Australia's Position on Investor–State Dispute Settlement: Fruit of a Poisonous Tree or a Few Rotten Apples?

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Abstract

This article critically analyses the methodology and substantive basis of Australia's initial rejection of, and subsequent ambivalence towards, investor–State dispute settlement ('ISDS') mechanisms contained in international investment agreements. The analysis focuses on the Australian Government Trade Policy Statement of 2011, as well as the 2010 and 2015 reports of the Australian Productivity Commission that largely informed the conclusions of the Trade Policy Statement. The article reveals that Australia's analysis was incomplete and lacking meaningful discourse on the general concerns and benefits of ISDS in light of Australia's regional relationships and the global political economy. Consequently, an adequate debate on the virtues of ISDS has yet to take place in Australia. In the absence of a clear and consistent investment policy, this article provides guidance for Australia's future policy, such as threshold criteria for the inclusion of ISDS and a model investment treaty. With the European Union and United States expressing dissatisfaction with the present system of ISDS, this article is timely and has broad relevance.

I Introduction

> Australia is a lucky country run mainly by second-rate people who share its luck.[1]

The 'lucky country' phrase entered, and remained, in the Australian vernacular as a term of endearment, depicting Australia as a country rich in natural resources and prosperity, geographically distant from global problems and, therefore, a great place to migrate or invest. Yet, unknown to most, Horne's depiction of Australia as the 'lucky country' was actually describing a political-legal system largely guided by

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1 Donald Horne, *The Lucky Country: Australia in the Sixties* (Penguin Books, 1964) 209.

luck, rather than guided by proactive governance that capitalises on Australia's underlying economic and legal advantages.[2]

Much has changed in the political-legal system and in Australia more generally since 1964, but this article addresses whether Australia has returned to 'second rate' governance whereby economic prosperity is the result not of foresight and planning, but of luck. This certainly appears to be the case behind the Australian Government's curious policy on international investment and, in particular, investor–State dispute settlement ('ISDS'). A common feature of international investment agreements,[3] ISDS is a mechanism that allows nationals of a party to an investment agreement to take direct legal action against the counterparty host State for breaches of that agreement. If successful, the host State could be liable for monetary damages payable directly to the investor.

Until 2011, Australia included ISDS in almost all of its investment agreements as a matter of course, with little discussion or debate. One notable exception is the *Australia–United States Free Trade Agreement* ('*AUSFTA*'),[4] which excluded ISDS at the request of Australia.[5] This exclusion by the conservative Howard Government perhaps planted the seed for the later left-leaning Gillard Government's Trade Policy Statement, which, inter alia, ostensibly declared that ISDS would no longer be included in Australian investment agreements.[6] In so doing, Australia became one of the few countries to reject ISDS in its investment agreements. Other states such as Ecuador, Bolivia, Venezuela and later Indonesia and South Africa clearly set out their bases for rejecting ISDS.[7] However, Australia's rejection was not accompanied by detailed or clear rationale. Instead, the Trade Policy Statement left unstated whether the rejection was based on specific institutional or systemic concerns, or simply as part of a general apprehension with the international investment regime. Since 2011, Australia's position on ISDS has again shifted, multiple times.

Australia included ISDS in all of its 21 bilateral investment treaties ('BITs') and most free trade agreements ('FTAs') entered into between 1988–2005 (over the Hawke and Keating Labor Governments and Howard Liberal Government), before

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2 See Michael J Enright and Richard Petty, *Australia's Competitiveness: From Lucky Country to Competitive Country* (Wiley, 2016) xi; Victoria Mason, 'Strangers within in the "Lucky Country": Arab-Australians after September 11' (2004) 24(1) *Comparative Studies of South Asia, Africa and the Middle East* 233, 240.

3 The term 'investment agreements' encompasses both standalone bilateral investment treaties and free trade agreements that contain a comprehensive chapter on investment.

4 *Australia–United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ('*AUSFTA*').

