MODELS FOR INVESTMENT TREATIES IN THE ASIA-PACIFIC REGION: AN UNDERVIEW

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I. INTRODUCTION

A. What is the Future for US-Style Investment Treaties in the Asia-Pacific Region?

The Trans-Pacific Partnership (TPP) is a major free trade initiative involving twelve Asia-Pacific countries: New Zealand, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, the United States, and Vietnam.[1] Its signature on 4 February 2016 seemingly confirmed both the trend towards regionalism in free trade agreements as well as the expanding influence of US-style approaches to investment liberalization and protection. New Zealand initiated the domestic procedures needed for it to ratify the agreement almost immediately and had completed them by November 2016 (the first TPP country to do so), as outlined further in Part II.B(4) below.[2] On January 20, 2017, Japan notified New Zealand (as Depositary for the TPP) that Japan had completed its domestic legal procedures necessary for entry into force of the Agreement. However, according to a letter dated January 30, 2017, the United States sent a letter to New Zealand (as Depository) stating an intention not to become a party to the TPP, and that the United States therefore had no legal obligations arising from former President Barack Obama's signature almost a year earlier.[3]

Since the election of Donald Trump to the US presidency, the prospects of the TPP entering into force in its current form now seem remote. One of the President's first executive acts, issued on January 23 and as foreshadowed during his earlier electoral campaign, was to withdraw the United States from any further participation in the agreement.[4] This was despite Australia's Prime Minister

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[1] *See generally* The Trans-Pacific Partnership, Office of U.S. Trade Rep., https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (last visited Feb. 20, 2017). This initiative is not in force. *Id.*

[2] *See* Trans-Pacific Partnership Agreement Amendment Act 2016, (N.Z.). *See also Trans-Pacific Partnership*, NEW ZEALAND TRANS-PACIFIC PARTNERSHIP, https://www.tpp.mfat.govt.nz/ (last visited Sept. 1, 2017) (explaining the legislative process of the Trans-Pacific Partnership).

[3] *Trans-Pacific Partnership Agreement (TPP): Current Status of the Agreement*, N.Z. FOREIGN AFF. & TRADE, https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/ (last visited Sept. 1, 2017).

[4] *See* Memorandum from U.S. President Donald Trump on Withdrawal of the U.S. from the Trans-Pac. P'ship Negots. & Agreement (Jan. 23, 2017) (on file with Federal Register).

Malcolm Turnbull agreeing with his Japanese counterpart in Sydney on January 14, 2017, that both countries remained committed to free trade initiatives and would work together towards the early entry into force of the TPP, as well as towards promptly concluding negotiations for the Regional Comprehensive Economic Partnership (RCEP) involving 14 other Asian countries but not the United States.[5] In Australia, a joint committee of both Houses of Parliament (with the majority of committee members from the Turnbull Coalition Government) issued a non-binding recommendation that the Government proceed to ratify the TPP that it had signed earlier.[6] However, a Senate committee (where the Government lacks a majority) recommended on February 7, 2017, that the Australian Government "should defer undertaking binding treaty action until the future of the [TPP] Agreement is clarified through further negotiations with Australia's major trading partners," and also should "expedite widely supported reforms to the treaty-making process in order to assist the completion of future trade agreements."[7] It remains uncertain when and how the Government will proceed to present tariff-reduction Bills needed before Australia can ratify the TPP, given the domestic political situation outlined further in Part II.B(4) below.

The new stance adopted by the new Trump Administration is very significant given that ratification by the United States is required before the TPP can come into force in its current form. (This is because Article 30.5 requires ratification either by all twelve original signatories or at least six "which together account for at least 85 per cent of the combined gross domestic product" of the 12 signatories.) Despite President Trump's continued public criticism of the TPP,[8] other TPP partners are considering various ways forward. For example, Singapore's Trade and Industry Minister reportedly suggested that:

> • the remaining eleven countries might all push ahead to ratify the TPP, in the hope for another change of heart by the United States;
>
> • they might instead re-draft the treaty so it can come into force only among the eleven countries, or use the TPP's commitments as the basis for pursuing missing bilateral free trade agreements (FTAs) among themselves; and/or

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[5] *Malcolm Turnbull, Shinzo Abe Agree to Push for TPP Despite Trump Scepticism*, ABC NEWS (Jan. 14, 2017), http://www.abc.net.au/news/2017-01-14/turnbull-abe-to-push-for-tpp-despite-trump-scepticism/8182892.

[6] *See* Joint Standing Committee on Treaties (JSCOT), *Submissions* etc., http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TransPacificPartnership/Report_165 (last visited Feb. 20, 2017).

[7] AUSTL. SENATE COMM. ON FOREIGN AFFAIRS, DEF. & TRADE, PROPOSED TRANS-PACIFIC PARTNERSHIP (TPP) AGREEMENT REPORT ii, ix (Feb. 7, 2017), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TPP/Report [hereinafter (TPP) AGREEMENT REPORT].

[8] Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal,* N.Y. TIMES, (Jan. 23, 2017), https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html.

- they may accelerate negotiations to complete other mega-regional deals such as RCEP.[9]

Both Peru and New Zealand have also recently suggested that China might join the TPP, partially filling the void left by the withdrawal of the United States ordered by the Trump Administration.[10] However, any re-negotiation and/or expansion of the TPP will be challenging, given that the deal was originally agreed to as a package by the original twelve signatories, and under the strong leadership of the United States.[11]

Such US leadership can be seen especially in the TPP's investment chapter, which adheres closely to the US Model Bilateral Investment Treaty (BIT) framework since 2004, in turn adapted in light of experiences under the North American Free Trade Agreement (NAFTA).[12] This model had also impacted investment chapters contained in Free Trade Agreements (FTAs) signed not only by the United States, but also many other countries across the Asia-Pacific region.[13] As such, the loss of momentum with respect to the TPP now creates greater space for alternative approaches to investment treaties to flourish and take hold in the Asia-Pacific. This paper provides a novel perspective from "Down Under" and considers what role New Zealand and Australia collectively might have in the pursuit of such alternatives, in light of broader regional and global developments in international investment law and practice.

B. Why Australia and New Zealand?

Imagine a trans-national regime with these institutional features:

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[9] Yasmine Yahya, *S'pore Has Options Despite US' TPP Withdrawal: Minister*, STRAITS TIMES (Feb. 11, 2017), http://www.straitstimes.com/business/economy/spore-has-options-despite-us-tpp-withdrawal-minister. It is also possible that TPP signatories lacking a bilateral FTA with the United States (notably, Japan and New Zealand) may also pursue such a deal. *Id.*

[10] Ryan Dube, *Peru Leads Region in Putting New Faith in Global Trade*, WALL ST. J., (Feb. 8, 2017), https://www.wsj.com/articles/peru-leads-region-in-putting-new-faith-in-global-trade-1486549808; *China, NZ Pledge to Boost Free Trade*, STRAITS TIMES, Feb. 11, 2017.

[11] *See generally* RAJ BHALA, TPP OBJECTIVELY: LAW, ECONOMICS, AND NATIONAL SECURITY OF HISTORY'S LARGEST, LONGEST FREE TRADE AGREEMENT (2016); Shin Jang-Sup, *The Pros and Cons of U.S. Withdrawal from TPP*, STRAITS TIMES, Feb. 8, 2017, at A20.

[12] North American Free Trade Agreement, Can.-Mex.-U.S. Dec. 17, 1992, 32 I.L.M. 289, 605. *See generally Reshape or Shatter? The Pitfalls of Renegotiating NAFTA*, ECONOMIST (Feb. 11, 2017), http://www.economist.com/news/americas/21716660-revision-north-american-trade-deal-will-not-give-donald-trump-what-he-wants.

[13] Wolfgang Alschner & Dmitriy Skougarevkiy, *The New Gold Standard? Empirically Situating the Trans Pacific Partnership in the Investment Treaty Universe*, 17 J. WORLD INV'T & TRADE 339 (2016).

- Virtually free trade in goods and services, including a "mutual recognition" system whereby compliance with regulatory requirements in one jurisdiction (such as qualifications to practice law or requirements when offering securities) basically means exemption from compliance with regulations in the other jurisdiction. And for some sensitive areas, such as food safety, there is a trans-national regulator;
- Virtually free movement of capital, underpinned by private sector and governmental initiatives;
- Free movement of people, with permanent residence available to nationals from the other jurisdiction – not tied to securing employment;
- Treaties for regulatory cooperation, simple enforcement of judgments (a court ruling in one jurisdiction being treated virtually identically to a ruling of a local court), and avoidance of double taxation (including a system for taxpayer-initiated arbitration among the member states);
- Interstate commitments to harmonize business law more widely, such as consumer and competition law.

No, we are not referring to the European Union (EU), or even aspects of the Association of Southeast Asian Nations (ASEAN) Economic Community—largely achieved by the end of 2015.[14] Instead, the aspects listed above characterize the Trans-Tasman framework built up between Australia and New Zealand, particularly over the last two decades. Much of this bilateral economic integration has been achieved by non-treaty means, including labor mobility and mutual recognition of goods (through parallel legislation in both countries) and business law harmonization (through loose Memorandums of Understanding). Occasionally, it even involves unilateral abrogation of national sovereignty (as with New Zealand legislation recognizing video/game classifications from Australia).[15]

Yet the growing economic integration has also been underpinned by treaties binding at international law. Both countries, with comparatively small economies (and populations) historically dependent on agricultural product exports,[16] have long been supporters of multilateral trade liberalization initiatives.

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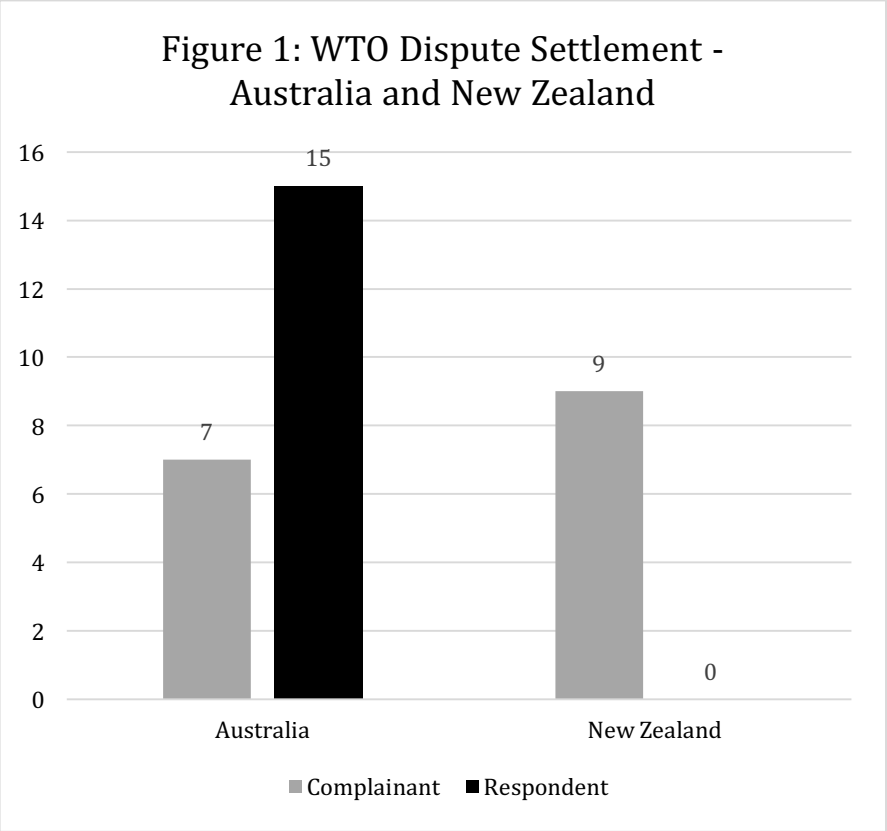
[14] *See generally* Tham Siew Yean & Sanchita Basu Das, *Introduction: Economic Interests and the ASEAN Economic Community*, MOVING THE AEC BEYOND 2015: MANAGING DOMESTIC CONSENSUS FOR COMMUNITY-BUILDING 1 (Tham Siew Yean & Sanchita Basu Das eds., 2016).

[15] *See generally* Luke Nottage, *Asia-Pacific Regional Architecture and Consumer Product Regulation Beyond Free Trade Agreements*, TRADE AGREEMENTS AT THE CROSSROADS 114 (Susy Frankel & Meredith Lewis ed., 2014).

[16] *See generally The Land and Its People: Economy*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE, www.dfat.gov.au/about-australia/land-its-people/Pages/economy.aspx (last visited Sept. 1, 2017) (Australia); *The World Factbook*: *Australia*, U.S. CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/as.html (last

They were leaders of the "Cairns Group," comprising mainly developing countries, during the Uruguay Round from 1986 that resulted in the creation of the World Trade Organization (WTO) in 1994.[17] Australia and New Zealand were also quite active users of the WTO's new and more effective inter-state dispute settlement system, as illustrated by **Figure 1** below.[18] However, Australia has not brought a claim since 2003 and did not join New Zealand in its recent claim alleging discrimination and other WTO violations by Indonesia concerning an array of agricultural products.[19]



visited Sept. 1, 2017) (Australia); *New Zealand Fact Sheet*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE, http://dfat.gov.au/trade/resources/Documents/nz.pdf (last visited Sept. 1, 2017); *The World Factbook, New Zealand*, U.S. CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/nz.html (last visited Sept. 1, 2017) (New Zealand).

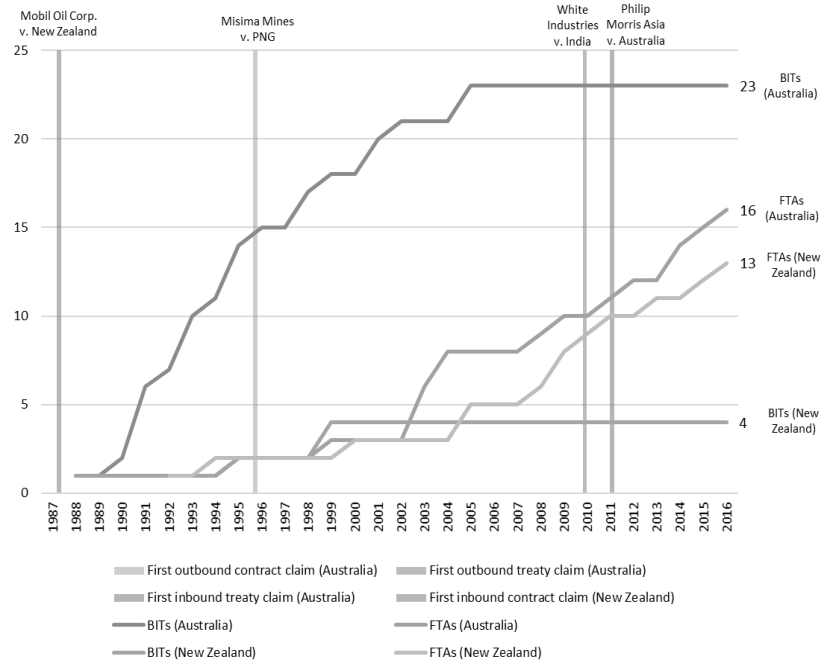
[17] E.g., Interview by Gabrielle Marceau with the former Secretary of Foreign Affairs for New Zealand; AMRITA NARLIKAR, INTERNATIONAL TRADE AND DEVELOPING COUNTRIES: BARGAINING AND COALITIONS IN THE GATT & WTO 1, 128-29 (2003).

[18] *See Dispute Settlement*, WORLD TRADE ORGANIZATION, www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Dec. 9, 2016).

[19] *Id.*

After it became clear around 2000 that further liberalization was not going to be readily forthcoming through the WTO, and both Australia and New Zealand also started to expand their bilateral and regional Free Trade Agreement (FTA) programs. They had already signed the Closer Economic Relations (CER) FTA in 1983 for trade in goods and services, when it was unclear what the future held for multilateral initiatives, and this was supplemented by a bilateral treaty for mutual recognition of services signed in 1988.[20] Australia and New Zealand added bilateral FTAs in the early 2000s, starting with Singapore, as indicated in **Figure 2** below.[21]

Figure 2: BITs and FTAs signed over time
Australia v New Zealand



[20] Australia-New Zealand Closer Economic Relations Trade Agreement, Austl.-N.Z., Mar. 28, 1983, [1983] A.T.S. 2; Protocol on Trade in Services to the Australia-New Zealand Closer Economic Relations Trade Agreement, Austl.-N.Z., Aug. 18, 1988, [1988] A.T.S. 20.

[21] Claudia Salomon & Sandra Friedrich, *Investment Arbitration in East Asia and the Pacific: A Statistical Analysis of Bilateral Investment Treaties, Other International Investment Agreements and Investment Arbitrations in the Region*, 16 J. WORLD INV. & TRADE 800 (2015); *Investment Policy Hub: International Investment Agreements Navigator*, UNCTAD, www.investmentpolicyhub.unctad.org/IIA (last visited Dec. 9, 2016). Years for first ISDS claims are derived from various cases. Mobil Oil Corp. v. Her Majesty the Queen in Right of N.Z., ICSID Case No. ARB/87/2, Findings on Liability, Interpretation, and Allied Issues, (May 4, 1989), 4 ICSID Rep. 140 (1997); Misima Mines Pty. Ltd. v. Independent State of Papua N.G., ICSID Case No. ARB/96/2, Discontinued, (May 14, 2001), 4 ICSID Reports 79 (1997); White Industries Austl. Ltd. v. The Republic of India, UNCITRAL, Final

This shared commitment to economic liberalization is quite recent. Over much of the 20th century, both countries were renowned for their strong welfare states, and high levels of tariffs and regulation. It was only from the mid-1980s, under the Lange Labour Government (1984-1990) and laissez-faire "Rogernomics" in New Zealand, as well as the Hawke-Keating Labor Governments in Australia (1983-96),[22] that both countries began deregulating and opening up their economies—typically unilaterally, as urged by neoclassical economists. Both countries promoted a similar approach in other economies in the region by actively supporting the Asia-Pacific Economic Forum (APEC) initiative from 1989.[23]

Inbound foreign direct investment (FDI) burgeoned as a result, especially from Australia into New Zealand (e.g. into the banking sector).[24] Yet, national regulation has remained relatively strict. According to the FDI Regulatory Restrictiveness Index compiled by the Organization for Economic Co-operation and Development (OECD), Australia scored 0.14 overall in 2015 (similar to Canada, Korea and Russia) while New Zealand scored 0.24 (similar to India).[25]

New Zealand has also been more cautious about signing BITs (as evident in Figure 2 above). Australia's higher flows and stocks of outbound FDI (depicted in Figures 3, 4, 6 and 7 below) have been paralleled by a more active BIT program, including many counterparties in the Asian region.[26] Both countries have more similar programs for FTAs, overwhelmingly concentrated on the Asia-Pacific region, where their main trade and investment relationships have existed for two decades.[27] Content-wise, their FTAs are also quite similar in balancing investment

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Award, (Nov. 30, 2011); Philip Morris Asia Ltd. (Hong Kong) v. The Commonwealth of Austl., PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, (Dec. 17, 2015).

[22] *See generally* SHAUN GOLDFINCH, REMAKING NEW ZEALAND AND AUSTRALIAN ECONOMIC POLICY: IDEAS, INSTITUTIONS AND POLICY COMMUNITIES (2000); JANE KELSEY, ECONOMIC FUNDAMENTALISM: THE NEW ZEALAND EXPERIMENT - A WORLD MODEL FOR STRUCTURAL ADJUSTMENT? (1995).

[23] *See generally* RAWDON DALRYMPLE, CONTINENTAL DRIFT: AUSTRALIA'S SEARCH FOR A REGIONAL IDENTITY (2003). The APEC legacy remains apparent in the policy advice in 2010 from the Productivity Commission and in the work of economists from the Australian National University. *Id. See, e.g.*, Shiro Armstrong & Peter Drysdale, *The Influence of Economics and Politics on the Structure of World Trade and Investment Flows*, *in* THE POLITICS AND THE ECONOMICS OF INTEGRATION IN ASIA AND THE PACIFIC (Shiro Armstrong ed. 2011).

[24] Bill Rosenberg, *Foreign Investment in New Zealand: The Current Position*, *in* FOREIGN INVESTMENT: THE NEW ZEALAND EXPERIENCE 24-32, 40-41 (Peter Enderwick ed., 1997).

[25] *FDI Regulatory Restrictiveness Index*, OECD, www.oecd.org/investment/fdiindex.htm, (last visited Dec. 9, 2016).

[26] *See Australian Foreign Investment: Australia's Bilateral Investment Treaties*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE, http://dfat.gov.au/trade/topics/investment/Pages/australias-bilateral-investment-treaties.aspx (last visited June 25, 2017) (listing Australia's BITs and counterparties).

[27] *See International Investment Agreements Navigator,* INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (last visited Sept. 1, 2017) (listing both Australia's and New Zealand's BITs); *Free Trade Agreements*, AUSTL.

protections and liberalization with substantive and procedural safeguards, influenced by the post-2002 US treaty practice,[28] which made it easier for both to join with ten other Asia-Pacific economies (including the United States) in signing the TPP FTA on 4 February 2016. Australia and New Zealand also signed an FTA with ASEAN in 2009 (AANZFTA) and a bilateral investment protocol to CER in 2011 (CER Investment Protocol),[29] and have been negotiating the "ASEAN+6" Regional Comprehensive Partnership (RCEP) FTA since late 2012.[30] Additionally, Australia is negotiating bilateral FTAs with Indonesia and India, both of which have recently been reviewing their stances on investment treaties.[31]

Given their strong economic relations with the wider region, commonalities in treaty (especially FTA) practice, and tight bilateral socio-economic, and legal harmonization,[32] Australia and New Zealand might be viewed collectively as a "middle power" potentially able to influence the ongoing "regionalization" of international investment law especially in Asia, as posited generally by Schill (referring instead to Korea and ASEAN).[33] This paper therefore

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GOV'T DEP'T FOREIGN AFF. & TRADE, www.dfat.gov.au/trade/agreements/pages/trade-agreements.aspx (last visited Dec. 9, 2016) (listing both Australia's and New Zealand's FTAs); *Free Trade Agreements*, N.Z. FOREIGN AFF. & TRADE, www.mfat.govt.nz/en/trade/free-trade-agreements/ (last visited Dec. 9, 2016) (listing both Australia's and New Zealand's FTAs).

[28] *See generally* Wolfgang Alschner & Dmitriy Skougarevskiy, *Mapping the Universe of International Investment Agreements*, 19 J. INT'L ECON. L. 516 (2016); Amokura Kawharu, *Expert Paper #2: Chapter 9 on Investment*, N.Z. EXPERT PAPER SERIES (2015), https://tpplegal.files.wordpress.com/2015/12/tpp-investment.pdf; Luke Nottage, *The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification*, (2016) 17 MELB. J. INT'L L. 313, https://papers.ssrn.com /sol3/papers.cfm?abstract_id=2767996.

[29] ASEAN-Australia-New Zealand Free Trade Agreement, Austl.-N.Z., Feb. 27, 2009, [2010] A.T.S. 1 [hereinafter AANZFTA]; Australia-New Zealand Closer Economic Relations Agreement Protocol on Investment, Austl.-N.Z., Feb. 16 2011, [2013] A.T.S. 10 [hereinafter CER Investment Protocol].

[30] *Regional Comprehensive Economic Partnership*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE, www.dfat.gov.au/trade/agreements/rcep/pages/regional-comprehensive-economic-partnership.aspx (last visited Dec. 9, 2016). *See generally* Jeffrey D. Wilson, *Mega-Regional Trade Deals in the Asia-Pacific: Choosing Between the TPP and RCEP?*, 45 J. CONTEMP. ASIA 345 (2015); Robert Scollay, *APEC, TPP and RCEP: Towards an FTAAP*, TRADE REGIONALISM IN THE ASIA-PACIFIC: DEVELOPMENTS AND FUTURE CHALLENGES 297 (Sanchita Basu Das & Masahiro Kawai eds., 2016).

