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The Investment Chapter and ISDS in the TPP: Lessons from Southeast Asia

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Abstract

The investment chapter and investor-state dispute settlement provisions in the Trans-Pacific Partnership attracted significant media and public attention. This paper shows that ISDS-backed investment treaty commitments, aimed to liberalising and protecting FDI, are already widespread across Southeast Asian countries. However, these countries have been subjected to comparatively few ISDS claims and (very recently) two adverse treaty-based arbitration awards. Meanwhile, investors from Malaysia and Singapore have initiated claims. This backdrop partly explains not only why those two states and the other existing TPP signatories (Vietnam and Brunei) were willing to agree to ISDS-backed commitments in that FTA. It also makes it quite likely that ISDS provisions are not likely to become deal breakers for countries such as Thailand, the Philippines and even Indonesia in future trade agreements. This paper also demonstrates that the TPP's investment chapter is already quite similar to the substantive and procedural (ISDS) investment treaty commitments entered into by Southeast Asian states, especially under FTAs over the last decade or so, including four ASEAN+ FTAs. Like recent treaties agreed by other Asia-Pacific states, these draw significantly on contemporary US-style treaty drafting containing features more protective of host state interests. This provided the platform for agreeing on the TPP. Its ratification also offers an opportunity to displace older more pro-investor standalone bilateral investment treaties (and revisit such BITs more broadly, like Indonesia since 2014). Nonetheless, this paper raises the question whether and how a further recalibration in favour of host states might occur, along the lines recently proposed by the EU with the US, and agreed already in FTAs with Canada and Vietnam.

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The Investment Chapter and ISDS in the TPP: Lessons from Southeast Asia[#]

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1. Introduction

The Trans-Pacific Partnership (TPP) free trade agreement (FTA) was signed on 4 February 2016.¹ Prior to and following the signing of the TPP, significant media and public attention focused on its investment chapter, especially the investor-state dispute settlement (ISDS) provisions. For example, one report asserted that: ‘Indonesia could fall into bankruptcy if the biggest market in Southeast Asia [joins the TPP], which would allow investors to sue the government in international arbitration courts through investor-state dispute settlements (ISDS)’.² Yet a considerable proportion of additional economic growth modelled from the TPP is expected to come from more foreign direct investment (FDI) generated by liberalisation commitments in that FTA.³

Even though the ratification of the TPP remains in doubt following newly-elected President Trump’s withdrawal of signature by the United States in January 2017, it is still useful to examine lessons that could be drawn from the investment chapter and ISDS in the agreement. For example, why were the Southeast Asian countries involved in the TPP agreeable to ISDS in the TPP? As Part 2 of this paper outlines, ISDS-backed investment treaty commitments are already widespread across the Asia-Pacific region.⁴ They have been offered in FTAs and earlier standalone bilateral investment treaties (BITs) signed by Southeast Asian states, to promote foreign direct investment (FDI) especially where host states lack domestic laws and courts meeting international standards, which are current TPP signatories as well as potential new partners.

[#] This paper is adapted and revised significantly, with permission, from Luke Nottage, “The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification”, *Melbourne Journal of International Law* 2016, <<http://ssrn.com/abstract=2767996>> (accessed 20 October 2016). It draws also on support from an Australian Research Council Discovery Project (DP140102526) for 2014–2016, jointly with Dr Shiro Armstrong and Professors Jurgen Kurtz and Leon Trakman. Thanks to Kirsten Gan for research and editorial assistance. Any errors or misconceptions remain my sole responsibility.

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¹ See generally Raj Bhala, *TPP Objectively: Law, Economics and National Security of History’s Largest, Longest Free Trade Agreement* (Carolina Academic Press, 2016). The original 12 TPP signatory states were: Brunei, Chile, New Zealand and Singapore (the original four from 2004); Australia, Malaysia, Peru, the United States and Vietnam (which had joined negotiations from 2008); plus Canada, Japan and Mexico (which joined negotiations from 2012–3). See generally Australian Government, *Trans-Pacific Partnership Agreement*, Department of Foreign Affairs and Trade <<http://dfat.gov.au/trade/agreements/tpp/Pages/trans-pacific-partnership-agreement-tpp.aspx>>.

² Anton Hermansyah, “TPP may bankrupt Indonesia, activists say”, *The Jakarta Post*, 15 February 2016 <<http://www.thejakartapost.com/news/2016/02/15/tpp-may-bankrupt-indonesia-activists-say.html>> (accessed 17 October 2016). For a broader critique of ISDS from a prominent Malaysian economist, see also Jomo Kwame Sundaram, “The Transpacific Partnership Agreement: Some Critical Concerns”, Institute for Policy Dialogue (based at Columbia University) Working Paper Series (2016), <<http://www.networkideas.org/blogs/2016/10/the-trans-pacific-partnership-agreement-some-critical-concerns/>> (accessed 20 October 2016).

³ Peter Petri and Michael Plummer, “The Economic Effects of the Trans-Pacific Partnership: New Estimates”, Peterson Institute for International Economics Working Paper No 16-2 (January 2016), <<http://www.iie.com/publications/interstitial.cfm?ResearchID=2906>> (accessed 17 October 2016).

⁴ Vivienne Bath and Luke Nottage, “Asian Investment and the Growth of Regional Investment Agreements”, in *Routledge Handbook of Asian Law*, edited by Christoph Antons, (London: Routledge, 2017), p. 182.

Other countries in the region that showed some interests in the TPP prior to January 2017 such as Thailand, the Philippines and Indonesia,⁵ have each been subjected to a few arbitration claims brought by foreign investors and these countries consequently reviewed their approach to investment treaties and ISDS. Yet until the end of 2016 none of them, and indeed no Southeast Asian state, had ever had to pay out on an arbitral award where the host state's consent to international arbitration has been given through an investment treaty. Nor has any Southeast Asian state declared that it would eschew ISDS completely in future treaties. This includes Vietnam, which has also been subject to several ISDS claims but signed the TPP. A different stance was adopted in recent years by a few leftist South American states, South Africa,⁶ and Australia (albeit only over 2011-13, under the centre-left Gillard Government's Trade Policy Statement).⁷ Meanwhile, investors from Singapore and Malaysia (the major sources of outbound investment from Southeast Asia⁸) have initiated several ISDS claims under investment treaties.⁹

This backdrop partly explains not only why those two states and the other existing TPP signatories from Southeast Asia (Vietnam and Brunei) were willing to agree to ISDS-backed commitments in that FTA. It also makes it quite likely that Thailand, the Philippines and even Indonesia will not see the ISDS provisions as precluding their joining the TPP, if it comes into force with the remaining signatories, the US changes its mind again, or a new version of the TPP is agreed. Anyway, the current signatories very probably would insist that any new TPP partners should adopt ISDS provisions as a key feature of the treaty package.

In addition, Part 3 shows that the TPP's investment chapter is already quite similar to the major investment treaty commitments entered into by Southeast Asian states, especially under FTAs over the decade or so, including four 'ASEAN+' FTAs concluded by the Association of Southeast Asian Nations (ASEAN).¹⁰ This is unsurprising. From around 2001, after earlier experiences with ISDS claims under the trilateral North American Free Trade Agreement (NAFTA), the US developed a new Model BIT (in 2004) that was significantly more protective of host state interests.¹¹ This template influenced the investment chapters in its own FTAs with Asia-Pacific counterparties (eg with Singapore,

⁵ See eg Antony Crockett, "Could Indonesia join the TPP?", *Kluwer Arbitration Blog*, 23 February 2016, <<http://kluwerarbitrationblog.com/2016/02/23/could-indonesia-join-the-tpp/>> (accessed 17 October 2016).

⁶ See generally Leon Trakman and David Musaleyan, "The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration", *ICSID Review* 30, no. 1 (2016).

⁷ See generally Luke Nottage, "The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration in Australia", *New Zealand Business Law Quarterly* 21, no. 4 (2015), manuscript at <<http://ssrn.com/abstract=2685941>>; and a more detailed analysis in Luke Nottage, "Investor-State Arbitration Policy and Practice in Australia", *CIGI Investor-State Arbitration Series Paper* 6 (2016) <<http://ssrn.com/abstract=2685941>> (accessed 17 October 2016).

⁸ Cassey Lee and Sineet Sermcheep, eds., *Outward Foreign Direct Investment in ASEAN* (Singapore: ISEAS Publishing, 2017).

⁹ See Figures 4 and 8 and Appendix in Luke Nottage and Sakda Thanitcul, "International Investment Arbitration in Southeast Asia", Sydney Law School Research Paper 16/95 (2016), <<https://ssrn.com/abstract=2862272>> (accessed 20 October 2016).

¹⁰ Vivienne Bath and Luke Nottage, "The ASEAN Comprehensive Investment Agreement and 'ASEAN Plus' - The Australia-New Zealand Free Trade Area (AANZFTA) and the PRC-ASEAN Investment Agreement", in *International Investment Law*, edited by Marc Bungenberg, Jorn Griebel, Stephan Hobe, August Reinisch (Baden, Germany: Nomos Verlagsgesellschaft, 2015).

¹¹ See generally eg Mark Kantor, "The New Draft Model U.S. BIT: Noteworthy Developments", *Journal of International Arbitration* 21 (2004).

Australia, and later Korea),¹² but also was adapted by the latter states and others (such as Japan) as they began negotiating FTAs (and/or sometimes still standalone BITs) with further countries, including in Southeast Asia.¹³ The US template also then influenced the drafting of the ASEAN+ FTAs, as well as the ASEAN Comprehensive Investment Agreement (ACIA, consolidating earlier 1987 and 1998 intra-ASEAN investment agreements),¹⁴ albeit with somewhat more variation. This significant shift in Asia-Pacific treaty practice over the last decade created a platform for the TPP investment chapter, which therefore draws heavily on contemporary US treaty practice.¹⁵

Part 3.1 therefore briefly sketches the scope of the main substantive protections offered to foreign investors in the TPP, compared to other major ASEAN agreements (especially ACIA, and its ASEAN+ FTAs containing investment chapters). These commitments include the host state's promise to compensate foreigners adequately for expropriating their investments, and to provide 'fair and equitable treatment' (including or related to avoiding 'denial of justice' in local courts, or egregious lack of due process by government authorities). In many ways, they are much more important than the ISDS provisions, discussed then in Part 3.2. Those merely add an extra dispute resolution procedure that can be selected by the foreign investor wishing to make (at its own expense) a direct arbitration claim against the host state, instead of trying to mobilise its home state to initiate the inter-state arbitration procedure that is also invariably agreed upon the treaties. (As the WTO inter-state dispute settlement process similarly shows, such procedures are often more politicised, so foreign investors nowadays almost never go down that route if the treaty provides the ISDS option.)

Overall, as concluded in Part 4, ISDS and even the rest of the investment chapter in the TPP should not therefore not really be a 'big deal'. In the short term, it is true that had the TPP come into force, US investors in Malaysia and Brunei would have gained new ISDS-backed protections for existing and future FDI there, but US investment in those countries would have been limited at least for Brunei. (The US already has ISDS through treaties with Vietnam and Singapore.) It may be more significant if other major Southeast Asian countries ratify the TPP too. But the region as whole has won or settled occasional claims brought by investors from the US, who furthermore are not necessarily more litigious than those from other nations on a per capita basis (as indicated in Appendix A).¹⁶ In addition, ratifying the TPP offers an opportunity to displace older more pro-investor standalone

¹² See generally Hi-Taek Shin and Liz (Kyo-Hwa) Chung, "Korea's Experience with International Investment Agreements and Investor-State Dispute Settlement", *Journal of World Investment and Trade* 16, no. 5-6 (2015).

¹³ See eg Shotaro Hamamoto and Luke Nottage, "Japan" in Chester Brown, ed., *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) p. 347. This focuses on the Japan-Cambodia BIT as the apparent de facto 'model' used to negotiate recent Japanese treaties.

¹⁴ Cf also generally Sungjoon Cho and Jurgen Kurtz, "International Cooperation and Organizational Identities: The Evolution of the ASEAN Investment Regime", *Northwestern Journal of International Law & Business* (2016), forthcoming, available at <<https://ssrn.com/abstract=2802628>> (accessed 17 October 2016); Julien Chaisse and Sufian Jusoh, *The ASEAN Comprehensive Investment Agreement: The Regionalization of Laws and Policy on Foreign Investment* (Cheltenham: Edward Elgar, 2016).

¹⁵ Wolfgang Alschner and Dmitriy Skougarevskiy, "The New Gold Standard? Empirically Situating the TPP in the Investment Treaty Universe", *Journal of World Investment and Trade* 17, no. 3 (2016).

¹⁶ For example, the United States filed 0.045 ISDS claims per 100,000 people compared to the Netherlands, which is much more 'litigious' on this measure, at 0.523 ISDS claims per 100,000 people. Calculations based on data drawn from UNCTAD, 'International Investment Dispute Settlement', *Investment Policy Hub*, <<http://investmentpolicyhub.unctad.org/ISDS>> (accessed 17 October 2016), and population estimates for the Netherlands and United States at Central Intelligence Agency, 'The World Factbook', <<https://www.cia.gov/library/publications/the-world-factbook/geos/nl.html>> (accessed 17 October 2016).

bilateral investment treaties (and revisit such BITs more broadly, like Indonesia has been doing since 2014).

Nonetheless, although TPP is arguably an improvement over earlier BITs, its US-style approach is now being challenged by the European Union (EU). The latter is now developing some interesting further innovations to recalibrate investment commitments, in even less pro-investor ways. These include a standing investment court with a review mechanism to correct substantive errors of law. The feature was developed especially for its FTA negotiations with the US (the Trans-Atlantic Trade and Investment Partnership or TTIP), but was recently accepted in the EU's FTAs with Canada and even Vietnam (which had agreed to a more traditional ISDS procedure in the TPP).¹⁷ In addition, the wording contained in the FTA between the EU and Canada (substantially agreed in August 2014, with modifications after a 'legal review' completed on 29 February 2016),¹⁸ and now proposed for TTIP, arguably protects the regulatory autonomy of host states somewhat more strongly than TPP's substantive provisions.¹⁹ This should not necessarily impede TPP ratification. Yet it does raise broader questions about whether an emergent EU-style model, rather than the current US-style model (culminating in the TPP), will and should ultimately prevail in (Southeast) Asia, including in the ongoing FTA negotiations for the 'ASEAN+6' Regional Comprehensive Economic Partnership (RCEP).²⁰

2. Investment Trends, Treaties and ISDS Claims in (Southeast) Asia

2.1 FDI and Treaty Trends

The Asian region has long been a major destination for foreign direct investment (FDI). It has also emerged as a major source of outbound FDI.²¹ The latter tendency began with

¹⁷ European Commission, *The Transatlantic Trade and Investment Partnership*, <<http://ec.europa.eu/trade/policy/in-focus/ttip/>> (accessed 17 October 2016); Michael Daly and Jawad Ahmad, "The EU-Vietnam FTA: What Does it All Mean? What Does it Mean for the Future?", *Kluwer Arbitration Blog*, 24 December 2015, <<http://kluwerarbitrationblog.com/2015/12/14/the-eu-vietfabove-nam-fta-what-does-it-all-mean-what-does-it-mean-for-the-future/>>(accessed 17 October 2016). See generally also August Reinisch, "The European Union and Investor-State Dispute Resolution: From Investor-State Arbitration to a Permanent Investment Court", *CIGI Investor-State Arbitration Series Paper No. 2*, March 2016, <<https://www.cigionline.org/publications/european-union-and-investor-state-dispute-settlement-investor-state-arbitration-permane>> (accessed 17 October 2016).