5 See Jacob Varghese, 'Australia–US Free Trade Agreement: Overview of Potential Legal Issues' (Research Note, Parliamentary Library (Cth), 10 February 2004) Analysis & Policy Observation <http://apo.org.au/system/files/8381/apo-nid8381-3276.pdf>.

6 See Department of Foreign Affairs and Trade ('DFAT'), Australian Government, 'Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity' (Policy Statement, DFAT, April 2011) 14 <https://goo.gl/KLzjaX>.

7 See generally William B McElhiney III, 'Responding to the Threat of Withdrawal: On the Importance of Emphasizing the Interests of States, Investors, and the Transnational Investment System in Bringing Resolution to Questions Surrounding the Future of Investments with States Denouncing the *ICSID Convention*' (2014) 49(3) *Texas International Law Journal* 601, 602.

being omitted by the Gillard Labor Government in FTAs with New Zealand (2010)[8] and Malaysia (2012).[9] The Abbott Liberal-led Government then included ISDS in trade agreements with Korea (2014),[10] the Association of South East Asian Nations ('ASEAN') (2014)[11] and China (2015),[12] but not in the FTA with Japan (2014).[13] The recent Government's 'case-by-case approach'[14] could very well be reasoned and rationalised, but such repeated shifts do beg the question whether Australia has been guided by any overarching theoretical principles or whether these shifts are simply the result of a schizophrenic policy from successive governments. What is clear is that a case-by-case approach without any underlying guiding principles inevitably leads to confusion and uncertainty in any subsequent negotiations.

The objective of this article is to critically analyse the basis for Australia's rejection of, and subsequent ambivalence towards, ISDS in the context of its regional relationships and the global political economy. The Australian Productivity Commission reports in 2010 and 2015 largely influenced and informed the conclusions of the Trade Policy Statement.[15] However, even a cursory evaluation of the Trade Policy Statement, as well as those reports, reveals incomplete analysis of the general (global) concerns and a summary dismissal of the benefits (both in general terms and to Australian investors) of ISDS. Consequently, an adequate debate as to the merits of ISDS has yet to take place by the Australian Government.

The topic of this article is apt in light of the most recent developments in Europe and the United States ('US') questioning the merits of ISDS.[16] Further, the

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[8] *Exchange of Letters Constituting an Agreement between the Government of Australia and the Government of New Zealand to Amend Annex G of the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)*, signed 16 June 2010, [2011] ATS 42 (entered into force 1 September 2011).

[9] *Malaysia–Australia Free Trade Agreement*, signed 22 May 2012, [2013] ATS 4 (entered into force 1 January 2013).

[10] *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014).

[11] *First Protocol to Amend the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 26 August 2014, [2015] ATS 14 (entered into force 1 October 2015).

[12] *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015).

[13] *Agreement between Australia and Japan for an Economic Partnership*, signed 8 July 2014, [2015] ATS 2 (entered into force 15 January 2015).

[14] Liberal Party of Australia, 'The Coalition's Policy for Trade' (Policy, Liberal Party of Australia, September 2013).

[15] Productivity Commission, Australian Government, 'Bilateral and Regional Trade Agreements' (Research Report, November 2010) <http://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf> ('*2010 Productivity Commission Report*'); Productivity Commission, Australian Government, 'Trade & Assistance Review 2013–14' (Report, 24 June 2015) <https://www.pc.gov.au/research/ongoing/trade-assistance/2013-14/trade-assistance-review-2013-14.pdf> ('*2015 Productivity Commission Review*'). The Productivity Commission, which represents itself as independent from government agencies, is government-funded and its inquiries are determined by the Government. The Commission operates under the *Productivity Commission Act 1998* (Cth) and has the power to summons witnesses. Commissioners are appointed by the Governor-General for fixed periods. See Productivity Commission, *How We Operate* <http://www.pc.gov.au/about/operate>.