[31] Antony Crockett, *Indonesia's Bilateral Investment Treaties: Between Generations?*, 30 ICSID REV. 437, 441 (2015); Prabhash Ranjan, *India and Bilateral Investment Treaties: From Rejection to Embracement to Hesitance?*, LOCATING INDIA IN THE CONTEMPORARY INTERNATIONAL LEGAL ORDER (R. Rajesh Babu & Srinivas Burra eds., forthcoming 2018).

[32] Both countries also share a history as British colonies and inherited the English variant of the common law tradition, which also made it easier to introduce a bilateral regime similar to that found within the EU regarding enforcement of judgments. Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, Austl.-N.Z., July 24, 2008, [2013] A.T.S. 32.

[33] Stephan Schill, *Can Asia Transform International Investment Law?*, EAST ASIA FORUM BLOG (July 27, 2016), http://www.eastasiaforum.org/2016/07/27/can-asia-transform-

begins with a closer look at the national FDI regulation and treaty practice of New Zealand (Part II) and Australia (Part III), including a focus on the important and revealing issue of FDI screening. From this largely common ground, Part IV of this paper compares key areas in key treaties (AANZFTA, the CER Investment Protocol, and TPP). Part V turns to both countries' negotiating positions as seemingly revealed in a leaked draft investment chapter for RCEP.[34] In light of this treaty practice, and also the current skepticism towards largely US-style treaty drafting exhibited now by Indonesia and India as negotiating partners, Part VI considers the scope to promote less pro-investor provisions in future treaties in the region. In particular, it looks at the potential of including both substantive commitments and dispute resolution procedures closer to the contemporary European Union approach, found already in the latter's recent FTAs with Singapore and Vietnam. Part VII concludes that shifts in that direction are also likely given the domestic political situation now in New Zealand and (especially) Australia, as well as various policy arguments for generally winding back investment treaty commitments for foreign investors—albeit without eschewing them altogether.

II. NEW ZEALAND'S INTERNATIONAL INVESTMENT REGULATION AND TREATIES

A. Foreign Investment Screening

Screening has been a central and long-standing element in New Zealand's regulation of foreign investment. It has also provided an avenue for expressions of political and social preferences on foreign investment, as reflected in the ongoing development of the screening system and, subsequently, investment treaty policy. New Zealand first began screening 1964, when it adopted regulations under banking legislation to require Ministerial consent to certain take-overs and capital investments by overseas interests.[35] Soon afterwards, screening provisions were added to the Land Settlement Promotion Act 1952 to require overseas buyers to obtain consent to the acquisition of certain land, reflecting public concern over sales of land with recreational and conservation value into foreign ownership and the potential economic and social consequences of unrestricted foreign access to rural

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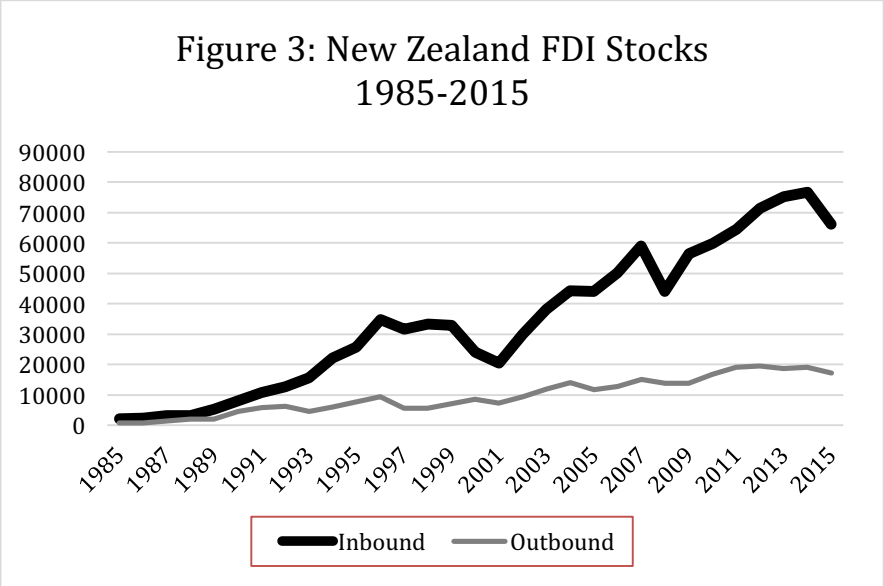
international-investment-law/ (referring instead to Korea (and ASEAN) as potential regional leaders nowadays). *C.f.* Yoshifumi Fukunaga, *ASEAN's Leadership in the Regional Comprehensive Economic Partnership*, 2 ASIA & PAC. POL'Y STUD. 103 (2014) (arguing that ASEAN will and should lead the RCEP negotiations).

[34] Knowledge Ecology International, *2015 Oct 16 Version: RCEP Draft Text for Investment Chapter*, (Apr. 21, 2016), http://keionline.org/node/2474 (last visited Dec. 9, 2016). The leaked draft, which we used for the analysis in Part III below, has since been removed and the included link no longer functions. Only a summary of the leaked draft remains online.

[35] Overseas Take-overs Regulations 1964 (N.Z.) (Supp. The Capital Issues (Overseas) Regulations 1965 (N.Z.)).

property.[36] The 1964 Regulations were replaced by a more comprehensive screening regime under the Overseas Investment Act 1973,[37] although foreign investment in land continued to be regulated separately under the 1952 Act.

In 1984, a new Labour Government was elected into office. With David Lange as its Prime Minister but with economic policies led by the Minister of Finance, Roger Douglas, it soon began to introduce a host of measures known as "Rogernomics," economic reforms that were aimed at deregulating and privatizing the New Zealand economy. Farmers were exposed to global market forces and their contribution to the economy grew from 14.2% in 1986–1987 to 20% by 2006.[38] During this watershed period, the 1973 Act remained in place, but the thresholds for requiring consent to invest were raised and capital controls were all but removed. The emphasis shifted to encouraging foreign investment. Investment flow into New Zealand increased dramatically, as indicated in **Figure 3** below.[39]



[36] Land Settlement and Promotion Act 1952, pt. IIA (N.Z.).

[37] Overseas Investment Act 1973 (N.Z.) (applying in conjunction with Overseas Investment Regulations 1974, which amended and consolidated the 1964 and 1965 Regulations.)

[38] NEAL WALLACE, WHEN THE FARM GATES OPENED: THE IMPACT OF ROGERNOMICS ON RURAL NEW ZEALAND 139 (2014). *See generally* in relation to the general economic and social impacts of the reforms in New Zealand, GOLDFINCH, *supra* note 22; KELSEY, *supra* note 22.

[39] U.N. Conference on Trade and Development, *World Investment Report 2016 – Investor Nationality: Policy Changes*, annex tbl. 3, annex tbl. 4 (June 22, 2016) [hereinafter UNCTAD WIR 2016]; U.N. Conference on Trade and Development, *Foreign Direct Investment: Inward and Outward Flows and Stock, Annual, 1980-2014*, UNCTAD STAT [hereinafter UNCTAD Stat], unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=96740 (last visited Dec. 9, 2016).

The basic approach to screening was carried forward into the current Overseas Investment Act 2005 (OIA 2005).[40] That said, unlike its 1973 predecessor, the OIA 2005 regulates both land and non-land foreign investments. Thus, consent is required to invest in "sensitive land," which is defined to include land adjoining a waterway or reserve, the foreshore, and areas of land greater than just five hectares in size.[41] In addition, consent is needed to invest in any business valued at more than NZD100 million (approximately USD75 million).[42] If the TPP enters into force, this would increase to NZD200 million (approximately USD150 million). In a move towards liberalizing investment flows with its closest trading partner, New Zealand also agreed to raise the monetary threshold for investments from Australia to NZD477 million (approximately USD350 million), indexed annually, under the CER Investment Protocol.[43] Apart from screening, there are various other restrictions on foreign investment in fishing quota,[44] and on foreign ownership of certain former state-owned enterprises that have been privatized.[45]

The enactment of the OIA 2005 followed a review in 2003 that aimed to ensure that New Zealand's legislation took a liberal position with respect to foreign investment, while simultaneously protecting land with special cultural and/or environmental significance.[46] These objectives are difficult to reconcile. For example, the factors for assessing whether to grant consent to foreign investment in sensitive land demonstrate a strongly defensive attitude towards foreign investment involving land-based assets, arising from a mixture of economic and non-economic considerations.[47]

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[40] Overseas Investment Act 2005 (N.Z.) (applying in conjunction with the Overseas Investment Regulations 2005 (N.Z.)).

[41] *Id.* ss 10(1)(a),12; *id.* pt. 1, sch 1.

[42] *Id.* ss 10(1)(b), 13.

[43] *Id.* reg. 36A, sch 5; CER Investment Protocol, *supra* note 29, at annex I-NZ-2, annex II-NZ-5. A lower threshold applies for Australian Government investment in New Zealand. *Id.*

[44] Overseas Investment Act 2005, *supra* note 40, s 10(2); Fisheries Act 1996 (N.Z.), ss 56–58B.

[45] The former state-owned enterprises are Chorus Ltd., and Air New Zealand Ltd. In respect of Chorus Ltd., the restrictions on foreign ownership are set out in the Deed Relating to Conversion of Kiwi Share between Chorus Ltd. and the Minister of Finance (July 11, 2011). In respect of Air New Zealand Ltd., the restrictions on foreign ownership are set out in a provision of the company's constitution (cl 3.4 of the Constitution of Air New Zealand Ltd.).

[46] Press Release, Michael Cullen, Minister of Finance, 1st Principles Review of Overseas Investment Act, (Nov. 10, 2003) (on file at www.beehive.govt.nz/release/1st-principles-review-overseas-investment-act).

[47] *See generally* Amokura Kawharu, *The Values at Stake in the Screening of Foreign Investment in Land: A Legislative History in Three Acts*, 21 N.Z. BUS. L. Q. 235 (2015).

The 2003 review was prompted at least in part by public opposition to applications by two American investors for consent to invest in coastal properties.[48] More recent controversies involving proposed foreign investment in land have provided catalysts for further piecemeal reform. For example, the Canada Pension Plan Investment Board (CPPIB) applied in 2008 for consent to acquire up to 40% of the company that owns and operates the Auckland airport. Inspired by CPPIB's consent application, the then Labour Government adopted an amendment to the Overseas Investment Regulations 2005, adding a new factor to be taken into account by the responsible Ministers when applying the national-benefit test that applies to land investments.[49] The Ministers then rejected CPPIB's application for failing to meet that test.[50] Additional reforms to the Regulations were made in 2010 under a National-led Government in response to mounting public concerns around aggregation of farms under foreign control and their vertical integration into primary production companies.[51]

More recently, the issue of foreign investment became an election issue in 2014, sparked by the proposed sale of Lochinver Station (one of New Zealand's largest and most valuable farms) to Chinese-owned company Shanghai Pengxin.[52] Two opposing parties questioned the proposed sale on both environmental and economic grounds.[53] In other words, foreign investment, at least insofar as it concerns land, has still not gained widespread acceptance in New Zealand. Calls for greater liberalization of the OIA 2005 based solely on economic arguments have largely fallen on deaf ears.[54]

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[48] *See* Denis McNamara & Craig Nelson, *Changes to the Overseas Investment Regime*, N.Z. L. J. 407, 408 (2004).

[49] Overseas Investment Act, *supra* note 40, at reg. 28(h).

[50] Clayton Cosgrove, Associate Minister of Finance, & David Parker, Minister for Land Information, Overseas Investment Act 2005: Reasons for Decision by Relevant Ministers, (Apr. 10, 2008) (on file at https://www.beehive.govt.nz/sites/all/files/Auckland%20airport%20-%20reasons%20for%20decision.pdf); Press Release, Clayton Cosgrove, Associate Minister of Finance, Ministers release decision on overseas investment proposal for Auckland International Airport, (Apr. 11, 2008) (on file at https://corporate.aucklandairport.co.nz/~/media/Files/.../ministers_statement.ashx?la...).

[51] Press Release, Bill English, Minister of Finance, Directive Letter Sets Balanced Investment Rules, (Dec. 9, 2010) (on file at https://www.beehive.govt.nz/release/directive-letter-sets-balanced-investment-rules).

[52] *See e.g.* Nick Grant, *Labour Joins NZ First's Lochinver Block Party*, NAT. BUS. REV. (Aug. 8, 2014), https://www.nbr.co.nz/article/labour-joins-nz-first%E2%80%99s-lochinver-block-party-ng-160418. *See also infra* Part III.A (explaining the same investor has also been active recently in Australia).

[53] *See e.g.*, Grant, *supra* note 52.

[54] *See e.g*, Luke Malpass & Bryce Wilkinson, *Verboten! Kiwi Hostility to Foreign Investment*, N. Z. INITIATIVE (Aug. 29, 2012), https://nzinitiative.org.nz/insights/reports/verboten-kiwi-hostility-to-foreign-investment/.

B. Investment Treaty Policy and Practice

1. New Zealand's Evolving Participation in the International Investment Law Regime

At the international level, unlike many other developed countries, New Zealand has not played an active part in the international investment law regime until fairly recently. Figure 2 above shows, for example, that it has signed far fewer BITs than Australia. Indeed, only one of those (with Hong Kong, signed in 1995) is still in force (Agreement Between the Government of Hong Kong and the Government of New Zealand for the Promotion and Protection of Investments, opened for signature 6 July 1995, entered into force 5 August 1995). New Zealand's first BIT was signed with China in 1988 (Agreement Between the Government of New Zealand and the Government of the People's Republic of China on the Promotion and Protection of Investments, signed 22 November 1988, entered into force 27 June 1994). New Zealand also signed BITs with Chile (Agreement Between the Government of New Zealand and the Government of the Republic of Chile for the Promotion and Protection of Investment, opened for signature 22 July 1999) and Argentina (Agreement Between the Government of the Argentine Republic and the Government of New Zealand and the Government of the Republic of Chile for the Promotion and Reciprocal Protection of Investments, opened for signature 27 August 1999), but neither of them entered into force. Cabinet papers indicate that the BITs with China and Hong Kong were motivated by a desire to establish clear terms for inbound investment and secure favorable treatment for New Zealanders investing off-shore, although at the time there were very low levels of cross-border investment between New Zealand and China.[55] In this light, the BIT with China may also have served a relationship building purpose.

Also, unlike Australia, to date, New Zealand has not faced an investment treaty arbitration claim by any investor. However, New Zealand was the respondent state in an ICSID arbitration brought by Mobil in the 1980s under an arbitration clause in a contract.[56] Recently, a New Zealand entity unsuccessfully attempted to bring a claim through ICSID against Macedonia, under a BIT between the Netherlands and Macedonia, in which the New Zealand entity claimed Dutch nationality by virtue of its ownership structure.[57] The historic lack of interest in the investment regime can partly be explained by the high levels of inbound foreign investment in New Zealand relative to the low levels of outbound foreign investment (as illustrated by Figure 3 above for stocks), with annual inflows

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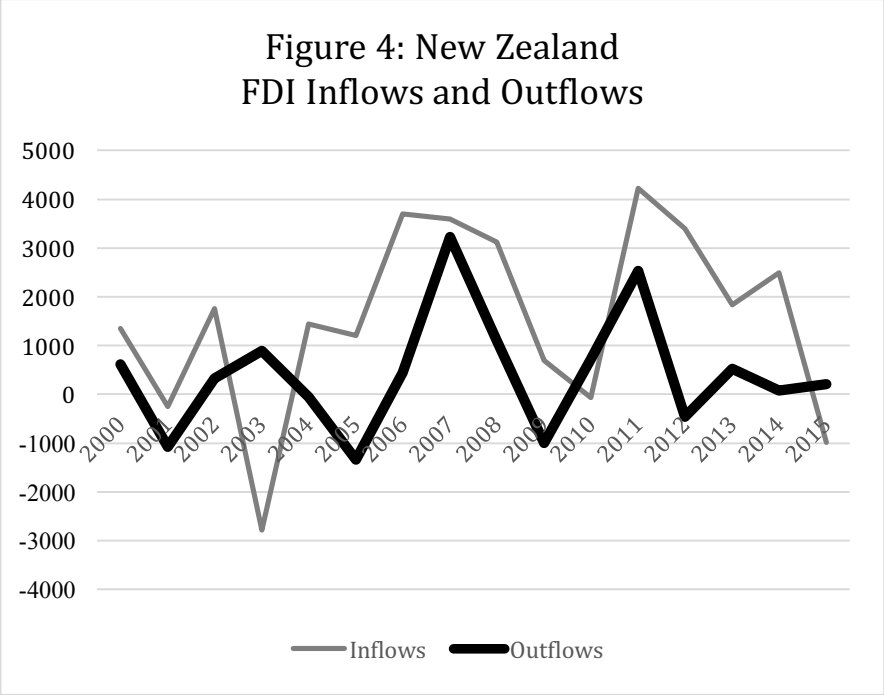
[55] Cabinet Development and Marketing Committee, Cabinet Paper CS (88) 792, 18 November 1988 at [2]; Cabinet Committee on Enterprise, Industry and Environment, Cabinet Paper CIE (95) 137, 20 June 1995 at [3] and [7]. On file with one of the authors.

[56] Mobil Oil Corp. v. New Zealand, ICSID Case No. ARB/87/2, Findings on Liability, Interpretation and Allied Issues, (May 4, 1989), 4 ICSID Rep. 140 (1997).

[57] Guardian Fiduciary Trust Ltd. v. Macedonia, ICSID Case No. ARB/12/31, Award, ¶ 87 (Sept. 22, 2015).

furthermore almost always exceeding outflows even since 2000 (as shown in **Figure 4** below[58]).



In addition, New Zealand traditionally has had a stronger focus on multilateral trade negotiations because the growth of New Zealand's economy depends on exports of agricultural goods to a very significant extent—even more so than Australia, which also exports resources and (increasingly) services worldwide.

The turning point for New Zealand was its 2001 FTA with Singapore which, in addition to trading goods and services, also covered investment. With the lack of progress in the WTO, New Zealand shifted its attention to promoting its trade agenda through FTAs. Further, recognizing the importance of promoting both inbound and outbound investment,[59] and the ability to use investment as a bargaining coin to extract trade concessions, New Zealand began to embrace investment within the context of its FTA program. The 2001 FTA with Singapore was followed by agreements containing investment chapters with Thailand (signed in 2005), China (2008), Australia and the ASEAN countries (AANZFTA, 2009), Malaysia (2010), Taiwan (2013), Korea (2015), and the TPP (signed 2016 but not in force), as well as the addition in 2011 of the CER Investment Protocol to the FTA

[58] UNCTAD WIR 2016, *supra* note 39, at annex tbl. 1, annex tbl. 2.

[59] *See* Bill Rosenberg, *Can We Ensure Foreign Investment Benefits New Zealand?*, 21 N. Z. BUS. L. Q. 221, 226–29 (2015) (discussing the detailed policy issues surrounding inwards FDI into New Zealand).

with Australia (in force from 2013).[60] The strength of the commitments on investment across these agreements is not exactly uniform, as outlined in Part IV below, but the overall trend has been towards greater acceptance of the comprehensive 2004 and then 2012 US Model BIT. The investment chapter in the FTA with Korea, for example, is clearly influenced by the US Model BIT.[61] In contrast, the provisions on investment in the early FTAs with Singapore and Thailand more closely resemble early generation BITs and are modest in scope.

2. ISDS

New Zealand does not have any model investment treaty text for its investment negotiations (at least not a publicly available one), and in particular, it takes a case-by-case approach to ISDS. Neither of the FTAs with Singapore nor Thailand includes binding ISDS. New Zealand's FTA practice was still in its infancy when these agreements were signed, which may help to explain the cautious approach. Singapore and Thailand are parties to the AANZFTA, and Singapore is also a signatory to the TPP. Both these FTAs include ISDS. In other words, the bilateral relations with these countries have evolved since New Zealand's 2001 and 2005 FTAs with them, and the initially limited agreements on investment have been superseded by more extensive ones. The FTAs with China, Malaysia, and Korea also include ISDS, but the agreement with Taiwan does not.[62]

The most notable features of New Zealand's practice in relation to ISDS relate to Australia: (a) the exclusion of ISDS from the CER Investment Protocol; (b) their agreement to not apply the investment chapter of the AANZFTA between themselves;[63] and (c) their agreement to not apply the ISDS provisions of the TPP.[64]

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[60] *See* DAVID WILLIAMS ET AL., WILLIAMS & KAWHARU ON ARBITRATION 833–70 (2d ed. 2017) (discussing New Zealand's investment treaty commitments as they were in August 2017). New Zealand has also entered into FTAs without investment chapters with Hong Kong (2011), and with Singapore, Brunei Darussalam and Chile via the Trans Pacific Strategic Economic Partnership (2005) which will, in effect, become redundant as a result of the TPP if and when the latter comes into force (because the parties are signatories to the more extensive TPP). *Id*.

[61] *See* Amokura Kawharu, *The Investment Chapter of the New Zealand–Korea Free-Trade Agreement: An Assessment of the Policy and Dispute Settlement Safeguards*, 2 N.Z. L. R. 291, 310 (2016).

[62] *See* DAVID WILLIAMS ET AL., *supra* note 60, at 833–70 (discussing New Zealand's investment treaty commitments as they were in August 2017).

[63] Letter from Hon. Simon Crean, Minister for Trade of Australia, to Hon. Tim Groser, Minister of Trade of New Zealand (Feb. 27, 2009) (on file with Australian Government Department of Foreign Affairs and Trade), http://dfat.gov.au/trade/agreements/aanzfta/Documents/minlet_aust.pdf; Letter from Hon. Tim Groser, Minister of Trade of New Zealand, to Hon. Simon Crean, Minister for Trade of Australia (Feb. 27, 2009) (on file with Australian Government Department of Foreign Affairs and Trade), http://dfat.gov.au/trade/agreements/aanzfta/Documents/minlet_nz.pdf.

[64] Letter from Hon. Todd McClay, Minister of Trade of New Zealand, to Hon. Andrew Robb, Minister for Trade and Investment of Australia (Feb. 4, 2016) (on file at

From New Zealand's perspective, this approach greatly reduces the litigation exposure from ISDS, because Australia is a significant source of foreign investment into New Zealand.[65] The absence of ISDS provisions from the CER Protocol was justified by the close relationship between the two countries and the mutual recognition of each other's highly developed judicial systems.[66] That said, New Zealand does not, and probably cannot, have a firm policy against ISDS in agreements with other developed countries based solely on their developed status. For instance, ISDS is included in the investment chapter of the FTA with Korea, although it does not appear to have been sought by New Zealand. According to media reports, ISDS was instead requested by Korea and for them it was a bottom-line requirement.[67] For New Zealand's part, presumably the view was that litigation risk could be managed by appropriately safeguarding regulatory space in the substantive provisions and was already outweighed by other benefits of the FTA given the low levels of Korean investment in New Zealand.

Even so, the ISDS provisions in the FTA with Korea attracted significantly more public and political attention as compared to New Zealand's ISDS commitments in its prior FTAs and BITs. New Zealand's first FTA that included binding ISDS was the 2008 agreement with China. Although this FTA was widely reported and discussed within New Zealand, attention was mainly focused on the predicted trade gains and the fact that the FTA was China's first with a developed country. Some submitters to the parliamentary select committee—the Foreign Affairs, Defence and Trade (FADT) committee—raised concerns about the FTA's investment chapter. These concerns were barely mentioned in the committee's report.[68] In contrast, almost all of the committee's later report on the 2015 New Zealand-Korea FTA addressed potential policy issues arising from its investment

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http://tpp.mfat.govt.nz/assets/docs/side-letters/New%20Zealand-Australia%20Side%20Letter%20Relationship%20between%20TPP%20and%20Other%20Agreements.pdf); Letter from Hon. Andrew Robb, Minister for Trade and Investment of Australia, to Hon. Todd McClay, Minister of Trade of New Zealand (Feb. 4, 2016) (on file at http://tpp.mfat.govt.nz/assets/docs/side-letters/New%20Zealand-Australia%20Side%20Letter%20Relationship%20between%20TPP%20and%20Other%20Agreements.pdf).

