"Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry"

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Abstract: This article draws on evidence presented at an Australian parliamentary inquiry into ratification of a major Asia-Pacific free trade agreement, focusing on the investment chapter and especially the vexed issue of investor-state dispute settlement (ISDS) arbitration. It outlines some rationales for ISDS-backed investment treaty commitments, and sets out empirical evidence about the usual costs, award amounts and transparency associated with ISDS, to contribute to more informed public debate in Australia and world-wide.

Australia, Japan, the United States (under the Obama Administration) and nine other Asia-Pacific states signed the Trans-Pacific Partnership (TPP) on 4 February 2016, including a detailed Investment Chapter. After the new Trump Administration took power and withdrew US signature in January 2017, the remaining eleven members re-signed the Comprehensive and Progressive Partnership for Trans-Pacific Partnership (CPTPP) on 8 March 2018.[3] Each has been going through respective national procedures for ratification of this free trade agreement (FTA), which comes into force after at least six states ratify. Our article draws on evidence given by Nottage on 15 June 2018 at oral hearings by the Joint Standing Committee on Treaties (JSCOT), and his Response to Questions on Notice provided subsequently with assistance from Ubilava, for a

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[3] For the text and associated information, see <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/Pages/trans-pacific-partnership-agreement-tpp.aspx>.

parliamentary inquiry into whether Australia should ratify the CPTPP.[4] We hope the arguments and empirical data presented will also assist other public inquiries and readers more generally who are interested in this and other international investment treaties and associated dispute resolution procedures.

Even without the US, which may eventually rejoin the now-eleven signatories, the CPTPP should have a significant impact on regional cross-border trade and investment, as well as on economic growth prospects especially in less developed states such as Vietnam.[5] It makes few changes to the original TPP, particularly in the Investment Chapter. As such, it should also have a major influence on other ongoing trade and investment treaty (re)negotiations, in the Asia-Pacific region and beyond.[6]

However, there have been persistent concerns about the investment liberalization and protection provisions contained in the (CP)TPP, especially the investor-state dispute resolution (ISDS) mechanism allowing foreigners to bring arbitration claims directly against host states for violating substantive commitments such as non-discrimination or compensation for expropriation of foreign investments. Concerns originated in some developing countries but have spread to several developed countries, including Australia since 2011, as they too have sometimes been subjected to occasional ISDS claims.[7]

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[4] Luke Nottage, Submission No 13 to the Joint Standing Committee on Treaties, *Inquiry into the Comprehensive and Progressive Transpacific Partnership (TPP11)*, 13 April 2018, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TPP-11/Submissions>; Hansard transcript of evidence provided by Luke Nottage (and others called by the Committee) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TPP-11>.

[5] See eg Nguyen Hong Ngan, 'CPTPP Brings Vietnam Direct Economic Benefits and Stimulate Domestic Reforms, WB Report Says' (Press Release, 9 March 2018) <http://www.worldbank.org/en/news/press-release/2018/03/09/cptpp-brings-vietnam-direct-economic-benefits-and-stimulate-domestic-reforms-wb-report-says>.

[6] See generally Julien Chaisse, Henry Gao and Chang-fa Lo (eds), *Paradigm Shift in International Economic Law Rule-Making* (Springer, 2008).

[7] See generally Julien Chaisse and Luke Nottage (eds*), International Investment Treaties and Arbitration Across Asia* (Brill, 2018).

One set of concerns, which emerged yet again in the recent JSCOT inquiry hearings, is that the *substantive* protections give extra rights to foreign investors over local investors under domestic law. This requires detailed comparative analysis, which is rarely attempted, and then a normative assessment.