[16] The EU has proposed major reforms to ISDS: see European Commission, 'A Future Multilateral Investment Court' (Press Release, 13 December 2016) <http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm>. For a detailed analysis of proposed investment court system in the Canada–European Union Trade Agreement ('*CETA*') and the proposed Transatlantic Trade and Investment Partnership ('*TTIP*') between the EU and US, see Kyle Dylan Dickson-Smith, 'Does the

effects of the June 2016 'Brexit' vote (in favour of the United Kingdom withdrawal from the European Union ('EU')) have, inter alia, prompted discussions as to a potential FTA between Australia and the United Kingdom.[17] In addition, an Australian Senate Committee inquiry pertaining to the ratification and implementation of the recently signed *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ('*TPP-11*'), which includes 10 other partner countries, remains ongoing.[18] Accordingly, this discussion may well shape Australia's approach in other ongoing negotiations, such as with Indonesia, India and the China-led Regional Comprehensive Economic Partnership.[19]

This article is divided into four parts: Part I briefly describes the nature and purpose of ISDS before reviewing its criticisms and benefits. This part addresses the question as to whether states predominantly include ISDS in investment agreements to attract investment, protect their investors overseas or as a response to the greater competitive pressure within the global political economy. Part II outlines Australia's historical approaches to ISDS, with reference to the aforementioned 2010 and 2015 Productivity Commission reports. This is contextualised against regional (historical and anticipated) trends of ISDS practice. Part III provides a critical analysis of the basis for Australia's ISDS policy and also discusses the implications in light of Australia's competitiveness and involvement in the regional economic community. The Part concludes that it is not in Australia's interest to reject ISDS unless and until a rational basis to do so emerges. Finally, Part IV provides a series of practical reform measures which address both substantive and procedural protections, and further suggests rational guidelines for future policymaking. It contrasts these suggested reforms with those adopted by other states and economies, and specifically draws on existing proposals in the *Transatlantic Trade and Investment Partnership* ('*TTIP*') negotiations between the US and the EU, as well as the recently signed *Comprehensive Economic and Trade Agreement* ('*CETA*') between the EU and Canada.[20]

European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model' (2016) 17(5) *Journal of World Investment & Trade* 773. For its part, the US is considering pulling back from ISDS in the renegotiation of the *North American Free Trade Agreement between Canada, the United States and Mexico*: signed 17 December 1988 (entered into force 1 January 1994) ('*NAFTA*'). See 'USTR Considering ISDS Proposal That Would Require NAFTA Countries to Opt In', *World Trade Online* (online), 19 August 2017 <https://insidetrade.com/daily-news/sources-ustr-considering-isds-proposal-would-require-nafta-countries-opt>.

17 See Paul Karp, 'Australia to Seal Early Trade Deal with Britain after Brexit, Says Turnbull', *The Guardian* (online), 5 September 2016 <https://www.theguardian.com/australia-news/2016/sep/05/australia-to-seal-early-trade-deal-with-britain-after-brexit-predicts-turnbull>.

18 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATNIF 1 (not yet in force) ('*TPP-11*'). The other parties to this agreement are Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam. See Senate Standing Committee on Foreign Affairs Defence and Trade, Parliament of Australia, *Proposed Comprehensive and Progressive Agreement for Trans-Pacific Partnership* <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TPP-11>. See also <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/Pages/trans-pacific-partnership-agreement-tpp.aspx>.

19 See generally DFAT, *Regional Comprehensive Economic Partnership* <http://dfat.gov.au/trade/agreements/rcep/Pages/regional-comprehensive-economic-partnership.aspx>.

20 *EU–Canada Comprehensive Economic and Trade Agreement*, signed 30 October 2016 (entered into force 21 September 2017) art 8.27(4) ('*CETA*').

The article concludes with a call for a consistent and principled, but flexible, policy that encapsulates both Australia's immediate investment needs and long-term prospects within the international investment regime. It is argued that such a policy, complemented with a model BIT,[21] will facilitate efficiency and predictability throughout the treaty negotiation and implementation process.