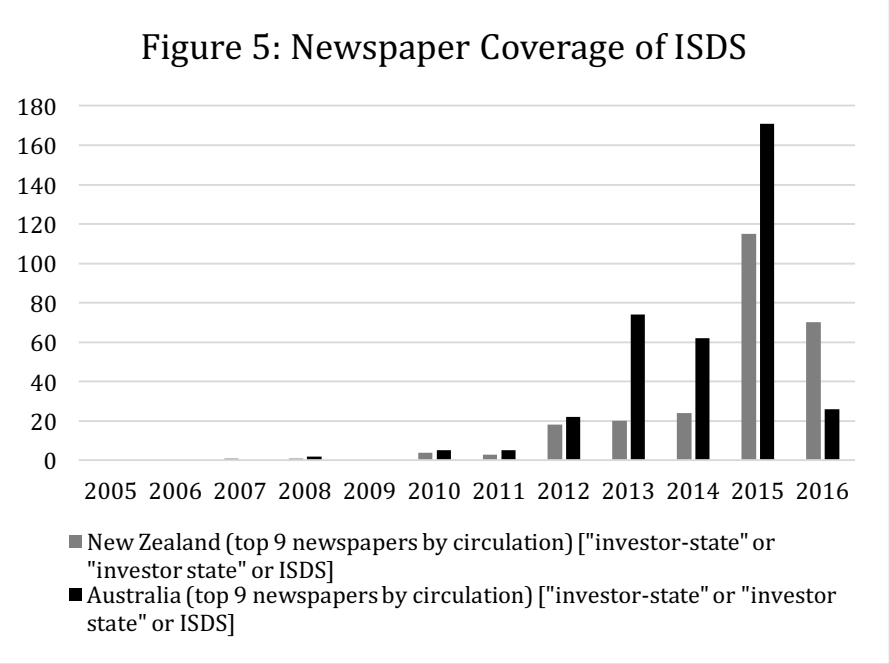
[65] NEW ZEALAND HOUSE OF REPRESENTATIVES, INTERNATIONAL TREATY EXAMINATION OF THE PROTOCOL ON INVESTMENT TO THE NEW ZEALAND-AUSTRALIA CLOSER ECONOMIC RELATIONS TRADE AGREEMENT: REPORT OF THE FOREIGN AFFAIRS, DEFENCE AND TRADE COMMITTEE, 26 (June 16, 2011) at 2 [hereinafter FADT Committee Report – CER Investment Protocol], www.parliament.nz/resource/en-NZ/49DBSCH_SCR5090_1/d68918dccf5ff23a7b18f4efde59808837d1283b.

[66] *Id.* at 26.

[67] *Questions Raised over Korea FTA*, BUSINESS NEWS (Mar. 27, 2015, 6:55 AM), www.radionz.co.nz/national/programmes/businessnews/audio/20172599/questions-raised-over-korea-fta.

[68] NEW ZEALAND HOUSE OF REPRESENTATIVES, NEW ZEALAND-CHINA FREE TRADE AGREEMENT BILL (210—1) AND THE FREE TRADE AGREEMENT BETWEEN THE GOVERNMENT OF NEW ZEALAND AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA: REPORT OF THE FOREIGN AFFAIRS, DEFENCE AND TRADE COMMITTEE, 6–7 (June 30, 2008), www.parliament.nz/resource/en-NZ/48DBSCH_SCR4094_1/4ef4ea7b76d9f362c91be7749249b8550b13e0e8.

protections, and much of the committee's attention was directed at ISDS.[69] By then, there was greater awareness of those issues prompted by active discussion within civil society and the media about the various pros and cons of the proposed TPP. **Figure 5** shows increasing levels of interest in ISDS within New Zealand in recent years, including a less dramatic slowdown in newspaper coverage compared to Australia from 2016, after the conclusion of TPP negotiations (and the Philip Morris claim mentioned in Part III.B below).[70]



[69] NEW ZEALAND HOUSE OF REPRESENTATIVES, INTERNATIONAL TREATY EXAMINATION OF THE FREE TRADE AGREEMENT BETWEEN NEW ZEALAND AND THE REPUBLIC OF KOREA FOREIGN AFFAIRS, DEFENCE AND TRADE COMMITTEE, 5–7 (May 22, 2015) [hereinafter FADT Committee Report – Korea FTA], www.parliament.nz/resource/en-NZ/51DBSCH_SCR62982_1/514ee77ec5f6ff977dd37c40679e58431134ebaf.

[70] In Australia, the main newspapers selected from the Factiva database were: *The Australian*, *Australian Financial Review*, *Daily Telegraph*, *Sydney Morning Herald*, *The Age*, *Herald Sun*, *Courier-Mail*, *Adelaide Advertiser*, and *West Australian*. The combined circulation in 2015 was 1,375,323. Myriam Robin, *'Magical' newspapers take a hammering in circulation figures*, CRIKEY (Nov. 13, 2015), https://www.crikey.com.au/2015/11/13/magical-newspapers-take-a-hammering-in-circulation-figures/. This number is down from 2,192,230 in June of 2005. Australian Press Council, *State of the News Print Media in Australia: 2007 Supplement to the 2006 Report*, APC (Oct. 18, 2007), www.presscouncil.org.au/uploads/52321/state-of-the-news-print-media-2007.pdf. In New Zealand, the main newspapers selected from the Factiva database were: *New Zealand Herald*, *Dominion Post*, *The Press*, *Waikato Times*, *Otago Daily Times*, *The Southland Times*, *Hawke's Bay Today*, *Taranaki Daily News* and *Bay of Plenty Times*. The combined circulation in December 2015 was 383,627. New Zealand Audit Bureau of Circulations, Inc. *Press audit results*,

3. The Screening Issue

Given the significance of investment screening, New Zealand's firm treaty practice has been to retain some ability to control the admission of foreign investment although its approach as to how to exert this control has varied.[71] In treaties with commitments to provide market access for foreign investment (through the national treatment obligation), New Zealand's usual approach has been to include a reservation for screening, which both preserves the current operation of the OIA 2005 and provides for limited regulatory flexibility. The reservation in the investment protocol with Australia is illustrative. It provides that national treatment is subject to the OIA 2005, and that "New Zealand reserves the right to adopt or maintain any measure that sets out the approval criteria to be applied to the categories of overseas investment that require approval under New Zealand's overseas investment regime."[72] In addition, in the FTA with Korea and the TPP, ISDS is excluded in relation to disputes over decisions whether to grant or withhold consent to invest.[73]

The adequacy of the reservation for the OIA 2005 became the focus of controversy during the examination of the FTA with Korea by the FADT committee and the subsequent parliamentary debates on the FTA in 2015. In turn, the controversy contributed towards the growing political divide in New Zealand with regard to its investment treaty commitments. The specific concern related to the restrictions imposed by the FTA on changes to the categories of land that are subject to the screening regime. The OIA 2005 requires screening of foreign investment in "sensitive land." "Sensitive land" as defined under the OIA 2005 essentially covers farms, reserves, land next to reserves, and the foreshore.[74] Screening is not currently required in relation to urban land, unless covered by the provisions relating to reserves. The FTA's reservation on screening allows changes to screening criteria, but it does not allow new categories of land, such as urban land, to be added to the screening regime. This was problematic for the opposition Labour Party because it conflicted with its policy proposal to introduce new restrictions on foreign ownership of residential housing to help address New Zealand's housing shortage. Labour added a "minority view" to the select committee's report recommending that governments be left with the unambiguous

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newspaper.abc.org.nz/audit.html?org=npa&publicationid=%25&mode=embargo&npa_admin=1&publicationtype=19&memberid=%25&type=%25 (last visited Dec. 9, 2016). This number is down from 591,497 in June of 2005. Statistics New Zealand, *New Zealand Official Yearbook 2012*, N.Z. OFFICIAL Y.B., Newspaper circulation (July 4, 2013), www.stats.govt.nz/~/media/Statistics/yearbook/tables/comm-yrbook-2012.xlsx.

[71] *See* Amokura Kawharu, *The Admission of Foreign Investment Under the TPP and RCEP: Regulatory Implications for New Zealand*, 16 J. WORLD INV. & TRADE 1058, 1081–82 (2015).

[72] CER Investment Protocol, *supra* note 29, at II-NZ-5.

[73] New Zealand - Korea FTA Agreement, N.Z.-Korea, art. 10.20(1), Mar. 2015 (stating ISDS applies post establishment); The Trans-Pacific Partnership, *supra* note 1, at 9–47.

[74] Overseas Investment Act 2005, *supra* note 40, s 12(a), sch 1.

and unrestricted power to control house sales to foreign buyers in future FTAs.[75] It then adopted as one of its conditions for supporting the TPP the requirement that New Zealand maintains the right to restrict sales of both farm land and housing to non-resident foreigner buyers.[76] When the National Government introduced the implementing legislation for the TPP in May 2016, Labour voted against it primarily because this condition was not met. This was the first real sign that the bipartisanship on FTAs between New Zealand's two main political parties, the National Party and the Labour Party, might be under threat.

4. Current State of Affairs

An important question is whether these controversies will prompt a rethink in FTA policy. The close attention paid in 2015 in New Zealand to the investment chapter provisions of the Korea FTA is probably due to the agreement being seen as a precursor to the TPP, and because the bilateral FTA provided an opportunity for political parties to test their positions on matters like ISDS. The National Government's majority view in the FADT committee's report emphasized that no claim had ever been brought against New Zealand under the existing FTAs and that the ISDS risks to New Zealand were low.[77] Labour's view was that ISDS was of little benefit in FTAs with developed countries.[78] The two minor parties represented on the committee, New Zealand First and the Greens, went much further—both were highly critical of ISDS.[79] Shortly after the report was issued, New Zealand First introduced an anti-ISDS private member's bill, the "Fighting Foreign Corporate Control Bill,"[80] along similar lines to the bill introduced in the Australian Senate by the Australian Green Party in 2014 (which has since lapsed).[81] Labour was prepared to support the bill at least to the select committee stage but it was defeated at the first reading. Blanket opposition to ISDS would in any event have been a difficult position for Labour to adopt, since Labour had agreed to ISDS in the FTA with China when it was in power in 2008.

Regarding the TPP, another of Labour's conditions for its support of the agreement was the requirement that "[c]orporations cannot successfully sue the Government [through the ISDS mechanism] for regulating in the public interest."[82] This still allowed Labour much leeway to decide whether or not it would support ISDS in the TPP. When it came to the select committee examination of the

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[75] FADT Committee Report – Korea FTA, *supra* note 69, at 10–11.

[76] Vernon Small, *Labour Sets 'non-negotiable' Stance on TPP Free Trade Talks*, STUFF (July 23, 2015), www.stuff.co.nz/business/industries/70496910/labour-sets-nonnegotiable-stance-on-tpp-free-trade-talks.

[77] FADT Committee Report – Korea FTA, *supra* note 69, at 6.

[78] *Id.* at 11.

[79] *Id.* at 12–13.

[80] Fighting Corporate Control Bill 2015 (N.Z) (defeated July 22, 2015).

[81] Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 (Austl.). *See also infra* Part III.B(2).

[82] Small, *supra* note 76.

agreement, Labour was silent on the issue (its criticism was centered on the screening/residential housing issue and the economic modeling used to estimate the trade gains).[83] The National Government remained of the view that an appropriate balance had been struck between the interests of New Zealand investors abroad and ISDS safeguards, although it did accept that a number of submitters had expressed concerns about the process.[84] It is also notable that the Government was not staunchly advocating in favor of ISDS. Rather, after explaining the safeguards, its majority report merely observed that it could be useful for New Zealand investors abroad,[85] perhaps indicating some flexibility.

The review of New Zealand's treaty practice over the past decade-and-a-half suggests that New Zealand has accepted ISDS when necessary, but has otherwise not given much thought to the issues surrounding ISDS until the period coinciding with the TPP negotiations. It also seems that New Zealand's position on ISDS remains an evolving one, and may be influenced in particular by political factors (such as a change in government, especially to a Labour-Greens coalition, or an ISDS claim, if it influences political receptiveness to ISDS), as well as wider developments in the investment regime. Meanwhile, sensitivities around the screening issue may at least prompt some re-thinking about the best approach to investment treaty provisions affecting market access.

III. AUSTRALIA'S INTERNATIONAL INVESTMENT REGULATION AND TREATIES

A. Foreign Investment Screening

Uren charts how Australia has historically demonstrated an ambivalent attitude towards FDI.[86] A liberal regime mostly prevailed before World War II, including large-scale investments from the United Kingdom such as the Vestey family's vast farm in the Northern Territory. From the 1950s through to 1970s, FDI from the United States expanded but attracted increasing public concern, in a protectionist era characterized by high tariffs on imports. A political turning point involved a takeover bid in 1972 by a large American conglomerate for a small manufacturer of an iconic Australian fast food. The Labor Party government voted

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[83] NEW ZEALAND HOUSE OF REPRESENTATIVES, INTERNATIONAL TREATY EXAMINATION OF THE TRANS PACIFIC PARTNERSHIP AGREEMENT: REPORT OF THE FOREIGN AFFAIRS, DEFENCE AND TRADE COMMITTEE, 11–14, (May 4, 2016) [hereinafter FADT Committee Report – TPP], https://www.parliament.nz/resource/en-nz/51DBSCH_SCR68965_1/017c7d1eedfaa46cda74da3faa83982cee1ab4d3.

[84] *Id.* at 8–9.

[85] *Id.* at 9.

[86] The following four paragraphs draw primarily on: DAVID UREN, TAKEOVER: FOREIGN INVESTMENT AND THE AUSTRALIAN PSYCHE 83–86, 90–91, 101–06, 110–11, 142 (2015). *See also* Luke Nottage, The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration in Australia, 2–4 (Nov. 5, 2015) (unpublished manuscript) (on file with SSRN.com) (giving more detailed citations and a fuller elaboration of Australia's attitude towards and regulation of FDI).

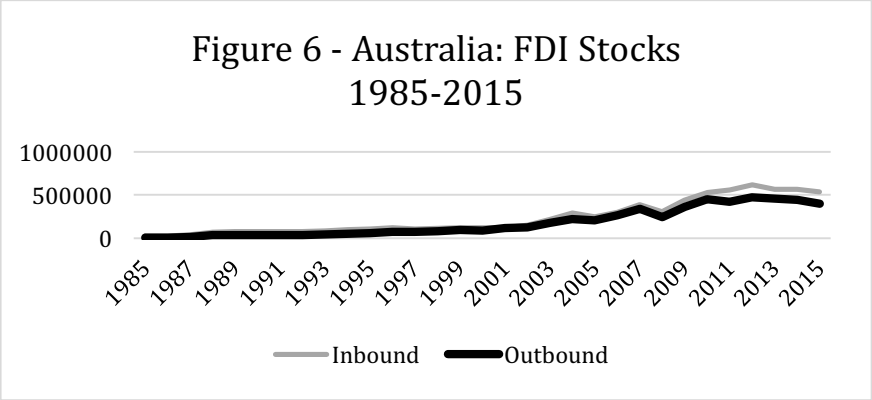
in that year, followed through pre-election commitments, to restrict FDI. The *Foreign Acquisitions and Takeovers Act 1975* (Cth) allowed the federal Treasurer to limit FDI in the "national interest," and limited foreign investment in resource projects to 50 percent. This regime was retained after a new government was formed by Malcolm Fraser, leading the Liberal Party in coalition with the rural Country Party. Indeed, the Fraser government extended the 50 percent rule to investments in farming, forestry, and fishing. Public concern also grew about Japanese investment in resources, the cattle industry, and real estate, although this diminished after Japan's "bubble economy" collapsed in 1990.

The Hawke-Keating Labor governments (1983-96) liberalized the Australian economy and parts of the foreign investment regime, including almost all additional formal limits to foreign ownership in resource investments. However, the 1975 Act remained, along with a Foreign Investment Review Board (FIRB) to "advise" the Treasurer on whether to limit FDI proposals in the national interest. Opposition leader and shadow Treasurer, John Howard, proposed abolishing the FIRB in the lead-up to the 1987 election. However, after gaining power in 1996 and directing the Liberal Party-led government in coalition with the National Party until 2007, Howard retained the FIRB and the existing FDI regime, except for removing the requirement that uranium mining be controlled by Australians. Indeed, in 2001 the Treasurer Peter Costello blocked a bid by Shell Oil Company to take over Woodside (operator of the North West Shelf gas project), against the backdrop of the Liberal Party losing a state election in Western Australia. Nonetheless, cross-border investment flows grew strongly from the 1980s, as local capital and currency markets were liberalized and share markets boomed.[87]

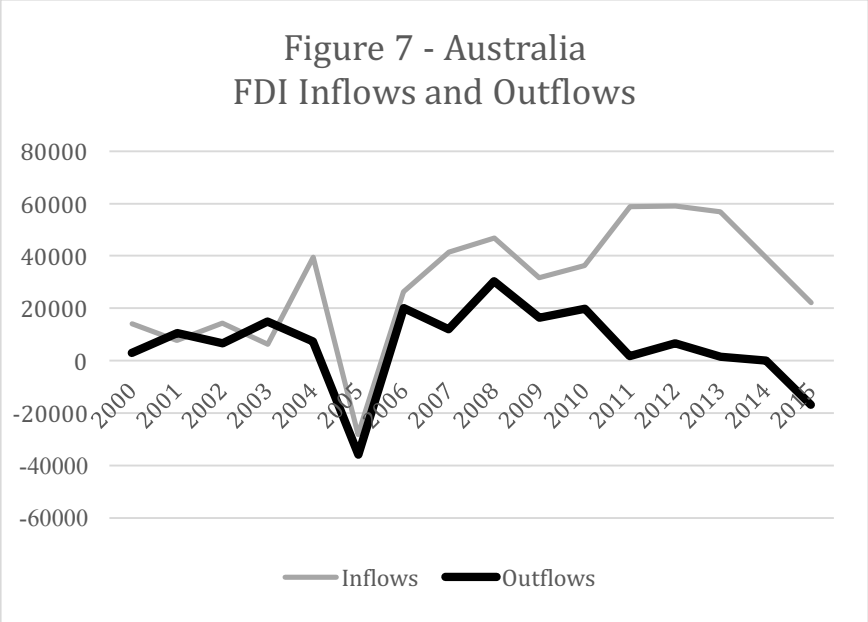
> Foreign investment poured into the country, doubling its share of the economy. Investment by Australian companies abroad soared even more remarkably, rising from five percent of GDP before the float [of the dollar in 1983] to 35 percent by the end of the 1990s. The combined value of investments by Australian companies exceeded the foreign investment in Australia.

[87] UREN, *supra* note 86, at 29.

Figure 6 charts the expansion of both inbound and outbound FDI stocks:[88]



Annual inflows and outflows were roughly balanced over 2000–2006, as indicated in **Figure 7** below,[89] although inbound FDI then grew more strongly due mainly to a mining boom in Australia.[90]



Against this backdrop, Australia began signing comprehensive FTAs, as indicated in Figure 2, beginning with Singapore in 2003 and Thailand in 2004.

[88] UNCTAD WIR 2016, *supra* note 39, at annex tbl. 3, annex tbl. 4; UNCTAD Stat, *supra* note 39.

[89] UNCTAD WIR 2016, *supra* note 39, at annex tbl. 1, annex tbl. 2; UNCTAD Stat, *supra* note 39.

[90] *See generally* ROSS GARNAUT, DOG DAYS: AUSTRALIA AFTER THE BOOM (2013).

Importantly, it initiated FTA negotiations with the United States in 2002.[91] By 2001, Australia's FDI stock in the United States was higher than the US's FDI in Australia.[92] The US Trade Representative at the time, Robert Zoellick, envisaged greater investment flows as the biggest potential benefit from the FTA.[93] He sought exemptions for US investors from the FIRB process, but instead ultimately achieved a much higher threshold before applications were subject to review ($800 million, for general business acquisitions). One study estimated that there was $73 billion more investment in Australian between 2005 and 2010 than would otherwise have been expected.[94]

Labor Governments under Kevin Rudd and Julia Gillard (2007–2013) retained a generally favorable stance towards inbound FDI. In 2012, Treasurer Wayne Swan resisted calls to block a Chinese acquisition of Australia's largest cotton farm, Cubbie Station, which otherwise risked insolvency. However, he rejected the application by the Singapore Stock Exchange to acquire the Australian Securities Exchange. This was partly on the grounds of economic nationalism (that the acquisition would impede the goal of positioning Sydney as a regional financial center) and partly out of concern about Australia losing sovereignty over regulatory control (especially in financial crises). Swan also arguably delayed a decision on a bid by a large US investor for Graincorp in October 2012. That decision was left to a new Treasurer, Joe Hockey, after the Liberal-led Coalition under Tony Abbott regained power in the general election of September 7, 2013.[95]

Hockey eventually rejected the application, under pressure from the National Party within the Coalition. The Party had also sought new FDI restrictions to be introduced, reviving longstanding concerns in Australia's rural community about foreign investors, including now State-Owned Enterprises (SOEs) and other government-linked companies from China and other capital-exporting countries. From 2015, the Coalition Government made good on its election commitments by requiring FIRB review of investments in rural land exceeding $15 million, and of "agribusiness" investments exceeding $55 million, albeit with higher thresholds remaining for investors from certain FTA partners due to commitments made under earlier treaties.[96] The Australian government has maintained a particular interest in FDI proposals by investors linked to foreign governments or SOEs—requiring

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[91] *See generally* Kristen Bondietti, Inconsistencies in Treatment of Foreign Investment in Trade Agreements (Dec. 2008) (unpublished manuscript) (on file with Australian APEC Study Centre).

[92] Thomas Westcott, *Foreign Investment Issues in the Australia-United States Free Trade Agreement*, 1 ECONOMIC ROUNDUP 69, 71 (2005).

[93] UREN, *supra* note 86, at 115.

[94] *Id.* at 26 (citing Stephen Kirchner, *Foreign Direct Investment in Australia Following the Australia-US Free Trade Agreement*, 45(4) AUSTL. ECON. REV. 410, 410–21 (2012)).

[95] *Id.* at 213–25.

[96] *See* Australian Government, *Foreign Investment Reforms Factsheet: Reform Overview* 2, firb.gov.au/files/2015/09/FIRB_fact_sheet_reform_overview.pdf (last visited Dec. 9, 2016).

FIRB approval irrespective of FDI value, and considering the commercial nature of the investor's activities when assessing the "national interest."[97]

Overall, both major parties—Labor and Liberal—have maintained a liberal stance towards inbound FDI despite enactment of the *Foreign Acquisitions and Takeovers Act 1975* (Cth). FIRB, composed mainly of businesspeople[98] assisted by a secretariat of Treasury officials, mostly recommends approval of FDI proposals. Successive Treasurers have rarely rejected them or exercised their wide statutory discretion to impose conditions on inbound investments. However, the Labor Party faces considerable opposition from its left factions, and especially the Australian Greens Party (with which the Gillard Government, for example, was in coalition from 2011-2013). The Liberal Party also faces concerns from some political conservatives and its National Party partner. Noting also that the "radical free trader perspective—the voice of John Hewson [Opposition leader of the Liberal Party, 1990-1994], who once called for abolition of the . . . Act—no longer finds expression in mainstream politics," Uren concludes that the bipartisan political center remains unstable.[99]

Indeed, on November 6, 2015 the Labor Opposition chastised the Coalition Government about bills it had introduced in July 2015, for discriminating on the basis of investors' nationality. Labor had proposed amendments to increase thresholds for Chinese, Korean, and Japanese investors in rural land from AUD $15 million (the Coalition's new general threshold since March 2015) to $50 million (as preserved for Thai and Singaporean investors under their longer-standing FTAs). However, this would still leave New Zealand, Chilean, and US investors with their FTA-guaranteed threshold of over $1 billion. Labor's spokesperson for trade and investment, Senator Penny Wong, further signaled that a future Labor Government would consider extending the $1 billion threshold to all foreign investors in non-sensitive sectors. She also objected to the Coalition legislating a new agribusiness investment review threshold of $55 million (or over $1 billion again for New Zealand, Chilean, and US investors), pointing out that this was one-fifth of the general threshold for sensitive sectors such as media, defense businesses, or uranium mining. Commentators saw this stance as a response to critiques by the Abbott Government that the Labor Party and the unions were being racist in objecting to ratification of the China-Australia FTA (eventually signed on June 17, 2015).[100] However, Labor's remarkably pro-FDI opposition came to naught when

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[97] UREN, *supra* note 86, at 214. *See generally* Treasurer of Australia, *Australia's Foreign Investment Policy*, (last updated July 1, 2016), firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf.