¹⁸ European Commission, *EU-Canada Comprehensive Economic and Trade Agreement*, <<http://ec.europa.eu/trade/policy/in-focus/ceta/>> (accessed 17 October 2016).

¹⁹ Caroline Henckels, "Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA and TTIP", *Journal of International Economic Law* 19 (2016); Charles-Emmanuel Cote, "Regulatory Space in International Investment Law: Canada, the TPP and CETA", Paper presented at the GELN Biennial Symposium, "The Age of Mega-Regionals: TPP and Regulatory Autonomy in IEL", University of Melbourne, 20 May 2016. See also generally Catharine Titi, "International Investment Law and the European Union: Towards a New Generation of International Investment Agreements", *European Journal of International Law* 26, no. 3 (2015), 654-7.

²⁰ See generally Yoshifumi Fukunaga, "ASEAN's Leadership in the Regional Comprehensive Economic Partnership", *Asia & The Pacific Policy Studies* 2, no. 1 (2015): 103-15; Jeffrey D. Wilson, "Mega-Regional Trade Deals in the Asia-Pacific: Choosing between the TPP and RCEP?", *Journal of Contemporary Asia* 45, no. 2 (2015): 345-53; Robert Scollay, "APEC, TPP and RCEP: Towards an FTAAP", in *Trade Regionalism in the Asia-Pacific: Developments and Future Challenges*, edited by Sanchita Basu Das and Masahiro Kawai, (Singapore: ISEAS Publishing, 2016), pp. 297-322.

²¹ Vivienne Bath and Luke Nottage, 'Asian Investment and the Growth of Regional Investment Agreements'.

investors from Japan in the 1980s,²² followed by investment out of Korea from the late 1990s,²³ and more recently China²⁴ and economies like Singapore within the Association of Southeast Asian Nations (ASEAN).²⁵ By 2013, a quarter of the top 20 host countries for inbound FDI were located in East Asia and the Pacific (EAP), but also more than a quarter of the top 20 economies for outbound FDI world-wide. Transnational companies also considered that eight of the 17 top prospective host countries for FDI over 2014-16 were in EAP.²⁶

Notably, FDI into Southeast Asia rose for the third consecutive year, from \$117 billion in 2013 to \$136 billion in 2014, despite a 16% decline in FDI flows world-wide in 2014. ASEAN member states collectively received the largest amount of FDI among developing countries, with inflows exceeding those into China since 1993. Intra-ASEAN investment (mostly from or via Singapore) jumped by 26% to comprise now almost one fifth of all inbound FDI, making Southeast Asian countries the second largest investor group in their region. A major driver has been the business sector's aim to develop a stronger regional presence due to the completion of the ASEAN Economic Community by the end of 2015. Infrastructure investment remains a priority area for FDI.²⁷

The dramatic expansion of FDI within or involving Asian economies has been paralleled by the emergence of an extensive network of investment treaties.²⁸ Standalone BITs mostly aim to *protect* existing investments, especially against discrimination compared to local or third-country investors, expropriation without adequate compensation, or denial of justice or other violations of 'fair and equitable treatment'. Such protections have also long been considered to indirectly encourage cross-border investment, especially FDI where the larger amounts and control involved for foreign investors often makes their sunk investments more politically sensitive and open to host state intervention. In addition,

²² Shotaro Hamamoto and Luke Nottage, 'Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-Based Investor-State Dispute Resolution', *Sydney Law School Research Paper* 10/145 (2010), <<http://ssrn.com/abstract=1724999>> (accessed 17 October 2016).

²³ Joongi Kim, "The Evolution of Korea's Modern Investment Treaties and Investor-State Dispute Settlement Provisions" in *Investment Law and Dispute Resolution Law and Practice in Asia*, edited by Vivienne Bath and Luke Nottage, eds., (Abingdon: Routledge, 2011), p. 211.

²⁴ Vivienne Bath, "The South and Alternative Models of Trade and Investment Regulation – Australia, China and the Regional Comprehensive Economic Partnership (13 August 2015)", *Sydney Law School Research Paper* 15/68 (2015), <<http://ssrn.com/abstract=2644013>> (accessed 17 October 2016).

²⁵ Jean Ho, 'Singapore' in Chester Brown, ed., *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013), p. 623.

²⁶ Sandra Friedrich and Claudia Salomon, "Investment Arbitration in East Asia and the Pacific", *Journal of World Investment and Trade* 16, no. 5-6 (2015) 800, 834, referring to UNCTAD's *World Investment Report 2014*. See also Martina Francesca Ferracane, "Investor-State Dispute Settlement Cases in APEC - the Record" in *Current Issues in Asia-Pacific Foreign Direct Investment*, edited by Australian APEC Study Centre at RMIT, (2015) <<http://mams.rmit.edu.au/cwgz1keqt2r8.pdf>> (accessed 17 October 2016), p. 61.

²⁷ ASEAN, "ASEAN Investment Report 2015: Infrastructure and Connectivity", (2015) <http://unctad.org/en/PublicationsLibrary/unctad_asean_air2015d1.pdf> (accessed 17 October 2016). See also generally ASEAN, "Invest in ASEAN", (2016) <<http://investasean.asean.org/>> (accessed 17 October 2016). On the ASEAN Economic Community project underway since 2007, see also Luke Nottage and Sakda Thanitcul, "Introduction", in *ASEAN Product Liability and Consumer Product Safety Law*, edited by Luke Nottage and Sakda Thanitcul (Winyuchon, 2016) p. 1, manuscript at <<http://ssrn.com/abstract=2703130>> (accessed 17 October 2016).

²⁸ Vivienne Bath and Luke Nottage, "Introduction", in *Investment Law and Dispute Resolution Law and Practice in Asia*, edited by Vivienne Bath and Luke Nottage, eds., (Routledge, 2011) p. 1; Bath and Nottage, "Asian Investment and the Growth of Regional Investment Agreements". The Asia-Pacific Economic Cooperation (APEC) forum has tried to help systematise this development, after earlier issuing non-binding 1994 Recommendations for its member economies to promote and protect inbound investment through voluntary unilateral measures.

provisions against discrimination – ‘national treatment’ (NT) and/or ‘most-favoured nation’ (MFN) treatment – can be extended to the pre-establishment or investment admission phase, albeit typically with some agreed carve-outs for specific sectors or types of investment. Such BITs can also *liberalise* market access for foreign investors and thus directly promote greater FDI.

More recently, Asia-Pacific countries have tended to negotiate fewer BITs, instead including investment chapters in Free Trade Agreements (FTAs). The latter almost always include substantive protections, but also increasingly pre-establishment liberalisation commitments. FTA investment chapters go beyond multilateral agreements, notably under the aegis of the World Trade Organization (WTO) in operation since 1995. These WTO agreements only offers liberalisation and then NT and/or MFN protection for individually-agreed service sector investments (under the General Agreement on Trade in Services), and protection against discriminatory ‘local content’ and other specific performance requirements targeting foreign investors (under the Trade-Related Investment Measures Agreement).²⁹ Some WTO member states sought to add broader investment protection and liberalisation commitments, but these initiatives were shelved after strong objections from civil society groups around 2000. The subsequent and more narrowly circumscribed Doha Development Round does not include such investment proposals, and initiatives within the OECD to develop a multilateral agreement on investment were also suspended in 1998.³⁰

Admittedly, recent research casts some doubt on whether offering treaty-based investment protections in fact leads to significantly more cross-border investment. For example, Poulsen’s archival research and interviews of treaty negotiators in various developing countries suggests that ‘motivated learning’ was a significant factor. That is, they *wanted* to believe in this benefit from signing BITs, without undertaking much investigation or rationally processing contrary evidence.³¹ Bellak’s recent ‘meta-analysis’ of econometric studies acknowledges that investment treaty implementation had an average impact on FDI ranging from 4-13 percent (with median increases of 2-19 percent) but argues that publication selection biases reduce aggregate effects on both flows and stocks to statistically negligible levels.³² To assist with more accurate quantitative analysis, which can furthermore be linked up to country-specific qualitative research, Chaisse and Bellak have gone on to develop a ‘BITSel Index’ that assesses the overall strength of investment treaties by combining their breadth or scope, liberalisation effect, protections against

²⁹ See generally Michael Hahn, “WTO Rules and Obligations Related to Investment”, in *International Investment Law*, edited by Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch, (eds.), (Oxford: Hart, 2015), p. 653.

³⁰ See generally Joachim Karl, “The Negotiations on the OECD Multilateral Agreement on Investment” in *International Investment Law*, edited by Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch, (eds.), (Oxford: Hart, 2015), p. 342.

³¹ Lauge Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge: Cambridge University Press, 2015) (reviewed by Nottage in the *Journal of World Investment and Trade* 17, p, 1015, manuscript at <<http://ssrn.com/abstract=2795396>>).

³² Christian Bellak, “Survey of the Impact of Bilateral Investment Agreements on Foreign Direct Investment” in *Current Issues in Asia-Pacific Foreign Direct Investment*, edited by Australian APEC Study Centre at RMIT, (2015) <<http://mams.rmit.edu.au/cwgz1keqt2r8.pdf>>, p. 71. However, he remarks (at p. 76) that these ‘results should not be read as implying that BITs are useless, as investor protection may enhance the effects of other types of investment policies and location factors, not least incentives, on FDI; and ‘BITs may contribute substantially to the sustainability of FDI, as they allow taking legal action against the host country’ (usually even after treaty termination, due to sunset clauses). On the first point, see also Catherine Rogers, “International Arbitration, Judicial Education, and Legal Elites”, *Journal of Dispute Resolution* 71 (2015), giving country studies – and signaling ongoing joint econometric research – suggesting that investment treaty arbitration combines with national reforms to international commercial arbitration regimes to generate significant effects on cross-border investment.

discrimination, other constraints on regulation (compensation for expropriation, fair and equitable treatment) and access to international dispute settlement.³³ Armstrong and Nottage used their underlying treaty database to present preliminary econometric results some significant positive impacts on world-wide FDI flows associated with investment treaties generally as well as from (separately) ISDS protections. However, there are other rather intriguing results and methodological challenges in such empirical work remain formidable.³⁴

Another recent study provides a comprehensive overview of both BITs and FTAs or other investment treaties concluded so far by East Asia and Pacific (EAP) economies – in East Asia, Pacific Islands, New Zealand and Australia. As of December 2014, 24 EAP economies had concluded 712 BITs (with 541 in force) out of around an estimated 3000 BITs world-wide, as well at least 69 other investment agreements (such as bilateral or regional FTAs) out of around 330.³⁵ The proportions of treaties signed by the most active EAP states (and numbers of formal ISDS claims filed) were as follows.³⁶

From slow beginnings in the 1970s, it became increasingly common for these investment treaties to provide the extra option of ISDS, notably international arbitration (generating an award binding on the host state if the tribunal finds a violation of substantive treaty commitments). If the treaty allows for the option of such arbitration under the 1965 Washington Convention establishing the (World Bank affiliated) International Centre for the Settlement of Investment Disputes, and both the home state of the foreign investor and the host state have ratified this further framework Convention, the arbitration will be administered through a more pro-investor and “delocalised” process. Any challenges about the scope of the consent to ICSID arbitration contained in the treaty, the arbitrators appointed or procedural problems will be heard by an annulment committee, rather than any court, and the final award simply has effect like a judgment of a court in the ICSID Convention member state where the successful investor seeks enforcement. Host states may also consent to ICSID Convention arbitration through individual investment contracts or authorisations,³⁷ or domestic legislation applicable to foreign investors

³³ Julien Chaisse and Christian Bellak, “Navigating the Expanding Universe of International Treaties on Foreign Investment - Creation and Use of a Critical Index”, *Journal of International Economic Law* 18, no. 1 (2015), p. 79.

³⁴ Shiro Armstrong and Luke Nottage, “The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis”, *Sydney Law School Research Paper* 16/74 (2016), <<http://ssrn.com/abstract=2824090>> (accessed 17 October 2016).

³⁵ Friedrich and Salomon, “Investment Arbitration in East Asia and the Pacific”, p. 802-3. For a second treaty dispute notified to Thailand in 2015, see Luke Nottage and Sakda Thanitcul, “The Past, Present and Future of International Investment Arbitration in Thailand”, unpublished manuscript, Part 3.3, available at <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2770889> (accessed 17 October 2016).

³⁶ Adapted from Friedrich and Salomon, “Investment Arbitration in East Asia and the Pacific”, and (for investment agreements other than BITs) its online annex, Claudia Salomon and Sandra Friedrich, “Annex Materials: Investment Arbitration in East Asia & Pacific - A Statistical Analysis of Bilateral Investment Treaties, Other International Investment Agreements and Investment Arbitrations in the Region”, *SSRN*, (15 April 2015), <<http://ssrn.com/abstract=2591186>> (accessed 17 October 2016). Lightly shaded columns in **Table 1** are current TPP partners; more heavily shaded columns are potential additional partners.

³⁷ See eg Luke Nottage, “Do Many of Australia’s Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis of *Planet Mining v Indonesia* and Regional Implications”, *Transnational Dispute Management* 1 (2015), <<http://www.transnational-dispute-management.com/article.asp?key=2177>> (accessed 17 October 2016). The tribunal upheld ICSID jurisdiction on the basis of a mining investment authorization from Indonesia, not the provisions of its BIT with Australia.

generally.³⁸ By contrast, if the host state has not acceded to the ICSID Convention, it can only offer other types of arbitration through its treaties (or contracts, etc), for example ad hoc arbitration under the UNCITRAL Rules. Resultant awards still be enforced against host states, but they may be challenged in courts at the agreed seat (or venue) of the arbitration and/or under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (widely ratified, but applicable also to arbitrations involving just private parties).