II The Nature of Investment Agreements and Investor–State Dispute Settlement Mechanisms

Before analysing how the Australian Government and the Productivity Commission evaluated the implications of ISDS, it is necessary to first briefly discuss the general purpose and utility of ISDS within the context of the international investment regime. It is also relevant to survey some of the general (global) concerns of ISDS, both to provide context and to assist in the assessment of whether the Australian Government and Productivity Commission's analyses were conducted meaningfully, fairly and comprehensively.

A *The Utility of Investment Agreements and ISDS*

Countries typically enter into investment treaties for one or more of three reasons: (1) to protect the investments of nationals in the territory of the counterparty; (2) to stimulate inbound foreign direct investment ('FDI'); and, more generally, (3) to facilitate investment liberalisation. In regards to the third reason, liberalisation involves the removal of restrictions or barriers to entry of foreign companies into host countries, such as opening up the financial structure of a country to market forces, and removing governmental control. Often, it is easier and more politically palatable to liberalise investment (and trade) through an international agreement, rather than unilaterally.[22] Among other factors, one of the general macroeconomic advantages of investment agreements is enhanced competition and consequential improved dynamic efficiency.[23]

ISDS provisions are designed to facilitate the objective of the underlying investment agreement to encourage investment flows by providing procedural recourse for the enforcement of substantive investor protections. ISDS, complemented with protections against discriminatory or unfair government measures, provides a direct mechanism to protect such investments without

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[21] Such a model of template agreements is commonly utilised by states throughout their negotiations. Examples include the US Model BIT (2012), Canada's FIPA (2014), India's Model BIT (2016) and China's Model BIT (2012). See generally Chester Brown, *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013).

[22] See Rafael Leal-Arcas, *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance* (Edward Elgar, 2010) 30–8, 69–86; Beth V Yarbrough and Robert M Yarbrough, *Cooperation and Governance in International Trade* (Princeton University Press, 1992) 55–61.

[23] See Jürgen Kurtz, 'Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication' (2012) 27(1) *ICSID Review* 65, 75, citing Joseph E Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities' (2007) 23(3) *American University International Law Review* 451, 548.

governmental action or consent by the investor's home State. Viewed from this perspective, ISDS removes a specific behind-the-border barrier for foreign investors; namely, ineffective judicial or administrative decision-making in the host State.

While the underlying purpose of an investment policy is to reduce behind-the-border barriers in order to attract the flow of capital into a signatory's territory, it remains debatable whether ISDS actually increases FDI flows and empirical evidence is equivocal on this point.[24] This lack of precision is not surprising given how difficult it is to isolate the direct effects on FDI of investment agreements and ISDS from other factors that influence investment, such as improvements in technology, a general expansion in trade, inflation, currency fluctuation, economic growth or a range of other domestic developments.

Another reason why states utilise ISDS is based on the global political economy and the competitive 'contagion' effect created by bilateral arrangements.[25] Simply stated, the increase of bilateral and regional FTAs is purported to create a self-reinforcing, or contagious, process that compels other states to follow and increase the standards of protections in investment agreements in order to remain competitive and attract FDI.[26]

The question for this discussion is whether Australia's policy towards investment protection, particularly for ISDS, considered these overall factors and concerns. In other words, has Australia considered the literature and broader debate when formulating its investment policy? While it is beyond the scope of this article to compare the advantages of arbitration with local judicial processes,[27] given Australia's rejection of ISDS in 2011 it is worth reviewing the criticisms of the system before proceeding.

