

“THE CURIOUS CASE OF ISDS ARBITRATION INVOLVING AUSTRALIA AND NEW ZEALAND”

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Criticism of investor-state dispute settlement (ISDS) has intensified as the number of cases and the range of affected states have grown. This has prompted a range of reform initiatives aimed at both ISDS and the investment treaty system more generally. Given their close ties and common interests, Australia and New Zealand have the potential to work together to promote bottom-up reform to ISDS. This paper examines their experiences with ISDS cases, including reporting about ISDS in local media, and asks to what extent these experiences may impact on their ISDS policies. We find that the first treaty-based ISDS case against Australia did generate “availability bias” against ISDS, underpinning a shift in policy and public perceptions, although media coverage has waned. By contrast, New Zealand’s early experience as respondent in a contract-based claim has been largely overlooked in debates about ISDS. There is also little evidence yet to indicate that either potential additional inbound treaty-based ISDS claims against Australia or outbound ISDS claims by Australian investors have influenced overall policy or even drafting on specific issues, although New Zealand’s recent experience shows how easily ISDS can resurface as a topical issue with a change in government. We suggest that a “status quo bias” in favour of path dependency has been a stronger influence than actual experiences with ISDS cases, although such dependency may be weakening for New Zealand at least.

Keywords: foreign investment, international economic law, investment law, dispute resolution, arbitration, investor-state dispute settlement (ISDS), Australia, New Zealand, Asia-Pacific

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I INTRODUCTION

Investor-state dispute settlement (ISDS) has been a hot topic in Australia, more recently in New Zealand and parts of the Asian region, and world-wide.¹ Known treaty-based ISDS claims, almost all involving foreign investors choosing the option of arbitration (so decisions are binding) rather than conciliation or mediation, have reached 855 by the end of 2017 (including 65 in that year).² Of the cumulative total, 658 claims for arbitration based on host state consent provided in investment treaties (or more rarely national laws) have been filed in the International Centre for Settlement of Investment Disputes (ICSID), headquartered in Washington DC. In addition, ICSID has received 104 filings for arbitration based on consent included in individual investment contracts between a foreign investor and a host state or its instrumentality.³ If the home state of the investor, as well as the host state, are also party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention'),⁴ any resulting arbitral award usually can be more easily enforced against the losing host state compared to enforcement under the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.⁵

Less concern about treaty-based ISDS was apparent until the turn of the 21st century, when the annual number of arbitration filings began to increase significantly, and even when the claims were mostly brought against developing countries. After all, the rationales for the active promotion of ISDS-backed bilateral investment treaty (BIT) commitments by international organisations like the United Nations Conference on Trade and Investment (UNCTAD) over the 1980s and 1990s⁶ were particularly apposite for developing countries. The substantive protections

¹ Luke Nottage, Julien Chaisse and Sakda Thanitcul, 'International Investment Treaties and Arbitration Across Asia: A Bird's Eye View' in Julien Chaisse and Luke Nottage (eds), *International Investment Treaties and Arbitration Across Asia* (Brill, 2017); Luke Nottage and Ana Ubilava, 'Asia's Changing Investment Regime' (Book Review), in this Issue.

² United Nations Conference on Trade and Development, 'Investment Dispute Settlement Navigator' <<http://investmentpolicyhub.unctad.org/ISDS>>.

³ ICSID, 'Cases' <<https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>>.

⁴ Convention on the Settlement of Investment Disputes between States and Nationals of other States (signed 18 March 1965, entered into force 14 October 1966) 4 ILM 524 (1965).

⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed 10 June 1958, entered into force 7 June 1959) (1958) 330 UNTS 38. For an example of difficulties in enforcing a treaty-based ISDS award under the New York Convention, see the Walter Bau saga described in Luke Nottage and Sakda Thanitcul, 'International Investment Arbitration in Thailand: Limiting Contract-based Claims While Maintaining Treaty-based ISDS', in Chaisse and Nottage, above n 1, with more details in the manuscript version at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2770889>.

⁶ Nicolás M Perrone, 'UNCTAD's World Investment Reports 1991–2015: 25 Years of Narratives Justifying and Balancing Foreign Investor Rights' (2018) 19(1) *Journal of World Investment and Trade* 7.

offered to foreign investors (and indeed sometimes local investors), and/or the administrative, court and political processes available to enforce such protections, were more likely not to meet international standards compared to developed countries. By offering ISDS-backed commitments under investment treaties, foreign investors were thought to be more likely to invest in such countries, often lacking capital and competing for foreign direct investment (FDI).⁷ It was also sometimes suggested that ISDS-backed commitments were more likely to improve the rule of law or governance more generally, particularly in developing countries.⁸ Another perceived advantage of the ISDS option was to de-politicise disputes, by allowing foreign investors to make direct claims against host states, rather than having to mobilise their home state (perhaps through politicians) to initiate an inter-state arbitration process (potentially involving geo-political or diplomatic complications). The latter has long been a feature of investment treaties and remains an alternative even when the ISDS option is added, albeit one that is hardly ever relied on by foreign investors. Recent studies have begun to question the empirical bases supporting these purported benefits,⁹ although the evidence is mixed and it is often easy to criticise something with the benefit of hindsight.

Quite understandably, academic and media criticism of treaty-based ISDS began to intensify as numbers of arbitration filings and the range of affected host states grew, including more and more developed countries – where the case for adding the ISDS option was always less obvious. Public concern emerged first mainly in the United States (US) and Canada, as claims started to file against them (not just Mexico) under an early free trade agreement (FTA) containing an investment chapter with ISDS (the North American Free Trade Agreement, or NAFTA, signed in

⁷ More recently, see eg Shiro Armstrong and Luke Nottage, 'The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis' (2016) 16/74 *Sydney Law School Research Paper*, and Asian Development Bank, 'Project Overview: Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific' <<https://www.adb.org/projects/50114-001/main>>.

⁸ More recently, see eg Donald Robertson, 'Governance and International Investment Treaties for Asia: A Principled Approach to Assessing Regulatory Action' in Chaisse and Nottage, above n 1. The latest annual *World Investment Report* (UNCTAD, 2018) <http://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> at 92 notes: 'As in previous years, the majority of new cases were brought against developing countries and transition economies'.

⁹ Joachim Pohl, 'Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence' (OECD Working Papers on International Investment 2018/01, Organisation for Economic Co-operation and Development, 2018) <http://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en> 16-31; Jonathan Bonnitcha, Lauge Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017). On the question of whether ISDS significantly promotes depoliticisation of investment dispute resolution, see n 101 below.

1993).¹⁰ From around a decade ago, as the proportion of ISDS claims among member states of the European Union (EU) also grew and tensions emerged with EU law, concerns also emerged in Europe. An early *cause celebre* involved a claim by a Belgian investor in 2007 under the Energy Charter Treaty, after the European Commission began investigating a contract favouring the investment vehicle as involving state aid contrary to EU law, resulting in its termination by Hungary. Eventually, in 2015, the arbitral tribunal found no lack of fair and equitable treatment by Hungary in calculating costs incurred by the investor in order to provide compensation under EU law, but the case attracted considerable attention.¹¹ Further, on 6 March 2018, the Court of Justice of the European Union decided that the ISDS arbitration procedure in the Slovakia-Netherlands BIT was contrary to EU law. This judgment generated a flurry of discussion about implications for EU-related investment treaty arbitration, including the EU's shift since 2015 to negotiating an 'investment court' alternative to traditional ISDS in its treaties with EU and other developed countries (like Canada) as well as developing countries (like Vietnam).¹² Already, according to UNCTAD: "Intra-EU disputes accounted for about one-fifth of investment arbitrations initiated in 2017. The overall number of known intra-EU investment arbitrations (initiated by an investor from one EU member State against another member State) totalled 168 by the end of 2017."¹³

¹⁰ Dodge notes that NAFTA was a significant milestone in international investment law and practice by adding ISDS provisions even though the treaty involved two developed countries (Canada and the US, with sophisticated local courts and extensive two-way FDI) as well as a more developing country (Mexico). Subsequent negotiations for a Multilateral Agreement on Investment among OECD (developed) countries, which provided for ISDS but broke down in 1998, had envisaged accession by developing countries. For bilateral investment treaties between developed countries, rather than traditional ISDS or eschewing it to leave only inter-state arbitration, Dodge generally favours ISDS only after exhaustion of local remedies. See William Dodge, 'Investment Treaties between Developed States: The Dilemma of Dispute Resolution' in Catherine Rogers and Roger Alford (eds) *The Future of Investment Arbitration* (Oxford University Press, 2009) 165, 168-9. Under the Trump Administration, ISDS became a major issue in the US-led attempt recently to renegotiate NAFTA: see eg Adam Behsudi and Doug Palmer, 'Investor Dispute Provision in NAFTA Still at Impasse Ahead of Washington Meeting' (*Politico*, 21 February 2018) <<https://www.politico.com/story/2018/02/21/canada-stands-firm-on-pursuing-bilateral-investor-dispute-process-with-mexico-in-nafta-356665>>.

¹¹ *Electrabel SA v Republic of Hungary*, ICSID Case No ARB/07/19, Award (25 November 2015) discussed in Matthew Levine, 'ICSID Tribunal Dismisses Final Claim for Compensation in relation to Hungary's 2008 Termination of Power Purchase Agreement' (IISD Investment Treaty News, 29 February 2016) <<https://www.iisd.org/itn/2016/02/29/icsid-tribunal-dismisses-final-claim-for-compensation-in-relation-to-hungarys-2008-termination-of-power-purchase-agreement-electrabel-sa-v-republic-of-hungary-icsid-case-no-arb-07-1/>>.

¹² For a preliminary analysis of the 2018 judgment, see eg Lucia Bizikova, 'The CJEU in Slovak v Achmea or is Justice Best Served Cold' (*Kluwer Arbitration Blog*, 11 March 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/03/11/cjeu-slovakia-v-achmea-justice-best-served-cold/>>. Regarding the EU's investment court model, see Kyle Dickson-Smith, 'An Investment Court that Judges the Judges?', in this Issue.

¹³ 'ISDS Navigator Update: 850+ Known Cases By Year-End' (12 March 2018) <<http://investmentpolicyhub.unctad.org/News/Hub/Home/1580>>.

Turning to the antipodes, Figure 1 below shows how ISDS became a hot topic in Australia as well from 2011, when a Notice of Dispute was filed by Philip Morris Asia (PMA) challenging tobacco plain packaging legislation.¹⁴ The new Gillard Government also issued a Trade Policy Statement declaring that Australia would not agree to ISDS in future treaties,¹⁵ which lasted until 2013 when that coalition of Labor and Greens parties lost power to a centre-right coalition that reverted to Australia's policy of mostly agreeing to ISDS but on a case-by-case assessment.¹⁶

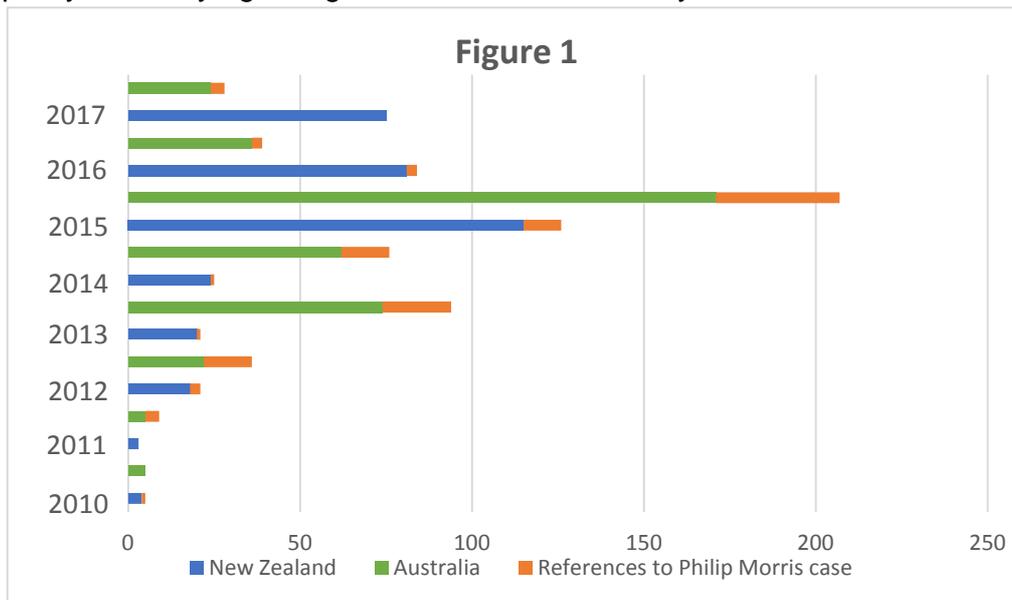


Figure 1¹⁷ also shows how ISDS coverage escalated in New Zealand especially from 2015, when ISDS-related newspaper articles tripled

¹⁴ Attorney-General's Department, Australian Government, *Tobacco Plain Packaging – Investor-State Arbitration* <<https://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobaccoplainpackaging.aspx>>.

¹⁵ Archived at <http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf>.

¹⁶ Luke Nottage, 'Investor-State Arbitration Policy and Practice in Australia' in Armand deMestral (ed), *Second Thoughts: Investor-State Arbitration Between Developed Democracies* (Centre for International Governance Innovation, 2017), based on a 2016 study at <<https://ssrn.com/abstract=2802450>>.