Elsewhere, Nottage has found that international investment (treaty) law does indeed provide some extra protections compared to Australian law, where there is for example no constitutional protection against even direct expropriation by state governments, and no protection under the federal Constitution against indirect as opposed to direct expropriation.[8] The latter difference was highlighted by the failed constitutional challenge by tobacco companies in the High Court of Australia in 2012 regarding Australia's plain packaging legislation of 2011, yet an ISDS claim of indirect expropriation then initiated by Philip Morris Asia under Australia's 1993 bilateral investment treaty (BIT) with Hong Kong. That claim was dismissed in December 2015 but on jurisdictional grounds (namely, an abuse of rights under customary international law), and the case has had a lasting and negative effect on public opinion regarding ISDS and investment treaties generally in Australia. By contrast, there has been no media coverage of the failed ISDS claim by Philip Morris under a BIT with Switzerland, which failed on the merits because the tribunal held that no compensation is payable for host states validly exercising its "police powers" for bona fide, non-discriminatory and proportionate public health regulations.[9]

[8] Luke R Nottage, 'Investor-State Arbitration Policy and Practice in Australia' in Armand De Mestral (ed), *Second Thoughts: Investor State Arbitration Between Developed Democracies* (McGill-Queen's Press-MQUP, 2017); Sydney Law School Research Paper No. 16/57, <https://ssrn.com/abstract=2802450>.
[9] Jarrod Hepburn and Luke R Nottage, 'Case Note: Philip Morris Asia v Australia' (2016) 18(2) *The Journal of World Investment and Trade*, 307-319. Sydney Law School Research Paper No. 16/86 <https://ssrn.com/abstract=2842065>.

There also has been hardly any discussion in Australia as to whether its domestic law (excluding indirect expropriation claims altogether) represents better public policy than the higher international standard. From a normative perspective, it could be argued that Australian domestic law should be raised to the international standard of protection, for the benefit then of local as well as foreign investors vis-à-vis over-reaching governments, rather than Australia's international investment treaties setting substantive protections at the domestic law level.

The second set of concerns is that foreign investors get better *procedural* rights through ISDS, compared to local investors who only can access justice through local courts (applying substantive domestic law). Curiously, there is no public objection in Australia to foreign investors gaining more rights in the form of inter-state arbitration, invariably provided in international investment treaties or FTA chapters. Both types of arbitration procedures may be justified – although especially if the host state is a developing country – as providing a more neutral and expert forum, with greater chance of an outcome enforceable against a losing government, compared to local courts that will be usually be more unfamiliar to foreign investors.[10]

Despite these responses to such general criticisms of ISDS procedures, they should be subjected to scrutiny in specific respects, with a view to ongoing improvements particularly when (re)negotiating investment treaties.[11] Particular and arguably intertwined issues include:

- costs (and delays) in ISDS arbitrations;
- over-optimistic amounts claimed, compared to amounts awarded; and

[10] For these and other common general criticisms of ISDS, and responses, see eg, above n 8.
[11] See eg Sophie Nappert, Luke R Nottage and Christian T Campbell, 'Assessing Treaty-based Investor-State Dispute Settlement: Abandon, Retain or Reform?' (2014) 11(1) *Transnational Dispute Management (TDM),* <https://ssrn.com/abstract=2280182>.

- transparency associated with ISDS outcomes and processes.

These issues resurfaced in the recent JSCOT hearings in Australia, and this following version of our Response to Questions on Notice attempts to cast light on them through some empirical analysis.

1. Usual costs of ISDS arbitrations

A scoping study on ISDS published in 2012 by the Organization for Economic Cooperation and Development, referred to by a JSCOT parliamentarian, had indeed noted that average total costs of their review of ISDS arbitrations found **average total costs of US$8m** (underlining added):[12]