[98] Peter Ryan, *FIRB Boss Brian Wilson Takes Up Advisor Role with Private Equity Firm The Carlyle Group*, ABC NEWS (Sept. 9, 2016, 6:45 PM), www.abc.net.au/news/2016-09-06/firb-boss-takes-up-advisor-role-with-private-equity-group/7818092 (discussing recent public controversy over possible conflicts of interest for the current FIRB chairperson).

[99] UREN, *supra* note 86, at 287, 298 ("There were 160 speeches and interventions referring to foreign investment in the parliamentary debates of the Abbott [G]overnment's first year.").

[100] Fleur Anderson, *Labor to Fight Foreign Investors Crackdown*, AUSTL. FIN. REV. (Nov. 6, 2015), http://www.afr.com/news/politics/labor-to-fight-foreign-investors-

the Coalition managed to strike a deal with the Greens to increase the likelihood of passing the bills through the Senate.[101]

Political debate has continued since 2016. After the Northern Territory Government concluded a long-term lease of Darwin's port facilities to a (private) Chinese investor,[102] a parliamentary inquiry began into whether there needed to be closer screening of such "critical infrastructure." Following a Report in April 2016,[103] the (by then Turnbull) Coalition Government amended the *Foreign Acquisitions and Takeover Regulation 2015* to remove a longstanding exemption for private foreign investors in critical infrastructure assets purchased directly from State or Territory governments. The new Treasurer, Scott Morrison, also announced the following:[104]

These changes add to the strengthened framework the Government has already enacted, including:

- Formal requirements on foreign investment applications to ensure multinational companies investing in Australia pay tax here on what they earn;
- Greater compliance powers for the Australian Taxation Office and strict new penalties for those caught breaking the rules;
- A new agricultural land foreign ownership register and reduction of the screening threshold for proposed foreign purchases of agricultural land by private investors to $15 million;
- FIRB screening of direct interests in agribusinesses valued at $55 million or more;
- The appointment of Mr. David Irvine (a former Director General of both the Australian Security Intelligence Organisation and the

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crackdown-20151106-gksdf1; Mark Kenny, *Labor to Oppose Tighter Vetting of Asian Investment in Farms and Agribusiness*, SYDNEY MORNING HERALD, (Nov. 6, 2015), www.smh.com.au/federal-politics/political-news/labor-to-oppose-tighter-vetting-of-asian-investment-in-farms-and-agribusiness-20151106-gkshpf.

[101] Anna Vidot & Lucy Barbour, *Greens Strike Deal with Coalition to Tighten Restrictions on Foreign Purchases of Australian Farms*, ABC NEWS (Nov. 23, 2015), www.abc.net.au/news/2015-11-23/greens-deal-to-pass-foreign-investment-bill/6963956.

[102] *Chinese Company Landbridge to Operate Darwin Port under $506m 99-year Lease Deal*, ABC NEWS (Oct. 13, 2015), http://www.abc.net.au/news/2015-10-13/chinese-company-landbridge-wins-99-year-darwin-port-lease/6850870.

[103] Committee on Economics, Parliament of Australia, *Foreign Investment Review Framework Report* (2016), www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreign_Investment_Review/Report.

[104] Press Release, Scott Morrison, Treasurer of Austl., Critical Asset Sales To Fall Within Foreign Review Net (Mar. 18, 2016), (on file at sjm.ministers.treasury.gov.au/media-release/031-2016/) ("Critical infrastructure assets comprise: public infrastructure (an airport or airport site; a port; infrastructure for public transport; electricity, gas, water and sewerage systems); existing and proposed roads, railways, inter-modal transfer facilities that are part of the National Land Transport Network or are designated by a State or Territory government as significant or controlled by the Australian federal government; telecommunications infrastructure; and nuclear facilities.").

Australian Secret Intelligence Service) to the FIRB, bolstering the Board's ability to advise on national security issues;
- Forced sales of 27 properties, worth more than $76 million, illegally acquired by foreign nationals.

The Government is delivering on its commitment to strengthen the foreign investment system. The Australian community can be confident that, under the Turnbull Government, foreign investment proposals will not be contrary to the national interest.

After being given 96 hours by the Treasurer in April 2016 to revise its FIRB application to purchase S. Kidman & Co., Australia's biggest private land holding (comprising 1.3 percent of the country's total land area and 2.5 percent of all agricultural land), a consortium led by the Shanghai Pengxin conglomerate withdrew the application altogether.[105] In August, Morrison formally rejected a FIRB application by a Chinese SOE and Hong Kong company for a long-term lease of half of Ausgrid (the electricity distribution network for New South Wales), following a FIRB recommendation and citing national security implications,[106] despite Chinese government protestations that this could indicate protectionism and a lack of transparency.[107]

B. Investment Treaty Policy and Practice

1. Australia's More Active Participation in the International Investment Law Regime

Like New Zealand, Australia signed its first BIT with China in 1988. However, Australia then developed a significantly more active treaty program, signing its last two BITs as late as 2005 (with Turkey and Mexico), as depicted in Figure 2 above. There was little media or parliamentary scrutiny of these BITs, although some were apparently negotiated pursuant to an undisclosed Cabinet-

[105] Jared Lynch, *Chinese Bidder Withdraws Bid for World's Largest Cattle Station*, SYDNEY MORNING HERALD (May 3, 2016), www.smh.com.au/business/chinese-bidder-withdraws-bid-for-worlds-largest-cattle-station-s-kidman--co-20160503-gol4sk.html.

[106] James Massola & Sean Nicholls, *Scott Morrison Confirms Decision to Block Ausgrid Sale*, SYDNEY MORNING HERALD (Aug. 19, 2016), www.smh.com.au/federal-politics/political-news/scott-morrison-confirms-decision-to-block-ausgrid-sale-20160819-gqwwkm.html.

[107] Philip Wen, *China Warns Against Threat to Ties and Investment from Australian Protectionism*, SYDNEY MORNING HERALD (Aug. 17, 2016), www.smh.com.au/federal-politics/political-news/china-warns-against-threat-to-ties-and-investment-from-australian-protectionism-20160817-gquzg8.html. *But see* Vivienne Bath, *Foreign Investment, the National Interest and National Security: Foreign Direct Investment in Australia and China*, 34 SYDNEY L. REV. 5 (2012) (providing a comparative analysis of the more discretionary regime for screening FDI into China).

approved template.[108] Under the primary jurisdiction of the Treasury, which provides advice on economic policy generally, as well as on applications from foreign investors through FIRB, it seems to have been assumed that BITs would help encourage cross-border investment—both inbound and outbound. Yet many of the counterparties did not seem to have much history or even potential in that regard.[109] The pattern suggests that successive Australian governments were subject to "motivated learning"—wanting to believe that BITs would lead to more FDI—as an element of "bounded rationality," as posited recently by Poulsen to explain the investment treaty practice particularly of developing countries.[110]

Like New Zealand, after it became clear around 2000 that there was little scope to achieve a broadly multilateral agreement through the OECD or the WTO, Australia began focusing on comprehensive FTAs. As shown in Figure 2, its first FTA to include an investment chapter was signed with Singapore, in 2002. Australia signed a bilateral FTA with Thailand as well in 2005. The main difference from New Zealand was that Australia was able to conclude a major bilateral FTA with the United States in 2004, thanks in part to closer geopolitical links between the Bush Administration in the United States and the (center-right) Howard Coalition Government in Australia. Yet that very aspect was, and sometimes still is, criticized for generating treaty commitments that have not lived up to expectations, according to some economists.[111] Nonetheless, in negotiating the TPP, Australia reportedly held out vigorously in the face of various proposals from the United States (e.g. relating to agricultural product trade and intellectual property rights).[112]

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[108] Luke Nottage, *The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration Policy and Practice in Australia*, 21 N.Z. BUS. L. Q. 266 (2015).

[109] *See, e.g.*, International Centre for Settlement of Investment Disputes, *Database of Bilateral Investment Treaties*, WORLDBANK, https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a7 (follow "Australia" hyperlink) (last visited Sept. 21, 2017) (listing Australia's Bilateral Investment Treaties with Poland (1991), Hungary (1991), Romania (1993), Czech Republic (1993), Argentina (1995), Uruguay (2001), Lithuania (2002), Egypt (2002), Turkey (2005), Mexico (2005)). Other BITs signed with Asia-Pacific countries seem more likely to promote cross-border investment. *Id.*

[110] LAUGE N. SKOVGAARD POULSEN, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES 25, 109 (2015). *See also* Luke R. Nottage, *Rebalancing Investment Treaties and Investor-State Arbitration: Two Approaches*, 17(6) J. WORLD INV. & TRADE 1015 (2016) (providing a review of the essay).

[111] *See generally* LINDA WEISS ET AL., HOW TO KILL A COUNTRY: AUSTRALIA'S DEVASTATING TRADE DEAL WITH THE UNITED STATES (2004); Shiro Armstrong, *The Economic Impact of the Australia–US Free Trade Agreement*, 69 AUSTL. J. INT'L AFF. 513 (2015).

[112] *See* Gareth Hutchens, *An Economic Analysis of the TPP? Don't hold your breath*, SYDNEY MORNING HERALD (Oct. 6, 2015), http://www.smh.com.au/federal-politics/political-news/an-economic-analysis-of-the-tpp-dont-hold-your-breath-20151006-gk2fic.html; John Garnaut, *The arm wrestle over drugs: Inside the TPP deal*, SYDNEY MORNING HERALD, (Oct. 7, 2015), http://www.smh.com.au/national/the-arm-wrestle-over-drugs-inside-the-tpp-deal-20151006-gk2dnt.html.

In 2009, the first (center-left) Rudd Labor Government requested the Productivity Commission (an independent agency advising the Treasurer) to conduct a public inquiry into Australia's bilateral and regional trade agreements (BRTAs). The Final Report from the Commission,[113] staffed mainly by Treasury and other economists, saw FTAs as a third-best solution. The Commission instead favored unilateral trade and investment liberalization—harkening back to the era of the Hawke-Keating Labor Governments (1983-1996) and the APEC approach from 1989—or otherwise multilateral initiatives. In April 2011, under a new Labor-led coalition with the more leftist Greens, the Gillard Government Trade Policy Statement accepted this basic approach and many of the Commission's specific recommendations.[114] Negotiations on major FTAs consequently slowed, with only one FTA signed with Malaysia in 2012, until a Coalition Government was restored by the September 7, 2013 election. The Trade Policy Statement was quietly buried and the Abbott Government subsequently concluded bilateral FTAs with Korea, Japan, and China, followed by the regional TPP agreement.

2. ISDS

One issue that attracted an unexpected amount of attention in the Productivity Commission's Inquiry was the scope of investment treaty protections, particularly ISDS. Until 2010, it had hardly figured in public debate, except to a limited extent around 2004 when the bilateral FTA had been signed with the United States. That ended up omitting ISDS mainly because civil society groups (especially in the United States) had become concerned about some claims under the North American FTA, combined with an upcoming US presidential election and the fact that the Howard Coalition Government lacked a majority in the Senate, which is required to approve tariff reduction legislation before Australia can ratify FTAs. Australian Treasury officials were also aware that the United States had a much larger stock of FDI in Australia than vice versa, possibly exposing Australia to more ISDS claims, although by that time, the annual FDI bilateral flows were quite balanced. The official reason emphasized for omitting ISDS, however, was that investors were already well protected by robust and familiar domestic courts and substantive laws. The latter rationale was also given for omitting ISDS bilaterally with New Zealand, when Australia signed AANZFTA in 2009, and then the CER Investment Protocol in 2011. Australia also proposed to omit ISDS with New Zealand (but not e.g. the United States or Japan) if and when the TPP is ratified and comes into force.[115] Otherwise, Australia had agreed to ISDS provisions in all other investment treaties, albeit limited to disputes related to the amount of

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[113] Australian Government, Productivity Commission, *Bilateral and Regional Trade Agreements Research Report*, (2010) at III.

[114] *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE (2011), blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf.

[115] Nottage, *supra* note 108, at 271–75.

compensation under the 1988 China BIT, and with a possibly very restrictive scope for the 1992 Indonesia BIT and several other early Australian treaties.[116]

In the Productivity Commission's 2010 Inquiry, the majority Report expressed concern that special treatment for foreign investors might create an uneven playing field and distort incentives for local investors.[117] On the one hand, it did acknowledge that such treatment might be justified first if ISDS-backed provisions led to more cross-border FDI (especially into Australia), but also pointed to some aggregated studies querying this position. Secondly, the majority Report accepted that such treatment could be justified if it helped Australia's outbound investors, but could not identify any instances of them bringing ISDS claims and noted the lack of submissions from industry groups to its Inquiry. On the other hand, the majority Report highlighted the direct (financial) and indirect ("regulatory chill") costs for Australia of being subject to ISDS-backed claims, pointing to various cases against other states involving claims of indirect expropriation or fair and equitable treatment. Accordingly, the majority Report included as recommendation 4(c) that Australia should: "seek to avoid the inclusion of investor-state dispute settlement provisions in BRTAs that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors."[118] Because ISDS, by definition, provides an extra *procedure* for foreign investors, this implied that Australia should no longer agree to ISDS provisions in any future agreements, even with developing countries.

The Gillard Government accepted this recommendation in its Trade Policy Statement, and consequently concluded the FTA with Malaysia without providing for ISDS. Yet that was quite meaningless in practice, as ISDS-backed protections were already available bilaterally under AANZFTA. Nor did the Gillard Government publish any assessment of how the Malaysia FTA's *substantive* commitments compared to those available to local investors under Australian domestic law—let alone which level of protection might be preferable from economic or other perspectives. In fact, as one recent study shows, similar international law protections are more protective with respect to direct expropriation by Australian state governments, indirect expropriations, some privative clauses, and probably also substantive legitimate expectations as an aspect of FET.[119] Even more curiously, the Gillard Government allowed the Peru BIT (ratified in 1997) to be renewed in 2012 after a fifteen-year term, even though it provided for ISDS.

Scholars expressed doubts about the Trade Policy Statement and underlying Commission Report.[120] The latter noted the dissenting views expressed

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[116] *Cf*. Luke R. 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*, 12 TRANSNAT'L DISPUTE MGMT. J. (2015).

[117] *Bilateral and Regional Trade Agreements Research Report*, *supra* note 113, at 255–77.

[118] *Id*. at XXXVIII.

[119] Nottage, *supra* note 108, at 273–76.

[120] Jurgen Kurtz, *Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication*, 27 ICSID REV. 65, 92 (2012); Leon Trakman, *Choosing Domestic*

by Professor Andrew Stoler, part-time Associate Commissioner appointed for this particular Inquiry and a former WTO Deputy Director-General:[121]

> He notes that foreign direct investment is very important in the modern economy and that Australians have significant investments in other economies. He considers that where the Australian Government deems it appropriate to negotiate a BRTA with a partner, that agreement should promote and protect investment and where the legal system of a partner is judged as not sufficiently developed to effectively handle investment disputes, Australian negotiators should preserve the option of including ISDS in the agreement.
>
> The report argues that Australia's investors do not require this added protection and that, by including ISDS, the Australian Government is taking on a risk (of being sued by foreign investors). The Associate notes that the report suggests that the investors are able to protect their overseas interests by accessing a variety of insurance schemes. In the view of the Associate, this is analogous to arguing against the need for a fire department because homeowners can buy property insurance.
>
> The Associate notes that those who oppose ISDS in BRTAs also tend to cite the risk of "regulatory chill" for Australia — in other words, the Australian Government might elect not to proceed with certain policies or regulations because it may be afraid of being sued in the ICSID. Opponents of ISDS cite cases such as where governments may back off regulating cigarette packaging due to the threat of a suit by a foreign investor. In the Associate's view, the appropriate response to these concerns is to ensure that the ISDS-related provisions of a BRTA are drafted carefully enough that they preclude challenges to those regulatory areas that Australia wants to ensure are protected (for example, health-related policies). In addition, in the Associate's view, there is reason to believe that a little bit of "regulatory chill" might be a good thing, even in Australia.
>
> Finally, the Associate considers that it is not realistic to suggest, as in his view part (c) of the recommendation suggests and the report implies, that it might be possible to agree an ISDS provision in a BRTA that does not give foreigners rights not available to nationals, or that a BRTA partner might seek to offer ISDS to Australia without seeking a reciprocal grant of ISDS rights.

Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo, 35 UNSW. L. J., 979, 985–87 (2012).

[121] *Bilateral and Regional Trade Agreements Research Report*, *supra* note 113, at 320–21.

Academics further urged a closer examination of the econometric evidence before rejecting the conventional view that ISDS-backed protections encouraged more cross-border investment.[122] It was suggested that such protections might encourage better quality FDI, especially in the sense of investments being made and managed with less bribery of foreign officials.[123] There were also warnings about over-reacting to high-profile ISDS cases, especially the first-ever claim against Australia that was formally initiated in 2011 by Philip Morris Asia under the 1993 BIT with Hong Kong where the Hong Kong subsidiary of the (originally US) tobacco group alleged expropriation of its trademarks and violation of FET due to Australia introducing tobacco plain packaging legislation.[124] The public outcry over this claim was evidenced in extensive newspaper coverage until the claim was rejected on December 18, 2015 on jurisdictional grounds.[125] This was identified as displaying "availability bias,"[126] similar to what Poulsen later referred to as "salience bias," as another example of bounded rationality displayed especially on the part of developing countries when faced with their first ISDS claims.[127] In addition, business groups such as the Australian Chamber of Commerce and Industry pressed the Gillard Government to revert to allowing ISDS in treaties particularly with developed countries, to protect Australia's outbound investors and rekindle stalled FTA negotiations.[128]

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[122] *See* Shiro Armstrong & Luke R. Nottage, *The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis* (Sydney L. School Research Paper No. 16/74 2016), ssrn.com/abstract=2824090.

[123] Luke R. Nottage, *The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic's View of Australia's 'Gillard Government Trade Policy Statement'*, 5 TRANSNAT'L DIS. MGMT J. (2011); Luke R. Nottage, *Throwing the Baby Out with the Bathwater: Australia's New Policy on Treaty-Based Investor-State Arbitration and Its Impact in Asia*, 37 ASIAN STUD. REV. 253, 258 (2013).

[124] *See* Philip Morris Asia Ltd. (Hong Kong) v. The Commonwealth of Austl., PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015); *Tobacco plain packaging—investor-state arbitration*, ATT'Y-GEN. DEP'T, www.ag.gov.au/tobaccoplainpackaging (last visited Sept. 21, 2017).

[125] *Compare* Nottage, *supra* note 108, at 27, *with supra*, Figure 5: Newspaper Coverage of ISDS. Indeed, as of September 12, 2016, there had not been a single Australian newspaper report about the *Philip Morris v. Uruguay* award rendered on July 8, 2016, even though that rejected a claim about other tobacco control measures on the merits and included Australia's pre-eminent international law expert on the tribunal (Professor James Crawford). Luke Eric Peterson, *The Philip Morris v. Uruguay Award on the Merits: Part One of our Three Part Analysis, Focusing on the Expropriation Claim*, 9 INV. ARBITRATION REPORTER 1, 3–7 (Jul. 31, 2016). *See also* Jarrod Hepburn & Luke R. Nottage, *Case Note:* Philip Morris Asia v. Australia, 18 J. WORLD INV. & TRADE 397 (2017) (giving further lessons to be drawn from the first and only ISDS claim against Australia).

[126] Luke R. Nottage, *Consumer Product Safety Regulation and Investor-State Arbitration Policy and Practice after* Philip Morris Asia v. Australia, 9 TRANSNAT'L DIS. MGMT. J. 1, 4 (2012).

[127] POULSEN, *supra* note 110, at 18, 142–46.

[128] *E.g.*, Press Release, Peter Anderson, Austl. Chamber of Commerce and Industry, *Australian Foreign Investment Requires Right to Sue Foreign Governments* (Aug. 9, 2012)

Even before the general election of September 7, 2013, the Coalition parties had declared that they would agree to ISDS in treaties on a case-by-case assessment.[129] On this basis, it agreed to ISDS-backed protections in bilateral FTAs signed with Korea and China on April 8, 2014 and June 17, 2015, respectively. However, the Coalition did not agree to such provisions in its FTA signed with Japan on July 8, 2014, which seemingly did not offer enough in return for seeking ISDS. Interestingly, the Labor Opposition protested about ISDS in parliamentary inquiries of the former two FTAs, but in late 2015, voted with the Coalition Government on tariff implementation legislation in order to allow their ratification.[130] This occurred even though the Government again lacked a majority in the Senate, and the Labor Party had agreed at its annual conference in July 2015 that its policy was to oppose ISDS in investment treaties.[131]

Labor Senators also sided with Coalition members in a Senate Committee Report in 2014 opposing an "Anti-ISDS Bill" introduced by a Greens Senator, which would have prevented any Australian government from agreeing to ISDS in any treaty. However, recalling past Labor Governments' active negotiation of human rights and environmental protection treaties, the Labor Senators mainly objected to the bill on the principle that the legislature should not shackle the executive branch's constitutional prerogative to negotiate treaties.[132] On the other hand, Labor Senators contributed to a majority Report in a separate Senate inquiry that was critical of the lack of transparency and parliamentary oversight associated with Australia's treaty-making in general, where ISDS was discussed even though this inquiry was primarily directed at the treaty-making process.[133] Further, in 2015, the Productivity Commission maintained its criticisms of ISDS (and FTAs generally).[134]

3. The Screening Issue

Like New Zealand (above Part II.B(3)), when Australia agrees to ISDS in FTAs, it generally includes an express carve-out from that procedure—and indeed inter-state dispute settlement—for decisions by the Treasurer (advised by FIRB) under the 1975 Act, Regulations and other aspects of Australia's foreign investment

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(on file at https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=7931).

[129] *Investor-State Dispute Settlement*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE, dfat.gov.au/trade/topics/Pages/isds.aspx (last visited Sept. 21, 2017).

[130] Nottage, *supra* note 108, at 268.

[131] Australian Labor Party's 47th National Conference, *National Platform: A Smart, Modern, Fair Australia*, 29 (July, 26, 2015).

[132] Luke Nottage, *The 'Anti-ISDS Bill' Before the Senate: What Future for Investor-State Arbitration in Australia?*, XVIII INT'L TRADE & BUS. L. R. 245, 275 (2015).

[133] Luke Nottage, *Investment Treaty Arbitration Policy in Australia, New Zealand and Korea?*, 25 J. ARB. STUD. 185, 197 (2015).

[134] Australian Government, Productivity Commission, *Trade & Assistance Review 2013-14*, (June 2015) 62.

policy as to whether or not to approve foreign investment proposal.[135] This is particularly important because when Australia signed its first FTA with Singapore in 2003, and especially the FTA with the United States in 2004, it significantly adjusted its trajectory of investment treaty-making towards a more contemporary US-style. On the one hand, it adopted more pro-state features with respect to commitments for *protecting* foreign investors. On the other, Australia adopted more liberal provisions for *liberalizing* FDI flows. Specifically, its FTAs more largely extend NT and MFN to the pre-establishment phase, subject to "negative list" annexes of existing non-conforming "measures," as well as "sectors" where extra requirements for foreign investors existed or could be added.