Table 1: Investment Treaties and ISDS Claims involving East Asia and Pacific States

States	BIT proportion (out of 541)	FTA proportion (out of 69)	ISDS claims received (including number and year first filed, where consent under treaty)
1. China	20.4%	17.4%	2 (under treaty: first filed in 2011 but settled)
2. South Korea	13.8%	15.9%	2 (1 under treaty: filed 2012)
3. Indonesia	10%	2.9%	7 (3 under treaties: first filed in 2004, but also under contract and settled)
4. Malaysia	10%	10.1%	3 (2 inter-related: filed in 1994 and 1999)
5. Vietnam	8.7%	1.4%	4 (first filed in 2003 but settled)
6. Singapore	6.5%	17.4%	-
7. Mongolia	6%	1.4%	4 (first filed 2004)
8. Thailand	5.6%	5.8%	1 (filed 2005)
9. Philippines	5.3%	1.4%	4 (first filed 2002 but settled)
10. Laos	3.5%	N/A	2 (both, inter-related, filed in 2012)
11. North Korea	3.4%	N/A	-
12. Australia	3.2%	23.2%	1 (filed 2011)
13. Japan	3.2%	18.8%	-
... 18. Brunei	0.8%	N/A	-
... 20. New Zealand	0.6%	2.9%	-

Source: Author's compilation

³⁸ This was initially proposed for Myanmar's investment law: cf Ksaw Hsu Mon, "After Much Deliberation, Investment Law Approved by Parliament", *The Irrawaddy* (online), 18 December 2015, <<http://www.irrawaddy.com/burma/after-much-deliberation-investment-law-approved-by-parliament.html>> (accessed 17 October 2016). But the government subsequently backtracked, seemingly envisaging that consent to ISDS would instead be provided under its (slowly) unfolding investment treaty program: see Jonathan Bonnitcha, "International Investment Arbitration in Myanmar", *Journal of World Investment and Trade* (2017), forthcoming.

Until around 2010, the numbers of ISDS claims filed against Asian host states appeared comparatively low, and even more so regarding Asian investors bringing ISDS claims against host states. Drawing on theoretical paradigms used to analyse low levels of civil lawsuits formally filed in Japan, Nottage and Weeramantry suggested that the most plausible explanation for comparatively few Asia-related ICSID arbitrations (for which data is most readily available) was an array of ‘institutional barriers’, including costs and a paucity of experienced counsel and arbitrators in Asia, rather than some general cultural aversion to arbitration.³⁹ Building on this hypothesis, Kim highlighted an increase in ICSID and other ISDS claims against Asian host states from 2011, as well as more claims filed by Asian investors, and anticipated more of both.⁴⁰ Salomon and Friedrich also noted eight claims against EAP states in 2011 and five in 2012, albeit only two each (closer to the usual number before the 2011 spike) in each of 2013 and 2014. This generated a total of 35 claims since 1981, including 30 cases where the host state had consented to ISDS under investment treaties, mostly against developing countries in Asia (as also indicated in Table 1 above).⁴¹ They also find 29 investors from EAP states, including 19 treaty-based claims and 22 administered by ICSID under the framework 1965 ICSID Convention, which has been adopted by almost all Asian states and facilitates enforcement of resultant awards.⁴² Salomon and Friedrich do admit that initially these EAP investors:⁴³

‘mostly were involved as locally-incorporated subsidiaries of Western European and North American parent companies. However, EAP investors quickly brought investment claims without the involvement (at least on the record) of any non-EAP parent entity. While investors from one of the region’s few developed countries, Australia, have been the most active in pursuing their investment claims in arbitration, nearly two-thirds of the region’s investment claims were brought by EAP investors from developing countries (19 cases, 65.5%).’

Overall, Salomon and Friedrich observe that ISDS arbitrations involving EAP parties have been lagging somewhat compared to global trends. However, the growth rate in the ICSID case proportion since 2000 has been twice as significant as the overall growth rate in ICSID cases, which comprises most investment arbitrations.⁴⁴ The last column in **Table 1** above highlights how the most active EAP signatories to BITs have now been subjected to at least one treaty-based ISDS claim, either under administered through ICSID or via ad hoc

³⁹ Luke Nottage and J Romesh Weeramantry, “Investment Arbitration in Asia: Five Perspectives on Law and Practice”, *Arbitration International* 28 (2012), p. 19. On the spread of international commercial arbitration in Asia especially over the last decade, undermining some earlier opinions that this was inconsistent with cultural preferences for negotiated or mediated settlements, see also Luke Nottage, “In/formalization and Glocalization of International Commercial Arbitration and Investment Treaty Arbitration in Asia”, in *Formalisation and Flexibilisation in Dispute Resolution*, edited by Joachim Zekoll, Moritz Baelz and Iwo Amelung, eds., (Leiden: Brill, 2014), p. 211.

⁴⁰ Joongi Kim, “A Pivot to Asia in Investor-State Arbitration: The Coming Emergence of Asian Claimants”, *ICSID Review* 27, no. 2 (2012), p. 399.

⁴¹ Friedrich and Salomon, “Investment Arbitration in East Asia and the Pacific”, p. 835-6 (also remarking that *Amco Asia Corp v Indonesia*, ICSID Case No ARB/81/1, was not only the first against an EAP state – albeit based on consent in a contract rather than a treaty with Indonesia – but also only the tenth ICSID arbitration ever filed).

⁴² *Ibid.*, p. 837.

⁴³ *Ibid.*, pp. 839-40 (footnote 225 omitted: identifying in the 1980s, *Amco Asia Corp v Indonesia* and *Mobil Oil Corp et al v New Zealand*, ICSID Case No ARB/87/2). More recently, however, *Cambodia Power Company v Cambodia*, ICSID Case No ARB/09/18 also involved a US-owned subsidiary: see J. Romesh Weeramantry, “International Investment Law and Practice in the Kingdom of Cambodia”, *Journal of World Investment and Trade* (2017), forthcoming.

⁴⁴ *Ibid.*, p. 840.

UNCITRAL Rules arbitration, although a few such pioneering claims were settled by the host state.

Extending the analysis to South and Central Asia as well as the Pacific Islands, Chaisse finds 70 ISDS claims brought against 25 Asia-Pacific states, including 14 against India.⁴⁵ He too notes a sharp jump in 2011 (10 claims filed, compared to around five each year over the previous decade), maintained in 2012 and 2013 (13 claims each), although only five again were filed in 2014.⁴⁶ Chaisse also explains such growth by increased FDI and investment treaties, combined with better understanding of such instruments, and expects ‘a likely intensification of international investment arbitration practice in the Asia-Pacific region in the coming years’.⁴⁷

However, there has been lingering discontent in parts of Asia over foreign investment generally,⁴⁸ and a backlash against ISDS remains possible. After all, that backlash has been evident in South America over many years, following a wave of claims against Argentina and then other high-profile cases against other states in that region.⁴⁹ The growing numbers of ISDS claims worldwide, exceeding 600 by the end of 2014,⁵⁰ have even given rise to some concerns among some developed countries in Europe and North America. So far, the ISDS system has survived,⁵¹ but it remains subject to more debate and many reform options are being discussed.⁵²

2.2 ISDS Policy and Practice in Southeast Asia

As a whole, **ASEAN** has arguably gone through three phases in protecting and liberalising investments through treaties.⁵³ Over the 1950s-70s, the logic was mainly ‘Hobbesian’: viewing foreign investors (and indeed traders) more as adversaries, and with member states consequently signing few BITs. Over the 1980s-90s, the logic became more ‘Lockean’, driven by neo-liberalism to instead compete for and welcome FDI, resulting in a proliferation of BITs as well as the 1987 ASEAN Agreement for Promotion and

⁴⁵ Chaisse and Bellack, “Navigating the Expanding Universe of International Treaties”, pp. 608-9.

⁴⁶ *Ibid.*, p. 611.

⁴⁷ *Ibid.*, p. 612. Ferracane, “Investor-State Dispute Settlement Cases in APEC”, finds 103 claims against APEC economies by the end of 2014, especially against Canada and Mexico under NAFTA, as well as 203 claims initiated by investors in APEC economies, especially in the US but also Canada. She also notes a reduction since 1998 in the disparity between APEC FDI stock and ISDS claims, as a proportion of global totals (although the APEC proportions are heavily influenced by the US, and the proportion of APEC to global FDI is still higher than the proportion of ISDS cases compared to world-wide ISDS cases).

⁴⁸ M. Sornarajah, “Review of Asian Views on Foreign Investment Law”, in *Investment Law and Dispute Resolution Law and Practice in Asia*, edited by Vivienne Bath and Luke Nottage, (London: Routledge, 2011), pp. 242-54.

⁴⁹ Rodrigo Polanco Lazo, “Is There a Life for Latin American Countries After Denouncing the ICSID Convention?”, *Transnational Dispute Management* 1 (2014), <www.transnational-dispute-management.com/article.asp?key=2037> (accessed 17 October 2016). See also generally Claire Balchin, Liz Kyo-Hwa Chung, Asha Kaushal, Michael Waibel, eds., *The Backlash against Investment Arbitration* (Alphen aan den Rijn: Kluwer, 2010).

⁵⁰ UNCTAD, “Investor-State Dispute Settlement: Review of Developments in 2014”, *IIA Issues Note 2* (May 2015), <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d2_en.pdf> (accessed 17 October 2016).

⁵¹ Leon Trakman and David Musaleyán, “The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice”. See also generally Mahdev Mohan, “Asian Perspectives on Investment Agreements and Arbitration: An Evolving Marcottage”, *Yearbook of International Investment Law and Policy* (2015-6).

⁵² Jean Kalicki and Anna Joubin-Bret, eds., *Reshaping the Investor-State Dispute Settlement System* (Leiden: Brill, 2015); UNCTAD, “Taking Stock of IIA Reform”, *IIA Issues Note 1* (March 2016), <http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d1_en.pdf> (accessed 17 October 2016).

⁵³ Sungjoon Cho and Jurgen Kurtz, “International Cooperation and Organizational Identities”.

Protection of Investments. The latter instrument did provide for ISDS, but was limited in scope to ‘investments specifically approved in writing’ and with respect to national treatment obligations. Those obligations were instead introduced (albeit without ISDS) through the 1998 Framework Agreement on the ASEAN Investment Area, aiming to bolster the declining share of intra-ASEAN FDI, after the Asian Financial Crisis of 1997 and the rise of China as a competing manufacturing powerhouse. In this third (partly ‘Kantian’) era, with ASEAN committing to deeper community, there nonetheless remain several significant Hobbesian or sovereigntist tendencies.

Turning to individual member states and their attitudes towards ISDS, only **Singapore** -- now a very large capital exporter -- has long been committed to negotiating investment treaties that include broad ISDS-backed protections.⁵⁴ By contrast, after being subject to some comparatively early investment treaty arbitrations, the **Philippines** has been noticeably more cautious for over a decade, although it only suffered its first treaty-based award on 23 January 2017 (the first such ICSID award against any Southeast Asian state).⁵⁵ In **Vietnam**, the Ministry of Justice also raised the possibility of limiting ISDS provisions after a few more recent claims, but the Ministry of Planning and Investment prevailed and instead an inter-agency protocol was introduced in 2014 to better anticipate and respond to investor claims.⁵⁶ Nonetheless, Vietnam has never acceded to the framework ICSID Convention, and recently agreed to a new FTA with the EU. That adopts the latter’s international investment court mechanism, to be staffed by permanent judges pre-appointed only by the treaty partner states (rather than ad hoc arbitrators, including one typically appointed by the relevant investor) and providing for appellate review for errors of law (along the lines of WTO dispute settlement).⁵⁷

Indonesia (like India more recently) is letting lapse its many existing BITs. The aim seemed to be to negotiate new ones in accordance with a model BIT, which might limit access to ISDS as well as host state liability exposure.⁵⁸ However, Indonesia (unlike India⁵⁹)

⁵⁴ Jean Ho, “Singapore”, in *Commentaries on Selected Model Investment Treaties*, edited by Chester Brown, ed., (Oxford: Oxford University Press, 2013).

⁵⁵ *Baggerwerken Decloedt En Zoon NV v. Republic of the Philippines*, ICSID Case No. ARB/11/27, Award, 23 January 2017; Marvyn Bennaning, ‘PHL to pay P800 million for Laguna Lake project scrapped by Aquino administration’, *Business Mirror*, (Manila, 7 February 2017) <<http://www.businessmirror.com.ph/phl-to-pay-p800-million-for-laguna-lake-project-scrapped-by-aquino-administration/>> accessed 29 March 2017. See generally Sornarajah, “Review of Asian Views on Foreign Investment Law” (adding that a provision in the 2009 ASEAN Comprehensive Investment Agreement required further post-dispute consent to ISDS for claims against the Philippines). A year after the adverse *Fraport* Annulment Committee decision in 2010, the Philippines also complained to – and sought procedural improvements through – the ICSID Administrative Council: see Lars Markert and Catharine Titi, “States Strike Back - Old and New Ways for Host State to Defend Against Investment Arbitrations”, in *Yearbook of International Investment Law and Policy*, edited by Andrea Bjorklund, ed., (Oxford: Oxford University Press, 2013-2014), p. 431.

⁵⁶ Thanh Tu Nguyen and Thi Chau Quynh Vu, “Investor-State Dispute Settlement from the Perspective of Vietnam: Looking for a ‘Post-Honeymoon’ Reform”, *Transnational Dispute Management* 1 (2014), <<http://www.transnational-dispute-management.com/article.asp?key=2041>> (accessed 17 October 2016). See also generally Hop Dang, “Legal Issues in Vietnam’s FDI Law: Protections under Domestic Law, Bilateral Investment Treaties and Sovereign Guarantees” in *Investment Law and Dispute Resolution Law and Practice in Asia*, edited by Vivienne Bath and Luke Nottage, eds., *Investment Law and Dispute Resolution Law and Practice in Asia* (London: Routledge, 2011), p. 225.

⁵⁷ See European Commission, *Trade*, 2 December 2015, <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409>> (accessed 17 October 2016).

⁵⁸ Antony Crockett, “Indonesia’s Bilateral Investment Treaties: Between Generations?”, *ICSID Review* 30 (2015), p. 437; Nottage and Thanitcul, “The Past, Present and Future of International Investment Arbitration in Thailand”.

⁵⁹ Grant Hanessian and Kabir Duggal, “The 2015 Indian Model BIT: Is This Change the World Wishes to See?”,

has not disclosed any new Model, perhaps reflecting tensions within different parts of the government over foreign investment policy. Draft investment regulations issued in 2016 also seemed to envisage the future conclusion of investment treaties containing consent to ISDS.⁶⁰ Indonesia may anyway need to be flexible as it continues to negotiate FTAs with significant FDI exporters, such as the EU or (bilaterally as well as via RCEP) with Australia.