> High costs were identified as one of the two greatest disadvantages of international arbitration in a recent survey of in-house counsel at leading corporations.21 This section reviews the broad issue of ISDS costs and finds that: (i) costs are high and some reform efforts are underway to try to reduce them; and (ii) rules for allocating these costs among the parties are very flexible and are a source of uncertainty for both claimants and respondents.22
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> For FOI Roundtable 15, the OECD has surveyed publicly-available information about ISDS costs. This survey shows that legal and arbitration costs for the parties in recent ISDS cases have averaged over USD 8 million with costs exceeding USD 30 million in some cases. 23 In the recent Abaclat decision (which addresses jurisdiction but not the merits), the tribunal noted that the claimants had spent some USD 27 million on their case to date, and that Argentina had spent about USD 12 million.24
>
> The largest cost component is the fees and expenses incurred by each party for its legal counsel and experts. They are estimated to average about 82% of the total costs of a case. Arbitrator fees average about 16% of costs. Institutional costs payable to organisations that administer the arbitration and provide secretariat services – such as ICSID, the Permanent Court of Arbitration (PCA), or the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) – are low in relative terms, generally amounting to about 2% of costs.25

[12] David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (2012) 9(7) Transnational Dispute Management (TDM), originally at <http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf> at p19. Contrary to some popular misconceptions, as reiterated by Nottage in his evidence to the JSCOT inquiry hearing, this study also noted (at p17) for their sample: '22% of the claimants in both ICSID and UNCITRAL cases are either individuals or very small corporations with limited foreign operations (one or two foreign projects)'.

However, footnote 23 indicates that this was based on a small subset of the then known ISDS case outcomes.

> The OECD Secretariat survey of 143 available ISDS arbitration awards listed on the www.italaw.com website (which collects and reproduces ISDS awards (formerly http://ita.law.uvic.ca)), revealed that only 28 provide information about the arbitral fees and the parties' legal expenses. Eighty-one cases provide some information about costs while 62 provide no information. Survey of the 143 awards (addressing jurisdiction, the merits and other issues) listed as of August 2011.

A more comprehensive analysis was conducted by Matthew Hodgson and Alistair Campbell, reviewing average costs until end-2012, recently updated until end-2017 (to give a sample of 324 cases for which costs data was available). Their summary is below, finding **average party costs of around US$5-6 plus tribunal costs of another US$1m**: underlining added):[13]

> The key findings of the study are (with the results of the 2012 study in **bold**) are:
>
> **Average Time** (from Request / Notice of Arbitration through to final Award)
> - 4 years (**3 years, 8 months**)
>
> **Success Rate**
> - Claimant wins: 43% (**41%**)
> - Respondent wins: 56% (**59%**) (with 26% (**26%**) dismissed on jurisdiction) (an additional 1% of cases were terminated with an award that yielded sufficient data to be included in the study)
>
> **Amounts claimed/recovered**
> - Average claim: USD 1,204,183,000 (USD 719,334,000 excluding the *Yukos v. Russia* arbitrations) (**USD 491,656,000**)
> - Average award (where claimant succeeds): USD 486,135,000 (USD 110,872,000 excluding *Yukos*) (**USD 76,331,000**)
>
> **Party Costs** (i.e. fees and expenses of counsel, experts and witnesses)
> - Average claimant costs: USD 6,019,000 (**USD 4,437,000**)
> - Average respondent costs: USD 4,855,000 (**USD 4,559,000**)
>
> **Tribunal Costs** (i.e. arbitrators' fees/expenses and institutional charges)
> - Average costs: USD 933,000 (**USD 746,000**)
> - Average ICSID costs: USD 920,000 (**USD 769,000**)

[13] Matthew Hodgson and Alastair Campbell, *Investment Treaty Arbitration: cost, duration and size of claims all show steady increase* (14 December 2017) Allen & Overy <http://www.allenovery.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-cost-duration-and-size-of-claims-all-show-steady-increase.aspx>.

- Average UNCITRAL costs: USD 1,089,000 (**USD 853,000**)

Recovering costs

- The successful party recovers some portion of its costs in 51% (**44%**) of cases (though the number has increased significantly since the 2012 survey, with the successful party in awards issued since 31 December 2012 recovering some of its costs in 64% of cases)
- Successful investors are more likely to recover costs (58%) (**53%**), than successful States (47%) (**38%**) (however, successful States have recently had more success in this regard, recovering costs in 63% of cases since the end of 2012)
- In contrast to the previous survey's findings, successful parties are no longer significantly more likely to recover costs in UNCITRAL claims (72% since 31 December 2012 (**69%**)) compared with ICSID claims (61% since 31 December 2012 (**36%**))