For example, under AUSFTA, Australia retained capacity for screening by the Treasurer (advised by FIRB, pursuant to the "national interest" test under the 1975 Act) to screen FDI applications from US investors, but in those Annex 1 "measures," it agreed to significantly raise the monetary threshold otherwise generally applicable before screening is required for general business acquisitions. Subsequent FTA partners have generally sought and obtained similar thresholds for their own investors into Australia, but lower thresholds still apply under FTAs with Singapore, Thailand (signed just after AUSFTA), and even Malaysia (signed in 2012). Vivienne Bath has closely analyzed Australia's varied FTA approaches to preserving its right to screen foreign investment, and observes that such:

> differences add to the complexity of Australian investment regulation and must also increase the attractiveness of "nationality shopping" for potential investors. It is not clear why the government retains these different thresholds. If a higher degree of liberalization was a component of government policy, it would be relatively straightforward to increase the thresholds unilaterally and apply them on a non-discriminatory basis. The failure to standardize the thresholds suggests that the government is holding the ability to grant higher screening thresholds in reserve for [future] combined trade and investment negotiations.[136]

Indeed, unilateral liberalization (raising thresholds for all foreign investors, under the Act) has also been advocated recently by some ANU-associated economists.[137] The Labor Opposition even adopted this position regarding the

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[135] *See* The Trans-Pacific Partnership, *supra* note 1, at Annex 9.H (listing similar reservations by New Zealand, Canada and Mexico).

[136] Vivienne Bath, *Australia and the Asia-Pacific: The Regulation of Investment Flows into Australia and the Role of Free Trade Agreements*, *in* RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH (2017). The higher agreed threshold in AUSFTA was a compromise reached after the United States initially proposed full exemption from FIRB review for its investors. *See supra* Part III.A.

[137] Shiro Armstrong et al., *Are Free Trade Agreements Making Swiss Cheese of Australia's Foreign Investment Regime?* 10–11 (E. Asia Bureau of Econ. Research, Working Paper No. 92, 2014), www.eaber.org/node/24527.

general business acquisition threshold in late 2015, in response to the Coalition Government's complaints of xenophobia and discrimination when Labor had initially indicated it might vote against tariff reduction legislation needed before the agreed FTA with China could be ratified (as mentioned above, Part III.A). It is unclear whether this proposal represents a genuine commitment to more far-reaching liberalization of foreign investment on the part of Labor, which has traditionally been somewhat more vocal in supporting local industry and has never mentioned liberalizing the 1975 Act when in power from 2008-13, but it is consistent with Labor's general objections to negotiating FTAs (outlined in (i) above).

Bath also points out that Australia's FTAs typically provide for a ratchet mechanism that allows for the state to modify its listed non-conforming "measures," but only if this does not decrease their conformity with NT and/or MFN commitments. This both limits and complicates the ability of the government to expand the scope of FDI screening under the 1975 Act, as evident by the amendments:

> in 2015 to lower the threshold for agricultural land to a cumulative amount of AUS$15 million. The lower thresholds could not, because of the agreements in the existing FTAs, apply to Chile, New Zealand or the United States. They could and do apply to investors from other FTA partners and non-FTA states, and the lower threshold of $55 million for agribusinesses and $15 million for agricultural land was specifically incorporated into the FTAs with China, Japan and Korea. In the case of Singapore and Thailand, because of the agreements in their FTAs, the threshold is $50 million in the case of land used wholly for a primary production business.[138]

The amendments to Australia's legislative regime to allow for screening agribusiness investment applications over $55 million also do not apply to investors from the United States, Chile, or New Zealand, which retain the much higher threshold for general acquisitions due to Australia's earlier treaty commitments. As mentioned above (Part III.B), the Labor Opposition had further objected that the lower threshold was much stricter than those for other traditionally sensitive sectors such as media or defense businesses.

Another issue identified by Bath relates to the 2016 amendment to Regulations under the 1975 Act to remove an exemption from FIRB review regarding state and territory government "critical infrastructure assets" sales (such as port facilities) to *private* foreign investors. She remarks that this:

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[138] Bath, *supra* note 136, at Part IV.C (noting TPP Investment Chapter Article 9.12(1) associated with Annex I as an example of a ratchet mechanism). *C.f.* The Trans-Pacific Partnership, *supra* note 1, art. 9.12(2) (including a ratchet regarding measures maintained or adopted in "sectors," "subsectors," or "activities" listed instead in Annex II).

> potentially constitutes a new measure which is not permitted by the ratchet mechanism applying to non-conforming measures. The Annexes to [AUSFTA], for example, do not refer to the sale of government assets, although transport, which includes most forms of infrastructure, is classified as a sensitive business for which a lower threshold of review applies. Article 22.2 also provides a carve-out for the controversial question of "essential security". In more recent agreements, the Australian list of non-conforming [sectors] specifically addresses the issue of privatization and includes it as a non-conforming [sector]. Thus Annex II of the TPP specifically reserves to the Australian government the right to limit the transfer or disposal of government entities or assets or the devolution of government services or the privatization of government owned entities or assets. In the ChAFTA, Annex III includes a similar provision.
>
> In practice, the size of infrastructure acquisitions, the frequent participation of state-owned enterprises and the complexity of structuring the acquisition will generally bring the [Act] into play in any case. However, this emphasizes the importance in both domestic policy, and FTAs, of providing scope for changes of policy on national interest and national security grounds. Australia's negative list approach, and the formulation of different negative lists in each negotiation, is arguably too prescriptive.[139]

So far, compared to New Zealand (Part II.B(iii) above), there has been much less discussion about this issue—investment treaties restricting the scope to add new categories to the national law regime for screening FDI applications in light of evolving community concerns. Perhaps the Labor Party does not want to highlight the topic, as it would then have to declare whether its pro-liberalization stance announced in 2015 extends to this very politically sensitive question. However, it may well gain wider public attention now, given that the TPP is again under parliamentary review, with minority parties and cross-bench Senators holding the balance of power in the upper house, as outlined in the next section. These politicians may become particularly keen to add new categories of businesses or assets to the national law regime for screening FDI applications.

4. Current State of Affairs

The big question now for Australia is whether the current Coalition Government can secure votes from cross-bench Senators or the Labor Opposition to pass tariff reduction legislation needed to ratify the TPP (even without the United

[139] Bath, *supra* note 136, at Part V.C.

States) or any future FTAs that contain ISDS provisions (including FTAs under negotiation with India and Indonesia). The Government was returned with an even smaller minority in the upper house (30 out of 76 Senators) following the July 7, 2016 double-dissolution election.[140] It therefore needs votes from at least nine other Senators, but the (nine) Greens Senators will likely never vote with the Government given their implacable opposition to ISDS, and indeed FTAs more generally. Of the 11 other cross-bench Senators, Pauline Hanson's 'One Nation' Senators (there are four) are notoriously xenophobic, while the Nick Xenophon Team Senators (there are three) favor more support for local manufacturing.[141]

A JSCOT Committee (with a majority of Government members, from both Houses) commenced an inquiry into ratifying TPP in February 2016, but it lapsed due to the general election.[142] On September 15, the Senate Foreign Affairs, Defence and Trade Committee commenced a parallel inquiry, with Submissions due by October 28 and its Report due by February 7, 2017.[143] The NGO most consistently critical of ISDS (as well as trade and investment liberalization generally) was pleased to announce:

> Sixty diverse Australian civil society organisations, representing two million Australians, recently wrote to all Labor, independent and minor party MPs and Senators to call for a Senate inquiry into the TPP. The inquiry was moved jointly by the Greens and the Nick Xenophon Team, and supported by the [Australian Labor Party . . .].
>
> This is a big victory for our campaign and gives us an opportunity to have our voices heard by a Senate committee, which will be more critical of the deal than the Government-majority Joint Standing Committee on Treaties (JSCOT). The committee is likely to meet in the week of October 10 to call for submissions.
>
> The inquiry will report in February 2017. The timing is important because it means the Australian government cannot push through the implementing legislation before it has been considered by the U.S. Congress. Both U.S. presidential candidates are opposed, and so far there is majority opposition in the Congress. The TPP cannot proceed if the U.S. fails to pass the implementing legislation.
>
> Despite their positive trade policy platform, Labor has not yet made any decision about how they will vote when the TPP

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[140] *See generally* Hannah Gobbett, *Composition of the 45th Parliament: A Quick Guide*, PARLIAMENT OF AUSTL. (Aug. 29, 2016), www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/45th_Parliament_Composition.

[141] *Cf.* Australian Fair Trade and Investment Network Ltd., *Election 2016: Trade Policy Comparison*, AFTINET (June 20, 2016), aftinet.org.au/cms/1606-2016-election-policy-scorecard.

[142] JSCOT, *supra* note 6.

[143] (TPP) AGREEMENT REPORT, *supra* note 7, at 1.

> legislation comes through Parliament. A senate inquiry will both delay the vote in Parliament and help to bring the TPP into focus.[144]

The most likely scenario remains that the present Coalition Government will try to secure votes from the Labor Opposition Senators. Yet Labor has already put the Government on notice that it remains opposed to treaties including ISDS, in the various parliamentary inquiries over 2013-15 dealing with major bilateral FTAs and/or ISDS (outlined in Part III.B(2) above). Emboldened by almost gaining power in the Lower House, where the Coalition Government was returned with a reduced majority of just one member, the Labor Opposition may now hold out and refuse to allow passage of legislation through the Senate to allow ratification of the TPP and future FTAs signed by the Coalition Government.

Indeed, on June 7, 2016 the Labor Party opposition's trade spokesperson declared publicly that, if elected, a new Shorten Government "would not accept . . . ISDS provisions in new trade agreements."[145] This would have reinstated the position under the Gillard Government Trade Policy Statement, consistent with the Labor Party's policy platform agreed to in July 2015, which was not widely publicized regarding the position on ISDS. However, the announcement might leave some small possibility of voting for legislation allowing ratification of the TPP if that might be considered not to comprise a "new" agreement.

More interestingly, and again consistent with the July 2015 Party platform, the spokesperson declared that a Shorten Labor Government would "develop a negotiating plan to remove ISDS provisions" from all of Australia's existing FTAs and BITs. If that proves impossible—which seems very likely at least for some recent treaties in light of Australia's experience of negotiating FTAs where counterparties like Korea had pressed very strongly to incorporate ISDS provisions[146]—the spokesperson announced that a future Labor Government would "seek to update the provisions with modern safeguards."[147] The rationale given was that "[S]ome of these provisions were drafted many years ago and do not contain the safeguards, carve-outs and tighter definitions of more contemporary ISDS provisions."[148] Although the spokesperson's statement focused on the ISDS *procedure*, such a policy shift might therefore extend to attempting to dial back the *substantive* commitments made to investors in earlier Australian treaties.

Additionally, the first Rudd Government agreed with Chile to terminate the BIT signed in 1996 when it signed the US-style bilateral FTA with Chile. The current Coalition Government has also proposed to terminate the BITs with

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[144] *Victory: Calls for Senate Inquiry Answered!*, AFTINET (Sept. 16, 2016), aftinet.org.au/cms/node/1250.

[145] Senator Hon Penny Wong, Senator for South Australia, Export Council of Australia at Australian Chamber of Commerce and Industry Trade Forum (June 7, 2016) (transcript available at www.pennywong.com.au/speeches/export-council-of-australia-australian-chamber-of-commerce-and-industry-trade-forum-sydney/).

[146] Nottage, *supra* note 132, at 220.

[147] Wong, *supra* note 145.

[148] *Id*.

Vietnam (signed in 1991), Peru (1997), and Mexico (2005) if and when the TPP involving those states is ratified and comes into force.[149] However, when ratifying the FTA with China in 2015—containing limited substantive commitments, and with only asymmetrical national treatment provisions subject to ISDS—the Coalition Government left in place the 1988 BIT. Under the FTA, Australia and China agreed on a three-year work program to discuss whether and how to fold in the BIT protections.[150]

IV. COMPARING KEY AREAS IN KEY EXISTING TREATIES FOR AUSTRALIA AND NEW ZEALAND

A. CER Investment Protocol

The starting point for comparing New Zealand and Australia with respect to the more technical aspects of investment treaties is the CER Investment Protocol—that is, the investment agreement between the two countries themselves. The principal CER treaty is regarded as one of the most liberalizing trade agreements globally, reflecting the long-standing strategy of both countries to integrate their economies and harmonize various business laws.[151] However, as explained in the Introduction above, it did not cover services or investment, and while a services protocol was concluded in 1988, it was not until 2011 that the two countries agreed on commitments to address cross-border investment. Given that the CER was signed in 1983 (well before the practice of including investment in FTAs had become standard practice),[152] the initial omission of investment is perhaps not surprising. That said, another reason has been given for the long delay before the start of investment negotiations: it appears that Australia was reluctant to extend preferential treatment to New Zealand regarding investment as this would have required Australia to extend that same treatment to its other investment treaty partners.[153] The impetus for the protocol was Australia's FTA with the United

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[149] *See Trans-Pacific Partnership Agreement*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE, dfat.gov.au/trade/agreements/tpp/pages/trans-pacific-partnership-agreement-tpp.aspx (last visited Sept. 21, 2017).

[150] Nottage, *supra* note 132, at 202. For details and the background to this compromise, *see* Vivienne Bath, *The South and Alternative Models of Trade and Investment Regulation – Chinese Outbound Investment and Approaches to International Investment Agreements*, RECONCEPTUALISING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH (2017).

[151] FADT Committee Report – CER Investment Protocol, *supra* note 65, at 2.

[152] *ANZCERTA – its genesis and the present*, Austl. Gov't Dep't Foreign Aff. & Trade, http://dfat.gov.au/trade/agreements/anzcerta/pages/anzcerta-its-genesis-and-the-present.aspx (last visited Sept. 21, 2017). The ANZCERTA replaced the New Zealand Australia Free Trade Agreement (also abbreviated as NAFTA) which had entered into force in 1966, leading to the removal of tariffs and quantitative restrictions on 80 per cent of trans-Tasman trade by the late-1970s. *Id.* The latter came to be seen as cumbersome and "lacked an effective mechanism for removing remaining restrictions." *Id.*

[153] FADT Committee Report – CER Investment Protocol, *supra* note 65, at 2.

States, AUSFTA. Negotiations began in 2005, prompted by New Zealand's concern that the relative position of New Zealand investors in Australia would deteriorate as a result of Australia's AUSFTA concessions to the United States.[154]

The Protocol is largely based on the 2004 US Model BIT, which marked a significant break with earlier US treaty practice, partly because of the United States' experience as a respondent in NAFTA cases.[155] By the time it was signed, both New Zealand and Australia had already concluded FTAs with investment chapters that also broadly followed the US approach, including AUSFTA for Australia (albeit omitting ISDS altogether) and AANZFTA for Australia and New Zealand (albeit including more provisions deferential to host states, overlapping with some found in other ASEAN agreements[156]). Apart from achieving consistency with this existing and expanding regional practice,[157] using the US model was a logical choice in the sense that a primary objective for New Zealand was to ensure a level of parity between New Zealand and US investors in Australia. Among the key (and often contentious) areas of investment treaties are their scope of application to defined investments,[158] the non-discrimination obligations of national and most favored nation ("MFN") treatment, and approaches to expropriation, the minimum standard of treatment and ISDS. The Protocol more or less follows the US template on all these issues—apart from ISDS, which is excluded altogether.

For instance, the definition of "covered investment" in the Protocol is lifted directly from the US Model BIT of 2004:

> [C]overed investment means, with respect to a Party, an investment in its territory of an investor of the other Party, in existence as of the date of entry into force of this Protocol or established, acquired, or expanded thereafter;[159]

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[154] FADT Committee Report – CER Investment Protocol, *supra* note 65, at 2.

[155] Mark Kantor, *The New Draft Model BIT: Noteworthy Developments*, 21 J. INT'L ARB. 383 (2004); Kenneth Vandervelde, *A Comparison of the 2004 and 1994U.S.Model BITs: Rebalancing Investor and Host Country Interests*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 283 (2008–2009). The 2004 model was replaced in 2012 by a largely similar version. Mark Kantor, *Little Has Changed in the New U.S. Model Bilateral BIT*, 27(2) ICSID REV. 335 (2012).

[156] *See generally* Vivienne Bath & Luke Nottage, *Asian Investment and the Growth of Regional Investment Agreements*, *in* ROUTLEDGE HANDBOOK OF ASIAN LAW 188 (2017); Diane Desierto, *Regulatory Freedom and Control in the New ASEAN Regional Investment Treaties*, 16 J. WORLD INV'T & TRADE 1018 (2015).

[157] *See* Alschner & Skougarevskiy, *supra* note 28, at pts. 5.B. 5.D. (fig. 1) (giving a quantitative analysis showing the diffusion of contemporary US treaty drafting in individual countries such as Japan and in the TPP).

[158] *See e.g.*, U.N. Conference on Trade and Development, *Scope and Definition*, 7–10, 13–19 (1999) [hereinafter UNCTAD, *Scope and Definition*] (giving definitions of terms like "investment" and "investor" and showing that they have a material role in determining the normative content of investment agreements).

[159] CER Investment Protocol, *supra* note 29, art. 1(a). The only differences are semantic, for example, the addition of a comma and "Treaty" in the US version is replaced

Then again, there are also efforts to integrate regional preferences, such as the inclusion of "claims to money or . . . contractual performance" in the definition of "investment,"[160] which is also featured in AANZFTA and other ASEAN, New Zealand, and Australian FTAs.[161]

Regarding investment liberalization, national treatment, and MFN under the Protocol, they apply from the pre-establishment phase, subject to extensive exceptions listed in New Zealand's and Australia's annexes of non-conforming measures.[162] Both countries included their respective foreign investment screening regimes in their annexes, but they also agreed to raise the monetary thresholds for screening business investments. Australia raised its threshold for New Zealand investors to match the one it agreed under AUSFTA to apply to US investors. For Australian investors, New Zealand agreed to more than quadruple the standard threshold from NZD100 million to NZD477 million, indexed annually.[163] Particularly in view of the absence of a direct enforcement mechanism, the raised thresholds are probably the most significant changes that affect trans-Tasman investors.

As for investor protections, the provisions on the minimum standard of treatment and expropriation generally follow the US model,[164] except that there is no annex to the Protocol setting out the parties' understanding of what amounts to an indirect or regulatory expropriation. Instead, there is a footnote to the expropriation provision in the main text, along the lines of the final clause of the annex on expropriation in the US model, as follows: "Except in rare circumstances, non-discriminatory regulatory actions by a Party to achieve legitimate public welfare objectives, such as protection of public health, safety, and the environment, do not constitute indirect expropriations."[165]

B. AANZFTA

The positions taken on the above issues in the CER Investment Protocol could be explained by the lack of any enforcement mechanism in the form of ISDS, and consequently, the low risk of the agreement to both countries. Nevertheless,

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with "Protocol." 2004 Model BIT, art. 1, https://www.state.gov/documents/organization/117601.pdf.

[160] CER Investment Protocol, *supra* note 29, art. 1(e)(vi). *Cf.* Australia-Chile Free Trade Agreement, Austl.-Chile, art. 10.1(j) n.10–17, July 30, 2008, [2009] A.T.S. 6 [hereinafter Australia-Chile FTA] (noting that: "Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other 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.").

[161] *E.g.*, AANZFTA, *supra* note 29, at ch. 11 art. 2(c)(iv).

[162] CER Investment Protocol, *supra* note 29, arts. 5, 9, annexations I–II.

[163] *Id.* annexations I-NZ-2 (New Zealand), I-AUS-2 (Australia).

[164] *Compare id.* arts. 12,14, *with* 2004 Model BIT, *supra* note 159, arts. 5–6.

[165] *Compare* CER Investment Protocol, *supra* note 29, art. 14(1) n.7, *with* 2004 Model BIT, *supra* note 159, annex B, *and* 2012 U.S. Model BIT, annex B, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

there is nothing in the Protocol on these issues that New Zealand and Australia have not been prepared to accept in other agreements, except, in the case of New Zealand, the lift in the screening threshold.[166] These other agreements include AANZFTA and the TPP, both of which also involve both New Zealand and Australia.

Like most of the ASEAN+ FTAs,[167] the AANZFTA has an investment chapter that provides for ISDS. The chapter, like the CER Investment Protocol, also follows the general format of the 2004 US Model BIT, which clearly influenced the chapter. For instance, it includes a broad asset-based definition of "investment" where an investment is defined as "every kind of asset . . ." (followed by an enumeration of examples), and tethers the minimum standard of treatment to customary international law.[168]

However, compared to the CER Protocol, the AANZFTA approach to investment is also more deferential to host states than the US template. For example, although the terms of the requirement to compensate for expropriation are generally the same, the interpretive annex defining what amounts to a regulatory taking does not have the "rare circumstances" proviso that allows public welfare regulation to be deemed expropriatory if the rare circumstances are present.[169] In some areas, AANZFTA is quite weak. As under the CER/US versions, national treatment applies from the establishment phase, but it remains conditional on further agreement being reached on reservations, and there is no MFN provision at all.[170] The AANZFTA investment chapter includes a provision on performance requirements, but this merely applies the parties' WTO obligations.[171] It does not have the more extensive and detailed prohibitions against the adoption of performance requirements as agreed to in the CER Protocol,[172] which are a longstanding pro-investor feature of US investment treaties since 2004 and remain a concern within Southeast Asia.[173] AANZFTA also follows typically ASEAN preferences on matters such as the definition of "covered investment," which expressly requires that investments be admitted in accordance with host state law in order to qualify for protection.[174] Such "admi[ssion]" requirements are aimed at

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[166] New Zealand has agreed to increase the screening threshold under the TPP, but only to NZD 200 million. Australia has agreed to lift the screening threshold under the TPP to the same higher level it applies to investors from the United States, New Zealand and other FTA partners.

[167] The exception is ASEAN's FTA with Japan. Shotaro Hamamoto & Luke Nottage, *Japan*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 345, 373 n.81 (2013).

[168] AANZFTA, *supra* note 29, at ch. 11 arts. 1(c), 6.

[169] *Id.* at ch. 11 annex. However, the proviso has not been successfully relied on to date in claims brought under other treaties adding such wording.

[170] *Id.* at ch. 11 art. 4. The negotiations on the reservations to national treatment and MFN are now taking place within the framework of the RCEP negotiations.

[171] *Id.* at ch. 11 art. 5.

[172] CER Investment Protocol, *supra* note 29, art. 7.

[173] We are grateful to Professor Julien Chaisse for pointing out the significance of performance requirements still in many Southeast Asian economies.

[174] AANZFTA, *supra* note 29, at ch. 11 art. 2(a). By virtue of a footnote, investments in Thailand and Vietnam also have to be approved in writing or, in the case of Vietnam, to be registered.

ensuring compliance with screening and other foreign investment approval laws.[175] As stated above, the CER approach is to deal with admission regulations through non-conforming measures only.

In the event, the overall outcome under AANZFTA is less ambitious than what New Zealand and Australia would have liked. This is evidenced by their efforts to expand their investment commitments through the standing joint committee of the AANZFTA parties,[176] and by their interest in signing their respective FTAs with Malaysia shortly after AANZFTA was concluded, so as to build on the AANZFTA commitments (in 2010 for New Zealand, 2012 for Australia). That said, even in New Zealand's and Australia's respective FTAs with Malaysia, the more cautious approach of the AANZFTA is still evident. The same approach as under AANZFTA is taken to the definition of "covered investment" (i.e. the admission requirement), national treatment (from establishment, but conditional on yet-to-be-agreed reservations), performance requirements (the application of the WTO commitments), and indirect expropriation (the lack of the "rare circumstances" proviso).[177]

C. The TPP

The TPP signals a move to even closer adherence to the 2004 US Model BIT than the CER Investment Protocol (and AANZFTA), albeit with several new provisions that were negotiated for the TPP to address concerns about its potential impact on the regulatory powers of host states. For these reasons, there is a mixture of "firsts" as well as established practice for New Zealand and Australia in this agreement.[178] The TPP may have extended a few commitments beyond what New Zealand and Australia would ideally have wanted, as judged against some apparent resistance to certain US-led approaches prior to conclusion of the TPP.

