre vielleicht ein besonders sorgfältiges Entwerfen von Handelsabkommen, oder vielleicht sogar der Entwurf eines Handelsabkommenmodells.

(Die Redaktion)