B *General Criticisms of the ISDS System*

The ISDS discussion exists along several lines of debate, which could perhaps be placed on a scale of the greatest potential ramifications to the least. The first line is whether agreements with ISDS equally distribute benefits to all states and facilitate a fair global governance system. The second line is whether the underlying agreement should grant any procedural rights to investors in ISDS. The third addresses the scope of substantive protections subject to ISDS. The fourth, and more

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[24] See Shiro Patrick Armstrong and Luke R Nottage, 'The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis' (Legal Studies Research Paper No 16/74, Sydney Law School, University of Sydney, August 2016) 15; Axel Berger et al, 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box' (Working Paper, World Trade Organization ('WTO'), 15 December 2009) <http://www.wto.org/english/res_e/reser_e/ersd201013_e.htm>. See generally Jeffrey Bergstrand and Peter Egger, 'What Determines BITs?' (2013) 90(1) *Journal of International Economics* 107.

[25] See Eric Neumayer, Peter Nunnenkamp and Martin Roy, 'Are Stricter Investment Rules Contagious? Host Country Competition for Foreign Direct Investment through International Agreements' (2016) 152(1) *Review of World Economics* 177.

[26] Ibid 178, 204.

[27] For an example of more comprehensive discussion on this point, see Leon E Trakman, 'Choosing Domestic Courts over Investor–State Arbitration: Australia's Repudiation of the Status Quo' (2012) 35(3) *University of New South Wales Law Journal* 979, 984.

nuanced debate, is based on the forum — whether ISDS procedural rights should be granted through arbitration or domestic courts, or whether investment agreements should provide the investor with a choice of forum. These various lines of debate are interrelated and collectively considered when states decide whether to include or exclude ISDS, to cover greater or fewer key investor protections, and to provide for ISDS with arbitration in addition to, or in lieu of, local court proceedings.

Most criticisms of ISDS relate to legitimacy. As it is beyond the scope of this article to analyse each of these in any depth, these criticisms have been reproduced in the Appendix to this article, with a description as to whether these have been considered by the Australian Government. However, an overall description of the general criticisms can be synthesised as follows:

1. Treaty interpretations by tribunals are often conflicting and the system does not allow for appeals.
2. ISDS unduly restricts states from exercising their traditional sovereign right to protect health, environment and culture, and thus leads to regulatory chill and effectively removes the democratic political process of public/parliamentary debate.
3. ISDS provides asymmetrical procedural rights to investors (but not states), giving exclusive standing to corporations, and creates unique legal norms in favour of multinational enterprises that is fragmented from, and thus left 'unchecked' by, other international legal norms, such as international human rights, Indigenous rights,[28] environmental law and (to a lesser extent) trade law.[29] These issues are compounded by agreements and tribunals refusing to grant standing to interested and affected parties or the right of audience through amicus curiae submissions.[30]

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[28] This has been raised in the context of the Lago Agrio Indigenous people in relation to the dispute between the Chevron Corporation and Ecuador: see Megan S Chapman, 'Seeking Justice in *Lago Agrio* and Beyond: An Argument for Joint Responsibility of Host States and Foreign Investors before the Regional Human Rights Systems' (2010) 18(1) *Human Rights Brief* 6.

[29] For example, the interrelated and divergent 'sugar/HFCS war' investment and trade determinations, involving the WTO cases of *Mexico —Taxes on Soft Drinks* (Appellate Body Report, WTO Doc WT/DS308/AB/R (6 March 2006)), and the *NAFTA* disputes of *Archer Daniels Co v Mexico* (Award, ICSID Arbitration Tribunal, Case No ARB (AF)/04/05, 21 November 2007); *Corn Products International Inc v Mexico* (Award, ICSID Arbitration Tribunal, Case No ARB (AF)/04/01, 15 January 2008) and *Gami Investments Inc v Mexico* (Final Award, UNCITRAL Arbitration Tribunal, 15 November 2004).

[30] See generally V S Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law' (2011) 42(3) *Columbia Human Rights Law Review* 797; S Schadendorf, 'Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and *NAFTA* Investor-State Arbitrations' (2013) 10(1) *Transnational Dispute Management* 1.

4. Substantive investor protections,[31] exceptions[32] and arbitral interpretations[33] are in large part skewed by Western (namely European and American) traditions, without being 'contextualised' for the legal regimes of developing states.