In terms of coverage, a draft version of the TPP investment chapter included an admission requirement in the definition of "covered investment,"[179] as under the AANZFTA, but in the final text it was omitted. Instead, the TPP

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[175] Chester Brown, *The Regulation of Foreign Direct Investment by Admission Requirements and the Duty on Investors to Comply with the Host State Law*, 21 N.Z. BUS. L. Q. 297, 301 (2015) (discussing whether a given investment satisfies an admission requirement is a question of the domestic law of the host state).

[176] *See* ASEAN-Australia-New Zealand Free Trade Area, *The Seventh Meeting of the FTA Joint Committee: Summary of Main Outcomes* (Aug. 18, 2015), http://aanzfta.asean.org/uploads/docs/FINAL_-_Summary_of_Outcomes_7th_FJC_for_Public_Release_20150818.pdf.

[177] New-Zealand – Malaysia Free Trade Agreement, arts. 10.1, 10.4, 10.6, annex 7 N.Z.-Malay., Oct. 26, 2009; Australia-Malaysia Free Trade Agreement, arts. 12.2(a), 12.4. 12.6, annex on expropriation, Austl.-Malay., May 22, 2012 [2012] ATNIA 17.

[178] *See* Kawharu, *supra* note 28; Nottage, *supra* note 28.

[179] CTC, *Newly Leaked TPP Investment Chapter Contains Special Rights for Corporations*, Citizens Trade Campaign (June 13, 2012), http://www.citizenstrade.org/ctc/blog/2012/06/13/newly-leaked-tpp-investment-chapter-contains-special-rights-for-corporations/.

definition is the same as that found in the US Model BIT and the CER Investment Protocol.[180] This is intriguing given that by the time the TPP was agreed to in October 2015, the Australian government was well aware of the important practical significance of admission requirements. During hearings in February 2015, Australia debated whether the admission requirements set out in Art 1(1)(e) of the Australia-Hong Kong BIT had been satisfied by Philip Morris in early 2011 when it applied and obtained FIRB approval for its Hong Kong subsidiary to assume ownership of Australian interests (including trademarks, subsequently diluted by tobacco plain packaging legislation).[181] However, uniquely among all known investment treaties so far, the TPP allows member states to exclude applicability of ISDS altogether (but not inter-state arbitration) regarding a "tobacco control measure," and both Australia and New Zealand appeared likely to do so.[182]

The TPP's obligations may extend to measures adopted or maintained by public enterprises, including potentially some activities of SOEs.[183] Each party's obligations under the investment chapter extend to "measures" (defined widely in chapter 1) adopted by a "state enterprise" to the extent that it is exercising delegated governmental authority.[184] This was also a first for New Zealand and Australia, although again it is consistent with the United States' preferred practice. Such coverage is particularly notable given the greater prevalence of government-linked companies in the economies of existing TPP signatories (e.g. Vietnam) and would-be prospective partners (e.g. Thailand).

Another pro-investor feature of the TPP enables investors to bring proceedings for alleged breaches of certain investment contracts with host

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[180] The Trans-Pacific Partnership, *supra* note 1, art. 9.1 (giving the definition of "covered investment").

[181] *See generally* Hepburn & Nottage, *supra* note 125. The subsequent award rejected the Australian government's argument that the application was misleading by not mentioning that the corporate restructuring could allow a BIT claim. The tribunal held that the government had not discharged its burden of proof that the admission was *prima facie* completed when a Treasury official had issued a 'no-objection' letter. Philip Morris Asia Ltd. (Hong Kong) v. The Commonwealth of Austl., PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶¶ 156–61, 551–22 (Dec. 17, 2015).

[182] The Trans-Pacific Partnership, *supra* note 1, art. 29.5. *See also* Tania Voon & Andrew D. Mitchell, *Philip Morris Vs. Tobacco Control: Two Wins for Public Health, but Uncertainty Remains* (Columbia FDI Perspectives, Paper No. 182, 12 (Sept. 12, 2016), http://ccsi.columbia.edu/files/2013/10/No-182-Voon-and-Mitchell-FINAL.pdf.

[183] *Chapter Summary: State-Owned Enterprises and Designated Monopolies*, *Trans-Pacific Partnership Factsheet*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE (Dec. 12, 2015), http://dfat.gov.au/trade/agreements/tpp/summaries/Documents/state-owned-enterprises-and-designated-monopolies.PDF. The TPP is also noteworthy for including a separate entire chapter (17) on SOEs, defined as enterprises principally engaged in commercial activities and predominantly owned or controlled by the state party. *Id.* Those commitments are enforceable under the (inter-state) dispute settlement chapter, unlike those under the broader competition law and policy chapter (16). *Id.*; Deborah Elms, *TPP Impressions: Competition and State Owned Enterprises (SOEs)*, ASIAN CENTRE BLOG (Nov. 17, 2015), http://www.asiantradecentre.org/talkingtrade/2015/11/17/tpp-impressions-competition-and-state-owned-enterprises-soes.

[184] The Trans-Pacific Partnership, *supra* note 1, art. 9.2(2)(b).

governments, as well as violations of substantive treaty commitments, or with respect to investment authorizations after granted by the applicable foreign investment authority. These proceedings may be brought subject to ISDS carve-outs for certain countries, including New Zealand and Australia, regarding screening decisions as to whether or not to admit investments under national laws.[185] This was a first for New Zealand, although not Australia. That said, Australia has only once included these types of claims, in its FTA with Korea,[186] and initially (when the Gillard Government's Trade Policy Statement was in place), Australia sought a complete exemption from the TPP's ISDS provisions.[187] More generally, the question of whether the ISDS provisions should enable investors to bring claims based on alleged breaches of their rights under contracts with TPP governments, as distinct from alleged breaches of the investment chapter, was one of the most contentious issues in the TPP investment negotiations. The US was reportedly alone in seeking the enforceability of contract claims with respect to contracts entered into before the TPP comes into effect, while most TPP countries opposed the inclusion of contract claims altogether.[188] However, the TPP is innovative (compared e.g. with the Australia-Korea FTA) in facilitating consolidation of any ISDS claims based on substantive treaty commitments with ISDS claims brought solely under contract law before specified arbitration institutions.[189]

The ISDS section of the investment chapter is reasonably standard for what it is. It reflects an approach to investment treaty arbitration that has become commonplace in investment agreements across the Asia-Pacific region,[190] and is also modeled on US practice. It includes a range of measures that have been developed in recent years in response to criticisms of the arbitral process. These include, for example, provisions that promote greater transparency, facilitate

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[185] The Trans-Pacific Partnership, *supra* note 1, art. 9.19(1)(a)-(b). *See also supra* Parts II.B(2), III. B(3) (discussing the carve-outs for initial screening decisions).

[186] Korea-Australia Free Trade Agreement, Korea-Austl., Apr. 8, 2014, [2014] A.T.S. 1, art. 11.16(1)(a)-(b) [hereinafter Korea-Australia FTA].

[187] *Id*.; Citizens Trade Campaign, *supra* note 179. This is based on a draft of the investment chapter that was leaked in 2012, and footnote 20 exempted Australia from the ISDS obligations. *Id.*

[188] Lori Wallach and Ben Beachy, *Analysis of Leaked Trans-Pacific Partnership Investment Text*, PUBLIC CITIZEN (Mar. 25, 2015), http://citizen.org/documents/tpp-investment-leak-2015.pdf.

[189] The Trans-Pacific Partnership, *supra* note 1, at annex 9-L. If the host state agreed in specified types of investment contracts to submit contract-based disputes to the Arbitration Rules of ICSID, UNCITRAL, ICC, or London Court of International Arbitration, the investor cannot directly invoke the ISDS procedure in Section B of the investment chapter in paragraph one. *Id.* But it does not waive rights to initiate or proceed with arbitration under those agreed rules in paragraph two "with respect to any measure alleged to constitute a breach" under Article 9.18. *Id.* 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 authorizations), the disputing parties can agree to consolidation of these sets of proceedings or otherwise be subjected to consolidated proceedings under Article 9.27. *Id.*

[190] Nottage, *supra* note 28, at 1.

amicus curiae participation, limit the amount of recoverable damages, bind tribunals to accept joint interpretations by the TPP parties, and empower tribunals to expedite the hearing of preliminary objections.[191] Although these provisions (or variants) are now quite familiar, not all are included in every recent agreement concluded by New Zealand and Australia, including AANZFTA (which lacks an express provision on amicus participation, for example). Unlike AANZFTA,[192] there is no express requirement that arbitrators be independent of the parties. However, this would follow under the applicable Arbitration Rules and/or background arbitration law, and could be elaborated in the code of conduct for arbitrators that must be agreed upon before the TPP may come into force.[193]

There are also variations to the standard format. For example, there is a requirement that the tribunal provide its draft award to the parties for comment, modeling WTO practice with respect to panel reports. This is not found in any of New Zealand's FTAs, but it was provided already in the 2004 US Model BIT as well as in Australia's FTA investment chapters with Chile (signed in 2008) and Korea (signed in 2014).[194] Finally, the TPP parties would consider how an appeals facility might apply to their agreement.[195] The 2004 US Model BIT goes further, in that it obliges the parties to "strive to reach an agreement" on the application of the appeals facility. In the 2012 Model BIT, this had been watered down to "consider" its application, which is the approach reflected in the TPP.[196] So far, this type of promise has paid lip service to the development of appellate review in ISDS. However, as discussed in Part VI below, appellate review is now a feature of the EU's revised approach to investment treaties, including as seen in its FTAs with Canada and Vietnam.

As to substantive investment liberalization and protection, the TPP includes clarificatory language across a number of provisions in the investment chapter to ensure public welfare considerations may be taken into account in the assessment of a measure's compatibility with the agreement. For example, there is a footnote and a Drafters' Note that together provide guidance on the interpretation of "in like circumstances" for the purpose of the national treatment and MFN treatment rules. The footnote clarifies that whether treatment is accorded in "like circumstances" depends on the "totality of circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of

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[191] The Trans-Pacific Partnership, *supra* note 1, arts. 9.23(4)–(6), 9.24, 9.25(3), 9.29(1)–(6).

[192] AANZFTA, *supra* note 29, at ch. 11 art. 23.2.

[193] The Trans-Pacific Partnership, *supra* note 1, art. 9.22(6). Precedents for the code would be the China-Australia FTA (Annex 9-A) and recent EU texts such as its FTA with Singapore (Annex 9-F), concluded before the former and which therefore seems to have provided the template. *Id*.; China-Australia Free Trade Agreement, China-Austl., Dec. 20, 2015 [hereinafter China-Australia FTA].

[194] *See, e.g.*, The Trans-Pacific Partnership, *supra* note 1, art. 9.23(10); 2004 Model BIT, *supra* note 159, art. 28.9; Australia-Chile FTA, *supra* note 160, art. 10.20(9); Korea-Australia FTA, *supra* note 186, art. 10.20(11).

[195] The Trans-Pacific Partnership, *supra* note 1, art. 9.23(11).

[196] *Compare* 2004 Model BIT, *supra* note 159, art. 28.10, *with* 2012 U.S. Model BIT, *supra* note 165, art. 28.10.

legitimate public welfare objectives."[197] There are also provisions that address the relevance of investor expectations to a minimum standard of treatment claim (not relevant, by themselves), and the meaning of such expectations in the context of an expropriation claim (including the requirements that the expectations be reasonable and investment-backed, which may depend on the nature and extent of regulation in the relevant sector).[198] Further exceptions deal with specific matters such as public debt.[199]

At the same time, the TPP loads most of the safeguarding of regulatory space into the investment provisions themselves. Unlike the approach taken in the CER Investment Protocol and the AANZFTA, but otherwise consistent with US preferences, the general GATT/GATS-based exceptions in the TPP do not apply to the investment chapter as an additional safeguard.[200] Negotiators may have taken comfort from the greater attention to the crafting of the various rules, or even determined that trade exceptions are not apt to cover investment obligations.[201] Nevertheless, New Zealand had not taken the TPP approach in its previous treaties, whereas Australia had included a general exception specifically for investment in its FTA with Korea, and both had extended GATS Article XIV to the investment chapter under AANZFTA.[202]

Apart from indicating levels of tolerance and ambition, the above agreements also say something else about New Zealand and Australian investment treaty practice. In general, both have been "rule takers" rather than innovators. This is not evident from quantitative comparisons of the level of linguistic consistency in treaties concluded by Australia and New Zealand,[203] but rather by their recent

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[197] The Trans-Pacific Partnership, *supra* note 1, at Drafters' Note, art. 9.4 n.14. *See also* Caroline Henckels, *Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA and TTIP*, 19(1) J. INT'L ECON. L. 45, (2016); Richard Braddock, *Striking a Balance – Protecting Investors from Discrimination while Clarifying the Scope for Legitimate Government Regulation in the TPP*, THE AGE OF MEGA-REGIONALS: TPP AND REGULATORY AUTONOMY IN IEL (2016) (locating the Drafter's Note in the context particularly of NAFTA case law, and arguing that the Note will have binding effect under the Vienna Convention and general international law).

[198] The Trans-Pacific Partnership, *supra* note 1, art. 9.6(4), annex 9-B & n.36.

[199] *Id.* at annex 9-G.

[200] *Id*. art. 29.1.

[201] *Cf.* JURGEN KURTZ, THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS 134 (2016).

[202] *E.g.*, Korea-Australia FTA, *supra* note 186, art. 22.1(3); AANZFTA, *supra* note 29, art. 15.1.2. By contrast, perhaps reflecting the influence of NAFTA and subsequent US treaty practice, the earlier Australia-Chile FTA lacks such a general exception. Australia-Chile FTA, *supra* note 160. Julien Chaisse provides an early argument that such provisions are not a panacea for investment treaties, being mostly unsuited or unnecessary regarding public health measures such as tobacco regulation. Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections – Is a General Exceptions Clause a Forced Perspective?* 39 AM. J. L. & MED. 332, 359 (2013).

[203] Mapping BITs, *Australia*, http://mappinginvestmenttreaties.com/country?iso=AUS (last visited Sept. 22, 2017) (showing Australia is actually ranked 3rd out of 133 countries with departures in linguistic consistency with its other BITs mainly for the treaties concluded with Hong Kong (probably due to the latter's tendency to follow the UK

reliance on the US Model BIT approaches to a range of key issues when crafting their CER Investment Protocol and recent FTAs.[204] There are exceptions, but so far these have been limited in scope and/or to individual treaties. These include the express public health exception in New Zealand's BIT with Hong Kong,[205] missing from the Australia–Hong Kong BIT signed two years earlier; New Zealand's now standard exception relating to the interests of its indigenous Maori (although it only benefits New Zealand); and interesting provisions in Australia's recent FTA with China on arbitrator ethics and "public welfare notices."[206] The latter allows a respondent state to issue a notice to the home state of the claimant investor, to trigger consultations on the applicability of the public welfare exception in the ISDS section of the investment chapter, with an inter-state decision potentially suspending proceedings at an early stage.

The reliance on the US-derived model has had its advantages in terms of its acceptance within New Zealand's and Australia's spheres of interest across the Asia-Pacific, but it may also risk creating a "status-quo" bias making it more difficult for either country to re-orient its treaty practice towards different approaches, such as the new model being promoted by the EU.[207] Be that as it may, while the TPP may be the high water mark in terms of the breadth, depth, and enforceability of obligations on investment, both countries have also been prepared to accept less ambitious approaches within the status-quo framework, as with AANZFTA, at least as an opening for further discussion and agreement. Furthermore, while there is some evidence that the TPP text has already influenced FTA negotiations in the Asia-Pacific,[208] the prospects that the TPP will enter into force in its current form are remote, in light of President Trump's determination that

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approach), Chile and Mexico (probably influenced by their strong reliance on the US approach), and India). Mapping BITs, *New Zealand*, http://mappinginvestmenttreaties.com/country?iso=NZL (last visited Sept. 22, 2017) (showing New Zealand is not ranked, perhaps because it only has four BITs to compare for internal consistency).

[204] *Cf.* Tomer Broudeet et al., *The Trans-Pacific Partnership and Regulatory Space: A Comparison of Treaty Texts*, 20 J. INT'L ECON. L. 391, fig. 1 (2017) (showing the similarity of the 2004 and 2012 US Model BITs, as well as recent Australian and especially New Zealand FTAs, with the TPP).

[205] Agreement on the Promotion and Protection of Investments, H.K.-N.Z., July 6, 1995, art. 8(3) [hereinafter Hong Kong-New Zealand BIT]. It would have been interesting to see whether the lack of such an express requirement in the Australia-Hong Kong BIT (signed in 1993) would have made any difference to the tribunal (even psychologically) if the Philip Morris claim had proceeded to a decision on the merits. However, the omission in the Swiss BIT (signed in 1988) did not prevent the tribunal in the recent award in favor of Uruguay from interpreting that treaty in light of customary international law, noting—like many significant awards since 2000—that the latter had long recognized that the protection of public health is an essential manifestations of a state's "policy power" (*lois de police*). *See generally* Peterson, *supra* note 125.

[206] China-Australia FTA, *supra* note 193, art. 9.11(4)–(8), annex 9-A.

[207] Nottage, *supra* note 28, at 334 (noting also a similar issue identified with Korea's treaty practice); *see supra* Part IV.

[208] *E.g.*, Andrew D. Mitchell & Tania Voon, *Foreword: The Continuing Relevance of the Trans-Pacific Partnership*, 17(2) MELB. J. INT'L L. I, v (2016).

the United States not ratify the agreement. While Australia and Singapore are leading attempts to persuade the remaining countries to salvage the TPP,[209] according to its terms, it cannot enter into force without ratification by the United States.[210] Any re-negotiation into a new agreement would be difficult. Japan's support for the TPP without the United States appears to be equivocal,[211] and if neither the United States nor Japan remains on board, the TPP loses much of its economic and strategic value. As against this loss, the remaining TPP countries would need to reconsider the extent to which US demands should continue to be reflected in any renegotiated text.

This state of affairs allows greater space for alternative models, including in RCEP and even possibly a wider FTA covering all or most of the Asia-Pacific region to flourish and take hold. Within this space, other regional powers such as China may step up. Yet, it would also provide New Zealand and Australia with a further opportunity to promote their preferences. The promotion of alternatives through RCEP is explored next, and more broadly in Part VI below.

V. NEW ZEALAND AND AUSTRALIA IN THE RCEP NEGOTIATIONS

The RCEP negotiations involve the ten members of ASEAN and the six countries with which ASEAN has existing FTAs (the "ASEAN+" FTAs): Australia, China, India, Japan, Korea, and New Zealand.[212] Formal negotiations began in May 2013 following their agreement on a set of guiding principles and objectives that were announced at the margins of the East Asia Summit in Cambodia in late 2012.[213] As usual, and despite the recommendations of Australia's Senate inquiry majority report into treaty-making in 2015, RCEP negotiations are taking place behind closed doors. However, the Australian government invited various stakeholders for a forum on ISDS and investment chapter issues, hosted on April 27, 2016, on the sidelines of the negotiation round held in Perth.[214] In addition, some light was shed on the RCEP negotiations when an apparent draft of the

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[209] Isabel Reynolds & Michael Heath, *Australia Pushes for TPP Without U.S. After President Donald Trump Exits Deal*, STUFF (Jan. 25, 2017), http://www.stuff.co.nz/world/australia/88738088/Australia-pushes-for-TPP-without-US-after-President-Donald-Trump-exits-deal.

[210] The Trans-Pacific Partnership, *supra* note 1, art. 30.5.2. Entry into force requires ratification by either all twelve signatories, or by at least six signatories that together account for at least 85 per cent of the combined gross domestic product in 2013; therefore, this threshold cannot be reached without the United States. *Id.*

[211] Reynolds & Heath, *supra* note 209.

[212] *See generally* Bath & Nottage, *supra* note 156; Desierto, *supra* note 156.

[213] *See Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE 3 (Nov. 20, 2012), http://dfat.gov.au/trade/agreements/rcep/Documents/guiding-principles-rcep.pdf.

[214] *RCEP News: Twelfth Round of Negotiations - 17-29 April 2016, Perth, Australia*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE (May 27, 2016), http://dfat.gov.au/trade/agreements/rcep/news/Pages/twelfth-round-of-negotiations-17-29-april-2016-perth-australia.aspx.

investment chapter (dated October 2015) was leaked in April 2016.[215] There are inherent limitations in relying on documents where the authenticity cannot be verified. Subject to this caveat, this RCEP investment chapter draft provides an interesting basis for analysis because it seemingly identifies the initial positions of each of the RCEP parties (except that the ASEAN countries are grouped together),[216] as well as the new text that has been proposed by the RCEP investment working group. In some respects, for the purpose of analysis, this has more value than a final text. Taking the CER Investment Protocol for example, it is not entirely clear where New Zealand and Australia may have differed to begin with, if at all, compared to the final outcome.

Both former New Zealand Prime Minister John Key and former Australian Prime Minister Julia Gillard described the RCEP as complementary to the TPP, in the sense that both agreements are part of each country's overall strategy to integrate economically into the Asia-Pacific.[217] At the same time, the two FTAs are competitive in terms of the economic as well as diplomatic and strategic interests involved.[218] The RCEP also provides an opportunity for the development of an alternative model in terms of legal text. The RCEP countries indicated some support for the idea that RCEP will be different and will reflect ASEAN preferences when they accepted that, as an ASEAN initiative, the RCEP negotiations would be ASEAN-led (through their recognition of "ASEAN Centrality in the emerging regional economic architecture").[219] Their guiding principles for negotiation also prioritize respect for the heterogeneity amongst the RCEP economies, by directing that the agreement take into consideration the different levels of development of the participating countries.[220] At the same time, the guiding principles reflect the expectation that the RCEP will broaden and deepen the existing arrangements and have "significant improvements" over the ASEAN+1 FTAs.[221]

Within the leaked investment chapter draft, New Zealand and Australia appeared to occupy the middle ground, at least to the extent that India's proposals in particular present more radical pro-state options in line with its revised Model

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[215] The leaked draft was available at http://keionline.org/node/2474, but the link no longer exists.

[216] Each party has an identifier next to a clause, phrase or word it supports. For instance, "Au" for Australia, "NZ" for New Zealand, "I" for India and so on.

[217] Press Release, John Key, Prime Minister of New Zealand, *New Zealand Joins Launch of Asian FTA Negotiations* (Nov 21, 2012) (on file at https://www.beehive.govt.nz/release/new-zealand-joins-launch-asian-fta-negotiations); Joint Press Release, Julia Gillard, Prime Minister of Australia, and Craig Emerson, Trade and Competitiveness Minister of Australia, *Australia Joins Launch of Massive Asian Regional Trade Agreement* (Nov. 20, 2012) (on file at http://trademinister.gov.au/releases/2012/ce_mr_121120.html).

[218] *See generally* Wilson, *supra* note 30.

[219] *Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership*, *supra* note 213, at 1. *See also* Fukunaga, *supra* note 33 (discussing the potential for ASEAN to take a lead role in the development of the RCEP).

[220] *Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership*, *supra* note 213, at 1.