¹⁷ Newspaper records were retrieved from the Factiva database using the expression ["investor-state" or "investor state" or ISDS]: Australian print newspapers selected for analysis were *The Australian*, *Australian Financial Review*, the *Daily Telegraph*, the *Sydney Morning Herald*, *The Age*, the *Herald Sun*, the *Courier-Mail*, the *Adelaide Advertiser*, and the *West Australian*. New Zealand print newspaper selected for analysis were the *New Zealand Herald*, the *Dominion Post*, *The Press*, *Waikato Times*, *Otago Daily Times*, *The Southland Times*, *Hawke's Bay Today*, *Taranaki Daily News* and *Bay of Plenty Times*. The references to the

compared to 2014, and remaining at significantly higher levels since 2016 compared to reporting over 2012-2014. This upsurge in interest has arisen despite New Zealand not yet having been subjected to a treaty-based arbitration claim. Newspapers made some references to the PMA case, as an international cause celebre. But the increase in reporting in 2015 occurred primarily because ISDS became a matter of public and parliamentary debate in the context of important FTAs negotiated by New Zealand. One was with Korea, but the main concern arose because the then National Government was pressing for conclusion of the Trans-Pacific Partnership (TPP) FTA including the US.¹⁸ This stoked public fears, as in Australia and indeed other TPP negotiating partners like Japan,¹⁹ about New Zealand potentially being exposed to arbitration claims by supposedly litigious American investors.²⁰

A quarterly analysis of New Zealand newspaper reports each year (not indicated in Figure 1 above) shows that reports mentioning ISDS diminished significantly soon after the TPP was signed by New Zealand, Australia, the US and nine other countries in Auckland in February 2016, but increased dramatically again in late 2017. This was because a new Labour-led coalition government declared that it would not agree to ISDS in future investment treaties, creating a strong sense of déjà-vu from an Australian perspective. The Ardern Government also announced that it would ask the TPP signatory countries to review the ISDS provisions, in the context also of the withdrawal of US signature by newly-elected President Trump in January 2017. However, the actual changes to the

Philip Morris case were identified by using the search term: "Philip Morris" and ["investor-state" or "investor state" or ISDS].

¹⁸ Reflecting the potential significance of the TPP for New Zealand, the TPP negotiations attracted a high degree of mostly critical academic attention relative to New Zealand's previous FTAs. See, notably, Jane Kelsey, 'International Trade Law and Tobacco Control: Trade and Investment Law Issues Relating to Proposed Tobacco Control Policies to Achieve an Effectively Smokefree New Zealand By 2025 (Tobacco Control Research Turanga, 2012); Jane Kelsey 'The Trans-Pacific Partnership Agreement: A Gold-Plated Gift to the Global Tobacco Industry?' (2013) 39 *American Society of Law, Medicine & Ethics* 237 (discussing in particular the potential for a Philip Morris type claim under the TPP). Professor Kelsey has been a prominent critic of the TPP from an early stage in the negotiations and her research and submissions, along with those of others including unions and health groups, have helped to inform and sustain public debate on the merits or otherwise of the agreement: see the citizens campaign website, <https://itsourfuture.org.nz/>. For discussion of the politicisation of the TPP negotiations, see Amokura Kawharu, 'Process, Politics and the Politics of Process: The Trans-Pacific Partnership in New Zealand' (2016) 17 *Melbourne Journal of International Law* 286.

¹⁹ Nottage, above n 16 and Amokura Kawharu and Luke Nottage, 'Foreign Investment Regulation and Treaty Practice in New Zealand and Australia: Getting it Together in the Asia-Pacific?' in Chaisse and Nottage, above n 1; Shotaro Hamamoto, 'Recent Anti-ISDS Discourse in the Japanese Diet: A Dressed-Up But Glaring Hypocrisy' (2015) 16 *Journal of World Investment and Trade* 931.

²⁰ However, the US is less "litigious" (as measured by the number of ISDS claims brought by its firms, on a per capita basis) than for example Canada: Luke Nottage, 'Are US Investors Exceptionally Litigious with ISDS Claims?' (*Kluwer Arbitration Blog*, 14 November 2016) <<http://arbitrationblog.kluwerarbitration.com/2016/11/14/are-us-investors-exceptionally-litigious-with-isds-claims/>>.

text, re-signed as the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) by the eleven countries (without the US) on 8 March 2017 along with extra side letters, proved minimal.²¹

Against this broader backdrop of concerns about ISDS spreading among developed countries,²² this paper takes a closer look at the experiences and discussions concerning ISDS cases in New Zealand and Australia, as neighbouring economies with many shared features and interests. Apart from the parallels in centre-left governments eschewing ISDS, those Trans-Tasman commonalities include:²³

- similar legal and political systems, although Australia has additional complexity due to a federal system and two-tier Commonwealth legislature;
- open trading economies, tightly linked with each other (thanks partly to hard and soft or non-treaty-based harmonisation measures) as well as increasingly with Asia;
- liberal regimes for inbound foreign direct investment (FDI), albeit with national laws providing for “national interest” screening for larger and/or more sensitive transactions such as foreign investment in land, and much more significant volumes of outbound FDI from Australia compared to New Zealand;
- similar patterns in Free Trade Agreements (FTAs), with investment chapter drafting heavily influenced by United States (US) treaty practice,²⁴ and Bilateral Investment Treaties (BITs) albeit to a lesser extent due to New Zealand having far fewer BITs in force;
- shared broader security and geopolitical interests, although Australia has retained a strong formal military alliance with the US.²⁵

²¹ Amokura Kawharu and Luke Nottage, ‘NZ Renounces ISDS: Déjà vu?’ (*Kluwer Arbitration Blog*, 6 December 2017) <<http://arbitrationblog.kluwerarbitration.com/2017/12/06/booked-luke-nottage/>>.

²² See also Leon E Trakman, ‘The Repudiation of Investor–State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor–State Arbitration’ (2015) 31(1) *ICSID Review* 194; and Armand de Mestral (ed), *Second Thoughts: Investor-State Arbitration Between Developed Democracies* (Centre for International Governance Innovation, 2017) (with working paper versions at Centre for International Governance Innovation, ‘Investor-State Arbitration Series’ <<https://www.cigionline.org/series/investor-state-arbitration>>).

²³ Amokura Kawharu and Luke Nottage, ‘Models for Investment Treaties in the Asian Region: An Underview’ (2017) 34 *Arizona Journal of International and Comparative Law* 461.

²⁴ For similar patterns in treaty practice of other Asia-Pacific states, see Wolfgang Alschner and Dmitriy Skougarevskiy, ‘The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe’ (2016) 17 *Journal of World Investment & Trade* 339.

²⁵ See also generally Luke Nottage, ‘Asia-Pacific Regional Architecture and Consumer Product Safety Regulation Beyond Free Trade Agreements’ in Susy Frankel and Meredith Kolsky-Lewis (eds), *Trade Agreements at the Crossroads* (Routledge, 2014) 114; Andrew Mitchell, Elizabeth Sheargold and Tania Voon, *Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment* (Elgar, 2018) 18-21 (describing the 1983 Australia-New Zealand FTA as early exception to both countries’ focus on multilateral

Given such commonalities, we reiterate our argument that both countries should work together more closely and pro-actively in promoting “bottom-up” reform to ISDS and the investment treaty system more generally. This is particularly timely given concerns as well among some Asian economies over ISDS.²⁶ Evidence of such concern can be found, for example, in:

- longstanding reluctance to ratify the ICSID Convention (eg in Thailand, India and Vietnam);
- recent termination of older, more pro-investor BITs (India and Indonesia); and/or
- advocacy for, and already some agreements on, new types of dispute settlement procedures (drastically pared-back ISDS for India, in a Model BIT largely adopted in a new BIT with Cambodia, or the EU-style permanent investment court alternative in its FTA concluded with Vietnam).

Greater Trans-Tasman collaboration can draw on, but may also hopefully provide impetus and realism for, multilateral initiatives. Those include the project on ‘Possible Reform of Investor-State Dispute Settlement’ commenced by the United Nations Commission on International Trade Law (UNCITRAL) in late 2017.²⁷

However, in encouraging Australia and New Zealand to work as a potential “middle power” influencing the trajectory of international investment law,²⁸ it is important to look at both countries’ experiences with ISDS cases. This is because, for example, empirical studies by Lauge Poulsen and others have shown that the first inbound treaty-based claim is followed by a statistically lower number of treaty signings by that particular country, perhaps associated with an increase in public concern

negotiations and agreements for trade liberalisation, linked to close historical and cultural as well as economic links); and Robert Ayson, ‘Future-Proofing Australia – New Zealand Defence Relations’ (Lowy Institute Analyses, 19 December 2016) <<https://www.lowyinstitute.org/publications/future-proofing-australia-new-zealand-defence-relations>>.

²⁶ On concerns about ISDS among some Asian states, see Nottage, Chaisse and Thanitcul. For updates, in the context of (re)negotiations of treaties with Australia and/or New Zealand, see Amokura Kawharu and Luke Nottage, ‘Renouncing Investor-State Dispute Settlement in Australia, then New Zealand: Déjà vu’ (2018) *Sydney Law School Research Paper No 18/03* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116526>. An abridged version of the second half of the latter paper, entitled ‘Has ISDS Gone Rogue for Australia and New Zealand? CPTPP (C-3PO), RCEP (R2-D2) and Beyond’, is forthcoming in *Yearbook on International Investment Law and Policy*.

²⁷ UNCITRAL, Working Group III, ‘2017 to Present: Investor-State Dispute Settlement Reform’ <http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html>.

²⁸ Cf Stephan Schill, ‘Special Issue: Dawn of an Asian Century in International Investment Law?’ (2015) 16(5-6) *Journal of World Investment and Trade* 765.

about ISDS. Focusing especially on developing countries, Poulsen argues that this is evidence of “availability bias” – an aspect of “bounded rationality”, as a more rational response would be to adjust treaty signings (and drafting) to reflect other countries’ experiences of being claimed against as well.²⁹ Australia seems to fit this pattern, given the slowdown in treaty signings under the Gillard Government following the PMA filing under the BIT with Hong Kong. But New Zealand risks this too, if its anti-ISDS stance jeopardises chances of concluding negotiations for pending or future treaties, even though New Zealand has not yet been subjected to a treaty-based claim itself.

In addition, Poulsen’s research does not examine what happens if a country experiences its first inbound contract-based ISDS claim, under advance consent given in an investment contract rather than a BIT or FTA investment chapter. This alternative scenario is explored in Part 2 below, as New Zealand in fact experienced such a contract-based ICSID claim filed by Mobil Oil NZ Ltd (Mobil) in 1987 and decided in 1989 (‘the Mobil Case’).³⁰ This experience does not appear to have influenced New Zealand’s then nascent policy on ISDS. Then again, ad hoc consent for a particular investor implies far less liability exposure than consent to arbitration with all foreign investors covered by a treaty. Indeed, New Zealand’s early run-in with ICSID did not prevent New Zealand from concluding four BITs during the late 1980s and 1990s, nor from actively pursuing FTAs with ISDS-backed commitments from the turn of the 21st century.

A second question extending Poulsen’s research is what happens to treaty signings or drafting, and associated public debates, after the host state experiences additional inbound treaty-based ISDS claims (beyond the first). Does further availability bias kick in, and with what follow-on effects? Part 3 below notes how reporters in both countries, even in Australia, have paid little attention to significant ISDS case developments after the announcement in December 2015 that PMA had lost its BIT claim at the jurisdictional stage. This is despite the disclosure of the Costs

²⁹ *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press, 2015). For a review essay, suggesting that some developing countries (like Thailand) may have displayed more rationality than posited whereas some developed countries (like Australia) may also have shown bounded rationality in their treaty practices, see Luke Nottage, ‘Rebalancing Investment Treaties and Investor-State Arbitration’ (2016) 17(6) *Journal of World Investment and Trade* 1015. On the slowdown in Australia’s FTA signings after the PMA filing in 2010, associated with Australia’s eschewing of ISDS in new treaty negotiations over 2011-2013, see further Luke Nottage, ‘Investor-State Arbitration Policy and Practice in Australia’ in de Mestral (ed) above n 22.

³⁰ *Mobil Oil Corp v Her Majesty the Queen in Right of New Zealand*, Findings on Liability, Interpretation and Allied Issues, ICSID ARB/87/2, 4 May 1989; (1997) 4 ICSID Reports 140 <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f87%2f2>> (and related proceedings, *Attorney-General v Mobil Oil NZ Ltd* [1989] 2 NZLR 649).

Award in mid-2017, and the merits award in favour of Uruguay in mid-2016 in another claim over tobacco control measures brought by the Philip Morris group under its BIT with Switzerland. Notably, there is hardly any mention of two ISDS claims threatened against Australia since 2015 under the FTA with the US – very ambitiously, not least because that bilateral treaty does not directly provide for ISDS (as explained further below).