The attitude of **Malaysia** remains more favourable towards ISDS even though it too been subjected to a few ISDS claims,⁶¹ the impact of a ‘new economic model’ announced in 2010 remains uncertain,⁶² and the country is now going through considerable political turmoil.⁶³ Yet Malaysia is a significant outbound investor, including through government-linked companies, and one of those (Malaysia Telekom) as well as private investor are known to have initiated ICSID arbitrations under its large network of BITs.⁶⁴ The scope of application for such treaties has also in fact widened over time: from (a) BITs protecting only specifically ‘approved projects’, to (b) treaties (from 1993) protecting investments admitted in accordance with the host state’s laws, to (c) recent FTA investment chapters (including the TPP) adding reference to covered assets needing to have certain characteristics of an investment.⁶⁵

Thailand is another intriguing country study within ASEAN.⁶⁶ BITs until 1993 did not provide for ISDS at all, or only if both states were party to the 1965 ICSID Convention – signed by Thailand in 1985, but never ratified. BITs containing effective (ad hoc) ISDS provisions then were increasingly signed, but the Thai government may have considered that its liability exposure remained limited by requirements for covered investments to be ‘specifically approved in writing’. It had also been quite successful in Thai court challenges

ICSID Review 30, no. 3 (2015). See also Prabhash Ranjan, “Comparing Investment Provisions in India’s FTAs with India’s Stand-Alone BITs” (2015) *Journal of World Investment and Trade* 16, no. 5-6 (2015) p. 899; Amokura Kawharu and Luke Nottage, “Models for Investment Treaties in the Asian Region: An Underview”, *Sydney Law School Research Paper* 16/87 (2016) <<http://ssrn.com/abstract=2845088>> (accessed 20 October 2016), Part 6.

⁶⁰ Antony Crockett, “The Termination of Indonesia’s BITs: Changing the Bathwater, but Keeping the Baby?” *Journal of World Investment and Trade* (2017), forthcoming.

⁶¹ Sornarajah, “Review of Asian Views on Foreign Investment Law”, pp. 246 and 250, remarks that the tribunal declined jurisdiction by finding no ‘approved investment’ as required under the relevant BIT, in *Gruelin v Malaysia*, ICSID Case No ARB/99/3; but had difficulties in *Malaysian Historical Salvors v Malaysia*, ICSID Case No ARB/05/10, where the sole arbitrator focused instead on economic development as a criterion for determining an actionable ‘investment’ (going on to decline jurisdiction in 2007, only to have his award overturned by an ICSID Annulment Committee in 2009). See also Govert Coppens, “Treaty definitions of ‘investment’ and the role of economic development: A critical analysis of the *Malaysian Historical Salvors* cases” in *Investment Law and Dispute Resolution Law and Practice in Asia*, edited by Vivienne Bath and Luke Nottage, eds., (London: Routledge, 2011), p. 174.

⁶² See Salim Farrar, “Foreign investment laws and the role of FDI in Malaysia’s ‘new’ economic model”, in *Investment Law and Dispute Resolution Law and Practice in Asia*, edited by Vivienne Bath and Luke Nottage, eds., (London: Routledge, 2011), p. 153.

⁶³ See Meredith Weiss, “No easy solutions for Malaysia’s mess”, *East Asia Forum*, 10 November 2015, <<http://www.eastasiaforum.org/2015/11/10/no-easy-solutions-for-malaysias-mess/>> (accessed 17 October 2016).

⁶⁴ Sufian Jusoh and Mohamad Azim Mazlan, “Malaysia and Investor-State Dispute Settlement: Learning from Experience”, *Journal of World Investment and Trade* (2017), forthcoming. More generally, see eg Lu Wang, “State Controlled Entities as Qualified ‘Investors’: Implications for the Pacific Region Investment Treaty Making”, *Transnational Dispute Management* 1 (2015), <www.transnational-dispute-management.com/article.asp?key=2188> (accessed 17 October 2016).

⁶⁵ Lucy Reed and Kenneth Wong, “Evolution of the Formal Requirements for Investment Treaty Protection of ‘Investments’ in Malaysia”, *KLRC A Newsletter* 20 (2015).

⁶⁶ Nottage and Thanitcul, “The Past, Present and Future of International Investment Arbitration in Thailand”; Vanina Sucharitkul, “From *Walter Bau* to *Hopewell*: Pathways to Bangkok Don Muang Airport”, *Asia-Pacific Arbitration Reporter* (1) (2015).

to purely contract-based arbitration awards with foreign investors (not based on consent provided in treaties, and/or drawing on substantive treaty violations).

However, a major adverse contract-based arbitration award in 2004 prompted a Cabinet Resolution requiring prior approval of concession and other contracts with public authorities. This was further tightened in 2009, when Thailand lost its first-ever treaty-based arbitration initiated by Walter Bau in 2005 (and then continued by its liquidator), under a revised BIT with Germany signed in 2002. Soon after the latter treaty (allowing for ISDS) had been ratified and came into force in 2004, directors appointed by majority (government and local) joint venture partners in a highway concession project outvoted the German directors to approve toll reductions that further impacted on the project's profitability. The adverse investment arbitration award attracted enormous public attention in Thailand in mid-2011, when the liquidator obtained a German court order seizing the airplane of the then Crown Prince (now the King of Thailand) in Munich airport.

The Thai government has vigorously resisted enforcement of this (non-ICSID Convention) award through courts in Switzerland (the agreed seat) as well as under the New York Convention in Germany and the US courts. For example, it revived objections that the original investment was not specifically approved, an argument rejected by the arbitral tribunal in its jurisdictional award in 2007. It was only in December 2016 that German courts finally confirmed that the BIT arbitration award should be enforced against security given by the Thai Government to secure release of the plane in 2011. However, rather than abandoning ISDS altogether, in 2013 Thailand revised its 2002 Model BIT to incorporate less pro-investor provisions. Thailand has since concluded a few BITs, as well as agreeing over the last decade to several bilateral FTAs and ASEAN investment treaties retaining ISDS provisions. Part of the context is that Thailand became a net FDI exporter in 2011.

Myanmar, which (like Thailand, Vietnam and Laos) has also not acceded to the framework ICSID Convention, obtained an award in 2003 where the tribunal (chaired by a Thai ex-diplomat) declined jurisdiction. The Singaporean company was found to have made its investment before Myanmar joined ASEAN and ratified its 1987 Agreement, without getting a subsequent specific approval in writing as required by the Agreement for such investments. (Significantly, however, the tribunal opined that for new foreign investments made after ratification, a general approval by the Myanmar investment board could be sufficient to satisfy under a separate provision in the Agreement.)⁶⁷

Laos now faces three related ISDS claims (one with the seat in Singapore⁶⁸) associated with a casino investment originating from Macau. The Lao government is also apparently now developing a Model BIT.⁶⁹ **Cambodia** has adopted the ICSID Convention, but (like Laos and Myanmar) has comparatively few BITs in force and has not yet faced an ICSID claim based on advance consent given under any of those treaties. However, it recently successfully defended an ICSID Convention arbitration initiated by a US investor in a

⁶⁷ See *Yuang Chi Oo Trading Pte Ltd. v Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, Award (31 March 2003) at paras 58-60, <<http://www.italaw.com/sites/default/files/case-documents/ita0909.pdf>> (accessed 17 October 2016); and generally Bonnitcha, "International Investment Arbitration in Myanmar".

⁶⁸ The tribunal's jurisdiction was recently upheld by the Court of Appeal: *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57.

⁶⁹ Mahdev Mohan, and J. Romesh Weeramantry, "Laos", *Journal of World Investment and Trade* (2017), forthcoming.

power plant, based on consent Laos had given in an investment contract.⁷⁰ **Brunei** also has very few BITs, or further investment treaties (other than through ASEAN). It is the only country in Southeast Asia with no known investment claims against it or brought by its own investors against other countries.

Overall, this ongoing variance in ISDS experiences and policy developments within Southeast Asia complicates the picture somewhat. This includes negotiations underway since late 2012 for RCEP, but ISDS was on the agenda in 2015.⁷¹ The inclusion of ISDS in the 1987 and 2009 intra-ASEAN agreements as well as all ASEAN+ FTAs (except with Japan, which omits an investment chapter), plus the limited adverse experience with ISDS claims across Southeast Asia, seem to be major factors behind the general acceptance still of this dispute resolution option. This not only explains why four ASEAN states agreed to ISDS in the TPP investment chapter, but also suggests that these provisions will not prove a deal-breaker if other ASEAN member states were to join that mega-regional FTA.

3. Highlights from the TPP Investment Chapter

Developing country members may indeed have been over-optimistic in acceding to BITs especially from the 1990s, hoping thereby to attract significantly more cross-border investment, without recalibrating treaty provisions in light of the emerging ISDS experiences of other countries.⁷² But the advent of mostly US-style FTAs in the Asian region over the last decade, and their own experiences with ISDS, have allowed for a more careful assessment of investment treaty provisions.

Nonetheless, it remains important to compare the TPP's investment chapter provisions against current major treaties in Southeast Asia. Part 3.1 examines its substantive provisions, while Part 3.2 focuses on the ISDS procedure. Key reference points include the ACIA and ASEAN's FTAs or investment treaties also signed in 2009, with Australia and New Zealand ('AANZFTA'), Korea ('AIAK') and China ('AICA'), as well as the investment agreement signed in 2014 with India ('AIAI').⁷³ The analysis reveals rather limited differences across those four instruments compared to the TPP. This reinforces the conclusion that the TPP's investment chapter, in itself, should not a 'big deal' for existing and potential signatories from Southeast Asia.

⁷⁰ Weeramantry, "International Investment Law and Practice in the Kingdom of Cambodia".

⁷¹ See the Ministerial statements as well as a leaked draft Investment Chapter: Kawharu and Nottage, "Models for Investment Treaties in the Asian Region: An Underview", Part 5.

⁷² Poulsen, *Bounded Rationality and Economic Diplomacy*.

⁷³ *ASEAN Comprehensive Investment Agreement*, signed 26 February 2009, in force 29 March 2012, <<http://investmentpolicyhub.unctad.org/IIA/treaty/3273>>; *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, signed 27 February 2009, in force 1 January 2010, <<http://investmentpolicyhub.unctad.org/IIA/country/11/treaty/3268>>; *ASEAN-Republic of Korea Investment Agreement*, signed 2 June 2009, in force 1 September 2009, <<http://investmentpolicyhub.unctad.org/IIA/country/111/treaty/3257>>; *ASEAN-China Investment Agreement*, signed 15 August 2009, in force 1 January 2010, <<http://investmentpolicyhub.unctad.org/IIA/treaty/3272>>; *Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India*, signed 12 November 2014, not yet in force, <<http://investmentpolicyhub.unctad.org/IIA/treaty/3503>> (all accessed 20 October 2016).

3.1 Substantive Provisions

The TPP investment chapter follows US treaty practice in adopting an asset-based definition of ‘investment’. Following the somewhat tighter definition in the 2004 and 2012 US Model BITs (compared to the 1984 Model), it must have ‘the characteristics of an investment’, such as ‘commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk’ (TPP Art 9.1). A similar clarification is found in ACIA, AIAK and AIAI (as indicated in the summary **Table 2** below), consistently also with recent FTAs concluded by TPP parties with third countries.⁷⁴ Anyway, even without such an express clarification, some investment tribunals have ruled that the concept of ‘investment’ can require similar characteristics.⁷⁵

By contrast, the TPP does not carry additional clarifications found for example in Korea’s recent FTAs with Australia and New Zealand restricting the scope to bring treaty claims for debts owed under commercial supply contracts,⁷⁶ although this issue has arisen in ISDS claims against Malaysia and the Philippines as well as several other countries.⁷⁷ Such express exclusions are found in ACIA, AIAK, AANZFTA and AIAI (but not AICA). Even without this exclusion, however, a tribunal recently rejected jurisdiction regarding a French company’s BIT claim against Vietnam, alleging non-payment by SOEs on contracts concluded during Vietnam’s economic slowdown over 1986-98 due to US trade embargoes and sanctions. The tribunal ruled that there was no investment ‘in’ Vietnam anyway, after finding no evidence of any transfer of know-how, capital or technology into Vietnam and no local staff training activities, with the French firm’s small office in Vietnam only performing very limited administrative tasks.⁷⁸

Nor does the TPP expressly clarify, as in the Korea-NZ FTA, that ‘market share, market access, expected gains, and opportunities for profit-making are not, by themselves, investments’.⁷⁹ However, that footnote is ‘for greater certainty’ and is indeed arguably well accepted anyway, at least among government negotiators and experts in international investment law – although not necessarily the general public.⁸⁰

⁷⁴ See eg Australia’s FTAs agreed since 2014 with Korea (Art 11.28), Japan (Art 14.2(f)) and China (Art 9.1(d)). Yet, curiously, the clarification is not found in its 2012 FTA with Malaysia, which had faced an ISDS claim where investment ‘characteristics’ were extensively canvassed.

⁷⁵ Cf generally Govert Coppens, “Treaty Definitions of ‘Investment’ and the Role of Economic Development: A Critical Analysis of the *Malaysian Historical Salvors* Cases”, in *Investment Law and Dispute Resolution Law and Practice in Asia*, edited by Vivienne Bath and Luke Nottage (London: Routledge, 2011), pp. 174-91.

⁷⁶ The FTA with Australia (Art 11.28) states in the main text: ‘a claim to payment that arises solely from the commercial sale of goods and services is not an investment, unless it is a loan that has the characteristics of an investment’. Korea’s FTA with New Zealand (Art 10.2) instead has footnote 1: ‘forms of debt such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics’ of an investment.

⁷⁷ Regarding the first two, see Sornarajah, “Review of Asian Views on Foreign Investment Law”. For claims against other states, see *Global Trading Corp et al v Ukraine*, ICSID Case No ARB/09/11, cited by Amokura Kawharu, “Expert Paper # 2 - TPPA: Chapter 9 On Investment”, *Trans-Pacific Partnership Agreement New Zealand Expert Paper Series*, <<https://tpplegal.files.wordpress.com/2015/12/ep2-amokura-kawharu.pdf>> (accessed 17 October 2016); and eg *Nova Scotia Power Inc v Venezuela*, ICSID Case No ARB(AF)/11/1.

⁷⁸ Jarrod Hepburn, “Local court affirms UNCITRAL tribunal’s dismissal of Vietnamese BIT claim centered on unpaid invoices for cross-border sales”, *Investment Arbitration Reporter* (13 October 2016), <<http://www.iareporter.com/articles/local-court-affirms-uncitral-tribunals-dismissal-of-vietnamese-bit-claim-centered-on-unpaid-invoices-for-cross-border-sales/>> (accessed 18 October 2016).

⁷⁹ Ibid.

⁸⁰ Cf eg Australian Government, “Investor-State Dispute Settlement, Department of Foreign Affairs and Trade”, <<http://dfat.gov.au/trade/topics/pages/isds.aspx>> (accessed 17 October 2016), remarking that:

The TPP also brings into the main text (and therefore highlights) a US Model BIT footnote expressly excluding ‘an order or judgment entered in a judicial or administrative action’. This appears aimed at preventing claims about local decisions that are allegedly *substantively* unfair, but it might still be arguable that egregious decisions evidence denial of *procedural* justice or FET, and anyway the TPP provision leaves open the possibility of treaty claims for non-enforcement of arbitral awards.⁸¹ Similar express exclusions can be found in AANZFTA and AIAI.