However, this study also talks about *average* costs, which become skewed if there are a few very high cost awards (eg cases that are especially large or complex, especially for the lawyers and expert witnesses involved – such as the unusually huge *Yukos v Russia* case, mentioned above in calculating average claim and award amounts). ***Median*** party costs are significantly less (**US$3-3.6m)** in the (subset of) ISDS arbitrations concluded through ICSID over 2011-15, although median tribunal costs are similar (around **US$0.9m**), according to Jefferey Commission in 2016 (underlining added):[14]

Average Claimant and Respondent Costs

The average claimant costs in the 55 ICSID arbitrations concluded between FY2011 and FY2015 (where claimant costs data was available) was US$5,619,261.74. In sixty-four percent of the arbitrations claimant costs were below US$5 million, and above US$5 million in thirty-six percent:

Claimant Costs in Concluded ICSID Arbitrations FY2011-FY2015	**Number of arbitrations**
US$1 million and less	9
US$1-2 million	10

[14] Jeffery P. Commission, 'How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years' *Kluwer Arbitration Blog* (29 February 2016) <http://arbitrationblog.kluwerarbitration.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/>.

US$2-3 million	9
US$3-4 million	4
US$4-5 million	3
US$5 million and above	20
TOTAL	**55**

In 56 ICSID arbitrations concluded between FY2011 and FY2015 where respondent costs data was available, average respondent costs were US$4,954,461.27. In sixty-eight percent of the arbitrations, respondent costs were below US$5 million, and above US$5 million in thirty-two percent:

Respondent Costs in Concluded ICSID Arbitrations FY2011-FY2015	**Number of arbitrations**
US$1 million and less	13
US$1-2 million	9
US$2-3 million	2
US$3-4 million	6
US$4-5 million	8
US$5 million and above	18
TOTAL	**56**

As with previous studies, the median figures for both claimant and respondent costs are significantly lower than the averages: US$2,913,786.50 is the median for claimant costs, and US$3,650,252.62 is the median for respondent costs.

ICSID Tribunal Costs

In 40 of the 93 arbitrations, awards or decisions included data about ICSID tribunal costs incurred. The average ICSID tribunal costs were US$882,668.19, with a median of US$875,907.97. These figures represent an increase in the US$769,000 average and US$544,000 median for ICSID tribunal costs arrived at in the Allen & Overy study of awards (available as of 31 December 2012).

In the majority of the 40 ICSID arbitrations concluded between FY2011 and FY2015 where tribunal costs information was available, such costs were US$1 million or less:

ICSID/Tribunal Costs in Concluded ICSID Arbitrations FY2011-FY2015	**Number of arbitrations**
US$1 million and less	27
US$1-2 million	12
US$2-3 million	0
US$3-4 million	1
TOTAL	**40**

As mentioned therefore by Nottage et al in an extended case note on the *Philip Morris Asia v Australia* case:[15]

> "… Uruguay expended USD 10 million (and was awarded USD 7 million by the tribunal) in successfully defending on the merits its own ISDS case against the Philip Morris group. By contrast, from mid-2015, local news sources began asserting (without quoting a source) that Australia had incurred over AUD 50 million (USD 37 million) to defend the PMA claim. Given [such] empirical studies, this amount would represent a glaring outlier in investment treaty arbitration. It appears large even taking into account costs relating to the parallel WTO proceedings and the 2012 constitutional challenge in the Australian High Court."