A third question is whether treaty patterns and public discourse change in the country when the first outbound ISDS claim is filed, especially if treaty-based rather than contract-based, or if multiple claims are filed. Do reporters, commentators and policy-makers significantly change their opinions and actions, by highlighting the practical utility of ISDS for supporting outbound investment by local firms, or by generating new approaches to treaty drafting by negotiators from the investor's home country? Or does the initial "availability bias" resulting in a cooling off towards investment treaties prevail, along with path-dependence or "status quo bias" in treaty drafting?³¹ Although there are no known ISDS claims brought by investors from New Zealand, there have now been several from Australia, as Part 4 shows. Yet our newspaper analysis also finds hardly any media coverage of these recent outbound ISDS claims. The overwhelming media focus has been instead on the PMA case, other than the Costs Award (which was only mentioned in two Australian and two New Zealand articles in 2017), as can be seen from the italicised rows in Table 1 below. Perhaps more surprisingly, although the outbound claims (like the inbound claims) raise interesting and topical issues, as explained in Part 4, there is no obvious impact yet on Australia's approaches to treaty (re)negotiation and drafting, which remain heavily influenced by post-NAFTA US treaty practice.³²

Table 1: ISDS Case-Related Newspaper Coverage in Australia and New Zealand Over 2015-2017³³

Factiva search term	2015	2016	2017
Total references to ["investor-state" or "investor state" or ISDS]	286 (115)	117 (81)	99 (75)
<i>"Philip Morris" and Australia</i>	<i>94 (21)</i>	<i>42 (19)</i>	<i>34 (0)</i>

³¹ Poulsen, above n 29; Nottage, 'Rebalancing Investment Treaties, above n 29 at 1027-1028 (arguing that the Australian Government's refusal to disclose its Cabinet-approved BIT template for discussion exacerbates "status quo bias" in Australian treaty practice).

³² See further Kawharu and Nottage, above n 26, Part 3; and generally Alschner, above n 24.

³³ Results retrieved from the Factiva database from selected print media sources in Australia and New Zealand, listed above n 17, using the search terms listed in Column 1 of Figure 3. The total results retrieved are listed first, with New Zealand print media results included in brackets.

<i>“Philip Morris” and Uruguay</i>	10 (5)	3 (3)	0 (0)
[<i>“investor-state” or “investor state” or ISDS</i>] and <i>“Philip Morris”</i>	47 (11)	6 (3)	4 (2)
[<i>“investor-state” or “investor state” or ISDS or AUSFTA</i>] and NuCoal	2 (0)	3 (0)	0 (0)
[<i>“investor-state” or “investor state” or ISDS or AUSFTA</i>] and APR	0(0)	2 (0)	0
<i>“Churchill Mining”</i>	0	1	0
<i>“Planet Mining”</i>	0	0	0
<i>“Tethyan”</i>	0	0	0
<i>“Kingsgate” and FTA</i>	0	0	1
<i>“Lighthouse Corporation”</i>	0	0	0

We conclude in Part 5 below that experiences with ISDS claims have given rise to short-lived availability bias, linked to PMA’s first treaty-based claim against Australia but not Mobil’s early contract-based claim against New Zealand. Since these cases, there has only been one Notice of Arbitration filed, against Australia. But there has been very little media attention or public discussion about this, or a further possible inbound claim, let alone various recent outbound ISDS claims. In the absence of another high-profile inbound treaty-based claim against Australia, or a first claim against New Zealand, other factors such as path dependence and reform initiatives taking place in other settings (notably UNCITRAL) are likely to have a stronger influence on policymaking than the past ISDS experiences involving both countries.

2. “Unavailability Bias”: An Early Contract-based ISDS Claim Against New Zealand

Although ISDS is now topical in New Zealand, this is a new phenomenon. As mentioned in Part 1 above, the upsurge in media coverage of ISDS tracks the public and parliamentary debate that surfaced in the context of FTA negotiations involving New Zealand from 2015 onwards. Until then, the paucity of public discussion regarding ISDS likely reflects New Zealand’s relatively limited participation in the investment treaty system, and therefore also its low exposure to the possibility of an ISDS claim. New Zealand’s first BIT was signed in 1988 (with China), and its second (with Hong Kong) in 1995. These BITs are both qualified in scope. Its two other BITs (with Chile and Argentina) were signed in 1999 but never entered into force. New Zealand’s embrace of

ISDS really only began in 2008, when a newly elected National Government concluded an FTA with China that had been negotiated initially by a Labour Government.³⁴ That FTA included an investment chapter with binding consent to ISDS claims, seemingly with bipartisan support at the time. To date, New Zealand has not faced an ISDS claim under its comparatively few BITs or growing number of FTAs, and there are no known instances of New Zealand investors initiating claims against foreign states under these agreements either.³⁵

Nonetheless, New Zealand signed the 1965 ICSID Convention as early as 1970, and enacted its obligations under the Convention into domestic law several years later in the *Arbitration (International Investment Disputes) Act 1979* (NZ).³⁶ This enabled New Zealand to offer to arbitrate disputes under the auspices of ICSID in individual contracts with foreign investors (as well as through investment treaties). New Zealand subsequently became a defendant in an ICSID claim in 1987, when Mobil initiated proceedings against the Government in respect of a dispute arising under an energy project contract between them.³⁷

The contract (a “participation agreement”) was entered into in February 1982, when the New Zealand Government agreed to participate in a project for the development of the Motonui Synthetic Fuels Plant. The main counterparty was Mobil, although others were also involved. The plant itself was the world’s first for converting natural gas to synthetic gasoline on a commercial basis. It was a signature “Think Big” project for

³⁴ See David AR Williams and Amokura Kawharu *Williams & Kawharu on Arbitration* (2nd ed, LexisNexis, 2017) ch 27 for an in-depth discussion of New Zealand’s participation in the investment treaty regime.

³⁵ A New Zealand entity, the Dunedin-based company Guardian Fiduciary Trust Ltd, attempted to bring an action against the Former Yugoslav Republic of Macedonia (Macedonia) under a BIT between The Netherlands and Macedonia. Guardian claimed Dutch nationality through its ownership by a Dutch foundation. The tribunal found that the evidence suggested instead that it was controlled by a beneficial owner, a Marshall Islands company, rather than the ultimate legal owner in The Netherlands, and dismissed the proceedings for lack of jurisdiction: *Guardian Fiduciary Trust Ltd v Macedonia*, Award, ICSID ARB/12/31 (22 September 2015). See further Amokura Kawharu and Anna Kirk, ‘Arbitration’ [2016] *New Zealand Law Review* 615, 634.

³⁶ Australia only signed the ICSID Convention in 24 March 1975, incorporating it into the International Arbitration Act (Cth) in 1990: see Malcolm Holmes and Chester Brown, *International Arbitration Act 1974* (LexisNexis Butterworths, 2nd ed, 2015) 8.

³⁷ According to ICSID, which records both treaty-based claims as well as claims where parties have consented to ICSID jurisdiction through contracts, ISDS claims involving the energy sector (oil, gas and mining, and electric power and other energy) amount to 41% of the 650 claims filed with ICSID as of 31 December 2017. This is unsurprising given the large amounts and long time frames involved in such projects, leading to more possibility of significant disputes and especially the attraction for host states (including newly elected governments) to seek to renegotiate the investment arrangement. See more at ICSID, ‘The ICSID Caseload – Statistics’ (Issue 2018-1) <[https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf)>.

the then National Government, led by Robert Muldoon who served as Prime Minister from 1975 until 1984, involving heavy borrowing from abroad to promote large-scale industrial projects for an economy traditionally focused on the agricultural sector.³⁸

Amongst other things, the participation agreement provided for preferential “offtake rights” in favour of Mobil (that is, Mobil was entitled to purchase gasoline on preferential terms). The agreement also provided for ICSID arbitration in an elaborate dispute resolution clause:

Article VII - Resolution of disputes

- 7.1 Any dispute arising on a matter contained in this agreement shall as quickly, and as far as possible be resolved amicably by the parties involved in such dispute.
- 7.2 Subject to section 7.12, the parties hereby submit themselves to the jurisdiction of [ICSID] for resolution of any dispute under this agreement or under any guarantee given pursuant to section 9.10 (hereinafter in this article called the 'dispute'), to the extent that [ICSID] can assume jurisdiction, which may arise between any two or more of them whether or not the interests of each of the parties in respect of such dispute are the same.

In addition to the consent to arbitrate (set out in art 7.2 above), other provisions deemed the investor parties to be nationals of states other than New Zealand and deemed the project to constitute an investment (for the purpose of satisfying ICSID’s jurisdiction requirements in art 25(1) ICSID Convention). The clause also required the president of any arbitral tribunal to be a New Zealand national, and expressed a preference for any proceedings to be held in New Zealand.

In 1986, after a Labour Government took power and embarked on an ambitious deregulatory agenda, New Zealand enacted its *Commerce Act 1986* (NZ) (‘the Commerce Act’), modelled on the *Trade Practices Act 1974* (Cth) that was renamed the *Australian Competition and Consumer Act* (Cth) in 2010. Section 27 of the Commerce Act prohibits contracts which have the purpose or effect of substantially lessening competition in the market. The New Zealand Government then claimed that Mobil’s offtake rights were in breach of section 27. Mobil denied the offtake rights had this effect and referred the dispute to ICSID arbitration under art VII of the participation agreement. In response, the Government applied to the

³⁸ See further Brian Easton, *The Nationbuilders* (Auckland University Press, 2001) 245-247.

New Zealand High Court for an anti-arbitration injunction to restrain the arbitral proceedings. It claimed that the dispute was not a dispute “under” the participation agreement for the purpose of art 7.2 of the dispute resolution clause, but a dispute as whether section 27 of the Commerce Act applied to the agreement; and secondly, that the dispute was not anyway an arbitrable dispute. Mobil sought a stay of the injunction proceedings.³⁹

The High Court rejected both of New Zealand’s arguments, and in doing so, generally regarded the availability and choice of ICSID arbitration as a positive for both foreign investors and host states alike. Justice Heron noted that the dispute resolution clause in the participation agreement was comprehensive, and that the jurisdiction of the domestic courts was consequently and unequivocally constrained “to a very marked degree”.⁴⁰ This seemed to the judge to be deliberate, and justified giving the word “under” a broad meaning:⁴¹

It is not difficult to contemplate, in these circumstances, having regard to the fact that this was an international company dealing with a sovereign State, that the prospect of later legislation affecting the relationships of the parties would be in the minds of the parties.

As to arbitrability, the Court relied on the finding by the United States Supreme Court in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth*⁴² that

³⁹ Arbitration (International Investment Disputes) Act 1979, s 8, confers a discretion on the court to grant a stay of litigation proceedings in respect of a matter that is also the subject of ICSID proceedings. The provision indicates that a stay should be granted if the court is “satisfied that there is no sufficient reason why the matter should not be dealt with under the [ICSID] Convention”.

⁴⁰ *AG v Mobil Oil NZ Ltd* [1989] 2 NZLR 649 at 660.

⁴¹ *AG v Mobil Oil NZ Ltd* [1989] 2 NZLR 649 at 660. This decision reflects a strongly pro-arbitration approach, despite replacing English-style arbitration law with the UNCITRAL Model Law on International Commercial Arbitration only in the Arbitration Act 1996. New Zealand courts continue to interpret arbitration agreements, and the arbitrability of disputes, liberally: see, for example, *Sure Care Services Ltd v At Your Request Franchise Group Ltd* [2010] 3 NZLR 102. By contrast, although Australia adopted the Model Law in 1989, its courts continued to interpret arbitration clauses quite narrowly. A significant turning point was reached only in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, which did not follow an earlier decision of the Full Federal Court in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1. See generally Richard Garnett, ‘The Legal Framework for International Arbitration in Australia’ in Luke Nottage and Richard Garnett (eds) *International Arbitration in Australia* (Federation Press, 2010) 38, 39-41.

⁴² *Mitsubishi Motors Corp v Soler Chrysler-Plymouth* 473 US 614 (1985). Again, this reference and decision suggests that New Zealand was relatively ahead of the times. For a discussion of ongoing uncertainties in Australia as to the scope of objective arbitrability, as well as *Mitsubishi v Soler* obiter dicta as a partial solution, see Luke Nottage and Richard Garnett, ‘The Top 20 Things to Change In or Around Australia’s International Arbitration Act’ in Nottage and Garnett, above n 41, 153-5. On extending the scope of arbitrability to “pure” competition law claims, see also Colette Downie, ‘Will Australia Trust Arbitrators with Antitrust? – Examining the Challenges in International Antitrust Arbitrations to Develop a Competition Arbitration Model for Australia’ (2013) 30 *Journal of International Arbitration* 221.

anti-trust claims are arbitrable. The High Court recognised the public policy objectives of the Commerce Act, but also recognised that New Zealand's accession to the ICSID Convention serves important New Zealand public policy. After quoting from another US case enforcing an arbitration agreement, Heron J ordered a stay of the injunction application after remarking:⁴³

Such expressions are of course expressions of United States judicial policy towards international investments and contracts. I think such principles are appropriate even in this small country as international trade and commercial relationships are of critical importance. In holding the Crown to its agreement I see no reason for departing from those principles of international commercial comity, and in my view they accurately reflect the attitude that New Zealand Courts should take to international arbitration provisions of this kind.

Accordingly, the dispute proceeded to ICSID arbitration. A tribunal was established and found in favour of Mobil on the question of liability.⁴⁴ The parties then settled and discontinued the arbitration proceedings.⁴⁵

Apart from discussion on arbitration law matters (regarding the High Court's findings on interpretation and arbitrability),⁴⁶ the Mobil case has largely gone unnoticed in New Zealand, even in recent years, and even though it is New Zealand's only experience as a defendant in an ISDS arbitration. There is no mention of the dispute, for instance, in the Cabinet papers relating to the negotiations and approval of New Zealand's signature of the BIT with Hong Kong.⁴⁷

There are several possible reasons for this lack of attention. The first is that the ICSID proceedings (not the New Zealand litigation) were held

⁴³ *AG v Mobil Oil NZ Ltd* [1989] 2 NZLR 649 at 668.