More importantly, the TPP does not limit covered investments to those admitted in accordance with host state’s domestic laws. This qualification was a feature of Malaysia’s BITs from 1993, for example, substituting for coverage only for ‘approved projects’ under earlier treaties. But the former wording is also found in the Malaysia-India FTA signed in 2011 (adding reference also to investments needing ‘characteristics of an investment’), and the AIAI further mentions that it applies to investment that ‘where applicable, has been admitted’ by the host state. Reed and Wong note that whereas Thailand, Cambodia and Vietnam have qualified protection under this 2014 Agreement to investments specifically approved in writing, Malaysia did not. Nor are there similar qualifications under the TPP investment chapter, which only restricts investments to assets having characteristics as such.⁸²

Kawharu adds that wording to restrict protection to investors that did not comply with host state’s laws when initially making the investment were proposed in a leaked draft TPP text of 2012, but were dropped by at least 2015.⁸³ This outcome may be challenging for Thailand to accept, without more, if it wants to join the TPP. After all, Thailand has tried to limit coverage in its treaties (even within ASEAN+ FTAs) to foreign investments specifically approved in writing, or at least admitted in accordance with its laws.⁸⁴ The ASEAN agreements certainly require investments to have been admitted in accordance

‘It is not enough that an investor does not agree with a new policy or that a policy adversely affects its profits.’

⁸¹ On denial of justice or FET claims, and more generally, see Christoph Liebscher, “Monitoring of Domestic Courts in BIT Arbitrations: A Brief Inventory of Some Issues” in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, edited by Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich, eds., (Oxford: Oxford University Press, 2009), p. 105. In response to a recent claim against Canada, see also Kathleen Liddell and Michael Waibel, “Fair and Equitable Treatment and Judicial Patent Decisions”, *Journal of Economic Law* 19 (2016). Arguments regarding non-enforcement of commercial arbitration awards were raised against India (by an Australian investor, White Industries) and Bangladesh, for example, with tribunals adopting various approaches: see generally Andrea Bjorklund, “The Arbitral Award as Investment”, in *The Evolution and Future of International Arbitration*, edited by Stavros Brekoulakis, Julian Lew and Loukas Mistelis, eds., (Alphen aan den Rijn: Kluwer, 2016).

⁸² Reed and Wong, “Evolution of the Formal Requirements for Investment Treaty Protection of ‘Investments’ in Malaysia”, p. 21.

⁸³ Kawharu, “Expert Paper # 2”.

⁸⁴ Reed and Wong, “Evolution of the Formal Requirements for Investment Treaty Protection of ‘Investments’ in Malaysia”, pp. 20-21, noting that Thailand has expressly required specific approval in the ASEAN-Australia-New Zealand FTA (as did Vietnam), the ASEAN-China FTA and ASEAN-India Investment Agreement. Nottage and Thanitkul, “The Past, Present and Future of International Investment Arbitration in Thailand”, observe that Thailand’s 2013 Model BIT applies to investments that have obtained specific approval but only ‘if required’ (similar to the 2009 Comprehensive Investment Agreement), as well as admission ‘in accordance with the laws’ of the host state. For a general argument that approval (or admission) and legality provisions should be interpreted differently rather than conflated, as by some investment tribunals, see Chester Brown, “The Regulation of Foreign Direct Investment by Admission Requirements and the Duty on Investors to Comply with Host State Law”, *New Zealand Business Law Quarterly* 21, no. 4 (2015).

with host state law, but one commentator notes that although this preserves significant regulatory freedom for ASEAN member states, the challenge is how they: ‘can enable prospective investors to predictably identify and determine the exact “laws, regulations, and policies” they are bound to comply with *ex ante*, so as to merit treaty protection *in future*’.⁸⁵

Table 2: Summary Comparing Scope for Covered ‘Investment’

Treaty:	ACIA	AIAK	AICA	AANZFTA	AIAI	TPP
‘Characteristics’	✓	✓✓			✓	✓
Excluding contract claims	✓	✓✓		✓	✓	
Excluding judgments				✓	✓	✓
Admitted under host state law	✓	✓	✓	✓	✓	

Source: Author’s Compilation

Turning from coverage of investments under the TPP, its substantive commitments by host states to foreign investors include the main protections now familiar from Asia-Pacific investment treaties:

- (1) **non-discrimination** compared to local investors (ie national treatment ‘in like circumstances’: Art 9.4) as well as third-country investors (most-favoured-nation treatment ‘in like circumstances’: Art 9.5), both after establishment or admission of the investment, as well as (more controversially) before establishment, but with some listed reservations;⁸⁶
- (2) **fair and equitable treatment**, tied to the evolving customary international law standard (elaborated in Annex 9-A), including a specific reference to denial of justice through local adjudicatory proceedings (contrary to ‘the principle of due process embodied in the principal legal systems of the world’: Art 9.6);
- (3) **compensation for direct and indirect expropriation** (Art 9.7).

The TPP’s main substantive commitments try to build in public welfare considerations, for arbitral tribunals to assess if when foreign investors allege violations, eg by further elaborating what constitutes ‘in like circumstances’, as well as the now-familiar Annex (9-B, derived from US domestic law and then treaty practice) on what constitutes ‘indirect expropriation’. Interestingly, ACIA includes this US-style Annex (as does AANZFTA, unsurprising given also that it was included in the Australia-US FTA signed five years earlier), but none of the other ASEAN agreements do so (even AIAI, signed recently). ACIA and AANZFTA exclude the US-style proviso (reproduced in the TPP’s Annex 9-B) that ‘except in rare circumstances’ non-discriminatory regulatory actions designed and applied to achieve legitimate public welfare objectives (such as the protection of public

⁸⁵ Diane Desierto, “Regulatory Freedom and Control in the New ASEAN Regional Investment Treaties”, *Journal of World Investment and Trade* 16, no. 5-6 (2015), p. 1029.

⁸⁶ Comparing generally ASEAN agreements, see Desierto, “Regulatory Freedom and Control in the New ASEAN Regional Investment Treaties”, p. 1033-35. It is far beyond the scope of this chapter to compare the specific reservations made by individual TPP member states (even from Southeast Asia) compared to those they recorded in earlier ASEAN treaties as well as bilateral IIAs with TPP counterparties.

health, safety and the environment) do not amount to indirect expropriation. However, there is anyway no known tribunal decision that has found such ‘rare circumstances’ and therefore ruled against the host state for taking such non-discriminatory public health or similar measures.

An innovation for TPP partners, including the US itself, is a ‘Drafter’s Note’ issued by government negotiators alongside the TPP that aims at restating at least some NAFTA case law and guiding future interpretations regarding national treatment and most-favoured nation commitments. It elaborates on footnote 14 of the TPP’s Investment Chapter, which requires non-discrimination ‘in like circumstances’ to be assessed on ‘the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives’. Specifically, Henckel has pointed out that according to the Note:⁸⁷

the purpose of the obligation is ‘to ensure that foreign investors or their investments are not treated less favourably on the basis of their nationality’ This indicates that only intentionally discriminatory measures would breach national treatment, which means that measures with legitimate objectives that happen to place a greater burden on foreign investors will not amount to a breach.

The Note also clarifies that a claimant must be in a competitive relationship with a domestic investor or investors for the purpose of comparison of treatment accorded by the measure, and provides that tribunals should take into account the measure’s objective, the applicable legal and regulatory frameworks and whether investors or investments are subject to like legal requirements when determining whether the treatment has been afforded to foreign and domestic investors or investments in like circumstances. Moreover, the Note indicates that to avoid liability, differential treatment of foreign and domestic investors or investments must be plausibly or reasonably connected to a legitimate public welfare objective and have been applied in a non-discriminatory manner.

The text of the provision and Note do not, however, address whether foreign investors or investments as a group should be compared with their domestic counterparts in terms of the benefits and burdens of the measure, or whether the more favourable treatment of a single domestic investor compared to the claimant would suffice for a finding of breach. Most tribunals to date have taken the latter approach, which is a relatively easy hurdle for a claimant to overcome.

TPP Article 9.15 adds that a host state may use measures ‘that it considers appropriate to ensure that investment ... is undertaken in a manner sensitive to environmental, health or other regulatory objectives’, but only if ‘consistent with this Chapter’ (ie non-discriminatory etc). Some commentators suggest that this proviso negates any protections otherwise added by the provision, but others argue that it can ‘pick up both the substantive protections contained in the Investment Chapter and its various carve-outs and clarifications – including those concerning the State’s right to regulate’.⁸⁸ In this respect, in contrast to the US Model BIT, the TPP’s Preamble further expressly acknowledges the

⁸⁷ Henckels, “Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties”, pp. 45-6.

⁸⁸ Sam Luttrell and J. Romesh Weeramantry, “Submission to the Joint Standing Committee on Treaties in respect of the Trans-Pacific Partnership”, 15 March 2015, p. 15, via <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016/Submissions> (accessed 17 October 2016); in response to Lise Johnson and Lisa Sachs, “The TPP’s Investment Chapter: Entrenching, Rather than Reforming, a Flawed System”, Columbia Center on Sustainable Investment Policy Paper, November 2015, <<http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-21-Nov-FINAL.pdf>> (accessed 17 October 2016). The former also point to the award in *Al-Tamimi v Oman*, ICSID Case No ARB/11/33, 3 December 2015, which took into consideration similar wording under the US-Oman FTA. See also Kawharu, “Expert Paper # 2”.

member states' 'inherent right to regulate'. This is also found in abridged form in Australia's FTA with China⁸⁹, but not those with Korea, Japan, Malaysia or (albeit much earlier) Thailand.⁹⁰

The investment chapters by some TPP partners other than the US, such as Australia (eg in its FTAs with Korea and China, signed in 2014 and 2015 respectively, and earlier in AANZFTA) included a general exception, based on GATT Art XX for trade in goods, allowing host states to introduce measures necessary to protect public health etc provided these were not applied in a discriminatory manner or as a disguised restriction on investment. This is also spelled out in other ASEAN agreements.⁹¹ An advantage of this approach may be the extensive jurisprudence from WTO panels applying the GATT exception. Disadvantages include some obvious as well as subtle differences between trade and investment law, as well as a potentially higher evidentiary burden on the state seeking to justify its measures.⁹² Somewhat ironically, adding an express general exception could therefore result in more pro-investor decisions compared to the NAFTA and TPP approach, although this remains to be seen. Certainly, including such a general exception gives something simpler for governments to highlight (compared to a lengthy Drafter's Note) when seeking to assuage public concerns about potential 'regulatory chill' from ISDS-backed treaty commitments.⁹³

Anyway, the TPP limits the scope of protection available to investors in specified areas raising strong public interest concerns, such as public debt claims (Annex 9-G) and tobacco control measures. ISDS claims over the latter can be precluded in advance by member states, under the treaty's overarching General Exceptions chapter (Art 29.5). This is clearly in response to arbitration claims brought by Philip Morris against Australia (and earlier Uruguay) – ultimately unsuccessfully⁹⁴ – although such a sector-specific exclusion had earlier been resisted by the US as setting a dangerous precedent for future treaty negotiations.⁹⁵ The TPP Investment chapter also contains the usual 'denial of benefits' provision (Art 9.14) seeking to limit scope for forum-shopping (as found anyway in the Philip Morris case against Australia). This allows the host state to refuse protection if the investor has no substantial business operations in the home state, although Kawharu

⁸⁹ The states uphold 'rights of their governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare'.

⁹⁰ By contrast, preambles in New Zealand's FTAs (including with Korea and Thailand) more consistently add such wording; Kawharu, "Expert Paper # 2".

⁹¹ Desierto, "Regulatory Freedom and Control in the New ASEAN Regional Investment Treaties", p. 1038-9.

⁹² See generally Henckels, "Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties"; Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge: Cambridge University Press, 2016).

⁹³ See eg generally Jomo, "The Transpacific Partnership Agreement: Some Critical Concerns", p. 41. For an empirical study doubting much independent impact on tobacco measures from ISDS threats, see eg Christine Côté, "A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment", *London School of Economics and Political Science PhD Thesis* (2014) <<http://etheses.lse.ac.uk/897/>> (accessed 17 October 2016).

⁹⁴ Jarrod Hepburn and Luke Nottage, "A Procedural Win for Public Health Measures", *Journal of World Investment and Trade* 18 (2017) p. 307, <<http://ssrn.com/abstract=2842065>> (accessed 17 October 2016).

⁹⁵ On some of the interest group politics behind this unique product-specific carve-out, see Simon Lester, "Applying Public Choice Theory to Trade Agreements" (paper presented at the GELN Biennial Symposium, 'The Age of Mega-Regionals: TPP and Regulatory Autonomy in IEL', University of Melbourne, 20 May 2016).

recommends further clarificatory wording.⁹⁶ ASEAN agreements also include such denial of benefits provisions.

In addition to the overarching commitment to ‘fair and equitable treatment’, the TPP includes a separate chapter 28 on ‘Transparency and Anti-Corruption’ (generally enforceable by inter-state dispute settlement procedures). The transparency requirements extend not only to:

- making publically available general foreign investment-related laws and agreements (as in the ASEAN agreements,⁹⁷ allowing also for enforcement through ISDS); but also
- allowing for reasonable public comment by foreign investors before those are finalised, and due process in related administrative proceedings (as found only in AANZFTA).

Another innovative feature of the TPP is that each member state commits to ‘encouraging’ its enterprises to ‘voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility’ endorsed or supported by the relevant state (Art 9.16). This could extend, for example, to (local and foreign) retailers with respect to adopting the Accord on Fire and Building Safety in Bangladesh, which then locks firms to a separate enforcement regime underpinned by international arbitration law.⁹⁸

3.2 ISDS Procedure

The option of ISDS set out in Section B of TPP Chapter 9, in addition to inter-state dispute settlement under Chapter 28, also tends to follow the provisions in the US Model BIT and its FTAs from around 2004, which in turn have influenced the FTAs drafted by other Asia-Pacific states.⁹⁹ For example, the TPP includes time limits for bringing claims (Art 9.20.1). Similar provisions can be found in ASEAN’s investment agreements.

The TPP also has a fairly standard ‘fork in the road’ provision (Art 9.20.2), requiring investors invoking ISDS to waive rights to henceforth *initiate or proceed with* claims to resolve disputes instead through local courts or administrative tribunals of the host state. This helps preclude situations as in the dispute brought by Philip Morris, which challenged Australia’s tobacco plain packaging law before the High Court of Australia under constitutional law as well as an ISDS tribunal under international treaty law.¹⁰⁰ However, Australia did not join Chile, Peru, Mexico and Vietnam, which extend (through Annex 9-J) the protection for host states by preventing ISDS if the investor had *already filed* claims

⁹⁶ Kawharu, “Expert Paper # 2” (arguing that some recent cases suggest that states must exercise the right to deny benefits proactively and at least before ISDS proceedings commence, which is less effective than clearly putting an onus on claimant investors to prove they have the requisite connection to the home state).

⁹⁷ See generally Desierto, “Regulatory Freedom and Control in the New ASEAN Regional Investment Treaties”, pp. 1039-42 (but noting also some potentially broad exceptions to transparency requirements in the ASEAN agreements).