2. Amounts claimed versus awarded in treaty-based ISDS Arbitrations

In total, 541 known, concluded, treaty-based ISDS arbitration cases have been incorporated into Ubilava's database developed for her PhD thesis focusing on prospects for investor-state mediation.[16] There are six outcomes: investor-won, state-won, discontinued, settled, neither party won or lost, unknown. For the purpose of examining the ratio between the claimed and awarded amounts, we can only study the investor-won cases as it is the only outcome of a concluded case that provides both claimed amounts and awarded amounts. (Amicably settled investor-state arbitration cases, which are many, also provide information on claimed amounts and settled amounts. However, because

[15] See above n 9.
[16] Data collected from UNCTAD and ICSID websites until the end of December 2017 <http://investmentpolicyhub.unctad.org/ISDS> and <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>.

such agreements are reached outside the arbitral tribunal, those settlement amounts are not awarded by ISDS tribunals and hence falls out of the scope of this study.)

The information provided by the following two tables is two-fold. The first table illustrates the median and average amounts of all the cases from the 541-case database regardless of their outcomes (regardless if they were awarded these amounts or not). What needs to be taken into consideration is that not all 541 cases provide publicly available information about the claimed amounts. Out of these 541 cases, 429 provided information on the claimed amounts. The **median claim is for $123 million.**

Claimed amounts of all known concluded ISDS arbitration cases	
Number of cases analysed	429
Median claimed amount (million USD)	**123.8**
Average claimed amount (million USD)	899.4

The second table provides more comprehensive information. In particular, the table below illustrates the median and average of claimed versus awarded amounts in the investor-won cases. **In total, out of 541 cases, 147 were won by the foreign investors.** Out of these investor-won cases, only **132 provided both claimed and awarded amounts**.

Claimed and awarded amounts of investor-won cases		
	Claimed amounts	Awarded Amounts
Number of cases analysed	132	132
Median Amount (million USD)	**$ 113.1 Million**	**$ 19 Million**
Average Amount (million USD)	$ 1287.2 Million	$ 490.5 Million

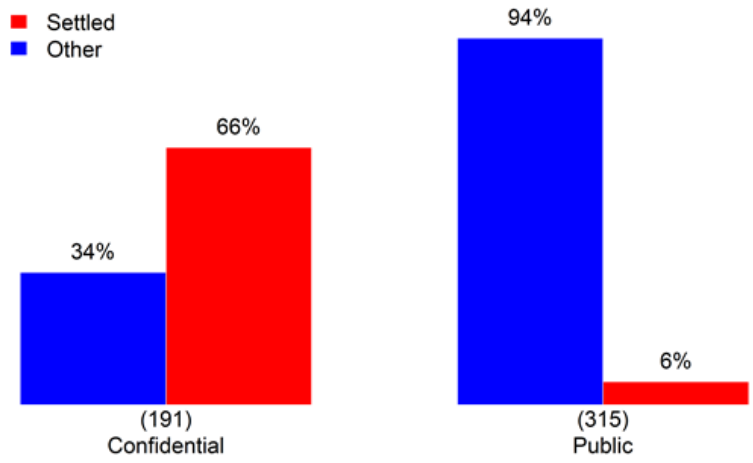
If we simply compare average amounts awarded versus claimed (the bottom line – unsurprisingly similar to the figures calculated by Hodgson and Campbell cited in Part 1 above), the ratio is 38%. Likewise, the **ratio of median claimed versus awarded amounts is 17%** (the bolded line above).

Alternatively, for each respondent country we can also calculate the ratio of the awarded amounts over the claimed amounts, and then calculate the average or median of those ratios. On this basis, the average of the awarded amounts works out at 35% of the claimed amounts. **The median awarded-to-claimed amounts ratio is 25%.** The latter means that in half of the cases where foreign investors won, the awarded amounts were 25% or less of the claimed amounts and, likewise, in half of the cases, awarded amounts were at least 25% of the claimed amounts.[17]

3. Transparency in treaty-based ISDS arbitration outcomes

Out of 506 known concluded ISDS arbitration cases (excluding 35 discontinued cases) **315 (62%) are Public and 191 (38%) are Confidential**. The figure below further analyses these two categories:

[17] In other words, the average value of the awarded-to-claimed amounts ratios is calculated by first obtaining these ratios for each case, and then by averaging these individual ratios across all cases. Similarly, the median value of the awarded-to-claimed amounts ratio represents the middle point of the ascendingly ordered awarded-to-claimed amounts ratios of the cases in consideration. Thus, the median of the awarded-to-claimed amounts ratios represents the value with 50% of the cases having ratios that are less than that value and 50% of the cases having ratios that are greater than that value.