⁴⁴ *Mobil Oil Corp v Her Majesty the Queen in Right of New Zealand*, Findings on Liability, Interpretation and Allied Issues, ICSID Case No ARB/87/2 (4 May 1989); (1997) 4 ICSID Rep 140. The tribunal comprised Sir Graham Speight, Professor Maureen Brunt, and Stephen Charles QC.

⁴⁵ There is a reference to an "Order Taking Note of the Discontinuance issued by the Tribunal on November 26, 1990, pursuant to Arbitration Rule 43(1)" on the ICSID website, but the order itself is not public. See <<https://icsid.worldbank.org/en/Pages/cases/ConcludedCases.aspx?status=c>>. ICSID data, above n 37, shows that a considerable proportion (34%) of their ISDS disputes are settled and/or discontinued after filing. Of this proportion, 74% are discontinued at the request of one or more of the parties, and 14% cases in this category embody the settlement agreement in an Award at the parties' request. See also Table 2 in Part 4 below, listing ICSID cases involving Australia.

⁴⁶ See, for example, Michael Pryles, 'Drafting Arbitration Agreements' (1993) 15 *Adelaide Law Review* 5; Robert Fisher, 'Relationship Property Arbitration' (2014) 8 *New Zealand Family Law Journal* 15; Williams and Kawharu, above n 34 at [7.1.2].

⁴⁷ The papers were obtained under the *Official Information Act 1982* (NZ) and are held on file with one of the authors.

under conditions of confidentiality, and the settlement remains confidential to this day. At the time, confidentiality of ISDS cases was not the controversial issue it has since become, and the confidentiality was presumably not questioned, even though the lack of information about the settlement has prevented quantification of the cost to New Zealand of the eventual outcome.⁴⁸ In addition, Mobil's action was initiated under a contract, following its significant investment in important infrastructure in New Zealand. In these respects, the case can be distinguished from treaty-based ISDS claims, which are initiated by investors relying on one-sided consents in treaties, and ISDS claims in respect of investments which themselves may be the subject of some public censure (such as Philip Morris' tobacco business). Furthermore, the New Zealand High Court accepted Mobil's right to take its claim through ICSID, both as a matter of contractual interpretation and New Zealand public policy. There was no indication in the High Court judgment that a New Zealand court was being undermined by the ICSID proceedings, as in the media and other commentary surrounding PMA's claim against Australia filed in 2011, even though the High Court recognised its own "significant and indeed exclusive" jurisdiction to formulate competition law policy under the Commerce Act for the future.⁴⁹

Fundamentally, the dispute only arose because a newly-elected New Zealand Government tried to rely on legislation that it had passed, for generally good reasons but also in this case to escape responsibility under a contract that its predecessor had entered into beforehand pursuant to the much interventionist "Think Big" approach to economic management. The new government thereby tried to circumvent the dispute resolution process that had been agreed to in that contract, underpinned by accession to the 1965 ICSID Convention. Given the local flavour of the dispute resolution clause in art VII of the participation agreement summarised above, it also seems likely that the Government was careful and influential in its drafting, unlike arguably some developing countries that committed to ISDS especially over the 1980s and 1990s – partly also

⁴⁸ For a discussion and empirical analysis of confidentiality regarding settlements from investment arbitrations, see generally Emilie M Hafner-Burton, Sergio Puig and David G Victor, 'Against Secrecy: The Social Cost on International Dispute Settlement' (2017) 42 *The Yale Journal of International Law* 279. Cf the statistical comparison of (very limited) confidentiality in awards from non-settled cases, in Luke Nottage and Ana Ubilava, 'Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry' (2018) 21 *International Arbitration Law Review* (manuscript at <<https://ssrn.com/abstract=3227401>>). Interestingly, the Singapore-EU FTA (Article 9.25) includes a requirement to make public any ISDS case settlement: see Mahdev Mohan, 'The European Union's Free Trade Agreement with Singapore – One Step Forward, 28 Steps Backward' in Chaisse and Nottage, above n 1. On confidentiality versus transparency in ISDS proceedings generally, compare also the PMA case outlined next in Part 3 below.

⁴⁹ *AG v Mobil Oil NZ Ltd* [1989] 2 NZLR 649 at 665.

to attract major inbound FDI into risky energy or infrastructure projects.⁵⁰ In the context of very recent ISDS criticism in New Zealand, it is difficult to raise the Mobil case as an illustration of inappropriate preferential treatment of foreign investors through the ISDS process. It might also be seen as an example of “unavailability bias”, in that this first and so far only inbound contract-based claim drew very little public attention at the time, and this remains true despite the increase in newspaper coverage of ISDS since 2015 sketched in Figure 1 above.

3. Recent Treaty-based ISDS Claims (Threatened) Against Australia

Turning next to the question of what happens after the first inbound treaty-based claim hits the host state, the recent Australian experience suggests that even if “availability bias” does initially kick and significantly frame policy responses and public perceptions, the media can lose interest. Figure 1 shows a remarkable drop-off in coverage of the PMA case, and ISDS generally, as soon as the decision declining jurisdiction was announced in December 2015, with little pick-up when the reasoning was subsequently disclosed or the final Costs Award was issued.

Part of the reason could be that generally only “bad news sells”, whereas the Australian Government (and taxpayers) ended up avoiding liability. Yet the Costs Award contained arguably good and bad news, as outlined below. In addition, there have been two further treaty-based claims threatened by US investors, with one progressing to a Notice of Arbitration. But the Notice is not publicly available online, and there has been almost no media coverage of either claim.

Media disinterest in ISDS over 2016-17 may have been linked to the decision declining jurisdiction in the PMA case being such a long time coming: four years from the Notice of Arbitration. The main reasons for that delay appear to include:

- disagreement on the Tribunal chair;
- dispute over the arbitral seat (with the curiosity that delays could have been even longer if Australia had succeeded in pressing for London instead of Singapore as seat, as PMA could then have challenged the negative jurisdictional ruling⁵¹);
- arguments over whether to bifurcate the proceedings;
- change of counsel for PMA;

⁵⁰ Poulsen 2015, above n 29. For more counter-indications even among developing countries, see Nottage and Chaisse, above n 1; Nottage and Thanitcul, above n 5.

⁵¹ Jarrod Hepburn and Luke Nottage, ‘A Procedural Win for Public Health Measures’ (2017) 18 *Journal of World Investment and Trade* 307, 314.

- long deadlines for submission of pleadings (partly due to the Tribunal requiring merits pleadings despite the bifurcation); and
- redactions of awards due to confidentiality concerns.

The result in favour of Australia in the PMA case, announced in December 2015, was quite widely reported; but the redacted award's reasoning disclosed in May 2016 was not. A unanimous tribunal (including Professor Donald McCrae, long based in Canada but originally from New Zealand) decided that the investor's claim was an abuse of rights under background international law. The Australian trademarks had been shifted from the parent company to its Hong Kong subsidiary, and the ISDS claim then filed under the Australia-Hong Kong BIT, when it was reasonably foreseeable that a dispute would arise due to the Australian government's announcement that it would introduce tobacco plain packaging legislation. Significantly, however, the tribunal rejected Australia's ambitious argument that PMA's investment had not been made in accordance with Australian law for screening foreign investments and was hence ineligible for BIT protection.⁵²

After the jurisdictional decision was announced, it took a remarkable further year and a half for the Final Award Regarding Costs to be written (8 March 2017), and then released publically.⁵³ It takes the unusual step of redacting the amount of costs and fees incurred, plus the percentage awarded to Australia as the acknowledged successful party. This means that we can never confirm or deny the local news reports that emerged from mid-2015, implausibly asserting (without quoting a source) that Australia had incurred over AUD \$50 million (USD \$37 million) to defend the PMA claim.⁵⁴

It is unclear whether redaction on confidentiality grounds was requested by PMA because such basic costs information was 'competitively sensitive' and/or because of 'reasons of political or institutional sensitivity, not in the public interest' as could have been asserted by Australia, pursuant to the Tribunal's earlier Procedural Order No 5 (30 November 2012). However, the latter may be more likely given that the Department of Health's budget summary for 2016-7 had previously declared that the Australian government 'does not intend to

⁵² *Ibid*, 309.

⁵³ *Philip Morris Asia Limited v The Commonwealth of Australia*, PCA Case No 2012-12, UNCITRAL, Final Award Regarding Costs (8 July 2017) <<https://www.italaw.com/sites/default/files/case-documents/italaw9212.pdf>>.

⁵⁴ For statistics on usual fee ranges in ISDS proceedings, see Hepburn and Nottage, above n 51, 315-316. Cf eg Peter Martin, 'Australia face \$50m legal bill in cigarette plain packaging fight with Philip Morris', *Canberra Times* (online), 28 July 2015 <<http://www.canberratimes.com.au/federal-politics/political-news/australia-faces-50m-legal-bill-in-cigarette-plain-packaging-fight-with-philip-morris-20150728-gim4xo.html>>.

publicly release information concerning the legal costs of defending challenges to tobacco plain packaging' in WTO and ISDS proceedings.⁵⁵ It might also be inferred (from the redacted para 74 of the Final Award) that Australia spent at least USD 4.5 million in defending this matter. Meanwhile, however, former Treasurer Wayne Swan – in the Labor-led Gillard Government, which declared over 2011-13 that Australia would not agree to ISDS provisions in future investment treaties – reportedly still believes that 'the case cost around [AUD] \$50 million', and that ISDS provisions (such as those subsequently agreed to in the FTAs with China and Korea) are bad.⁵⁶

For now, we can only be sure from the Award that, on the one hand, the amounts requested by Australia were found generally to be reasonable given the complexity of the issues and the case's importance for public health, including Australia's claims for representation by its in-house lawyers at a rate higher than their salaries would suggest (Costs Award, para 101). On the other hand, the Tribunal reduced the legal fees and other party costs incurred by Australia by a redacted proportion, because its unsuccessful argument that PMA's investment had not been validly admitted had required close examination of Australian domestic law and taken up a substantial part of the ISDS proceedings (paras 69-70). These determinations were made pursuant to Article 42(1) of the UNCITRAL Arbitration Rules (2010), which adopts a costs-follow-the-event principle even for party costs, although the tribunal may make some other apportionment if reasonable. Unfortunately, no further guidance was provided by the early-generation Australia-Hong Kong BIT, unlike some more recent investment treaties.⁵⁷

⁵⁵ See Department of Health, Australian Government, 'Health Budget 2016-2017: Tobacco Plain Packaging Litigation' <<http://www.health.gov.au/internet/budget/publishing.nsf/Content/budget2016-factsheet34.htm>>.

⁵⁶ 'Philip Morris Ordered to Pay Australia Millions in Costs For Plain Packaging Case', *Sydney Morning Herald* (online), 9 July 2017 <<http://www.smh.com.au/federal-politics/political-news/philip-morris-ordered-to-pay-australia-millions-in-costs-for-plain-packaging-case-20170709-gx7mv5.html>>. This report does not mention that Mr Swan appeared as a witness for Australia regarding its unsuccessful argument that PMA's investment had not been validly admitted under domestic law, and that the Tribunal declined to award Australia expenses incurred related to such evidence from him (and two others called): Final Award on Costs, above n 53, [102] n 96).

⁵⁷ Even Australia's recent FTAs provide limited further guidance. For example, the TPP's Investment Chapter Art 9.29(3) leaves this issue in principle to the applicable arbitration rules, although the starting point is to award reasonable costs to the successful respondent following 'frivolous' claims for damages from trying to make an investment (Art 9.29(4)) or claims determined early on to be 'manifestly without legal merit' (Art 9.29(6)). By contrast, Investment Chapter Art 8.39(5) of the Canada-EU Comprehensive Economic and Trade Agreement <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf>, sets the costs-follow-the-event principle 'unless the Tribunal determines that such apportionment is unreasonable,' and also clarifies that if claims are partially successful 'the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.'

Interestingly, Table 1 above shows that there were only two Australian newspaper articles from mid-2017 briefly mentioning the final Costs Award in the PMA case. In addition they have still made no mention of the 2016 merits award favouring Uruguay brought by Philip Morris over tobacco packaging legislation under the Switzerland BIT. This was despite the tribunal including Australia's most eminent international lawyer, and the award setting out important lessons for how an experienced tribunal can respect host state interests even under early-generation treaties.⁵⁸ It held (partly by majority) that the less extensive tobacco advertising regulations did not result in a denial of justice or other violation of FET. The tribunal also held unanimously that there was no indirect expropriation, recognising that bona fide and proportionate public health measures are an essential manifestation of a state's 'police powers' under customary international law. Yet such conclusions and the specific reasoning adopted⁵⁹ are very important for host states concerned about possible "regulatory chill", a persistent refrain in the public discourse over ISDS in Australia (and more recently New Zealand).

It seems therefore that newspapers in Australia, at least, have lost quite a lot of interest in ISDS – for now. As indicated in Table 1 and mentioned above, there have also been surprisingly few reports on two threatened claims under the 2004 Australia–US FTA. The first involves a coal mining company, incorporated in New South Wales (NSW). In late 2015, US shareholders in locally-incorporated NuCoal were reportedly⁶⁰ pressing the US government to *invoke consultations* with Australia under Article 11.16.1 of the FTA's investor chapter, which stated (emphasis added):

If a Party considers that there has been a *change in circumstances* affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party *may request consultations* with the other Party on the subject, including the development of procedures that may be appropriate. On such a request, the Parties shall promptly enter

⁵⁸ *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016) <<https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf>>. The members of the Arbitration Panel included Professor Piero Bernardini (President), Mr Gary Born and Judge James Crawford.