⁹⁸ Bangladesh Accord Secretariat, “Introduction to the Accord on Fire and Building Safety in Bangladesh”, <<http://bangladeshaccord.org/about/>> (accessed 17 October 2016). The arbitration clause in this Accord is awkwardly worded, but arguably not pathological and therefore unenforceable.

⁹⁹ Luke Nottage and Kate Miles, “Back to the Future’ for Investor-State Arbitrations: Revising Rules in Australia and Japan for Public Interests”, *Journal of International Arbitration* 26, no. 1 (2009), p. 25. See also generally Alschner and Skougarevskiy, “The New Gold Standard?”.

¹⁰⁰ *British American Tobacco Australasia Limited and Others v Commonwealth of Australia* (2012) 250 CLR 1; Australian Government, “Tobacco plain packaging—investor-state arbitration”.

before local courts or tribunals.¹⁰¹ The Annex qualification reinstates the approach taken under the 1994 US Model BIT. By contrast, the 2004 US Model BIT had adopted wording that is (uncharacteristically) more pro-investor in this respect,¹⁰² which has carried over into US and Australian FTA treaty practice – including now TPP Art 9.20.2.

The ASEAN agreements also reveal diversity on this point. ACIA, AANZFTA and even AIAI allow the foreign investor to commence local proceedings, but then abandon those to bring an ISDS claim before one of the international forums listed in the relevant treaty. This is also allowed under AICA ‘before a final judgement [sic] has been reached’ in the local court proceedings (Art 14.5), except for Vietnam as well as Indonesia, Philippines and Thailand – a court claim therefore precludes a subsequent ISDS claim. AIAK is most restrictive: once the investor files in local courts or indeed administrative tribunals, ‘the choice of forum shall be final’ (Art 18.6). The latter approaches may seem more favourable to host states, especially if other ASEAN and Korean investors are unaware of these features and inadvertently first attempt to resolve their disputes through local proceedings. Yet this is arguably unfair on investors, by catching them by surprise, compared to the approach in other ASEAN treaties and the TPP. That can also help to build up capacity in local courts or administrative tribunals, and allow attempts at cheaper and more amicable dispute resolution.¹⁰³

Similarly following the 2004 Model BIT and US FTA practice, and as in Australia’s FTA with Korea (and to a somewhat lesser extent with China), TPP Article 9.23 sets out extensive provisions for transparency in ISDS proceedings. These include public hearings (still rare even in WTO inter-state dispute resolution) and admission of *amicus curiae* briefs from relevant third parties. The ASEAN agreements, even AANZFTA, have much less extensive requirements than the TPP regarding transparency, even though this is often highlighted in public critiques of the ISDS system.¹⁰⁴

Article 9.22 requires arbitral tribunals to decide preliminary jurisdictional objections on a fast-track basis, and may award lawyer and other costs against the claimant after considering whether the claim was frivolous. (However, it does not have to award such costs, and nor is there a general ‘loser-pays’ rule for costs as under the recent Canada-EU FTA: cf TPP Art 9.28.3).¹⁰⁵ Similar provisions are found in the ASEAN agreements.

Unlike all ASEAN agreements (even AANZFTA), except for the recent AIAI,¹⁰⁶ under the TPP an (inter-state) Commission can issue an interpretation of a provision that then

¹⁰¹ Kawharu, “Expert Paper # 2”.

¹⁰² See generally Kantor, “The New Draft Model U.S. BIT”, p. 388.

¹⁰³ Vietnamese law has been revised recently to encourage court-annexed mediation generally, and indeed to require either negotiations or mediation with state authorities in the event of an investment dispute: see Dzung Manh Nguyen and Trang Thi Thu Nguyen, “International Investment Dispute Resolution in Vietnam: Opportunities and Challenges”, *Journal of World Investment and Trade* (2017), forthcoming. Because AIAK requires Korean investors to choose at the outset between local proceedings and ISDS, their legal advisors will almost certainly recommend the latter. Under the other ASEAN treaties, foreign investors can instead commence local proceedings and related mediation, without losing all rights to ISDS.

¹⁰⁴ For recent multilateral initiatives, building on US-led treaty developments, see also Esme Shirlow, “Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-based Investor-State Arbitration”, *ICSID Review* 31, no. 3 (2016), p. 633.

¹⁰⁵ European Commission, *EU-Canada Comprehensive Economic and Trade Agreement*.

¹⁰⁶ Art 20 requires the tribunal to abide by a joint decision of the states party. Art 19 adds an innovative provision specifying that if a joint decision cannot be reached within 60 days of a request from a disputant or the tribunal, any interpretation submitted by one state party nonetheless ‘shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account’.

binds the arbitral tribunal (Art 9.24.3). This is a provision favouring host states over investors, although joint interpretations may be difficult to achieve in practice in regional compared to bilateral treaties. In addition, there is some debate among commentators about whether such a Commission can make such a binding interpretation regarding a pending (or already-filed) dispute,¹⁰⁷ and the China-Australia FTA wording had helpfully clarified that it can. That FTA also adds an innovative provision, not found in the TPP (or any other FTA involving Australia) allowing a host state to issue a ‘public welfare notice’ to the home state of the foreign investor, declaring that it invokes the (Article 9.11.4) general exception for public health measures etc. This triggers inter-state consultations and a requirement on the host state to publically announce its view on the home state’s invocation of the exception. The ASEAN agreements only provide for inter-state consultations at a later stage regarding certain claims involving taxation measures, and any joint interpretations are not necessarily binding on tribunals.

Partly offsetting the omission of Australia’s innovative ‘public welfare notice’ in the TPP, it adds the option (in the General Exceptions chapter) of a host state precluding ISDS (but not inter-state dispute settlement) claims regarding tobacco control measures, as mentioned in Part 3.1 above. More generally, the investment chapter adds that the arbitral tribunal can only award limited damages if the foreign investor successfully claims that it was thwarted in attempting to make an initial investment, due to the host state violating substantive treaty commitments. The tribunal must also issue a draft award to the disputing parties for comment (Art 9.22.10), albeit not to the public or even the home state of the investor. Release of draft decisions is a feature of WTO inter-state dispute resolution, and is found already in the 2004 US Model BIT as well as in Australia’s FTA investment chapters with Chile (signed in 2008) and Korea. This useful feature is not found in any of the ASEAN agreements.

However, similarly to all the ASEAN agreements, the TPP does not establish an appellate review mechanism, to correct for errors of law (as opposed to errors in procedure or jurisdiction) as under the WTO regime. There is only a commitment to consider such a mechanism if and when developed for international investment disputes ‘under other institutional arrangements’ (Art 9.22.11). This provision again derives from the 2004 US Model BIT, in turn prompted by the Bipartisan Trade Promotion Authority Act 2002.¹⁰⁸ However, the 2004 Model provided more specifically that if a multilateral agreement created an appellate mechanism, the parties would strive to agree to extend its jurisdiction to the BIT (a provision reproduced in the Korea-Australia FTA Art 11.20.13); and otherwise the parties would consider adding a bilateral appellate mechanism within three years of the BIT coming into force (with no counterpart in Australian treaties). Yet no appellate review mechanism has ever been added to subsequent US investment treaties, no doubt reflecting the persistent diversity of views on this possible reform to the ISDS system.¹⁰⁹

¹⁰⁷ See generally Micah Burch, Luke Nottage & Brett Williams, “Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century”, *University of New South Wales Law Journal* 35, no. 3 (2012), p. 1013; Tomoko Ishikawa, “Keeping Interpretation in Investment Treaty Arbitration ‘On Track’: The Role of States Parties”, *Transnational Dispute Management* 1, (2014), <<http://www.transnational-dispute-management.com/article.asp?key=2048>> (accessed 17 October 2016).

¹⁰⁸ 19 USC § 3801; Kantor, “The New Draft Model U.S. BIT”, p. 384 and pp. 391-2.

¹⁰⁹ See generally eg Jaemin Lee, “Introduction of an Appellate Review Mechanism for International Investment Disputes - Expected Benefits and Remaining Tasks”, *Transnational Dispute Management* 1 (2014), <<http://www.transnational-dispute-management.com/article.asp?key=2076>> (accessed 17 October 2016).

Luttrell highlights that TPP chapter 27 creates an inter-state ‘TPP Commission’, with power not only to issue interpretations of the treaty but also to resolve disputes about its interpretation and application (Arts 27.2(2)(e)(f)). He further suggests that ‘some form of appellate or review body will be established if or once the TPP comes into force. However, at least for the first few years, any appellate function is likely to be formed by ad hoc committees formed by the TPP Commission ...’.¹¹⁰ However, this sort of institutional arrangement goes back to the North American FTA signed in 1993 (Art 2001 on the Free Trade Commission), but has never exercised appellate review functions in the way envisaged by Luttrell. Instead, the US BITs and FTAs since 2004 have added specific provisions to encourage the potential development of an appellate mechanism.

As introduced in Part 1 above and elaborated in Part 4 below, the EU is now expressing stronger interest in appellate review, including in its TTIP negotiations with the US, where it has even proposed establishing an international investment court.¹¹¹ Indeed, the EU has already agreed on this sort of court (including appellate review for errors of law) in FTAs recently agreed with Canada and Vietnam,¹¹² despite the latter being also party to the TPP and its more traditional ISDS mechanism.

Article 9.21.6 further envisages that, before the TPP comes into force, member states will ‘provide guidance’ on extending the Code of Conduct for arbitrators (already in Chapter 28 for inter-state arbitrations) to ISDS disputes, as well as ‘other relevant rules or guidelines on conflict of interest’. The Australian government will presumably point to the Australia-China FTA, where such a Code of Conduct has already been set out for ISDS arbitrators, and reference may also be made to further proposals now being raised in the EU and beyond.¹¹³

In addition, TPP Art 9.18.1 allows ISDS claims for breaches of:

- (a) the substantive commitments set out in Section A of the Investment Chapter itself;
- (b) an ‘investment authorisation’ of its foreign investment authority,¹¹⁴ or
- (c) an ‘investment agreement’ with central government authorities for their natural resources, specified utilities or infrastructure projects for the general public, which is concluded after the TPP comes into force, and is relied upon by the harmed foreign investor in making the covered investment and the claimed subject matter and damages directly relate to it.

¹¹⁰ Lee, ‘Introduction of an Appellate Review Mechanism for International Investment Disputes’, p. 27.

¹¹¹ See European Commission, ‘The Transatlantic Trade and Investment Partnership’; European Commission, ‘Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations’, 16 September 2015, <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364>> (accessed 17 October 2016).

¹¹² European Commission, ‘EU-Canada Comprehensive Economic and Trade Agreement’.

¹¹³ For arbitrator ethics requirements agreed in their FTA with Canada, see European Commission, ‘EU-Canada Comprehensive Economic and Trade Agreement’. On the possibility of also having state-nominated rosters of ISDS arbitrators, not yet envisaged for the TPP, see Leon Trakman, ‘Standing Panels in Investor-State Arbitration’ (paper presented at the GELN Biennial Symposium, ‘The Age of Mega-Regionals: TPP and Regulatory Autonomy in IEL’, University of Melbourne, 20 May 2016).

¹¹⁴ However, claims are excluded regarding enforcement of authorisation requirements or conditions (footnote 31), and ‘investment authorisation’ excludes for example ‘actions taken by a Party to enforce laws of general application, such as competition, environmental, health or other regulatory laws’ (footnote 10). Ministerial decisions not to approve investment proposals are not subject at all to ISDS or inter-state dispute settlement (Annex 9-H), consistently with Australia’s past FTA practice. However, Kawharu, ‘Expert Paper # 2’, argues that claims may be possible for a foreign *vendor* of an investment for non-approval, or for administration of foreign investment legislation (such as monitoring of compliance with approval conditions).

The latter two scenarios are also covered in the Korea-Australia FTA, but the TPP goes on to expressly allow the host state then to raise a related counterclaim or set-off against the foreign investor (Art 9.18.2).

Annex 9-L adds innovative provisions dealing with potential multiple claims where there is a specified ‘investment agreement’. If the authorities have consented therein to arbitration under the Arbitration Rules of ICSID, UNCITRAL, ICC or London Court of International Arbitration, the investor cannot make an ISDS claim under Section B of the TPP Investment Chapter (paragraph 1). But it does not waive rights to initiate or proceed with arbitration under those agreed Rules (paragraph 2) ‘with respect to any measure alleged to constitute a breach’ under Art 9.18. Nonetheless, if such claims ‘have a question of law or fact in common and raise out of the same events or circumstances’ as a claim for breach of Section A substantive treaty commitments (or investment authorisations), the disputing parties can agree to consolidation of these sets of proceedings or otherwise be subjected to consolidated proceedings under Art 9.27. In other words, both contract- and treaty-based claims are channelled more efficiently into one forum, benefitting especially host states and addressing a scenario that can arise quite often in practice.¹¹⁵

Curiously, however, Annex 9-L does not list for such treatment investment agreements containing consent to arbitration of contract-based disputes under the Arbitration Rules of major regional centres, such as the Kuala Lumpur Regional Centre for Arbitration or the Singapore International Arbitration Centre (SIAC).¹¹⁶ Perhaps they were considered to have less experience in investment arbitrations than the ICC or LCIA. But it means that parallel treaty claims may still be brought by the claimant under Art 9.18.4 before a tribunal constituted by ICSID, UNCITRAL or other agreed Arbitration Rules.¹¹⁷ Legal advisors to investors wishing to preserve this option, perhaps to obtain greater leverage in settlement negotiations in the event of a dispute, may therefore seek to conclude investment agreements that provide for example for SIAC Arbitration Rules.

¹¹⁵ Cf eg *SGS v Pakistan*, ICSID Case No ARB/01/13, *SGS v Philippines*, ICSID Case No ARB/02/6, although complicated by the relevant BITs also including an umbrella clause; outlined by Matthew Wendlandt, “SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes”, *Texas International Law Journal* 43 (2008), p. 523. Various tribunals have accepted jurisdiction to rule on contract-based disputes under ‘generic treaty dispute settlement clauses’ (whereby the host state consents to arbitration of ‘any’ disputes related to the covered investment). There is far less case law suggesting that tribunals can assume jurisdiction under such clauses (thus applying the applicable contract law, as opposed to international law pursuant to an ‘umbrella clause’) if the foreign investor is not also claiming violation of substantive treaty commitments. However, the latter tendency has been criticised: Anthony Sinclair, “Bridging the Contract/Treaty Divide” in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, edited by Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich, eds., (Oxford: Oxford University Press, 2009), p. 92. In addition, arguing that general doctrines under international law could be developed so investment tribunals can give preclusive effect to commercial arbitration awards, see Maja Stanivukovic, “Investment Arbitration: Effects of an Arbitral Award Rendered in a Related Contractual Dispute”, *Transnational Dispute Management* 4 (2014) <<http://www.transnational-dispute-management.com/article.asp?key=2138>> (accessed 17 October 2016).