Once again, the key question for this article is the extent to which the Australian Government, in its blanket rejection of ISDS in 2011, relied on any of this general discourse and whether it disproportionally attributed excess or little weight to these factors. The remaining sections will evaluate, with this framework in mind, the basis for Australia's decision with respect to investment agreements and, specifically, ISDS.

III Australia's Historical and Evolving Position on ISDS

The implications of the inclusion/exclusion of ISDS for Australia is best understood from the perspective of appreciating the nation's political economy, its current and potential position with respect to FDI flows and its treaty practice.[34]

A *The Nature of Australia's Investment Flows*

Australia has, for some time, relied on FDI in order to maintain and increase its standard of living. In the words of Australia's first Minister for Investment:

> Since the First Fleet, Australia has been a country unashamedly reliant on foreign investment … As a big and sparsely populated continent with a thin domestic capital market … our reliance continues today.[35]

The benefits of FDI to a host State are numerous, and include the provision of capital for economic growth, the creation of employment opportunities, and the increase of productivity and scale of competition between domestic industries, which in turn improves consumer choice.[36] Australia has historically required FDI to employ and expand its population which, in turn, perpetuate further economic growth.[37] Over the period of 1979–2007 (before the Global Financial Crisis), the level of FDI in

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[31] For example, 'Investment arbitrators will rely on their comprehension of the laws of developed countries in determining the "reasonable" or "legitimate" expectations of foreign investors': Trakman, above n 27, 1004.

[32] See, eg, the series of arbitration cases filed against Argentina stemming from the 2001 financial crisis. Those cases determined that art XI of the US–Argentina BIT was not a *lex specialis* that departed from the customary international law exclusion State conduct, by the defence of necessity. It has been stated that arbitrators 'will imbed the defense of necessity under *customary international law* that allegedly systemically disadvantages developing countries and their investors': ibid 1003 (emphasis added). See also: at 1003 n 105.

[33] See M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) 37.

[34] For background, see Jürgen Kurtz and Luke Nottage, 'Investment Treaty Arbitration "Down Under": Policy and Politics in Australia' (2015) 30(2) *ICSID Review* 465.

[35] Andrew Robb, 'Australia: A Land of Investment and Opportunity' (Speech delivered at the Credit Suisse Asian Investment Conference, Hong Kong, 27 March 2014), quoted in David Uren, *Takeover: Foreign Investment and the Australia Psyche* (Black, 2015) 7.

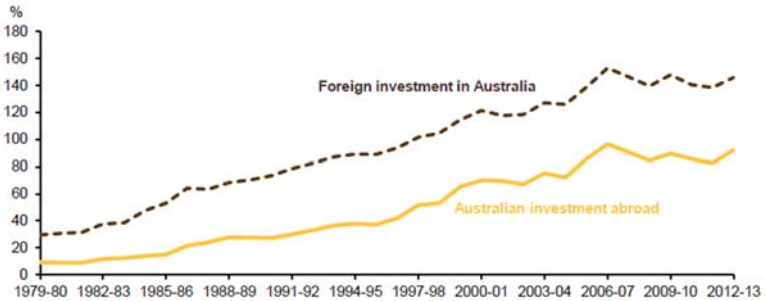
[36] See Peter Enderwick, 'Attracting "Desirable" FDI: Theory and Evidence' (2005) 14(2) *Transnational Corporations* 93.

[37] See Uren, above n 35, 65.