[221] *Id.*

BIT (finalized in December 2015).[222] Within the middle ground though, New Zealand tended to revert to the more cautious AANZFTA approach, whereas Australia generally remained aligned with the US model and the TPP. This may reflect Australia's greater interests in promoting outbound investment as well as (anticipated) greater negotiating power vis-à-vis ASEAN and other major capital-importing countries engaged in the RCEP negotiations. That said, there is a mixture of convergence and divergence between both countries' positions. There is little evidence that either country proposed or supported novel approaches to the balancing of host government and investor interests, although both have put forward some clarificatory language derived from their other recent agreements. The date of the draft may partly explain this, as it pre-dates the tabling of the EU's proposed investment chapter for the Transatlantic Trade and Investment Partnership with the United States (TTIP), the release of the TPP in November 2015, and the finalization of the revised Indian Model BIT and the subsequent discussions on these later texts.[223]

For example, in relation to investment coverage, the draft shows that New Zealand favored the CER Investment Protocol/US Model BIT definition of "covered investment" whereas Australia supported the inclusion of an AANZFTA-type admission requirement (along with ASEAN, China, and India).[224] On the other hand, New Zealand wanted to include the "claims to money or . . . contractual performance" element in the definition of "investment" (as in the CER Protocol and AANZFTA), but Australia did not. Australia (supported only by Japan) was prepared to extend the chapter's protections to measures adopted by state enterprises exercising governmental authority, as under the TPP.

Regarding market access, as would be expected given their past practice, both New Zealand and Australia supported the application of national treatment from the pre-establishment phase.[225] Only India was an outlier on this. All the

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[222] Memorandum from the Joint Sec. to the Gov't. of Indian, Indian's Model Bilateral Investment Treaty Text (Dec. 28, 2015) (on file at http://mof.gov.in/reports/ModelTextIndia_BIT.pdf). This revised text is somewhat less pro-state than a consultation draft released earlier in 2015. Model Text for the Indian Bilateral Investment Treaty, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (last visited Sept. 22, 2016). Similar concepts can also be found in the "Joint Interpretive Statement" reportedly proposed by India for (re)negotiations with existing BIT signatories. Sarthak Malhotra, *India's Joint Interpretive Statement for BITs: An Attempt to Slay the Ghosts of the Past*, IISD INVESTMENT TREATY NEWS (Dec. 12, 2016), www.iisd.org/itn/2016/12/12/indias-joint-interpretive-statement-for-bits-an-attempt-to-slay-the-ghosts-of-the-past-sarthak-malhotra/.

[223] *Proposal for Transatlantic Trade and Investment Partnership*, COM (July 2015), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230.

[224] All of the provisions in the draft are numbered "Article XX" and for this reason are not referenced.

[225] China also seems to have accepted, upfront, the application of national treatment from establishment. In contrast, it only agreed to national treatment post-establishment in its FTAs with New Zealand and Australia: China and New Zealand Free Trade Agreement, China-N.Z., Apr. 7, 2008, [2008] NZTS 19, art. 138; China-Australia FTA, *supra* note 193, art. 9.3(2)–(4).

same, the key issue for both New Zealand and Australia concerns the scope of the exceptions to the obligation, rather than the in-principle acceptance of its application from the point of establishment. In this regard, the RCEP may provide an opportunity, in a way that the TPP probably did not,[226] for both countries to reconsider their approaches to the scheduling (as non-conforming measures) of their respective screening regimes. For example, a revised reservation that allows the addition of new screening categories may relieve some of the domestic political pressure that the RCEP may otherwise attract. India proposed language similar to that found in the TPP on the interpretation of "like circumstances," although India's version is more elaborate and, by listing broad indicative factors for assessing the legitimacy of regulatory objectives, also more deferential to host governments. Neither New Zealand nor Australia supported India's proposal—at least they did not at the time of the 2015 draft. Australia, Japan, India, and Korea also provided text to clarify that national treatment refers, with respect to a regional level of government, to treatment of investors by that regional level of government. This is presumably to address the argument, raised in *Merrill & Ring Forestry Inc. v. Canada*,[227] that an investor can be discriminated against by one regional government if another investor receives more favorable treatment in a different region by a different regional government.[228]

New Zealand and Australia also supported the application of MFN from the pre-establishment phase, and again, India was the only country not to endorse it. Instead, it seems that India's position on MFN (which it eschews completely in the revised Model BIT finalized in December 2015) was to leave such treatment to individual negotiation. This is not entirely clear, however, given the way the draft text is presented. The ASEAN countries also sought an exception for future intra-ASEAN investment agreements.

On the investor protections, New Zealand generally backed language that closely tracks AANZFTA (and sometimes the CER Investment Protocol), while Australia favored the language of the US model and the TPP. For the minimum standard of treatment, the differences are in the expression and ordering, rather than the substance. India proposed a list of proscribed behaviors, similar to those in the Canada-European Union Comprehensive Economic and Trade Agreement

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[226] JANE KELSEY, HIDDEN AGENDAS: WHAT WE NEED TO KNOW ABOUT THE TPP 16, 31 (2013) (observing that the United States "always demands less vetting of foreign investment" in its FTA negotiations) Australia faced pressure to exempt the United States from its screening regime during the AUSFTA negotiations but instead agreed to significantly raise its screening threshold. Larry Crump, *Global Trade Policy Development in a Two-Track System*, 9 J. INT'L ECON. L. 487, 497 (2006).

[227] Merrill & Ring Forestry L.P. v. The Government of Canada, UNCITRAL, Award, 225 (Mar. 31, 2010) (noting that the tribunal appeared to accept that regional variations could be justified by local conditions).

[228] *Id. See also* Korea-Australia FTA, *supra* note 186, art. 11.3(3) (providing similar language as the Merrill case).

(CETA)[229] and the EU's TTIP draft,[230] but again neither New Zealand nor Australia indicated any support for this approach at the time. Australia and Korea proposed exceptions on health and environmental measures within the prohibitions on performance requirements. This perhaps suggests Australian acceptance of the TPP approach to incorporating policy space within substantive obligations rather than as stand-alone exceptions, although in its FTA with Korea, Australia had agreed to an overarching general exception (as mentioned in Part IV.C).

New Zealand (aligned with India) proposed to exclude the "rare circumstances" proviso to the policy safeguard for public welfare regulation in the annex on expropriation. Australia on the other hand accepted it, although it did not join Korea in seeking to clarify when such rare circumstances might arise (such as when a measure is extremely severe or disproportionate in light of its purpose).[231] New Zealand and Australia also differed on how to treat investor expectations as a factor relevant to the case-by-case analysis of an allegedly expropriatory measure. This factor, as expressed by New Zealand (and India), was whether the measure breached a prior, binding, and written assurance by the host government. For Australia (and China, Japan and Korea), investment-backed expectations must be distinct and reasonable, indicating a lower threshold for proof. New Zealand sought to include, as a criterion for a finding of indirect expropriation, that the deprivation be so severe as to amount to a lack of good faith by the host government. Similar language is found in New Zealand's FTA with Korea,[232] as well as Korea's FTA with Canada.[233] According to the draft, however, Korea did not promote its inclusion in the RCEP.

China and Korea confirmed their acceptance of investment treaty arbitration as the primary mode of ISDS. So did Japan, which is interesting given that it gave up on seeking ISDS in its bilateral FTA with Australia (and earlier with the Philippines),[234] plus some concerns expressed particularly by some opposition

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[229] Alschner & Skougarevskiy, *supra* note 28, at 577. CETA was concluded in mid-2014, then subjected to a "legal scrub," which significantly altered the text, including shifting to the EU-preferred "investment court" model. However, the agreed revised text has not yet been signed. *Id.* at 585.

[230] *Proposal for Transatlantic Trade and Investment Partnership*, *supra* note 223. According to UNCTAD, reaching agreement on an exhaustive list of specific obligations may be challenging but it may also lower the risk of unanticipated interpretations. *See* U.N. Conference on Trade and Development, *World Investment Report 2012 – Towards a New Generations of Investment Policies* 85 (2012).

[231] *See* Nottage, *supra* note 108, at 1015–18. Australia (as well as Korea) proposed including proportionality as a relevant factor for the case-by-case analysis of a measure for its expropriatory effect. For arguments by Henckels and others for tribunals to engage in more structured proportionality testing in investment treaty arbitration. *Id.*

[232] New Zealand-Korea Free Trade Agreement, N.Z.-Korea, annex 10-C, Mar. 28, 2015.

[233] Canada-Korea Free Trade Agreement, Can.-Korea, annex 8-B, Sept. 23, 2014.

[234] Luke Nottage, *Investor-State Arbitration: Not in the Australia-Japan Free Trade Agreement, and Not Ever for Australia?*, 38 J. JAPANESE L. 37, 38–39 (2014).

party parliamentarians especially in the context of TPP negotiations.[235] Indeed, these three countries also proposed extending ISDS to the enforcement of investment agreements.[236] China appears to have promoted the idea of appellate review of awards, although there is no proposed clause on the matter in the draft. The New Zealand and Australian views on these potentially contentious issues cannot be discerned from the draft because, at the time, neither country had provided any text on ISDS.

VI. POTENTIAL FOR PROMOTING MORE EU-STYLE TREATIES IN THE ASIAN REGION

India finalized its distinctly more pro-state Model BIT in December 2015,[237] although this was dialled back from an earlier discussion draft.[238] Since mid-2016, India has been approaching BIT partners (such as Australia) to inquire about renegotiating those early treaties according to this template.[239] India also can be expected to press for at least some of the features in its new Model BIT to be included also in FTAs, such as the bilateral treaty under negotiation with Australia since May 2011,[240] as well as RCEP. Some commentators welcome this possibility as a means to slow or reverse the expansion of US-style treaty drafting in the Asian region.[241]

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[235] *See generally* Shotaro Hamamoto, *Recent Anti-ISDS Discourse in the Japanese Diet: A Dressed-up but Glaring Hypocrisy*, 16 J. WORLD INV. & TRADE 931 (2015).

[236] *Id.* In recent BITs, by contrast, Japan has included a broader "umbrella" or "obligations observance" clause that elevates obligations assumed vis-à-vis investors on the part of the host state (even unilaterally) to substantive treaty commitments, which are usually (but not always) then subject also to possible enforcement via ISDS. *See* Shotaro Hamamoto, Debates in Japan over Investor-State Arbitration with Developed States 5–6 (CIGI Investor-State Arbitration Series, Paper No. 5*,* 2016), https://www.cigionline.org/sites/default/files/isa_paper_no.5.pdf.

[237] Ranjan, *supra* note 31, at 14.

[238] Joel Dahlquist & Luke Eric Peterson, *Analysis: In Final Version of its New Model Investment Treaty, India Dials Back Ambition of Earlier Proposals – But Still Favors Some Big Changes*, INV. ARB. REP. (Jan. 3, 2016), http://www.iareporter.com/articles/analysis-in-final-version-of-its-new-model-investment-treaty-india-dials-back-ambition-of-earlier-proposals-but-still-favors-some-big-changes/. *Cf.* Grant Hanessian & Kabir Duggal, *The 2015 Indian Model BIT: Is This Change the World Wishes to See?*, 30 ICSID REV. 729 (2015).

[239] Deepshikha Sikarwar, *India Seeks Fresh Treaties With 47 Nations*, ECONOMIC TIMES (May 27, 2016), http://economictimes.indiatimes.com/news/economy/foreign-trade/india-seeks-fresh-treaties-with-47-nations/articleshow/52458524.cms.

[240] *Australia-India Comprehensive Economic Cooperation Agreement*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE, http://dfat.gov.au/trade/agreements/aifta/pages/australia-india-comprehensive-economic-cooperation-agreement.aspx (last visited Sept. 22, 2017).

[241] Kyla Tienhaara & Belinda Townsend, *Is India Holding the Line Against Another TPP?*, EAST ASIA F. (May 20, 2016), http://www.eastasiaforum.org/2016/05/20/is-india-holding-the-line-against-another-tpp/.

However, pushback can be expected from countries such as Australia with significant outbound FDI stocks or potential, especially if its investors have already had adverse experiences in India (as evidenced by the first-ever and successful "outbound" treaty claim by an Australian investor, filed on 27 July 2010).[242] Australia will also not want to agree to an Indian-style regime because it could encourage a similarly pro-state stance to be taken by Indonesia, which has also been in FTA negotiations with Australia bilaterally since 2013 and through RCEP. Indeed, bilateral diplomatic relations have warmed recently and FTA negotiations have been reactivated from 2016,[243] so it now seems more likely that Australia will conclude a bilateral FTA with Indonesia before one with India. This could set a useful baseline for Australia then with respect to India, bilaterally and in RCEP. Yet Indonesia has also been letting old BITs lapse since 2014, planning to replace them with "new generation" treaties through FTAs and/or BITs based on its own new model.[244] The latter remains undecided or at least undisclosed, possibly allowing for more flexibility in negotiations, but countries like Australia will also need to be innovative in negotiating with Indonesia.

In addition, the European Union has been "reorienting" towards Asia in recent years, concluding FTAs with Singapore on October 17, 2014,[245] and with Vietnam on December 2, 2015.[246] The latter, in particular, hopes to "trigger a new wave of high quality investment in both directions, supported by an updated investment dispute resolution system,"[247] reflecting prominent features of the new EU approach towards investment treaty drafting—precipitated mainly by the TTIP negotiations with the United States.[248] With part of the European Union also now actively pursuing greater engagement with counterparties in the Asian region, FTA

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[242] White Indus. Australia Ltd. v. Republic of India, UNCITRAL, Award (Nov. 30, 2011).

[243] *Indonesia-Australia Comprehensive Economic Partnership Agreement*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE, http://dfat.gov.au/trade/agreements/iacepa/pages/indonesia-australia-comprehensive-economic-partnership-agreement.aspx (last visited Sept. 22, 2017).

[244] Crockett, *supra* note 31, at 448.

[245] *See* European Commission, *Trade: Countries and Regions: Singapore*, EC EUROPA http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore/ (last updated Sept. 8, 2017); Mahdev Mohan, *The EU-Singapore FTA: 'Bounded Rationality' or Good Treaty Drafting*?, USYD (July 18, 2016), http://blogs.usyd.edu.au/japaneselaw/EU%20Singapore%20FTA%20%28MM%29.18.7.16.pdf.

[246] *See* European Commission, *Trade: Countries and Regions: Vietnam*, EC EUROPA, http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/ (last updated Mar. 16, 2017); Nguyen Manh Dzung, *International Investment Dispute Resolution in Vietnam: Opportunities and Challenges*, DZUNGSRT & ASSOCS. (July 18, 2017), http://slideplayer.com/slide/11597420/.

[247] European Commission, *The EU and Vietnam Finalise Landmark Trade Deal*, TRADE NEWS ARCHIVE (Dec. 2, 2015), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409.

[248] August Reinisch, The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court (CIGI Investor-State Arbitration Series, Paper No. 2, 2016), https://www.cigionline.org/publications/european.

negotiations are also now likely with Australia and New Zealand,[249] although it is unclear if and how "Brexit" will impact on such negotiations.[250]

For all these reasons, a real possibility is emerging of contemporary EU-style drafting changing the trajectory of investment treaties in the Asia-Pacific region.[251] Drawing also on the analysis above of the main treaties recently concluded by Australia and New Zealand (Part IV) and their initial positions in RCEP negotiations (Part V), Part VI.A therefore examines some possibilities in terms of substantive commitments. Part VI.B focuses on various reform options for dispute resolution procedures, including the EU-style permanent "investment court" alternative to ad hoc appointments of ISDS arbitrators, as found in the recent EU-Vietnam FTA.[252]

A. Substantive Provisions

The EU approach to investment coverage is to extend investor protections to a wide range of investment types. In common with US-style agreements, it follows the asset-based method for defining "investment." However, the European Union's TTIP draft and CETA take a distinctly different approach to the definition of "covered investment" as compared to the US Model BIT, by their incorporation of an express "legality" requirement.[253] These types of provisions require investors to comply with the host state's foreign investment laws as well as other laws that

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[249] *Australia-European Union Free Trade Agreement*, AUSTL. GOV'T DEP'T FOREIGN AFF. & TRADE, http://dfat.gov.au/trade/agreements/aeufta/pages/aeufta.aspx (last visited Sept. 22, 2017); *New Zealand-European Union FTA*, N. GOV'T DEP'T FOREIGN AFF. & TRADE, https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/eu-fta/ (last visited Sept. 22, 2017).

[250] *Cf.* Tang See Kit, *Brexit and the EU-Singapore FTA: Further Delays or a Slow-Death?*, CHANNEL NEWS ASIA (July 5, 2016), http://www.channelnewsasia.com/news/business/singapore/brexit-and-the-eu/2929208.html; Sophie Nappert & Nikos Lavranos, *BREXIT: Implications for the EU Reform of ISDS*, PRACTICAL L. (Apr. 1, 2016), http://uk.practicallaw.com/5-625-7968?source=relatedcontent.

[251] *E.g.*, Luke Nottage, *Towards a European Model for Investor-State Disputes?*, EAST ASIA F. (July 1, 2016), http://www.eastasiaforum.org/2016/07/01/towards-a-european-model-for-investor-state-disputes/ (updated and elaborated for the *Indian Journal of Arbitration*, forthcoming 2017).

[252] *Id. See also* Mark Mangan, *The EU Succeeds in Establishing a Permanent Investment Court in its Trade Treaties with Canada and Vietnam*, DECHERT LLP CLIENT BRIEFING PUBLICATION (Mar. 23, 2016), https://www.dechert.com/The_EU_Succeeds_in_Establishing_a_Permanent_Investment_Court_in_its_Trade_Treaties_with_Canada_and_Vietnam_03-23-2016/; Stefanie Schacherer, *TPP, CETA and TTIP Between Innovation and Consolidation – Resolving Investor-State Disputes Under Mega-regionals*, 7(3) J. INT'L DISP. SETTLEMENT 628 (2016).

[253] *Proposal for Transatlantic Trade and Investment Partnership*, *supra* note 223, art. x1; Comprehensive Economic and Trade Agreement (CETA), E.U.-Canada, Mar. 30, 2016, art. 8.1 [hereinafter CETA] (this initiative is not in force). It may be possible to argue that at least some form of legality requirement is implied anyway under background general international law.

may be applicable to making investments (including those aimed at preventing fraud and corruption). In this respect, a legality requirement arguably differs from an "admission" requirement, which is only concerned with an investor's compliance with foreign investment laws. The wider scope of legality requirements is balanced against their less strict application, in the sense that tribunals have tended to require compliance with respect only to non-trivial provisions of the applicable laws.[254] The legality requirement in the European Union's TTIP proposal is stated as follows (in italics):

> covered investment means an investment which is owned, directly or indirectly, or controlled, directly or indirectly, by investors of one Party in the territory of the other Party *made in accordance with applicable laws*, whether made before or after the entry into force of this Agreement.[255]

By contrast, the Indian Model BIT adopts an enterprise-based definition of "investment," where an investment is defined as an enterprise together with certain specified assets that it may possess. Enterprise-based definitions are normally (but not always) narrower in scope than asset-based ones.[256] In the case of the Indian Model BIT, portfolio investment (which is not itself defined) is expressly excluded from the list of qualifying assets. Expansive legality requirements covering not only the making of an investment, but also its operation, are included in the definitions of both "investment" and "enterprise." The definition of "investment" also requires that the enterprise be "constituted, organised and operated in good faith."[257] In common with most standard definitions of investment, the investment must have the characteristics of an investment, such as the commitment of capital and the assumption of risk. In addition to this, the investment's contribution to the development of the host state is also a relevant factor. If the investor is a juridical person, the definition of "investor" requires that it have "substantial business activities" within the home state or be controlled by such an entity.[258] In the earlier draft, minority shareholder claims were excluded by

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[254] *See* Brown, *supra* note 175, at 303, 315. Reviewing 15 treaty arbitration cases, including five involving Southeast Asian states, it has been argued that admission requirements for the (initial) investment under host state law should be strictly observed, whereas any legality requirements under the relevant treaty should only preclude protection for "non-trivial" violations of a host State's legal order, violations of a host State's foreign investment regime, and violations of public policy, such as fraud or corruption. *Id.*

[255] *Proposal for Transatlantic Trade and Investment Partnership*, *supra* note 223, art. x1.

[256] UNCTAD, *Scope and Definition*, *supra* note 158, at 31.

[257] *Id. See also* Indian Model BIT, art. 11, http://indiainbusiness.nic.in/newdesign/upload/Model_BIT.pdf (last visited Sept. 1, 2017) (noting, the Indian Model BIT has a substantive provision on investor obligations).

[258] Indian Model BIT, *supra* note 257, arts. 1.3–1.5 (providing the definition of "enterprise," "investment," and 'investor" respectively).

a requirement that the investor own or control the investment (i.e. the enterprise). Interestingly, this has been removed from the final version.[259]

In some respects, the current Indian approach departs in such significant ways from New Zealand and Australian treaty practice that it is hard to see it gain much traction with either of them—in particular:

- the enterprise-based definition of investment and the exclusion of portfolio assets (depending on how those might be defined) from it;
- the standing obligation to comply with host state law; and
- the express (but potentially vague) requirement of good faith as a condition to accessing the treaty protections.

Other aspects of the Indian Model BIT are dissimilar in terms of text or structure, but reflect common concepts.[260] To this extent there is perhaps some scope for compromise or finding common ground. For example, the potential for investment to contribute to development objectives is often spelt out in preambles. The Indian BIT differs in this respect because it is part of the definition of "investment," but its status is only as a relevant characteristic of investments rather than a mandatory criterion. The requirement that an investor have substantial business activities within the home state (if a juridical person) is not totally foreign either, but is more commonly reflected in "denial of benefits" clauses that are aimed at addressing the problem of forum shopping. Including the requirement within the definition of "investor" as under the Indian Model may be a more effective means of foreclosing on forum shopping. This is because, unlike denial of benefits clauses, the host state does not have to take the proactive step of denying benefits (and then potentially having to defend its right to do so). There has also been uncertainty about when the denial of benefits should take place, with some tribunals deciding that states must exercise the right to deny protections before the commencement of any arbitral proceedings.[261] The Indian Model BIT clarifies this in a separate denial of benefits clause, which allows the respondent state to deny the treaty's benefits at any time, including after the start of legal proceedings.[262] This seems arbitrary and

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[259] *See generally id.* There has also recently been some renewed interest as to whether and how minority shareholder claims can be brought under ISDS procedures, for example, in the context of the TPP and earlier given the first ever claim against Thailand (under a BIT with Germany). *See* Nottage, *supra* note 28; *see also supra* Part III.B.

[260] *See generally* Prabhash Ranjan & Pushkar Anand, *The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW. J. INT'L L. & BUS. (forthcoming 2018) (on file at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946041).

[261] *See, e.g.*, Plama Consortium Ltd. v. Bulgaria, ICSID Case No. ARB/03/24, Jurisdiction 52 (Feb. 8, 2005); Yukos Universal Ltd. (Isle of Man) v. Russian Federation, PCA Case No. 227, Interim Award on Jurisdiction and Admissibility 160 (Nov. 30, 2009); Khan Resources Inc. v. Mongolia, PCA Case No. 2011-09, Jurisdiction 88 (July 25, 2012). *Contra* Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Jurisdiction, ¶ 4.1–4.2 (June 1, 2012).

[262] Indian Model BIT, *supra* note 257, art. 20.

unnecessary given the definitional requirement for substantial business activities under which the investor must prove its presence within the home state as a threshold matter.

More generally, in their use of legality requirements, both the EU and Indian texts reflect their concern about the need for investors to respect host state law when investing. New Zealand and Australia have also recognized this concern in their FTA practice, through their prior acceptance of both admission and legality requirements in agreements such as AANZFTA and their earlier BITs.[263] That said, so far they have not been consistent, and in the CER Investment Protocol and TPP, for instance, their screening regimes are only recognized as exempted non-conforming measures. Nonetheless, admission and legality requirements align with their interests and values, specifically in relation to their screening regimes, but also more broadly the respect for due process which is well established in both countries.[264] As noted earlier (Part IV.C), Australia's experience as respondent in the Philip Morris case should have raised its awareness of the practical significance of admission requirements as a "gateway" through which investor claims need to pass.[265] For these reasons there is a clear possibility for the requirements to be featured more consistently in their future FTA practice. In terms of form, the Indian Model BIT incorporates legality requirements into two definitions centered around its enterprise-based view of what constitutes an investment. The European Union's approach of including a legality requirement in the definition of "covered investment" is more consistent with the structure adopted by New Zealand and Australia for addressing investment coverage, and also their prior acceptance of admission requirements within that definition.