⁵⁹ For details see Hepburn and Nottage, above n 51.

⁶⁰ Chris Merritt, 'Japanese Angered by NSW Reaction to Corruption Ruling', *The Australian*, 26 June 2015; Chris Merritt, 'Dispute Settlement Needed as State Tramples over Foreign Property Rights', *The Australian*, 9 October 2015; Chris Merritt, 'US Anger over ICAC Asset Grab', *The Australian*, 1 April 2016; Chris Merritt, 'Don't Act Like A Banana Republic', *The Australian*, 15 April 2016; Paul Garvey, 'Canberra Resists US Compo Claim', *The Australian*, 14 November 2016.

into consultations with a view towards allowing such a claim and establishing such procedures.

In its Report 61 recommending ratification of this FTA in 2004, Australia's JSCOT had noted concerns expressed by community groups (such as AFTINET) that this Article would be used as a backdoor to reintroduce ISDS in future through the back door. The parliamentary Committee therefore recommended clarification by Side Letters or otherwise an inter-governmental interpretation after the FTA came into force.⁶¹ In fact, neither occurred, but a former Treasury official subsequently viewed JSCOT's concerns as "unwarranted" – adding that Article 11.16 "appears to be a face-saving mechanism to appease industry lobbies who will view [omission of ISDS] as a significant loss".⁶²

Fast forward a decade, and some commentary suggests that US shareholders in NuCoal were indeed trying to get in by the backdoor, by arguing that Article 11.16.1 should be interpreted as requiring agreement on *how* to set up an ISDS procedure rather than *whether* it should be made available. The shareholders had acquired around 30% of NuCoal over 2010-11, soon after a mining exploration licence had been issued to its predecessor. In 2013 the NSW anti-corruption commission found the (Labor government) minister to have acted corruptly in issuing the licence, so in 2014 the (by then Liberal) state government passed legislation to cancel it. Expropriation provisions are not contained in state constitutions and can only be invoked under the federal Constitution for federal government actions. In 2015 NuCoal lost a High Court challenge on other constitutional grounds,⁶³ and a NSW Supreme Court challenge for lack of due process by the anti-corruption commission.⁶⁴ The shareholders then

⁶¹ Joint Standing Committee on Treaties, Australian Government, *Report 61: Australia - United States Free Trade Agreement* (2004) 53-55 [4.26-4.33].

⁶² Thomas Westcott, 'Foreign Investment Policy and Australia's International Investment Agreements: Catching the Third Wave' (unpublished, 2007) <http://www.researchgate.net/publication/237376942_Foreign_Investment_Policy_and_Australia%27s_International_Investment_Agreements_Catching_the_Third_Wave> 17.

⁶³ *Duncan v New South Wales; NuCoal Resources Ltd v New South Wales; Cascade Coal Pty Ltd v New South Wales* (2015) 255 CLR 388. NuCoal's High Court case led one commentator to find parallels with the *Philip Morris Asia Limited* proceedings where the investor also pursued ISDS after failing in a constitutional challenge against the Australian Government before the High Court: Patricia Ranald, 'High Court final authority? Think again', *Sydney Morning Herald* (8 April 2016) <<http://www.smh.com.au/comment/high-court-the-final-authority-think-again-20160408-go1edb.html>>. However, the facts in the two cases are quite different and NuCoal's situation has attracted at least some sympathy. With reference also to its Australian shareholders, a (Liberal) NSW parliamentarian has even recently said that in cancelling NuCoal's licence without compensation, NSW 'stole' it, driven by political rivalry with the former Labor government: Alexandra Smith, 'Political Scalps: Liberal MP defends corrupt Labor minister', *Sydney Morning Herald* (16 February 2018) <<http://www.smh.com.au/nsw/liberal-mp-defends-corrupt-labor-minister-20180215-p4z0g9.html>>.

⁶⁴ *NuCoal Resources Limited v Independent Commission Against Corruption* [2015] NSWSC 1400.

invoking AUSFTA also reportedly argue that that claims in US courts would fail due to sovereign immunity for Australia. They also therefore query the premise that a direct right to ISDS in that treaty was unnecessary due to adequate remedies being provided under advanced systems of national law. A commentator also adds that the inclusion of ISDS in the expanded TPP might constitute a “*change in circumstances*” triggering the application of Art 11.16.1.⁶⁵

However, if this is indeed the interpretation pressed by the US shareholders, it is difficult to sustain given that the consultations, if requested by the home state, require both states to “consider allowing” an individual ISDS claim. The consultations must then be “*with a view towards* allowing such a claim and establishing such procedures”, but that also does not seem to commit the states to always allowing it.⁶⁶ After also making submissions to the Australian Government’s 2016 AUSFTA Review,⁶⁷ consultations between the US Trade Representative were scheduled for 4 May 2016.⁶⁸ Since that time, little progress has been seen. No changes have been made to the AUSFTA investment dispute mechanisms after review. It appears that NuCoal continues to lobby both US and Australian politicians.⁶⁹ However, it also seems that NuCoal’s

⁶⁵ Jarrod Hepburn, ‘US Investors Mired in Australian Dispute Contend that State-To-State Consultations, if Launched, must be Followed by Investor-State Arbitration’ on *Investment Arbitration Reporter* (1 December 2015) <<https://www.iareporter.com/articles/us-investors-mired-in-australian-dispute-contend-that-state-to-state-consultations-if-launched-must-be-followed-by-investor-state-arbitration/>>.

⁶⁶ Cf also somewhat similar wording in Article 14.19(2) of Australia’s FTA with Japan (signed on 8 July 2014 and available via Department of Foreign Affairs and Trade, Australian Government, ‘Japan-Australia Economic Partnership Agreement’ <<http://dfat.gov.au/trade/agreements/jaepa/Pages/japan-australia-economic-partnership-agreement.aspx>>), which also omitted ISDS but requires bilateral negotiations to be commenced within 3 months, and a report within 6 months, if “Australia enters into any multilateral or bilateral international agreement providing for a mechanism for the settlement of an investment dispute between Australia and an investor of another or the other party to that agreement, with a view to establishing an equivalent mechanism”. A bilateral inter-state consultation may have been initiated after the China-Australia FTA came into force, since the Japan – Australia FTA had omitted ISDS provisions too, but the discussions or outcomes are not public. See Greg Wood, ‘Free Trade Agreements Not the Great Deal We’ve Been Sold’, *Sydney Morning Herald* (22 June 2016) <<http://www.smh.com.au/comment/free-trade-agreements-not-the-great-deal-weve-been-sold-20160621-gpnw71.html>>, and generally Luke Nottage, ‘Investor-State Arbitration: Not in the Australia-Japan Free Trade Agreement, and Not Ever for Australia?’ (2014) 38 *Journal of Japanese Law* 37.

⁶⁷ NuCoal Resources Ltd, ‘AUSFTA Review Submission’ (7 April 2017) <<https://nucoal.com.au/wp-content/uploads/2016/04/NuCoal-Resources-Ltd-AUSFTA-Submission-7-April-2016.pdf>>.

⁶⁸ Chris Merritt, ‘NuCoal to Cloud US Trade Talks after ICAC, Barry O’Farrell Move’, *The Australian*, 1 April 2016.

⁶⁹ Lou Caruana, ‘NuCoal Continues to Seek Justice over Doyles Creek’, *Mining Monthly* (4 December 2017) <<http://www.miningmonthly.com/coal/company-activity/nucoal-continues-to-seek-justice-over-doyles-creek/>>.

efforts may now be aimed at instituting state-state negotiations in respect of its claim rather than direct ISDS proceedings.⁷⁰

The second claim was commenced by a Notice of Dispute dated 30 November 2016 by US companies (APR) regarding estimated damages of at least US\$260 million caused by losing priority in relation to rights in power generation turbines.⁷¹ APR alleged:

- expropriation under AUSFTA Article 11.7;
- violation of FET (including a denial of justice, associated with adverse Australian court decisions) under the 2005 Australia – Mexico BIT’s Article 4, thanks to AUSFTA’s Article 11.4 providing for MFN; and
- ISDS rights according to the 1993 Australia – Hong Kong BIT, thanks again to the AUSFTA MFN provision.

Interestingly, APR’s Notice of Dispute made no reference to AUSFTA Art 11.16.1. Further, as one commentator has pointed out, the Notice “does not discuss cases such as *Plama v Bulgaria*, in which tribunals have declined to import dispute settlement provisions wholesale from other agreements via MFN, where no such provisions exist at all in the base treaty”.⁷²

On 11 January 2017, the Australian government responded succinctly to APR’s legal advisors as follows:⁷³

There is no jurisdiction for APR Energy to bring a dispute under AUSFTA, or any other international agreement, in relation to this matter. In negotiating AUSFTA, Australia and the United States made the clear public policy

⁷⁰ See Chris Merrit, ‘US disputes \$131m coal seizure’, *The Australian* (21 February 2018).

⁷¹ Available at <<https://www.italaw.com/sites/default/files/case-documents/italaw8748.pdf>>.

⁷² Jarrod Hepburn, ‘A Second US Investor Tries to Arbitration Under Australia-US FTA, Despite Absence of an Investor-State Arbitration Mechanism’ on *Investment Arbitration Reporter* (24 April 2017) <<https://www.iareporter.com/articles/a-second-us-investor-tries-to-arbitrate-under-australia-us-fta-despite-absence-of-an-investor-state-arbitration-mechanism/>>. Most FTAs subsequently signed by Australia (like TPP) expressly clarify this point. See Mitchell, Sheargold and Voon (above n 25, 122-30). They also point out that Australia’s FTAs have also generally excluded MFN treatment with respect to other FTAs, through lists of agreed Non-Confirming Measures, albeit mostly for pre-existing treaties. This is true under the Australia-US FTA Final Provisions Annex II of non-conforming measures (available at <<http://dfat.gov.au/trade/agreements/ausfta/official-documents/Pages/official-documents.aspx>>) for any prior “bilateral ... international agreement” in force, although it could be argued that this impliedly is limited to agreements of the same genus (FTAs) rather than BITs. APR may be invoking the older Hong Kong BIT because its ISDS provisions are more “bare bones” than those of Australia’s two final BITs signed after 2004.

⁷³ Letter from Harold E Patricoff, Shutts & Bowen LLP to The Honourable Malcolm Turnbull MP and The Honourable George Brandis QC, ‘RE: Notice of Dispute Under United States-Australia Free Trade Agreement’, 30 November 2016 <<https://www.italaw.com/sites/default/files/case-documents/italaw8748.pdf>>.

decision to not include investor-state dispute settlement. Accordingly, Australia has not consented to investor-state claims under AUSFTA, and your clients cannot rely on other agreements in order to create jurisdiction where no such consent exists.

Accordingly, if your clients persist in submitting a notice of arbitration, the Australian Government will vigorously contest jurisdiction and will seek a full award of its costs. In any event, the Government is confident that, in all respects, it has complied with its obligations under AUSFTA and any losses alleged by APR Energy resulted from its failure to exercise due diligence.

Nonetheless, APR apparently filed a Notice of Arbitration on 14 April 2017,⁷⁴ although the document itself cannot be located online.

Compared to the NuCoal shareholders' claims of expropriation, as a matter of substantive law, APR's claim faces very great difficulty. It boils down to a complaint that Australia's *Personal Property Securities Act 2009* (Cth) differs by including operating leases within its regime for security interests, in contrast to the US domestic law familiar to APR and their US advisors. Yet that Act took this stance, following New Zealand and Canadian law, partly because of some uncertainties in the US law that had otherwise significantly influenced their law reforms. There has also been considerable discussion in Australia about the legislature's decision to include operating leases as security interests (requiring perfection by lessors, usually by filing or registration, to maintain priority against the insolvency administrator of the lessee), which later caught out the US companies in this case.⁷⁵ Intended or even unintended differences are ubiquitous when law reformers engage in legal transplants across borders.⁷⁶ There is also no rule of international investment treaty law requiring a host state's legislation to be or remain identical to that of a foreign investor (even from a large economy and significant legal system,

⁷⁴ Ashurst, 'Recent Investment Arbitration Developments in Australia' in *Arbitration Update* (9 August 2017) <<https://disputescentre.com.au/wp-content/uploads/2017/09/arbitration-update-recent-investment-arbitration-developments-in-australia-1.pdf>>. See also an affidavit by APR's counsel in the ISDS claim (<http://res.cloudinary.com/lbresearch/image/upload/v1492696206/s_203117_1450.pdf> at para 36) filed in support of a discovery subpoena against an Australian bank that was rejected in *Australia and New Zealand Banking Group Ltd v APR Energy Holding Ltd*, 2017 WL 384187 (SDNY, 1 September 2017).

⁷⁵ See eg Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (2nd ed 2016) 79, 364-5 (with further comparative references). See also eg David Brown, 'Australian Secured Transactions Law Reform' in Louise Gullifer and Orkun Aksell (eds), *Secured Transactions Law Reform: Principles, Policies and Practice* (Bloomsbury / Hart, 2016) 145, 154-5.

⁷⁶ For a discussion of various types of 'legal transplants', and how they have played out in Australia and major Asian economies to generate definitions and practices with respect to independent directors that differ significantly from those in US corporate governance, see Souchirou Kozuka and Luke Nottage, 'Independent Directors in Asia: Theoretical Lessons and Practical Implications' in Dan Puchniak, Harald Baum and Luke Nottage (eds) *Independent Directors in Asia: A Historical, Contextual and Comparative Approach* (Cambridge University Press, 2017).

like the US). In addition, cases like *Eli Lilly v Canada*⁷⁷ show that it is particularly difficult to prove a denial of justice (or expropriation) with the respect to developments in the case law handed down by courts in a developed common law country.