¹¹⁶ Since at least 2015, the KLRCA has been building up its capacity in international investment arbitration: see eg Kuala Lumpur Regional Centre for Arbitration, “KLRCA International Investment Arbitration Conference”, (10-11 March 2016), <<http://klrca.org/events/klrca-international-investment-arbitration-conference-kiac-2016/>> (accessed 17 October 2016).

¹¹⁷ In addition, the TPP and Annex 9-L do not address the situation where the investor agrees with the host state under an investment contract to bring claims (even exclusively) before a local court. In principle, treaty-based claims operate at a different (international law) level, so are not precluded. For a critique, see Johnson and Sachs, “The TPP’s Investment Chapter”.

Interestingly, on 1 February 2016 SIAC initiated a public consultation on SIAC Investment Arbitration Rules.¹¹⁸ Well-advised host states may instead seek to incorporate those into their investment contracts. First, these Rules build in some – but not all¹¹⁹ – features better tailored to public interests associated with investment disputes, such as greater transparency. Secondly, if a treaty-based claim is ever initiated, it may be easier – although perhaps still difficult – to persuade an investor to agree to one set of arbitration proceedings under the SIAC Investment Arbitration Rules, rather than ICSID or UNCITRAL Rules. In addition, SIAC and the Singaporean government may be hoping that SIAC Investment Arbitration Rules may eventually be added to a list similar to Annex 9-L in any amendments to the TPP or future FTAs such as RCEP.

A final little-remarked provision of the TPP Investment Chapter, albeit found in Australia's other FTAs, concerns the possibility of minority shareholders bringing ISDS claims against host states. Under Art 9.19, a claimant may submit an 'investment dispute' to arbitration regarding, for example, a violation of Section A substantive commitments by the host state. Under Art 9.1, an 'investment' includes shares as an asset 'that an investor owns or controls, directly or indirectly'. (Unlike some investment treaties promoted by other states, there is no exclusion for 'portfolio investment'.¹²⁰) Article 9.19.1(b) further allows an investor in shares to make a *representative claim* 'on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly'. However, although this may allow a claim by a minority investor, it necessitates a controlling interest in the investment vehicle in that host state, and any relief awarded (such as damages) then goes to that local vehicle (Art 9.28.5).

By contrast, it seems that any minority shareholder may seek arbitration 'on its own behalf' if it 'has incurred loss or damage of, or arising out of, that breach' (Art 9.19.1(a)). It is accepted, even by those generally critical of claims by minority shareholders under investment treaties,¹²¹ that shareholders can bring a *direct claim* at least for direct interference with their rights, such as host state laws seizing their shares or preventing exercise of their voting rights in the local investment vehicle.

More controversial is whether a minority shareholder can make a *reflective loss claim* for the diminution of the value of their shareholding, due especially to the host state's violation of fair and equitable treatment (as found in the Walter Bau case, for example¹²²) or expropriation relating to the local investment vehicle. Many such damages claims have been upheld, beginning in fact with the first-ever successful ISDS claim for violation of UK BIT commitments, brought by a Hong Kong minority investor into a locally incorporated shrimp farm in Sri Lanka.¹²³ In particular, several claims were upheld by

¹¹⁸ Singapore International Arbitration Centre, "Public Consultation on Draft SIAC Investment Arbitration", (1 February 2016), <<http://www.siac.org.sg/69-siac-news/469-public-consultation-on-draft-siac-investment-arbitration-rules>> (accessed 17 October 2016).

¹¹⁹ For example, draft Art 29.5 allows the chairperson a casting vote to issue an award, whereas the UNCITRAL and ICSID Rules require a majority vote of the tribunal: see generally Nottage and Miles, above n 118.

¹²⁰ Cf eg the recently revised India Model BIT (January 2016) Art 1.4, at <http://finmin.nic.in/the_ministry/dept_eco_affairs/investment_division/ModelBIT_Annex.pdf> (accessed 17 October 2016).

¹²¹ See eg, from an Argentinian official, Gabriel Bottini, "Indirect Claims under the ICSID Convention", *University of Pennsylvania Journal of International Law* 29, no. 3 (2008), pp. 563-564.

¹²² Nottage and Thanitkul, "The Past, Present and Future of International Investment Arbitration in Thailand".

¹²³ *AAPL v Sri Lanka*, ICSID Case No Arb 87/3. The majority award (27 June 1990) has been described as a 'silent revolution', but not with respect to allowing a claim from a minority shareholder (for destruction of the investment

minority US investors in local companies holding concessions or other arrangements with Argentina after its economic crisis around 2000, under the 1991 BIT.¹²⁴ However, the wording of these treaties is less elaborate from that found in the US Model BITs of 2004 and 2012, in turn derived broadly from NAFTA, and which have carried over into the TPP and other US-inspired FTA provisions.

In 2004, a NAFTA tribunal rejected a jurisdictional objection by Mexico against a claim under Art 1116 by a 15% minority shareholder in a local company operating sugar mills that were allegedly subject to direct expropriation as well as breaches of FET and national treatment obligations,¹²⁵ despite acknowledging that in principle such claims might lead to double recovery (if the local company also was able to claim against the host state, for example under host state law).¹²⁶ The tribunal upheld the admissibility of the claim for direct expropriation, but ultimately dismissed it because a local court had since rendered judgment neutralising the effect of this. It also upheld the admissibility of the FET claim for reflexive loss, although holding that this substantive violation was not proven.

However, before permitting ISDS claims NAFTA Art 1121 requires the investor *and the local investment vehicle* to provide waivers of rights to continue other proceedings, regarding claims by an investor on its own behalf for loss arising out of treaty violations (Art 1116) as well as by an investor on behalf of its investment vehicle (Art 1117). Douglas points out that this can limit scope for reflexive loss claims by minority shareholders, as the majority shareholders may be satisfied by any relief provided by the host state to the investment vehicle, and therefore not provide the necessary waiver.¹²⁷ Páez-Salgado goes on to argue that the US Model BITs since 2004 and TPP ‘retain the essence of NAFTA provisions’, thus providing ‘for direct claims and representative claims, [but] excluding reflective loss claims’.¹²⁸

However, those Model BITs and the TPP (Art 9.21.2(b)(i)) require a written waiver regarding other proceedings, prior to ISDS, only from the claimant (such as a shareholder) and *not from the local investment vehicle* in the scenario of claims brought by the investor on its own behalf, as opposed to on behalf of the local vehicle (where double waivers are required: Art 9.21.2(b)(ii)). This reinstates more possibility of double recovery, and also leaves open the question of whether reflexive loss claims by a minority shareholder are permitted. Tribunals will need to decide whether it ‘has incurred loss or damage of, or arising out of that breach’ of the TPP (under Art 9.19.1(a)), bearing in mind case law and commentary under various BITs and NAFTA that mostly recognises minority shareholder

vehicle by government forces during a civil war): Joost Pauwelyn, “At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed”, *ICSID Review* 29 (2014). Nor is this aspect criticised by the strongly-worded dissenting award (also available at <<http://www.italaw.com/cases/96>> (accessed 17 October 2016)).

¹²⁴ Dolores Bentolila, “Shareholders’ Action to Claim For Indirect Damages in ICSID Arbitration”, *Trade, Law and Development* 2, no. 1 (2010).

¹²⁵ *Gami Investments v The Government of the United Mexican States*, UNCITRAL, Final Award. 15 November 2004, available at <<http://www.italaw.com/cases/474>> (accessed 17 October 2016); critically examined in Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009), pp. 420-25.

¹²⁶ On the policy implications, see also generally David Gaukrodger, “Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law”, Organisation for Economic Co-operation and Development Working Paper No. 2014/02 (2014), <http://www.oecd.org/investment/investment-policy/WP-2014_02.pdf> (accessed 17 October 2016).

¹²⁷ Douglas, *The International Law of Investment Claims*, p. 446.

¹²⁸ Daniela Páez-Salgado, “Settlements in Investor-State Arbitration: Are Minority Shareholders Precluded from Having Treaty Claims Adjudicated?”, *Journal of International Dispute Settlement* 7 (2016), p. 22.

claims for reflexive loss.¹²⁹ Future treaty negotiators may need to reconsider the pros and cons of allowing such treaty claims, contrary to the traditional position under customary international law and despite the possibility of double recovery, as well as the related vexed issue of whether any contractual settlement of a dispute between the investment vehicle and host state should preclude minority shareholder claims.¹³⁰

4. Conclusions

The wording of many Asia-Pacific FTA investment chapters, derived from recent US treaty practice and epitomised by the TPP, can be seen as a blessing and curse.¹³¹ On the one hand, the wording of the US Model BIT of 2004 (largely maintained in 2012¹³²) drew on NAFTA drafting and actual experiences with ISDS claims to incorporate provisions that were mainly more favourable to host states,¹³³ compared to earlier US Models and BIT wording that was more pro-investor even than Western European templates.¹³⁴ This shift influenced FTA negotiations by the US with regional partners such as Australia from 2002, and made it easier to sign its two other early FTAs with Singapore and Thailand, which had respectively concluded or begun their own bilateral FTA negotiations with the US. The result is more balanced investment treaty regimes for FTA investment chapters, compared to earlier-generation BITs for those countries and other (actual and potential) TPP signatories.¹³⁵

¹²⁹ Christoph Schreuer, “Shareholder Protection in International Investment Law”, *Transnational Dispute Management* 3 (2005), <<http://www.transnational-dispute-management.com/article.asp?key=426>>, manuscript also at <http://www.univie.ac.at/intlaw/pdf/csunpublpaper_2.pdf> (accessed 17 October 2016); Abby Cohen Smutny, “Claims of Shareholders in International Investment Law” in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, edited by Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich, eds., (Oxford: Oxford University Press, 2009), p. 92; Andrea Bjorklund, “NAFTA Chapter 11” in Chester Brown, ed., *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013), p. 501 (albeit without specifically addressing the possibility of reflexive loss claims by a minority shareholder under NAFTA Art 1116); Lee M. Caplan and Jeremy K. Sharpe, “United States” in Chester Brown, ed., *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) (albeit without specifically addressing the possibility of reflexive loss claims by a minority shareholder under 2012 Model BIT Art 24(1)(a)). But for interpretations of treaties and case law to limit minority shareholder reflexive loss claims for violations of FET or indirect expropriation, see Douglas, *The International Law of Investment Claims*, especially p. 415-51.

¹³⁰ See generally Páez-Salgado, “Settlements in Investor-State Arbitration”; Bentolila, “Shareholders’ Action to Claim For Indirect Damages in ICSID Arbitration”, p. 139. The practical difficulties for a foreign minority shareholder are illustrated by the quite recent case of *Walter Bau* (see Sucharitkul, “From *Walter Bau* to *Hopewell*”), where the German investor held only 10% whereas local companies held 30% and the government itself held a majority stake in the vehicle, when the investor finally filed its (ultimately successful) BIT claim for reflexive loss against Thailand in 2005. Various settlements had earlier been reached between the local investment vehicle and Thai authorities, related to prior disputes related to the long-term concession agreement: Nottage and Thanitkul, “The Past, Present and Future of International Investment Arbitration in Thailand”.

¹³¹ I thank Prof Jaemin Lee for this observation, in private conversation comparing developments in Korea and Australia.

¹³² Mark Kantor, “Little Has Changed in the New US Model Bilateral Investment Treaty”, *ICSID Review* 29, no. 2 (2012).

¹³³ See generally Kantor, “The New Draft Model U.S. BIT”; and David Gantz, “Investor-State Dispute Settlement in US Law, Politics and Practice: The Debate Continues”, CIGI Investor-State Arbitration Series No. 9, (August 2016), <<https://www.cigionline.org/publications/investor-state-dispute-settlement-us-law-politics-and-practice-debate-continues>> (accessed 20 October 2016). But see Part 3.2 above, on wording that may be more permissive of minority shareholder claims for reflexive loss even compared to NAFTA.

¹³⁴ Poulsen, *Bounded Rationality and Economic Diplomacy* (highlighting elaborate performance prohibitions, and pre-establishment non-discrimination provisions promoting investment liberalisation as well as protection, as features of US treaty practice).

¹³⁵ See eg Luke Nottage, “Investor-State Arbitration Policy and Practice in Australia”. However, the ICSID tribunal in *Planet Mining v Indonesia* argued that several of Australia’s early BITs intentionally contained highly constrained

On the other hand, the spread of the US-derived FTA template through subsequent bilateral and more recent regional treaties risks creating a new ‘status quo bias’¹³⁶ that prevents or limits further significant rebalancing, even if that can be shown to be optimal. Specifically, it makes it hard for Asia-Pacific states to develop their treaty practice towards the new approach being pressed by the EU, in its TTIP FTA negotiations with the US but also more broadly.¹³⁷ Compared to TPP investment chapter wording, that approach arguably provides narrower substantive protections for fair and equitable treatment (by enumerating proscribed behaviours and constraining the concept of legitimate expectations), more guidance on general exceptions, and express reference to proportionality of the adopted measures when assessing indirect expropriations.¹³⁸

In terms of procedural innovations, the new EU approach involves moving away from ad hoc appointment of investment treaty arbitrators to create a standing investment court, which moreover can engage in appellate review. This move is potentially game-shifting, given the predominance so far of ISDS arbitrators from backgrounds in law firms.¹³⁹ They would generally start off (as least) with less exposure to key concepts developed in national public law and recently international law, such as proportionality and standards of review of state action. Indeed, other fields of international law that have expanded concepts of proportionality, despite little or no direct textual references, have done so in the context of standing judiciaries. If the EU successfully promotes the institution of permanent investment courts, the latter may feel similarly more confident about developing proportionality doctrine (and the related question of the standard of review) to adjudicate international investment disputes in a more principled way.¹⁴⁰ The EU has already introduced this court institution into its FTA with Vietnam, despite the latter having agreed to more conventional ISDS in the TPP.¹⁴¹ It is conceivable that something like a permanent investment court could emerge even by Side Letters even among existing TPP

access to ISDS protections: cf Nottage, “Do Many of Australia’s Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration?”. Although a questionable conclusion, this would instead make Australia’s subsequent FTAs – all clearly providing advance consent when including ISDS protections – significantly more pro-investor. Anyway, to clarify the situation Australia arguably needs at least to terminate BITs with new FTA partners (as it was careful to do with Chile in 2008, and now some other TPP partners). On the complex interaction between bilateral and regional treaties, particularly in the Asia-Pacific region, see generally Teerawat Wongkaew, “Disentangling the Regional Comprehensive Economic Partnership (RCEP) Noodle Bowl: Analysis of Legal and Policy Challenges”, *Transnational Dispute Management* 1 (2015), <www.transnational-dispute-management.com/article.asp?key=2173> (accessed 17 October 2016); Julien Chaisse, “Asian Noodle Bowl of International Investment Agreements: How to Mitigate the Problems?”, *Current Issues in Asia-Pacific Foreign Direct Investment* 54 (2015) edited by Australian APEC Study Centre at RMIT.

¹³⁶ Cf generally Poulsen, *Bounded Rationality and Economic Diplomacy*.