- 66% of the 191 confidential cases involve early settlements;
- 94% of the public cases have other outcomes, such as Investor-Won, State-Won or where neither party has won.

However, to address the issue of transparency, we need to determine first the meaning of "confidentiality" in ISDS arbitrations. After closer observation, it becomes apparent that there are several levels of confidentiality:

A. Strictly Confidential - A case where the confidentiality is so high that basic information on which party had won the case is unknown;

B. Confidential - A case where its merits and the award (including the amount) are confidential, but the information on which party had won the case is known;

C. Partly Confidential - A case where the merits and the final award are confidential but the information on who won the case is known and, despite the award being confidential, the awarded amount is publicly known (or in the case of a settlement, the settlement amount is publicly known).

D. Public - A case that is fully public.

The results are more informative when we start to differentiate the levels of confidentiality. As indicated in the Table, in bold, **around 85% of cases where either the investor or the state have won are fully Public, and almost all the rest are only Partly Confidential.** For settled cases, as *italicised*, 41% are Public or Partly Confidential.

This suggests that minimising costs and delays through early settlement may often be facilitated by keeping the outcome at least partly private, but not necessarily in all situations.

How many awards were confidential or public per outcome						
	Unknown	Strictly Confidential	Confidential	Partly Confidential	Public	Total number
Investor-Won	0	0	3 (2%)	20 (14%)	**124 (84%)**	147
Settled	3 (2%)	0	82 (57%)	*42 (29%)*	*18 (12%)*	145
State-Won	0	0	4 (2%)	26 (13%)	**164 (85%)**	194
Unknown	0	9 (100%)	0	0	0	9
Neither party	0	0	0	2 (18%)	9 (82%)	11

4. Conclusions

Our analysis above has sought to add some empirical insights regarding some persistent concerns about treaty-based ISDS. Typical party and tribunal costs are found to be quite high, although they may not be as high as found by the OECD in its 2012 survey, and

international justice never comes cheap.[18] Amounts claimed are much higher than ultimately awarded, suggesting the need for the more detailed provisions commonly found in Asia-Pacific investment treaties concluded over the last decade or so.[19] Those treaties also increasingly incorporate express provisions regarding transparency of process and outcomes in ISDS, but our empirical analysis finds a surprising degree of transparency in awards issued even under earlier treaties.

Our analysis is inspired by the recent CPTPP ratification hearings in the Australian parliament, but we hope they can also assist in public inquiries and broader debates about other international investment treaties. As noted in his opening statement to the JSCOT inquiry hearings, based also on earlier research and publications, Nottage argues that that ISDS-backed investment treaty commitments have generated significantly greater cross-border FDI flows, especially into developing countries, without causing undue direct or indirect harms to developed countries like Australia.[20] As such, after a thorough review of the investment chapter and broader regional developments, he supported ratification of the TPP as signed in 2016.[21]

He also now supports ratification of the CPTPP, while urging Australia should to work to pursue further targeted improvements to ISDS. This can be done within the existing CPTPP, notably by:

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[18] See generally D Wippman, 'The Costs of International Justice' (2006) AJIL 861, cited in Stephen Tully, 'Costs Awards by International Courts and Tribunals: Key Lessons from *Philip Morris v Australia*' (2017) 23 AILJ 163 at 144.

[19] See eg Tomer Broude, Yoram Haftel and Alexander Thompson, 'The Trans-Pacific Partnership and Regulatory Space: A Comparison of Treaty Texts' (2017) 20 JIEL 391.

[20] See above n 8; and see generally, Shiro Armstrong and Luke Nottage, 'The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis' (2016) Sydney Law School Research Paper No. 16/74, <https://ssrn.com/abstract=2824090>.