Overall, therefore, Australia's experience of an initial inbound treaty-based ISDS claim does seem to have involved significant availability bias, triggering critical public and political responses, including the 2011 Gillard Government Trade Policy Statement declaring that Australia would not agree to ISDS provisions in future treaties. Yet this bias has diminished over time, paralleling a reversion to Australia's case-by-case assessment of ISDS provisions under the Coalition Governments that took power from 2013. Nonetheless, the PMA saga has generated a considerable paradigm shift in attitudes towards ISDS in Australia, which then seems to have filtered through to New Zealand as it too engaged in major FTA negotiations.

4. Recent Outbound ISDS Claims by Australian Investors⁷⁸

The next question to examine is what happens to such attitudes and practices within a country if and when the first or subsequent outbound claims are initiated, especially where treaty-based. Although there has not yet been any emanating from New Zealand, there have now been several from Australia. Yet they too have had almost no newspaper coverage, as indicated in Table 1 above, and limited impact on public discourse – or even on Australia's subsequent treaty drafting.

⁷⁷ See *Eli Lilly and Company v Canada*, ICSID Case No UNCT/14/2 <[http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/dispdiff/](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/dispdiff/eli.aspx?lang=eng)

[eli.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/dispdiff/eli.aspx?lang=eng)>. See also Boris Kasolowsky and Eric Leikin, 'Eli Lilly v. Canada: A Patently Clear-Cut Dismissal on the Facts, but Opening the Door for Future Claimants on the Law' (2017) 34 *Journal of International Arbitration* 889; and Kyle-Dickson Smith, in this Issue.

⁷⁸ The analysis in this section is based on ISDS claims that are publically and widely known, and does not purport to be exhaustive. In addition, for example, an Australian company (Arrowhead Resources Ltd) is reportedly preparing to file a claim against Egypt in relation to an alleged expropriation of its mine at Abu Dabbab, in reliance on the 2002 Australia-Egypt BIT. Arrowhead is awaiting finalisation of a funding agreement with litigation and arbitration funder Calunius Capital, before proceeding with the claim. See Jarrod Hepburn, 'Australian investor in preparations for third-party-funded bit arbitration against Egypt over alleged mine expropriation' *Investment Arbitration Reporter* (5 March 2018). We are aware that other Australian investors have sought advice on potential claims but have not pursued them to date due to lack of financial resources. We also do not discuss cases involving Australian and New Zealand investors that have brought (or assumed) ISDS claims through companies in other states with treaties in or contracts with the host state, outlined eg in Nottage above n 16; see also above at n 35.

According to ICSID data, Australian investors have initiated several outbound ISDS cases based on consent given in individual investment contracts, as summarised below:⁷⁹

Table 2: Australia's Outbound ICSID Claims Based on ISDS Consent in Contracts

Case name	Citation	Subject matter	Registration	Tribunal	Outcome
<i>Misima Mines Pty Ltd v Independent State of Papua New Guinea Russell Resources International Ltd and others</i>	ICSID Case No ARB/96/2	Oil, gas and mining – Mining concession agreement	29 April 1996	Gavan Griffith QC	Discontinued
<i>Tullow Uganda Operations Pty Ltd</i>	ICSID Case No ARB/12/34	Oil, gas and mining – Petroleum exploration, development, and production activities	31 October 2012	N/A	Pending
<i>Tullow Uganda Operations Pty Ltd and Tullow Uganda Ltd</i>	ICSID Case No ARB/13/25	Oil, gas and mining – Petroleum exploration, development, and production activities	26 September 2013	Jean Kalicki (appointed by the Parties), William W Park (appointed by the claimant), Kamal	Discontinued

⁷⁹ <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>

<i>Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC</i>	ICSID Case No ARB 15/2	Electric power and other energy – fuel supply agreement	14 January 2015	Hossain (appointed by the respondent) Gabrielle Kaufmann-Kohler (appointed by the co-arbitrators), Stephen Jagusch (appointed by the claimant), Campbell McLachlan (appointed by the respondents)
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The earliest was registered as early as 1996, discontinued in 2001 presumably due to a settlement, after the investor and Papua New Guinea had jointly agreed to a former Solicitor-General of Australia as sole arbitrator. The most recent was under a contract with nearby Timor-Leste, with both party-appointed arbitrators being New Zealand nationals, where the tribunal rejected jurisdiction (as discussed at the end of this Part 4). Yet these cases have attracted almost no newspaper or even academic commentary.

This may not be so surprising, again since they each involve only one investor or project, but there has also been very little media coverage and public discussion of several outbound treaty-based claims brought by Australian investors. The first was *White Industries Australia Ltd v The Republic of India*,⁸⁰ decided in 2011 in favour of a mining company under UNCITRAL Arbitration Rules and therefore not publicised through the ICSID website. India was found liable for not providing the mining company with “effective means” to enforce an international commercial arbitration award against an Indian state-owned enterprise, a protection which was incorporated from the 2001 India-Kuwait BIT into the Australia-India BIT using the MFN provision. The case and outcome came to light too late to influence the policy discussion that resulted in the 2011 Trade Policy Statement shift. However, there have been several subsequent

⁸⁰ *White Industries Australia Ltd v The Republic of India*, UNCITRAL, Final Award (30 November 2011). See also Prabhash Ranjan and Pushkar Anand, ‘Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does it Go Too Far?’ in Chaisse and Nottage (eds), above n 1.

outbound cases, including two publically accessible through the ICSID website, which have also not attracted much newspaper coverage (as evidenced by Table 1 above) although they have sometimes been discussed in parliamentary inquiries into Australia ratifying FTAs containing ISDS provisions.⁸¹

This is quite surprising as one of the most high-profile ISDS claims against Indonesia has been brought by Churchill Mining and its Australian subsidiary, Planet Mining, under BITs respectively with the UK and Australia but consolidated into one proceeding under the ICSID Arbitration Rules since the day after Christmas in 2012.⁸² The claimants sought several billion US dollars regarding a massive coal deposit discovered in Kalimantan, alleging that mining licences secured by its local partner, the Ridlatama Group, were unilaterally revoked without due process and proper grounds.

The tribunal's Decision on Jurisdiction (24 February 2014) reasoned – quite debatably⁸³ -- that the 1992 Australia-Indonesia BIT lacked the host state's agreement to arbitration under the ICSID Convention, since that BIT stated only that the state "shall consent" (in future). This wording contrasted with that identified in some other contemporaneous and subsequent Australian treaties that very clearly provided advance consent. Nonetheless, the tribunal found ICSID jurisdiction for the Australian investor instead by interpreting mining licences issued by Indonesian

⁸¹ Indeed, Churchill Mining provided a public Submission in an inquiry into the Trans-Pacific Partnership: see in Joint Standing Committee on Treaties, Parliament of Australia, *Report 165* (2016) ch 6, [6.25-6.26], discussed in Luke Nottage, 'Investment Treaty Arbitration Policy in Australia, New Zealand – and Korea?' (2015) *Sydney Law School Legal Studies Research Paper No 15/66*, accessible on SSRN at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643926>.

⁸² The convoluted procedural history and the final Award are available via ICSID, 'Case Details: Churchill Mining Plc and Planet Mining Pty Ltd, formerly ARB/12/40 v Republic of Indonesia, ICSID Case No. ARB/12/40 and 12/14' <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/12/40%20and%2012/14>>. See eg Mélida Hodgson, 'Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia: Procedural Order No 15: Reconsideration under the ICSID Convention: No Award Required' (2016) 31 *ICSID Review* 114.

⁸³ For one critique, see Luke Nottage, 'Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis and Regional Implications' (2015) 12 *Transnational Dispute Management* 1; *Sydney Law School Research Paper No 14/39* <<http://ssrn.com/abstract=2424987>>, with a version also as 'The Limits of Legalisation in Asia-Pacific Investment Treaty Arbitration' in Julien Chaisse and Tsai-yu Lin (ed), *International Law and Government: Essays in Honour of Mitsuo Matsushita* (Oxford University Press, 2016), 153-79. Mitchell, Sheargold and Voon (above n 25, 168) similarly criticise the reliance on other treaties to interpret a differently worded one in question, as a matter of the law of treaties, before remarking that anyway:

"The tribunal appears to presume a level of consistency and strategy in Australia's negotiating approach that may not be borne out in the messy and pressure-filled practice of inter-State negotiations today, let alone more than two decades ago".

authorities, and for Churchill under the BIT with the UK (including historical documents related to its negotiation).

However, Indonesia eventually persuaded the ICSID tribunal that the licences were procured by forgery. The Award of 6 December 2016 dismissed the claim by holding that the foreign investors had been “willfully blind” and failed to exercise due diligence with respect to this fraud, apparently committed by the local partner and involving an insider of the Government.⁸⁴ The favourable outcome for Indonesia was widely reported in the local media, with the justice minister declaring:⁸⁵

“Many foreign investors come to Indonesia with malevolent intentions, as they try to benefit from regulatory loopholes and want to make a fortune from it. Therefore, the decision made by the ICSID should be a good warning to them,” Yasonna said.

However, he acknowledged that such situations could arise because regional administrations across the archipelago often issued problematic mining permits.

On 4 April 2017 Churchill publicly criticised the award on several grounds, including alleged failures of due process by the tribunal, and announced it would seek annulment.⁸⁶ The application was registered a week later, an annulment committee was formed in May, and provisional stay of enforcement of the award (including an order for the claimants to pay over US\$8m comprising 75 percent of the legal costs incurred by Indonesia to defend the matter).⁸⁷ In October 2017 Indonesia filed its

⁸⁴ For a summary, see Inaê Siqueira De Oliveira, ‘ICSID Tribunal Dismisses Claims Brought Against Indonesia Based on Forged Mining Licences’ in *International Institute for Sustainable Development Investment Treaty News* (13 March 2017) <<https://www.iisd.org/itn/2017/03/13/icsid-tribunal-dismisses-claims-forged-mining-licences-churchill-mining-plc-planet-mining-pty-ltd-v-republic-indonesia-icsid-case-no-arb-12-14-arb-12-40/>>.

⁸⁵ Viriya P Singgih, ‘Indonesia Vindicated in International Arbitration’, *The Jakarta Post* (online), 9 December 2016 <<http://www.thejakartapost.com/news/2016/12/09/indonesia-vindicated-in-international-arbitration.html>>. See also eg Firman Hidayat, ‘Indonesia Wins International Tribunal Against Churchill Mining’ on *tempo.co* (8 December 2016) <<https://en.temppo.co/read/news/2016/12/08/056826357/Indonesia-Wins-International-Tribunal-against-Churchill-Mining>>. On the challenges for investors more generally due to the post-Suharto democracy’s devolution of powers to regional or local governments, see Simon Butt, ‘Foreign Investment in Indonesia: The Problem of Legal Uncertainty’ in Vivienne Bath and Luke Nottage (eds), *Investment Law and Dispute Resolution Law and Practice in Asia* (Routledge, 2011).

⁸⁶ Churchill Mining PLC, ‘Churchill Files Request for Annulment of ICSID Award: Update on Suspension’ (4 April 2017) <<http://www.churchillmining.com/library/file/CHL%20RNS%204%20April%202017%20-%20Annulment.pdf>>.

⁸⁷ Luke Eric Peterson and Zoe Williams, ‘Asia Round-Up: China and Vietnam Face New BIT Claims - By Hela Schwarz GMBH and Trinh Vinh Binh Respectively - As Proceedings Against Korea and Indonesia Move Forward’ on *Investment Arbitration Reporter* (22 June 2017)

counter-memorial, but the annulment decision may not be issued until 2019. Meanwhile, this cause celebre – along with several other ISDS claims pending against Indonesia, including another with connections to Australia⁸⁸ – will continue to cast a long shadow over the public mood in Indonesia and therefore its stance toward negotiating present and future investment treaties.

A contrary decision on jurisdiction appears to have resulted in another ISDS case under an Australian BIT, *Tethyan Copper Co v Pakistan*.⁸⁹ In 2006, Tethyan replaced another Australian company (BHP Billiton) as a party to a joint venture with the Province of Balochistan in Pakistan. The joint venture agreement provided for the exploration of gold, copper and other mineral deposits within the Province, but tensions reportedly arose between the joint venture partners over Tethyan's role in developing deposits discovered in the Chagai Hills. Tethyan commenced its claim against Pakistan under the 1998 Australia-Pakistan BIT following the refusal by provincial authorities to issue a mining license for an area it had been engaged in exploration activities. Tethyan claimed it was entitled to the license subject only to routine regulatory requirements. A confidential award on liability was issued in favour of Tethyan in March 2017, while a ruling on damages is expected sometime during 2018.

There are three noteworthy aspects to this case. The first is that the Australia-Pakistan BIT contains identical wording regarding consent to ICSID arbitration (the parties “shall consent”⁹⁰) as is set out in the 1993 Australia-Indonesia BIT, discussed above. Since the *Tethyan* decision upholding jurisdiction in 2014 has not been made public, it is unclear whether the tribunal took a different approach to those words to that taken

<<https://www.iareporter.com/articles/asia-round-up-china-and-vietnam-face-new-bit-claims-as-proceedings-against-korea-and-indonesia-move-forward/>>.