¹³⁷ European Commission, *The Transatlantic Trade and Investment Partnership*; Stephan Schill, “Editorial: US Versus EU Leadership in Global Investment Governance”, *Journal of World Investment and Trade* 17, no. 1 (2016).

¹³⁸ However, the latter reference might also work in favour of investors, and the TPP is clearer in limiting national treatment and MFN violations to intentional discrimination: Henckels, “Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties”.

¹³⁹ Joost Pauwelyn, “The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators Are from Venus”, *American Journal of International Law* 109 (2015).

¹⁴⁰ Caroline Henckels, *Proportionality and Deference in Investor-state Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge: Cambridge Studies in International and Comparative Law, 2015), comparing emergent investment treaty case law with the approach of the WTO Appellate Body, Court of Justice of the European Union, and the European Court of Human Rights.

¹⁴¹ Michael Daly and Jawad Ahmad, “The EU-Vietnam FTA: What Does it All Mean? What Does it Mean for the Future?”, *Kluwer Arbitration Blog*, (24 December 2015) <<http://kluwerarbitrationblog.com/2015/12/14/the-eu-vietfabove-nam-fta-what-does-it-all-mean-what-does-it-mean-for-the-future/>> (accessed 17 October 2016).

signatories,¹⁴² especially if domestic political circumstances impede ratification, or potential future partners such as Indonesia become ever-more sceptical about ISDS-based treaty protections. This development is probably even more likely in the context of the ongoing RCEP negotiations, involving India, and bilateral negotiations commenced by the EU with countries like Thailand and recently Australia.¹⁴³

¹⁴² After all, Australia and New Zealand have already signed Side Letters that completely exclude ISDS bilaterally: Andrew Robb, Minister of Trade, “Australia – New Zealand: Investor State Dispute Settlement, Trade Remedies and Transport Services”, Letter to Todd McClay, Minister of Trade, (4 February 2016), <<http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-new-zealand-investor-state-dispute-settlement-trade-remedies-and-transport-services.PDF>> (accessed 20 October 2016).

¹⁴³ See Australian Government, “Australia-European Union Free Trade Agreement”, Department of Foreign Affairs and Trade, <<http://dfat.gov.au/trade/agreements/aeufta/pages/aeufta.aspx>> (accessed 17 October 2016).

APPENDIX: ISDS Claim Statistics

Critics of the TPP, and ISDS protections more generally, have often argued that a particular concern is that the US is not only a large source of FDI, but it is ‘the nation whose corporations use ISDS the most’.¹⁴⁴ The inference is that US investors are particularly ‘litigious’ in the field of investment treaty claims, rather like they are purported to be in civil litigation in their home courts.¹⁴⁵ In fact, empirical research into comparative civil dispute resolution patterns has long noted that a representative US state like Arizona – in terms of urban/rural population mix, etc – has fewer filings per capita than several other countries.¹⁴⁶

Comparing ISDS claim patterns, while Table A and Figure A-1 below confirm that claimants from the US had indeed lodged the most claims by end-2015 (138), on a per capita basis (per 100,000 people in the home state) US investors are historically less ‘litigious’ compared to investors from eleven other countries whose investors have filed considerable numbers of ISDS claims. Those states are all the EU (including Belgium and Luxembourg, which generally conclude IIAs collectively and whose investors have filed the most claims per capita), except for Switzerland (whose investors become the fourth most litigious) and Canada (the fifth most litigious home state). As further indicated in Table A and Figure A-2, if we group together most of these EU states their investors’ per capita ISDS claim rate is also higher than that for US investors.

Admittedly, many of those other more highly-ranked states have historically attracted foreign investment for logistical and/or tax reasons (Luxembourg/Belgium, Cyprus, Netherlands). Some may have come from and remained controlled by US investors, who could have then launched ISDS claims under those countries’ claims (to the extent not precluded from denial of benefits or other treaty provisions).¹⁴⁷ However, other such investments would have come from outside the US; data is hard to come by.

It could also be retorted that per capita claim rates do not accurately reflect litigiousness anyway, in the sense of a propensity to sue based on a comparable corpus of underlying disputes. However, the latter is extremely difficult to determine (even for civil dispute resolution within one country, which is why researchers tend to use per capita filings). A starting point would be to ascertain outbound FDI stocks. Yet by the end of 2015 the US had a very large accumulated volume, even compared to the outbound stocks of major EU states combined (eg UK, Germany, France).¹⁴⁸ The US did have comparatively few IIAs, but some of those concluded by EU states may not originally have had ISDS protections (eg the initial BIT between Germany and Thailand),¹⁴⁹ or may have been concluded with

¹⁴⁴ See eg Jess Hill (quoting ANU Professor Thomas Faunce), <http://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/6634538>.

¹⁴⁵ See eg Shotaro Hamamoto, ‘Recent Anti-ISDS Discourse in the Japanese Diet: A Dressed-Up But Glaring Hypocrisy’ (2015) 16(5-6) *Journal of World Investment and Trade* 931. See also Luke Nottage, ‘ISDS in the Japanese Diet’ on *Japanese Law and The Asia-Pacific* (2 December 2015)

<http://blogs.usyd.edu.au/japaneselaw/2015/12/isds_in_the_japanese_diet.html>.

¹⁴⁶ Luke Nottage and Christian Wollschlaeger, ‘What Do Courts Do?’ [1996] *New Zealand Law Journal* 369.

¹⁴⁷ See eg the (first and only treaty-based) claim brought by Lonestar against Korea, outlined by Shin and Chung, ‘Korea’s Experience with International Investment Agreements and Investor-State Dispute Settlement’.

¹⁴⁸ See <https://data.oecd.org/fdi/fdi-stocks.htm>.

¹⁴⁹ Nottage and Thanitcul, ‘The Past, Present and Future of International Investment Arbitration in Thailand’.

counterparties that were less economically significant (thus not generating much additional FDI) compared to those focused on in US treaty negotiations. It is also possible that the nature of US outbound investment differed from that originating from the EU, Switzerland or Canada. After all, for example, ISDS cases world-wide tend to congregate more on services and primary industry sectors, compared to FDI in manufacturing.¹⁵⁰ Additional research along these lines would be helpful, although difficult.

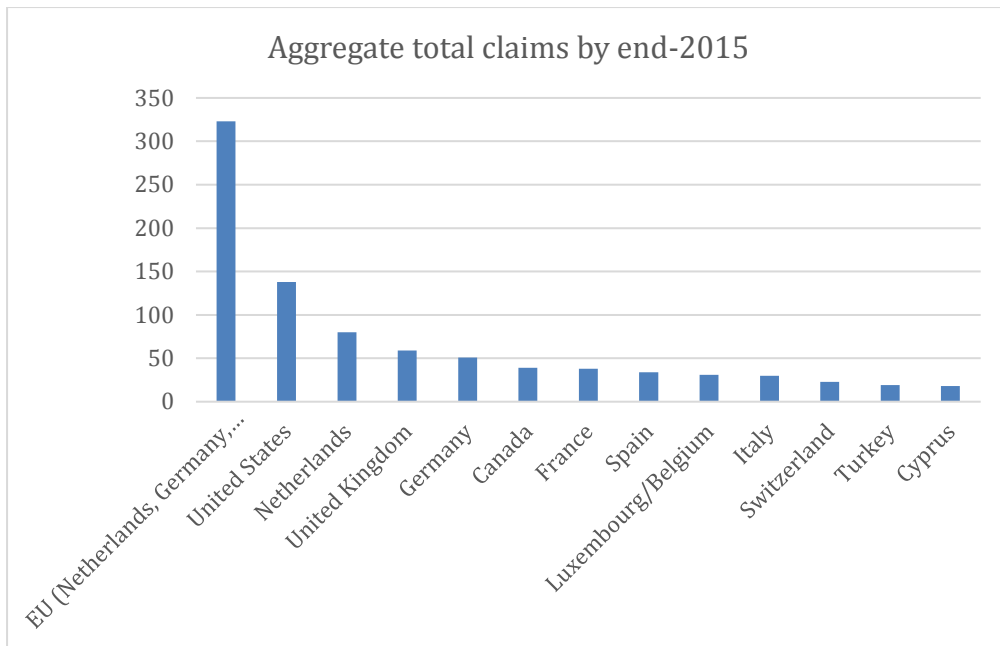
Table A: Most ISDS Claims Filed – Totals vs Per Capita

Ranking (per capita)	State(s) of Claimant	Claims per capita by end- 2015 (per 100,000 people)	Total claims by end 2015
1	Luxembourg/Belgium	5.32	31
2	Cyprus	1.49	18
3	Netherlands	0.47	80
4	Switzerland	0.28	23
5	Canada	0.11	39
6	United Kingdom	0.09	59
7	Spain	0.07	34
8	EU (Netherlands, Germany, France, Spain, Luxembourg)	0.06	323
9	Germany	0.06	51
10	France	0.057	38
11	Italy	0.048	30
12	United States	0.042	138

Sources: <http://investmentpolicyhub.unctad.org/ISDS> and
<https://www.cia.gov/library/publications/the-world-factbook/>

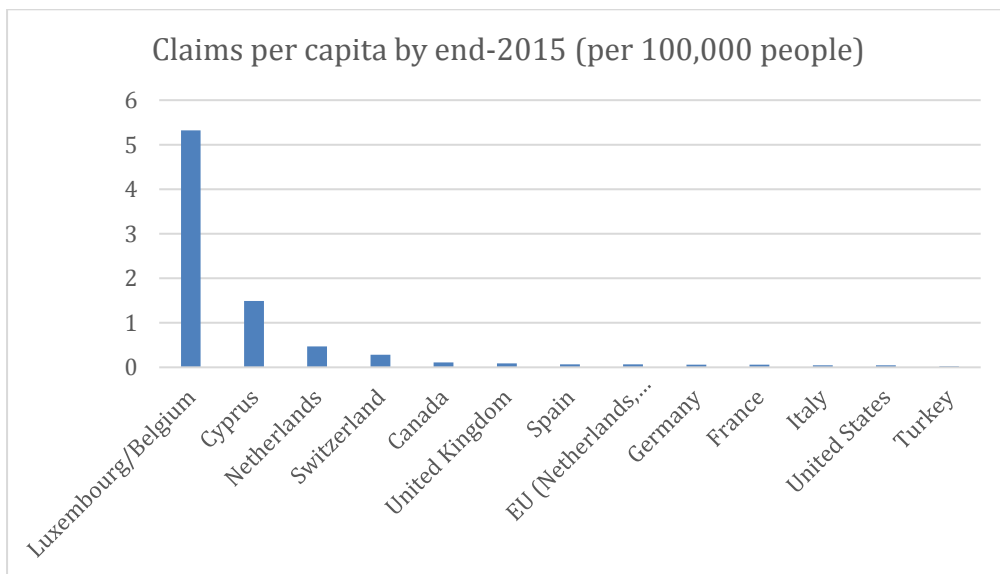
¹⁵⁰ UNCTAD, “Investor-State Dispute Settlement: Review of Developments in 2015”, IIA Issues Note (No 2, June 2016) <http://investmentpolicyhub.unctad.org/Publications/Details/144> , 5.

Figure A-1: Total ISDS Claims Filed (by Home State of Investor)



Sources: <http://investmentpolicyhub.unctad.org/ISDS> and <https://www.cia.gov/library/publications/the-world-factbook/>

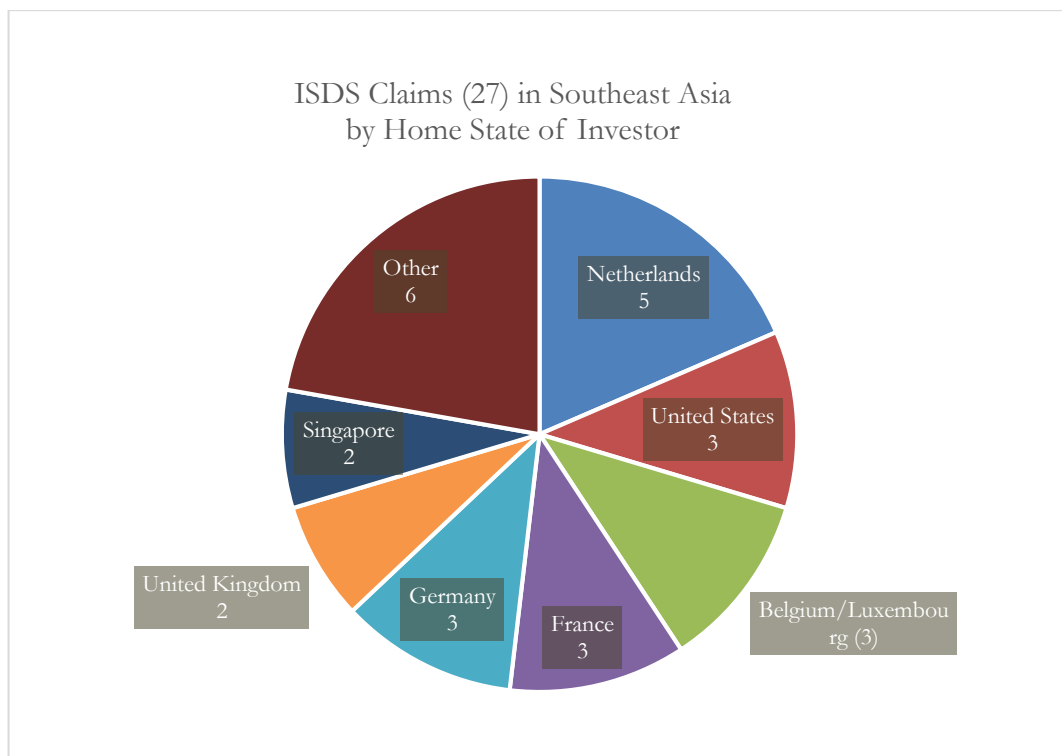
Figure A-2: Per capita ISDS Claims Filed (by Home State of Investor)



Sources: <http://investmentpolicyhub.unctad.org/ISDS> and <https://www.cia.gov/library/publications/the-world-factbook/>

Meanwhile, it is certainly more useful for policy-makers and commentators concerned about exposure of host states to ISDS claims by ‘litigious’ foreign investors from particular countries to focus on per capita rates rather than absolute numbers of claims. Further, in the Southeast Asian context, one recent study has located 27 total claims (relatively few, given the large volume of FDI now in that region). Only three claims have been brought by US investors, as indicated in Figure B below.¹⁵¹ This hardly seems grounds for being concerned about treaties such as the TPP on the basis that they include the US.

Figure B: ISDS Claims vs Southeast Asian States



Source: Nottage and Thanitcul, “International Investment Arbitration in Southeast Asia”, Appendix

¹⁵¹ Nottage and Thanitcul, “International Investment Arbitration in Southeast Asia”. Two were brought by US companies under investment contracts (against Indonesia, eventually obtaining US\$2.7m; and failing against Cambodia), while another claim was brought under the US treaty with Vietnam (unsuccessfully).