[21] For his background analysis, see Luke Nottage, 'The TPP Investment Chapter and Investor–State Arbitration in Asia and Oceania: Assessing Prospects for Ratification' (2016) 17 *Melbourne Journal of International Law* 313 <https://ssrn.com/abstract=2767996>.

- Leading the development of a Code of Ethics for ISDS arbitrators, which must be completed underway under Article 9.22 of the (CP)TPP before it comes into force – including an express prohibition on "double-hatting" (so arbitrators cannot serve as counsel in other cases, which creates a risk or perception of bias);
- Proposing to other signatories the addition of an appellate review mechanism (to enhance consistency of interpretations), as permitted by Article 9.23.

These should enhance predictability, and therefore reduce ISDS costs and delays in the long run. Such targeted reforms should also help promote the overall legitimacy of this dispute resolution mechanism, which is increasingly contested.[22]

In addition, Nottage argues that in future treaty negotiations, including for the (ASEAN+6) Regional Comprehensive Economic Partnership FTA, Australia should be actively exploring something like the permanent investment court model favoured by the EU in its latest treaties (eg with Vietnam and Singapore). The EU's approach retains the rights for foreign investors to bring claims directly against host states for illegal (in)actions if their home states do not want to incur the costs or diplomatic problems of bringing an inter-state arbitration on their behalf. But the dispute resolvers are pre-selected by the states themselves, cannot engage in double-hatting, and are subject to appellate review.[23] This mechanism is also now under active consideration in a new UNCITRAL committee exploring the need and possible options for ISDS reform,[24] but deliberations at this multilateral level will take many more years and should be paralleled

[22] For a broader analysis of (social) media discussions over international arbitration, see Luke Nottage, 'International Arbitration and Society at Large' in Andrea Bjorklund, Franco Ferrari and Stefan Kroell (eds) *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press, forthcoming) <https://ssrn.com/abstract=3116528>.
[23] Amokura Kawharu and Luke R Nottage, 'Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu' (2018) Sydney Law School Research Paper No. 18/03 <https://ssrn.com/abstract=3116526>.
[24] United Nations Commission on International Trade Law (UNCITRAL) Working Group III, <http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html>.

with "bottom-up" reforms by countries like Australia as they continue to (re)negotiate investment treaties.

However, we conclude with two quotations. The first, popularised by Voltaire, is that: "the perfect is the enemy of the good".[25] Just because an even better option may exist or be developed should not mean not taking a decent option already on the table (such as the CPTPP). The second quote, attributed to the late Stephen Hawking but more likely popularised by US Congress Librarian and author Daniel Boorstin, runs along these lines: "the greatest enemy of knowledge is not ignorance, it is the illusion of knowledge".[26] Many people now think they know about investment treaties and ISDS. However, as indicated unfortunately by some others who made Submissions to the recent JSCOT inquiry in Australia,[27] they have not looked closely or systematically at the evolving treaty provisions and arbitral decisions – or perhaps they do not wish to. Hopefully, our article injects some realism into the ongoing debate.

[25] See, eg, Wikipedia, *Perfect is the enemy of good* (26 February 2018) <https://en.wikipedia.org/wiki/Perfect_is_the_enemy_of_good>
[26] Quote Investigator, *The Greatest Obstacle to Discovery Is Not Ignorance—It Is the Illusion of Knowledge* (20 July 2016)<https://quoteinvestigator.com/2016/07/20/knowledge/>.
[27] An example comes from The Vintage Reds of the Canberra Region, Submission No 18 to the Joint Standing Committee on Treaties, *Inquiry into the Proposed Comprehensive Progressive Agreement on the Trans Pacific Partnership (TPP)*, 16 April 2018, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TPP-11/Submissions>. They turn out to be not a group of wine exporters keen to access the Canadian market (hopefully now being prised open by Australia bringing its first World Trade Organization inter-state claim in 15 years). Rather, they constitute "a group of retired trade unionists" who adopt a remarkably narrow conception of national sovereignty in opposing the (CP)TPP, and by implication any FTA.