⁸⁸ See eg the 10 August 2016 claim related to a palm oil project brought by Singapore-registered OleoVest (under the 2005 Singapore-Indonesia BIT, which was terminated by Indonesia but has a sunset clause for pre-existing investments, and the investor presumably sees this BIT as more pro-investor than two potentially applicable ASEAN treaties): *Oleovest Pte Ltd v Republic of Indonesia*, ICSID Case No ARB/16/26 <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/16/26>>. OleoVest (represented by Clifford Chance, which also represents Churchill and Planet Mining) is a former subsidiary of Australian biofuels firm Mission NewEnergy: Jarrod Hepburn, ‘Palm Oil Company sees BIT Claim Registered Against Indonesia at ICSID’ on *Investment Arbitration Reporter* (11 August 2016) <<https://www.iareporter.com/articles/palm-oil-company-registers-bit-claim-against-indonesia-at-icsid/>>. Oleovest has appointed the Australian, Gordon Smith, as its arbitrator in this ICSID proceeding: Zoe Williams, ‘ICSID Taps Alexandrov to Chair Oleovest v Indonesia Arbitration’ on *Investment Arbitration Reporter* (1 December 2017) <<https://www.iareporter.com/articles/icsid-taps-alexandrov-to-chair-oleovest-v-indonesia-arbitration/>>.

⁸⁹ *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1.

⁹⁰ Australia-Pakistan BIT (signed 7 February 1998, entered into force 14 October 1998), art 13(3)(a).

by the tribunal in the Planet Mining case, or whether (on a similar or different basis to that adopted by that tribunal) it founded jurisdiction on other grounds.⁹¹ Secondly, the investment project, much like the mining licenses held by Churchill and its Australian subsidiary, has attracted allegations of corruption. Indeed, the Pakistan Supreme Court found that as a result of corruption, the joint venture agreement was void.⁹² In addition, since the BIT does not have more modern standards for ISDS transparency and the award remains confidential, it is not possible to say whether or how the tribunal examined the legality of the investment, including for the purpose of the admission requirement embedded within the BIT's definition of "investment".⁹³ Thirdly, in September 2017 the two co-arbitrators (Lord Hoffman and chairperson Dr Klaus Sachs) rejected Pakistan's challenge to (claimant-appointed) Stanimir Alexandrov based partly on the increasingly controversial practice of "double-hatting".⁹⁴

The latest treaty-based ISDS claim filed by Australian investors appears to be the claim by Kingsgate (parent and subsidiary) against Thailand under the 2004 bilateral FTA,⁹⁵ which the investors and their legal advisors presumably perceive as more favourable than AANZFTA.⁹⁶

⁹¹ See further Luke Eric Peterson and Katherine Simpson, 'Tribunal Rules That Australia BIT does not Express Advance Consent to Arbitration; A Dozen Other Australian Treaties are Worded Similarly' in *Investment Arbitration Reporter* (27 February 2014) <<https://www.iareporter.com/articles/tribunal-rules-that-australia-bit-does-not-express-advance-consent-to-arbitration-a-dozen-other-australian-treaties-are-worded-similarly/>>. From the publically-available 13 December 2012 Decision on Claimant's Request for Provisional Measures, Mitchell, Sheargold and Voon (above n 25, 170, footnotes omitted) remark that:

"The *Tethyan Copper* tribunal did not even consider the 'shall consent' wording, perhaps because Pakistan apparently did not contend that it had not given consent to the arbitration³⁸ and did in fact provide the requisite written consent pursuant to the BIT."

⁹² *Baloch and others v Government of Balochistan and others*, Decision of the Supreme Court, CP 796/07 etc, 7 January 2013, <http://www.supremecourt.gov.pk/web/user_files/File/C.P.796of2007-dt-10-5-2013.pdf>.

⁹³ Australia-Pakistan BIT, art 1(a). For discussion on the operation of admission requirements, see further Chester Brown, 'The Regulation of Foreign Direct Investment buy Admission Requirements and the Duty on Investors to Comply with Host State Law' (2015) 21(4) *New Zealand Business Law Quarterly* 297 (contending that admission requirements for the initial investment under host state law should be strictly observed).

⁹⁴ The claimant reportedly proposed "a supposedly 'novel' variation of the discounted cash flow valuation method, the so-called "modern" or "real options" DCF approach", while "Pakistan argued ... that the same valuation method had formed a meaningful part of Peru's case in a separate arbitration where Mr. Alexandrov represents Peru": Luke Eric Peterson, 'Pakistan's Effort to Disqualify Stanimir Alexandrov in Tethyan Copper Case Proves Unsuccessful' in *Investment Arbitration Reporter* (7 September 2017) <<https://www.iareporter.com/articles/pakistans-effort-to-disqualify-stanimir-alexandrov-in-tethyan-copper-case-proves-unsuccessful/>>.

⁹⁵ Department of Foreign Affairs and Trade, Australian Government, 'Thailand-Australia FTA' <<http://dfat.gov.au/trade/agreements/tafta/pages/thailand-australia-fta.aspx>>.

⁹⁶ On the various provisions favouring host states in such ASEAN(+) treaties, see generally Diane A Desierto, 'Regulatory Freedom and Control in the New ASEAN Regional Investment Treaties' (2015) 16 *Journal of World Investment and Trade* 1018, and more generally Sungjoon

Kingsgate (with local partners, through locally-incorporated joint company Akara Resources Public Co Ltd) began open-cast mining of Thailand's largest gold mine in 2001, expecting to operate it under licence until 2028, but filed a notice of dispute in April 2017 five months after the Thai (military) government banned all gold mining nation-wide as a part of a policy review prompted by growing concerns about environmental pollution and public health.⁹⁷ On 18 August 2017 Kingsgate announced that it had been able to meet with Thai authorities, and that:⁹⁸

Shortly before the meeting, the Company was informed that the Thai Government had lifted the "temporary suspension" of the Chatree Mine, which is operated by the Company's subsidiary, Akara Resources Public Company Limited ("Akara"). Further, Kingsgate was advised that Akara's application for renewal of its Metallurgical Processing Licence, which expired on 31 December 2016, could now be processed.

However, it subsequently became clear that the Thai Government would not be offering any monetary compensation for the substantial losses that Kingsgate has already suffered as a result of the unlawful closure and expropriation of the Chatree Mine, nor for the substantial expenses that would be incurred in connection with restarting operations at Chatree (if an appropriate framework for doing so was able to be agreed with the Thai Government).

Kingsgate accordingly reserved its rights under the Thailand – Australia FTA and seems to have been unable to resolve the matter of compensation associated with the mine's suspension. On 2 November 2017, it announced via the Australian Stock Exchange that it had filed for

Cho and Jürgen Kurtz, 'The Limits of Isomorphism: Global Investment Law and the ASEAN Investment Regime' in Chaisse and Nottage, above n 1. The legal advisors for Kingsgate are reportedly Clifford Chance (again) and Sydney-based Andrew Bell SC. See Jarrod Hepburn, 'Australian Investor Makes Good on BIT Arbitration Threat Against Thailand - and Also Takes its Political Risk Insurer to Court' on *Investment Arbitration Reporter* (2 November 2017) <<https://www.iareporter.com/articles/australian-investor-makes-good-on-bit-arbitration-threat-against-thailand-and-takes-its-political-risk-insurer-to-court/>>. That commentary also reports that Kingsgate "recently commenced proceedings in an Australian court against its political risk insurer, which denied Kingsgate's claim", noting the possibility of double recovery and that Article 917(6) of the FTA provides that Thailand "shall not assert, at any stage of proceedings ..., that the investor concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation".

⁹⁷ IA Reporter, 'A Second Gold Mine Investor Puts Thailand on Notice of Arbitration Claim - This Time Under Australian Free Trade Agreement' on *Investment Arbitration Reporter* (3 April 2017) <<https://www.iareporter.com/articles/a-second-gold-mine-investor-puts-thailand-on-notice-of-arbitration-claim-this-time-under-australian-free-trade-agreement/>>.

⁹⁸ Kingsgate Consolidated Limited, 'Update on Claim Against Kingdom of Thailand' (News Announcement, 18 August 2017) <<http://www.kingsgate.com.au/update-on-claim-against-kingdom-of-thailand/>>.

arbitration alleging expropriation under the bilateral FTA,⁹⁹ which provides for UNCITRAL Arbitration Rules.¹⁰⁰

Possibly complicating this matter, in October 2015 (soon after a meeting between the then Australian Ambassador and Thailand's Industry Minister where Thailand's mining law and policy was reportedly discussed in the context of bilateral economic cooperation generally) *The Nation* reporters interviewed Greg Foulis as the CEO of Kingsgate, who:¹⁰¹

denied allegations that it paid bribes to get permission for the Chatree gold mine to operate, saying that its 100-per-cent shareholding in Akara Resources, as indicated in the annual report [and arguably contrary to Thai law on foreign investment], had been misinterpreted by the Thai media ...

Allegations of corruption have long complicated arbitrations involving other foreign investments, albeit mostly with the arbitral seat in Thailand.¹⁰² In addition, Thailand unsuccessfully objected to jurisdiction in

⁹⁹ Kingsgate Consolidated Limited, 'Commencement of Arbitration Against Thailand' (Media Release, 2 November 2017) <<http://www.asx.com.au/asxpdf/20171102/pdf/43nx46y27z949y.pdf>>.

¹⁰⁰ For a comparison of Australia's bilateral FTAs with Thailand and other early counterparties, see generally Luke Nottage and Kate Miles, "Back to the Future" for Investor-State Arbitrations: Revising Rules in Australia and Japan for Public Interests' (2009) 26 *Journal of International Arbitration* 25, with a manuscript version including an Appendix table at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1151167>.

¹⁰¹ Tanpisit Lerdbamrunghchai, 'Envoy Meets Minister Over Mining', *The Nation* (online), 8 October 2015) <<http://www.nationmultimedia.com/national/Envoy-meets-minister-over-mining-30270416.html>>. Incidentally, the involvement of the Australian government in trying to help Kingsgate resolve its dispute with the Thai government, before Kingsgate ended up filing its ISDS claim, makes sense given that the bilateral FTA contains both inter-state arbitration and investor-state arbitration provisions. A rational investor is likely first to try to mobilise its home state to negotiate with the host state in the shadow of the former mechanism, before incurring the cost of an ISDS claim. This undercuts the argument that there has been no significant depoliticisation of investment disputes as Wikileaks evidence suggests that the US government has continued to get involved in trying to resolve disputes on behalf of its investors since the 1990s, albeit less intensely than in an earlier era, whether or not there exists an investment treaty (Geoffrey Gertz, Srividya Jandhyala and Lauge Poulsen, 'Legalization, Diplomacy, and Development: Do Investment Treaties De-Politicize Investment Disputes?', (2018) 107 *World Development* 107. Such continued politicisation can be explained because such treaties would contain an inter-state arbitration mechanism in addition to (usually) the ISDS mechanism. However, it is possible (and not tested in this empirical study) that significant depoliticisation occurs after the investor files an ISDS claim, after failing to resolve the dispute with some involvement from the home state, which then can say to the host state that the matter is now out of its hands. Cf also generally the apparently limited role that depoliticisation has played as a motivation for the development of the investment treaty system: Bonnitcha, Poulsen and Waibel, above n 9, at 193-198.

¹⁰² Luke Nottage and Sakda Thanitcul, 'The Past, Present and Future of International Investment Arbitration in Thailand' (2016) 16/31 *Sydney Law School Research Paper* <<http://ssrn.com/abstract=2770889>>. The frequency with which allegations of corruption are now being made generally may suggest that such allegations are becoming part of a standard defensive strategy for respondent states: see Sam Luttrell, 'Fall of the Phoenix: The New Test for Illegality Objections in International Investment Arbitration', in this volume.

the protracted *Walter Bau* arbitration under the Germany-Thailand BIT (Thailand's first inbound ISDS claim) on the ground that the investment had not been properly approved in writing.¹⁰³ It then vigorously challenged the final award on similar grounds in Switzerland (the seat for that UNCITRAL Rules arbitration), then in the US, and (eventually unsuccessfully) in Germany. Award enforcement would have been much more straightforward had it been subject to the ICSID Convention, but Thailand has signed yet has never ratified that framework treaty.

Historically, Thai government lawyers have persistently contested arbitration proceedings involving foreign investors, although recently the government is also trying to make Thailand a more attractive seat for commercial arbitration and also has become aware that ISDS provisions can underpin outbound as well as inbound FDI. In 2011, on UNCTAD data, Thailand became a net FDI exporter;¹⁰⁴ and on 31 July 2017 a Thai investor notified a treaty-based ISDS dispute (against Malaysia) for the first time.¹⁰⁵ It is unclear therefore whether and how the new claim against Thailand under its bilateral FTA with Australia will impact on its stance in negotiating other treaties, especially now RCEP.

Overall, the ISDS claim filed by Kingsgate in 2017 has not yet received much attention in Thailand's local media.¹⁰⁶ However, this could change as health problems allegedly linked to heavy metal toxins have been investigated for many years,¹⁰⁷ even generating in late May 2016 the first-ever class action by affected residents pursuant to Thailand's new

¹⁰³ For some documentation on the *Walter Bau* case, see ITA Law <<https://www.italaw.com/cases/123>>.

¹⁰⁴ See generally Luke Nottage and Sakda Thanitcul, 'International Investment Arbitration in Thailand: Limiting Contract-based Claims While Maintaining Treaty-based ISDS' (2017) 18 *Journal of World Investment and Trade* 767. However, data on FDI inflows may not be reliable, with two other datasets giving conflicting results over whether Thailand's ISDS-backed treaties have significantly increased inbound FDI. See Jason Webb Yackee, 'Do Investment Treaties Work – In the Land of Smiles?' in Chaisse and Nottage (eds), above n 1.