The national treatment and MFN treatment provisions in CETA do not have the clarifying language regarding the meaning of "in like circumstances" that is found in the TPP.[266] The European Union's TTIP draft has neither the national treatment nor most favored nation treatment provisions at all, but references to them in the ISDS section of the draft suggest that they will be added eventually. India's Model BIT does attempt to clarify what "in like circumstances" means,[267] but the open-ended nature of the language it uses may leave too much room for states to discriminate against foreign investors. As noted above (Part V), India's proposal for national treatment in the RCEP negotiations (including similar language) was not agreed to by New Zealand and Australia in the 2015 leaked draft investment chapter. India's Model BIT does not include any MFN provision (as mentioned in Part V above). Likewise, the European Union has also been flexible with MFN

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[263] *E.g.*, Australia-Indonesia, Republic of (BIT), Austl.-Indon., Nov. 17, 1992, [1993] A.T.S. 19, art. 3.1(admission); Australia-Indonesia BIT, Australia-Argentina (BIT), Austl.-Argentina, Aug. 23, 1995 [1997] A.T.S. 4, art. 3 (legality); Hong Kong-New Zealand BIT, *supra* note 205, art. 3 (legality).

[264] Transparency International, *Corruption Perceptions Index* (2015), http://www.transparency.org/country/ (showing New Zealand and Australia ranked 4th and 13th respectively).

[265] *See* Brown, *supra* note 175, at 301.

[266] CETA, *supra* note 253, art. 8.6–8.7.

[267] Indian Model BIT, *supra* note 257, art. 4 & n.2.

rights, excluding them from its recent FTA with Singapore. Accordingly, on national treatment and MFN, New Zealand and Australia may continue to prefer the TPP approach of including both while seeking to confine their scope to discrimination that cannot properly be justified on policy grounds.

In terms of the other substantive investor protections, one of the significant features of the European Union's recent practice has been its development of a list of behaviors that it considers would breach the obligation of fair and equitable treatment. For example, for TTIP, the European Union proposes a clause that states a party will be in breach of the obligation if a measure constitutes a denial of justice, fundamental breach of due process, manifest discrimination, targeted discrimination, harassment, or similar bad faith conduct. The list may be added to by agreement of the standing joint committee of the parties,[268] as in CETA but in contrast with the Indian Model BIT's completely closed list.[269] Whether it is realistic to leave the development of the law to an FTA committee in this way may depend on how the committee structure is set up and supported, and may be particularly problematic in "mini-lateral" agreements with multiple states party such as RCEP. To date, decision-making by FTA joint committees on matters concerning the scope of investment obligations has had minimal impact, apart from a high-profile joint interpretation of fair and equitable treatment by the parties to the North American FTA.[270]

Unlike most contemporary investment treaties, the European Union's proposed clause (and that already agreed in CETA) does not limit the obligations of fair and equitable treatment and full protection and security to the minimum standard of treatment under customary international law. This latter approach is intended to protect the regulatory powers of host states, but it has become contentious because of the discretion that is still available to tribunals to determine the content of the standard.[271] India has also developed a list of proscribed behaviours in its Model BIT,[272] but unlike the EU version (and the list agreed to in CETA), India's list seeks also seeks to tether it to customary international law. To date, New Zealand and Australia have seemingly preferred the flexibility of grounding their obligations in customary international law, but given the drawbacks of this, they have also been receptive to efforts to make their views on that law clearer. A possible middle ground option would be a list of behaviours considered to breach the customary law standard that is provided on an illustrative but non-exhaustive basis.

In terms of expropriation, the EU approach is quite similar to that found in the US Model BIT in its use of an annex to determine the scope of indirect

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[268] *Proposal for Transatlantic Trade and Investment Partnership*, *supra* note 223, art. 3(2).

[269] *Compare* Indian Model BIT, *supra* note 257, at art 3.1, *with* CETA, *supra* note 253, art. 8.10.

[270] NAFTA Free Trade Commission, *North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001), http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

[271] *See* Henckels, *supra* note 197, at 33–36.

[272] Indian Model BIT, *supra* note 257, art. 3.1.

expropriation, and the European Union's annex is also similarly worded compared to the US one (in turn strongly influenced by US domestic law standards). It differs in that it provides some explanation of when "rare circumstances" might arise (for the proviso to the safeguard for public welfare regulation), and its TTIP draft (but not CETA) omits investor expectations altogether from the (non-exhaustive) list of assessment factors.[273] These features may be especially appealing to New Zealand, given its apparent retreat from the TPP/US text in the RCEP negotiations. Rather than using an annex, the Indian Model BIT explains the scope of indirect expropriation in the main body of the treaty.[274] The language it uses is fairly orthodox. It emphatically rejects the notion that public welfare regulation may be deemed expropriatory, and the "rare circumstances" proviso is not included. This again may be appealing to New Zealand, although perhaps not for Australia, in view of its apparently different position in the RCEP negotiations (outlined in Part V).

Unlike the United States, the European Union favors applying general exceptions to the commitments on investment,[275] as does India. As explained in Part V, this seems to be another area of divergence between New Zealand and Australia, with New Zealand aligned more closely to the EU/India view. The European Union also favors including a clause that affirms the parties' general right to impose regulations to achieve legitimate policy objectives.[276] A statement to similar effect is included in the preamble of the TPP (although not in the preamble of the US Model BIT). Preambles may be considered in the interpretation of treaty provisions, and the TPP statement may support more pro-state interpretations of that agreement.[277] Affirming the right to regulate in the main body of the treaty may give it greater interpretive weight, although at this stage the impact of this approach remains to be seen. That said, protecting the right to regulate underpins much of the controversy within New Zealand and Australia regarding FTAs. Both countries may be receptive to affirming the right to regulate in an operative provision as it would be an easily-understood way of responding to public concerns.

B. Dispute Settlement Procedure

Controversy persists especially over ISDS, in several developed countries (such as Australia and more recently New Zealand), large developing countries

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[273] *Proposal for Transatlantic Trade and Investment Partnership*, *supra* note 223, art. annex 1.

[274] Indian Model BIT, *supra* note 257, art. 5.3.

[275] The FTA with Singapore incorporates exceptions within the national treatment rule, similar to Australia's proposal for the prohibitions on performance requirements under the RCEP.

[276] *E.g.*, *Proposal for Transatlantic Trade and Investment Partnership*, *supra* note 223, art. 2.1.

[277] The Trans-Pacific Partnership, *supra* note 1, at Preamble. A preamble can be taken as evidence of relevant intent and context for the interpretation of treaty commitments. *See* Vienna Convention on the Law of Treaties art. 31(1)–(2), Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679.

(such as India and Indonesia), and in international society at large.[278] Already, Vietnam and even Singapore have agreed to FTAs with the European Union that accept at least some aspects of the latter's more cautious approach towards conventional ISDS.

Australia and New Zealand have also displayed some flexibility in their treaty practice with regard to ISDS, as explained in Parts II–IV. They have excluded ISDS altogether vis-à-vis each other (in the CER Protocol, as well as within AANZFTA and TPP), and for Australia, in bilateral FTAs with other developed countries (with the United States and Japan, respectively, although ISDS will extend to them also if and when the TPP comes into force). Both have otherwise adopted contemporary US-style drafting of ISDS provisions, but displaying some flexibility with counterparties (e.g. in AANZFTA), and Australia has agreed to some innovative features in recent FTAs (notably the "public welfare notice" procedure in its FTA with China, which is not found in any other Chinese agreements so therefore may derive from the Australian side).

Accordingly, there seems to be significant flexibility for Australia, with New Zealand, to press for more EU-like features in treaties in future negotiations in the region, including RCEP (*c.f.* Part V). In fact, there are at least five reform options.

First, if the primary concern is inconsistency in decision-making by ISDS tribunals, an appellate review mechanism can be added to assess first-instance awards for errors of law (and possibly even some errors of fact) as well as the narrower grounds set out, e.g. in the ICSID Convention.[279] This can be seen as a "TPP+" approach, as it and earlier US-inspired treaty practice in fact envisaged or even required the state parties to consider adding some form of appellate review, even if that has never been implemented in the region. An appellate review body could be introduced under each treaty, as presently favored by the European Union, or through a proposed multilateral "opt-in convention" extending a single appeal mechanism (or indeed a single permanent International Tribunal for Investment") to existing treaties.[280]

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[278] *See, e.g.*, the Google news search and Twitter feed results reported in Luke Nottage, *International Arbitration and Society at Large*, *in* CAMBRIDGE COMPENDIUM ON INTERNATIONAL ARBITRATION (Andrea Bjorklund et al. eds., forthcoming 2017).

[279] European Union-Vietnam Free Trade Agreement, E.U.-Vietnam, art 28.1, *unsigned*, http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf (last visited Sept. 19, 2017) [hereinafter EU-Vietnam FTA] (following the new EU approach, the grounds for appeal are: "(a) that the Tribunal has erred in the interpretation or application of the applicable law; (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).").

[280] Gabrielle Kaufmann-Kohler & Michele Potesta, *Can The Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap*, (CIDS – Geneva Center for International Dispute Settlement Research, Paper No. 3, 2016), http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

Second, in part perhaps to improve decision-making quality but primarily to address public perceptions (rightly or wrongly) about potential conflicts of interest or bias by arbitrators on ISDS tribunals, Australia and New Zealand may promote a code of conduct and/or pre-determined panel for arbitrators. Australia already agreed to both in its FTA with China signed on 17 June 2015.[281] Because that was after the conclusion of the EU-Singapore FTA on 17 October 2014, whereupon the European Union issued a "Factsheet" on investment provisions highlighting similar features in that earlier FTA,[282] it seems Australia and/or China followed this precedent.[283] The recent EU-Vietnam FTA also has extensive provisions on "Ethics" for those deciding investor-state disputes. For example, they:

> [S]hall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest . . . . In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law.[284]

The additional words (not spelled out in the EU-Singapore or Australia-China FTAs) seek to avoid the increasingly criticized problem of "double-hatting," whereby an arbitrator may promote an interpretation or application of a similar treaty that advances his or her client's position in a pending or likely case under a similar treaty when serving as counsel.[285] In addition, however, the EU-Vietnam

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[281] China-Australia FTA, *supra* note 193, annex 9-A, art. 9.15(5)–(6). Under the latter, the states shall nominate at least 20 arbitrators for a list, within two years of it coming into force (December 20, 2015), although so far it seems Australia has made no nominations. *See generally* Leon Trakman & David Musaleyan, *Arguments for and against Standing Panels of Arbitrators in Investor-State Arbitration Evidence and Reality*, (2016) (unpublished manuscript) (on file with the authors).

[282] European Commission, *Investment Provisions in the EU-Singapore Free Trade Agreement*, EC EUROPA (Oct. 17, 2014), http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152845.pdf. *See also* European Union-Singapore Free Trade Agreement, annex 9-F, arts. 9.18((3)–(4), Oct. 9, 2014 (providing for at least 15 arbitrators to be appointed within one year).

[283] *See* China-Australia FTA, *supra* note 193. It is unclear whether both features were promoted in their FTA negotiations primarily by Singapore or the EU, but the latter seems more likely to have provided the impetus. *See generally* Reinisch, *supra* note 248 (discussing the shift in EU negotiation preferences in recent years). At least one other FTA concluded earlier by Japan provides for a list of arbitrators for ISDS tribunals, namely that with Mexico. Hamamoto & Nottage, *supra* note 167, at 385. However, that has never been created or at least publicized.

[284] EU-Vietnam FTA, *supra* note 279, at ch. 8 § 3 art. 14(1).

[285] Philippe Sands, *Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel*, *in* EVOLUTION IN INT'L INV. ARB. (2011) (providing an early and strong critique).

FTA provides that the dispute resolvers shall be nominated by the states on monthly retainers as members of a two-tier investment court.[286]

A third, more ambitious reform option, not yet found in the region would be to combine appellate review with a code of conduct and/or predetermined panel of arbitrators. The fourth would be to add the European Union's preference for a permanent investment court, as under its recent FTA with Vietnam.

A fifth conceivable option is based upon the revised Indian Model BIT. It provides extensive details aimed at preventing conflicts of interest among arbitrators, which may be supplanted by an agreed upon code of conduct, albeit no express prohibition of double-hatting. However, it has no pre-determined list of arbitrators, and no commitment even to consult on an appeals facility.[287] The big difference is that the Indian Model BIT requires exhaustion of local administrative and judicial remedies, to be commenced within "one (1) year from the date on which the investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that the investment, or the investor with respect to its investment, had incurred loss or damage as a result." Then, but only after "at least a period of five years from the date on which the investor first acquired knowledge of the measure in question," can the investor file a notice of dispute under the treaty, triggering at least six months of negotiations to take place at the capital city of the host state. The investor may then issue a claim to arbitration, but only if preceded by a notice of arbitration (1) at least ninety days before hand; (2) no more than 12 months after exhausting local remedies; and (3) no more than six years after the investor first acquired or should have first acquired knowledge of the measure and loss.

Essentially, therefore, the investor must proceed quickly to local courts or tribunals, then seek relief there for five years, then file for arbitration under further tight conditions. This process is unlikely to be palatable for those familiar with the extensive delays in Indian courts, including those familiar with a BIT award in 2011 in favor of an Australian investor because India had not complied with a treaty commitment to provide "effective means" for enforcing arbitral awards.[288] Indian investors have also started to take advantage of existing BITs to protect their outbound investments, namely in Indonesia.[289] Nonetheless, the Indian government is likely to begin treaty (re)negotiations, including for FTAs with Australia bilaterally and via RCEP, from the standpoint of its new Model BIT. If developed countries like Australia and New Zealand wish to avoid the revival of an exhaustion of local remedies requirement, which was a major impetus for moving away from

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[286] EU-Vietnam FTA, *supra* note 279, ch. 8 section 3 art. 12(14).

[287] *Compare* Indian Model BIT, *supra* note 257, art. 19(10)–(11), *with id.* art. 29.

[288] White Indus. Australia Ltd. v. Republic of India, UNCITRAL, Award (Nov. 30, 2011). However, this and subsequent BIT claims may have prompted some more general improvements in India's arbitration law and practice. Harisankar K. Sathyapalan, *Indian Judiciary and International Arbitration: A BIT of a Control?*, 0 ARB. INT'L 1, 10 (2016).

[289] Jarrod Hepburn & Luke Eric Peterson *Indian Investor's BIT Claim Against Indonesia Moves Forward, With Tribunal Now Finalised*, INV. ARB. REP. (Aug. 2, 2016), http://www.iareporter.com/articles/indian-investors-bit-claim-against-indonesia-moves-forward-with-tribunal-now-finalized/.

customary international law to investment treaties in the first place,[290] the compromise may well have to be at least option one or two above, or possibly even option three or four.

VII. CONCLUSION

The foregoing analysis has shown significant commonalities in Australian and New Zealand treaty practice, especially in their FTAs over the last decade inspired by contemporary US practice, yet also some significant flexibility depending on the issue (especially whether and how to incorporate ISDS) and on the counterparties (e.g. from Southeast Asia). This opens up a considerable scope for both countries to influence the future trajectory of treaty negotiations in the Asian region, including moving it away from US preferences towards contemporary EU-style drafting that is more deferential to host state interests. This seems particularly likely in relation to the procedure for direct claims by investors, where there exist various options short of a full-scale permanent investment court, some of which may prove an acceptable compromise in the face of the revised Indian Model BIT approach that is less palatable for investors. Australia and New Zealand also need to consider the recent hesitancy displayed by Indonesia, in the face of some large treaty-based ISDS claims.

There are also other attractions for both countries to display more leadership now in reforming the traditional ISDS procedure, centered on *ad hoc* appointments of arbitrators and a single-tier dispute resolution mechanism. Most of the public concern, evident in media coverage and parliamentary inquiries recently in Australia and (more recently) New Zealand, has been fixated on this aspect of investment treaties rather than the scope of their substantive commitments, and the merits of the latter compared to domestic law standards of protection available to all investors through local courts and tribunals. This may be because it is easier to see that ISDS provides an "extra" protection available only to foreign investors (even if that was precisely the point, especially in countries with less developed domestic law systems). But the critical commentary understandably has concentrated on the initial lack of attention regarding appointments of arbitrators, and current patterns (compared to, for example, appointments to WTO panels),[291] especially now that more and higher profile ISDS claims are being filed.

Those from the "political left" argue that this encroaches too much on national sovereignty in matters of major public interest, and may concentrate on this issue in hopes of putting a brake on negotiating FTAs and economic liberalization in the wake of the Global Financial Crisis of 2008. Those from the "economic right" also highlight the additional ISDS procedure as formally "discriminatory," like FTAs, but in hopes of revitalizing multilateral or unilateral initiatives to

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[290] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 215 (2009).

[291] Joost Pauwelyn, *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators Are from Venus*, 109 AM. J. INT'L L. 761 (2015).

promote instead greater economic liberalization. From this theoretical starting point, these economists are skeptical about whether ISDS-backed treaty commitments might still be worthwhile through promoting more cross-border FDI. Although a recent econometric analysis finds they do, it also finds (counter-intuitively) that weaker-form ISDS provisions have an even stronger positive impact on FDI flows.[292]

Apart from such principled policy considerations, and the current preferences of major counterparties to its pending and likely future investment treaty negotiations, the Australian Government now has pragmatic political reasons for advancing more EU-like innovations. It has a razor-thin majority in the lower House of Representatives, and will most probably need the votes of the main Opposition Labor Party in the Senate, to pass tariff reduction legislation before being able to ratify the TPP, or eventually the RCEP. Yet the Labor Party, bolstered by almost winning the general election held in July 2016, has reiterated its objections to ISDS provision, in future as well as past treaties. More broadly, in January 2017 the Labor Opposition Leader Bill Shorten criticized Prime Minister Malcolm Turnbull for agreeing with his Japanese counterpart to proceed to ratify the TPP, even if the incoming Trump Administration did not do so. Although Shorten reportedly called such an initiative a "waste of time," perhaps reflecting the fact that under its current wording the TPP requires ratification by the United States to come into effect, he went on to express concerns that appear more protectionist than pragmatic.[293] A few weeks later, as mentioned in Part I.A above, the Senate Standing Committee on Foreign Affairs and Trade issued a non-binding, Labor-dominated Report recommending both that Australia defer ratification of the TPP—highlighting continued concerned over ISDS in the investment chapter[294]—and that the Government implement reform to the treaty-making process more generally in order to smooth completion of future trade and investment agreements.[295]

To secure Labor Party votes in Parliament and be able to join the TPP or RCEP, given the even more protectionist stances of the minority parties in the Australian Senate, the Turnbull Government may need to reach a broader compromise with the Labor leadership. For example, it might commit in advance at least to a strict code of conduct for ISDS arbitrators (e.g. preventing "double-hatting"), and to seek subsequent addition of an appellate review mechanism, as envisaged under that treaty. It could make this stance more credible by publicly declaring that Australia will seek the incorporation of such provisions into major new treaties such as RCEP, but also consider further reforms such as a pre-determined list of arbitrators (as in its FTA with China, and between Singapore and the European Union), and even an EU-style permanent investment court (as in the

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[292] Armstrong & Nottage, *supra* note 122, at 8.

[293] Henry Belot, *Trans-Pacific Partnership: Malcolm Turnbull Accuses Shorten of Populism Amid 'Dead Deal' Comments*, ABC NEWS (Jan. 16, 2017), http://www.abc.net.au/news/2017-01-16/turnbull-accuses-shorten-of-populism-amid-tpp-deal-comments/8185132 (quoting Shorten as complaining that: "In 2016, we lost 50,000 full-time jobs in Australia and I don't want to see a repeat of that this year.").

[294] (TPP) AGREEMENT REPORT, *supra* note 7, ¶ 3.3.

[295] Nottage, *supra* note 133, at 199–200.

EU-Vietnam FTA). The Australian Government might also respond to calls from the Labor Opposition, through the 2015 Senate Inquiry, for greater consultation and openness about treaty-making generally. For example, it could commit to developing a model Investment Chapter or at least negotiating parameters (perhaps listing and explaining several options in terms of investor-state dispute settlement), to frame future negotiations as well as a reassessment of its many early-generation BITs. Such initiatives are important given the revival of broader concerns about inbound FDI in Australia, threatening bipartisan consensus since the 1980s.

As for New Zealand, there are far fewer domestic political pressures for the current Government to make such reform commitments. With its minor party support partners, it has a majority in the unicameral Parliament, which it has used simply to pass legislation to ratify the TPP, and may use again for future treaties such as RCEP. It also has only one BIT in force, which could benefit from a reassessment based on a new bipartisan template.

Nonetheless, public media coverage of ISDS in New Zealand has been growing over recent years.[296] This coverage is likely to continue with ongoing discussion about the future of the TPP, and with RCEP negotiations underway. The Government can no longer take for granted that public interest in FTA negotiations, and their investment chapters in particular, will be positive. This was evident from select committee hearings on the FTA with Korea and the TPP, both of which exacerbated an emerging rift with the Opposition Labour Party. Notably, Labour has started to adopt more critical stances on FTAs, which would have been inconceivable barely a decade ago. With a majority of only one vote, and an election due in September 2017, the Government will be very mindful of these factors. In other words, even in New Zealand, political factors indicate that New Zealand may be amenable to re-assessing how it approaches its investment commitments. These same factors may also help to explain why New Zealand appears to have reverted to relatively more pro-state provisions in RCEP during negotiations in 2015, despite the Government's position that the TPP is at least tolerably safe. Indeed, (and alongside its Australian counterpart) the Government has remained hopeful that life remains in the TPP, possibly through minor changes in text, despite the indications to the contrary following the election of President Trump.[297]

However, the latter stance may also be anticipating the somewhat more cautious approach to investment treaty commitments evident in ASEAN(+) agreements,[298] as well as now by influential individual counterparties such as Indonesia and India. More broadly, in current and foreseeable treaty negotiations, parts of Asia may demonstrate a less acute form of "ideological hostility and

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[296] *See generally* Kawharu, *supra* note 28; Nottage, *supra* note 28.

[297] *Trump Pacific Partnership? New Zealand PM's idea to save TPP*, GUARDIAN (Nov. 19, 2016), https://www.theguardian.com/world/2016/nov/20/trump-pacific-partnership-new-zealand-pms-idea-to-save-tpp (quoting the then Prime Minister John Kay's joke about saving the agreement by naming it the "Trump Pacific Partnership").

[298] *See generally* Sungjoon Cho & Jürgen Kurtz, *The Limits of Isomorphism: Global Investment Law and the ASEAN Investment Regime*, 17 CHI. J. INT'L L. 341 (2016).

collective memories of foreign intervention" identified for example in Argentina,[299] by commentary highlighting such "social-constructivist" reasons behind that country's longstanding refusal to comply with adverse ISDS awards. Nonetheless, that study also emphasizes the importance of economic factors (stressed by "realist" accounts of international relations) and manifestations of liberal-democratic values behind Argentina's recent move to paying out on some of those awards. Similar countervailing factors also appear to be operating in the Asian region.[300] If Australia and New Zealand wish indeed to project a collective "middle power" influence on the future trajectory of international investment law in the region, and thus globally, both countries need to examine and reflect on their own historical experiences, values and economic interests associated with foreign investment more generally.[301]

[299] Moshe Hirsch, *Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach* 19 J. INT'L ECON. L. 681, 705 (2016).

[300] *Cf.* Muthucumaraswamy Sornarajah, *Review of Asian Views on Foreign Investment Law*, INVESTMENT LAW AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA 242 (2011).

[301] Kawharu, *supra* note 28 (providing a more detailed analysis); Nottage, *supra* note 28 (providing a more detailed analysis).