¹⁰⁵ Damien Charlotin and Luke Eric Peterson, 'Estate of Thai National Hopes That Terminated ASEAN Treaty can be used for Claim Against Malaysia' on *Investment Arbitration Reporter* (3 August 2017) <<https://www.iareporter.com/articles/estate-of-thai-national-hopes-that-terminated-asean-treaty-can-be-used-for-claim-against-malaysia/>>.

¹⁰⁶ The Factiva database was used to search leading English-language Thai newspapers Bangkok Post and The Nation, retrieving 17 articles referring to the claim when searching under the term "Kingsgate Consolidated". See for example Sitthipoj Kebui, 'Kingsgate Begins Arbitration Proceedings', *Bangkok Post* (online), 3 November 2017 <<https://www.bangkokpost.com/archive/kingsgate-goes-to-arbitration/1354076>>.

¹⁰⁷ See eg 'Locals Near Mine Get New Health Test', *Bangkok Post* (online), 19 October 2015 <<https://www.bangkokpost.com/archive/locals-near-mine-get-new-health-test/734084>> and Pratch Rujivanarom, 'Conflict Over Mine Rages Ahead of License Deadline', *The Nation* (online), 6 May 2016 <<http://www.nationmultimedia.com/national/Conflict-over-mine-rages-ahead-of-licence-deadline-30285377.html>>.

US-style legislation.¹⁰⁸ Prior to this dispute escalating, Kingsgate had been reportedly interested in expanding its mining activity in Thailand as well as other ASEAN countries,¹⁰⁹ but may now be rethinking this strategy.

Australian investors have also recently but unsuccessfully pursued claims against Timor-Leste, although the arbitration in this instance was initiated under a contract between the investors and host government, rather than an investment treaty. The claims were advanced by Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC against Timor-Leste with respect to a dispute under a fuel-supply contract. Lighthouse sought to found ICSID jurisdiction in “standard terms” documents, which it said provided for ICSID arbitration in the event of disputes and which, it alleged, had been incorporated by reference into the parties’ contract. The tribunal rejected these arguments, finding the relevant documents ambiguous as to their meaning and application, and also that on the evidence, it had not been established that Timor-Leste was even aware of them. To the contrary, the tribunal concluded that the parties had intended to rely on domestic litigation as the means for resolving any disputes that might arise under the contract. Lighthouse was ordered to pay the costs of the arbitration proceedings (around US\$547,000) and reimburse Timor-Leste US\$1.3 million for legal costs.¹¹⁰

Table 1 above shows that that this case has received no Australian newspaper coverage. This is perhaps unsurprising given that it involves a one-off contract, rather than an outbound treaty-based IDS claim – although even those do not get much press. The silence is somewhat striking, however, given that Timor-Leste has been in the Australian (and international) news very recently regarding a settlement of a longstanding and controversial maritime boundary dispute between the two countries involving a major gas field.¹¹¹

¹⁰⁸ Wasant Techawongtham, ‘PLAIN TALK: Justice for Villagers Shows Thailand is Moving Forward’, *Bangkok Post* (online), 3 June 2016 <<https://www.bangkokpost.com/print/999841/>>. On the new class action regime, and claiming behaviour recently over personal injuries, see eg Sakda Thanitcul, ‘Thailand’ in Luke Nottage and Sakda Thanitcul (eds), *ASEAN Product Liability and Consumer Product Safety Law* (Winyuchon, 2016) 273-302. On consumer and citizen activism on matters affecting public health, despite (and sometimes because of) periodic military governments, see eg Frank Munger, ‘Cause Lawyers and Other Signs of Progress: Three Thai Narratives’ in Scott L Cummings (ed), *The Paradox of Professionalism: Lawyers and the Possibility of Justice* (Cambridge University Press, 2011) 243-273 and Frank Munger, ‘Revolution Imagined: Cause Advocacy Consumer Rights and the Evolving Role of NGOs in Thailand’ (2014) 9 *Asian Journal of Comparative Law* 29.

¹⁰⁹ Lamonphet Apistniran, ‘Kingsgate to Dig Out Thai Mining Stand’, *Bangkok Post* (online), 5 August 2015 <<https://www.bangkokpost.com/print/644336/>>.

¹¹⁰ *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v Democratic Republic of Timor-Leste*, ICSID Case No ARB/15/2, Award, 22 December 2017 at [344]-[346].

¹¹¹ Helen Davidson, ‘Australian and Timor-Leste Sign Historic Maritime Border Treaty’, *The Guardian* (online), 7 March 2018 <<https://www.theguardian.com/world/2018/mar/07/australia->

Overall, therefore, it seems that outbound claims have attracted little public attention. Indeed, the issues they throw up seem not (yet) to have generated significant drafting innovations in more recent treaties negotiated by Australia. In other words, we find no availability bias that might countervail that created by the first inbound treaty-based claim, and instead a persistent status quo bias.

5. Conclusion

Australia and New Zealand have continued to embed themselves within the investment treaty regime, including its preferred ISDS mechanism for resolving investor claims. Notably, Australian investors are becoming more active ISDS users. Nonetheless, acceptance of ISDS was interrupted for Australia during the Gillard Government's tenure (2011-3), and since November 2017 has been put on hold in New Zealand by the Ardern Government's rejection of ISDS for future treaties. In Australia's case, the pattern of ISDS policy-making can partly be explained by availability bias, following the initiation of PMA's claim in 2011 (which then had some spill-over influence on public debates in New Zealand). For New Zealand's part, its only experience as a respondent, in Mobil's contract-based ISDS claim, has been largely overlooked. This seems understandable given the nature of the complaint in the Mobil case, as well as more limited repercussions of contract-based rather than treaty-based claims. Concerns about ISDS have only emerged in New Zealand much later, as part of a wider debate about the merits of New Zealand's negotiation of recent FTAs, and as part of the politicisation of those negotiations.

It is also interesting that in Australia's case, there does not seem to be evidence of availability bias extending to additional inbound treaty-based claims. Neither the tail-end of the PMA case addressing costs issues, nor the similar arbitration regarding tobacco control measures adopted by Uruguay, has sustained the level of media attention that was generated by PMA's claim against Australia on the merits. Meanwhile, the prospect of subsequent ISDS claims against Australia under AUSFTA has not generated widespread media attention either, at least not yet, even accepting that the chances of such claims being successfully prosecuted are a fairly remote prospect. Instead, reporting on ISDS in the Australian media fell away significantly after the dismissal of PMA's claim on jurisdictional grounds (Figure 1).

and-timor-leste-sign-historic-maritime-border-treaty>. See generally Natalie Klein, 'Conciliation under Article 298 of UNCLOS between Timor-Leste and Australia (Timor-Leste v Australia)' (Paper presented at the 6th Annual Conference on International Law: The Year in Review, Sydney Centre for International Law (SCIL), Sydney Law School, 23 February 2018).

The effects of availability bias from experiences with ISDS therefore seem to have been quite limited in Australia, despite prompting a policy shift over 2011-13 and a lingering change in public perceptions that may be diminishing. Effects have also been quite muted in New Zealand, which has only been subjected to an almost unknown contract-based ISDS claim, and instead has only recalibrated its FTA practice in light of other countries' experiences of treaty-based arbitration.¹¹² Accordingly, both countries may yet be able to take an active and innovative approach to ISDS reform, despite the Adern Government's recent rejection of ISDS. This could usefully take into account not only the issues faced by Australia as host state, especially the delays and complications such as those associated with transparency highlighted by the PMA case,¹¹³ but also from the growing number of claims by Australia's outbound investors (Part 4).

On the other hand, the question of whether those outbound ISDS claims will have a positive influence on receptiveness to ISDS is difficult to judge. As indicated by the decline in reporting on ISDS, the current claims by Australian investors have received very little media attention to date. Even if some of the outbound ISDS claims prove successful, this may well attract more criticism of the ISDS system within Australia rather than a heightened appreciation of how it can help Australian investors secure redress for interference with their FDI abroad, particularly in developing countries. Persistent critics (and their preferred media outlets and political parties) are likely to perceive or portray successful ISDS claims as a rich developed country indirectly beating up on poor developing countries – particularly as most claims involve mining companies, which those critics probably dislike anyway. In addition, although the reporting of ISDS has dropped off in Australia recently, the New Zealand experience shows how easily it could resurface as a major topic of public discussion if and when a more centre-left government is elected in Australia.

¹¹² Quite similarly, for example, Indonesia and Korea did not significantly debate ISDS policy after being subject to early contract-based ISDS claims. This has only occurred in recent years, albeit after major inbound treaty-based claims. See Antony Crockett, 'The Termination of Indonesia's BITs: Changing the Bathwater, But Keeping the Baby?' (2017) 18(5-6) *Journal of World Investment and Trade* 836 (noting the *Amco* case); and Younsik Kim, 'Investor-State Arbitration in South Korean International Trade Policies: An Uncertain Future, Trapped by the Past' (Centre for International Governance Innovation Investor State Arbitration Series Paper No 15) <<https://www.cigionline.org/publications/investor-state-arbitration-south-korean-international-trade-policies-uncertain-future>> (noting the *Colt* case).

¹¹³ On 18 July 2017, Australia did become the first Asia-Pacific state to sign the 2014 (Mauritius) United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (at <http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html>), which helps retrofit broader transparency provisions onto pre-existing treaties. But Australia has not yet ratified this treaty and a related Bill has not yet passed the Senate: see Luke Nottage and James Morrison, 'Accessing and Assessing Australia's International Arbitration Act' (2017) 34(6) *Journal of International Arbitration* 963, 969-71.

Apart from experiences with ISDS cases, it seems likely that other factors will continue to affect the ability of Australia and New Zealand proactively to influence the path of international investment law. These include the status quo bias that both countries have demonstrated through their path dependence in their recent investment treaty practice. That practice has been strongly inspired by the 2004 US Model BIT and that country's related FTA practice.¹¹⁴ Yet, recent events suggest that the dependency has weakened. Following the departure of the US from the TPP, the treaty was resigned (and rebranded as the Comprehensive and Progressive Agreement for Trans Pacific Partnership, or 'CPTPP'), subject to the "suspension" of various provisions.¹¹⁵ In particular, the CPTPP parties agreed to suspend the operation of ISDS with respect to investment agreements, as had been pushed for by the US during the TPP negotiations. As a result, contract disputes will be resolved according to any contractually agreed means, which may include confidential arbitration. Apart from the potential for less transparency than ISDS, there is also a potential for inefficiency if the dispute generates a treaty-based ISDS claim in parallel.

Interestingly, New Zealand, Canada and Chile issued a Joint Declaration on ISDS, released alongside the official CPTPP texts signed on 8 March 2018. The three countries stated that they "intend to work together on matters relating to the evolving practice" of ISDS, "including as part of the ongoing review and implementation" of the CPTPP.¹¹⁶ Specifically, the parties stated their intention to cooperate in addressing the ethical responsibilities of arbitrators, including the "double-hatting" problem that arose in the *Tethyan* case, as part of the implementation of Art 9.22.6 of the CPTPP (which requires guidance or a code of ethics for ISDS arbitrators before the treaty comes into force). They also agreed to "promote rules" for reducing the costs of dispute settlement for small and medium-sized enterprises. This could be of considerable interest to New Zealand, given that it has relatively few large-scale entities that are active investors in other countries. By highlighting ethical issues such as "double-hatting", and costs of conventional ISDS proceedings, these countries appear to be signaling their (soft) commitment to take a more pro-active role in reforming the system – at least in the Asia-Pacific through the

¹¹⁴ See Kawharu and Nottage, above n 23, 507-509.

¹¹⁵ The text, including the list of suspended provisions, is available at Ministry of Foreign Affairs and Trade, *CPTPP Text* <www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/>.

¹¹⁶ Ministry of Foreign Affairs and Trade, *CPTPP Joint Declaration*, <<https://www.mfat.govt.nz/assets/CPTPP/CPTPP-Joint-Declaration-ISDS-Final.pdf>>. We thank Murray Griffin for bringing this document to our attention. It is not listed among the CPTPP texts online (MFAT, above n 115) perhaps because the three states do not intend to be bound under international law by this joint statement of intent.

CPTPP, and potentially more widely. However, Australia was not prepared to join New Zealand (and its two partners, including Canada which has already agreed to the permanent court alternative in its FTA with the EU). This may reflect Australia's greater path-dependence on US treaty practice, as well as a more complicated political system.¹¹⁷

¹¹⁷ The (non-binding) Report No 181 of the (government-majority) Joint Standing Committee on Treaties, issued in July 2018 (and referring to evidence provided by Nottage) recommended ratification of CPTPP while concluding regarding the Investment chapter (<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TPP-11/Report_181/section?id=committees%2freportjnt%2f024179%2f26342> at para 4.104): 'The potential improvements discussed [...] an appellate mechanism; a code of ethics for ISDS arbitrators; and the introduction of precedent, light the way forward for ISDS'. Additional Comments by (Opposition) Labor Party committee members (at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TPP-11/Report_181/section?id=committees%2freportjnt%2f024179%2f26463>) agreed to ratification but concluded a more sustained critique of ISDS (including reference to New Zealand's new policy shift) by reiterating: 'A future Labor Government will not agree to [ISDS] provisions in new trade agreements and will seek to remove these provisions from existing trade agreements as part of their scheduled reviews'