Australia rose from around 15% of Gross Domestic Product ('GDP') to more than 35% (see Figure 1, below).[38] In that same period, the level of Australian FDI abroad rose from less than 5% of GDP to 34.4%.[39]

Notably, the rate of investment between Australia and Asia has more than doubled (in both directions) in the last 10 years.[40] This trend is most noticeable in regards to China. Based on the accumulated volume of FDI between 2005 and 2015, Australia was China's second largest destination of investment (following the US), totalling US$87.2 billion in 2016 alone.[41] China is now Australia's largest trading partner and FDI flows have grown significantly in the last decade.[42] However, by international standards, Australia's level of FDI inflow is not particularly high, accounting for less than 40% of its GDP.[43] Australia could, thus, benefit from further Chinese investment. In terms of Australian FDI, Australia directs more FDI to China, in proportion to many other countries, with significant room for further growth.[44]

Figure 1: Australian Foreign Investment: Inward and abroad as a percentage of GDP, 1979–80 to 2012–13[45]



38 DFAT, 'Australia's Foreign Investment — Historical Overview' (Report, DFAT, September 2014) <https://dfat.gov.au/about-us/publications/Documents/australias-foreign-investment-historical-overview.pdf>.

39 Ibid 1.

40 Ibid. See also generally, Thomas Boak, 'Auditing the Australia-China Relationship: A Cross Country Study of Bilateral Relations with China' (Report, UTS Australia-China Relations Institute, October 2015) 16 <https://goo.gl/Ze5joE>. Australia Bureau Statistics, 'International Investment Position, Australia: Supplementary Statistics, 2017' (10 May 2018) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/5352.0>.

41 See DFAT, 'International Investment Australia 2016' (Report, DFAT, October 2017) 14 <https://dfat.gov.au/about-us/publications/documents/international-investment-australia.pdf>. See also KPMG and University of Sydney, 'Demystifying Chinese Investment in Australia' (Report, KPMG, May 2017) 5 <https://assets.kpmg.com/content/dam/kpmg/pdf/2016/04/demystifying-chinese-investment-in-australia-april-2016.pdf >.

42 DFAT, above n 41, 7, 9–10, 14–15, 18, 23, 27, 51–2. See also Leon Trakman, 'Investor State Arbitration: Evaluating Australia's Evolving Position' (2014) 15(1–2) *Journal of World Investment & Trade* 152, 181; Boak, above n 40, 7.

43 See Treasury, Australian Government, 'Foreign Investment into Australia: Treasury Working Paper' (Treasury Working Paper, Treasury, Australian Government, January 2016) 6 <https://static.treasury.gov.au/uploads/sites/1/2017/06/TWP_201601_Foreign_Investment.pdf>.

44 See Boak, above n 40, 16.

45 DFAT, above n 38, 1.

B *Australia's Position on ISDS Before and After the Trade Policy Statement of 2011*

Australian investment agreements that omit ISDS are the exception, rather than the norm. Historically, the practice has been to include ISDS and this has been the case for all of Australia's 21 BITs and all but a select few of its FTAs.[46] Australian trade agreements that exclude ISDS are the Investment Chapter (added in 2011) to Australia's (first) FTA with New Zealand (1982),[47] the *AUSFTA* (2004),[48] and FTAs with Malaysia (2012),[49] Japan (2014),[50] and the *AANZFTA* (2014, only in relation to the obligations between Australia and New Zealand).[51]

Despite a fairly consistent adoption of ISDS, the Government began vocalising concern over ISDS in 2002, when the centre-left Labor Party in opposition successfully campaigned against including ISDS in the *AUSFTA*.[52] After coming into power in 2007, however, the Labor Party quietly acceded to ISDS in the FTAs signed with Chile (2008)[53] and ASEAN (2009).[54] After expressing 'serious reservations' about ISDS in March 2010, the release in 2011 of the Trade Policy Statement firmly staked out the Government's position:

> In the past, Australian Governments have sought the inclusion of investor–State dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice.[55]

The Trade Policy Statement was largely based on the *2010 Productivity Commission Report*,[56] the recommendations of an independent statutory and

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[46] This calculation excludes other less comprehensive trade and investment related agreements, such as the *Canada–Australia Trade and Economic Cooperation Arrangement* (signed and entered into force 10 November 1995); *Energy Charter Treaty*, signed 17 December 1994 (entered into force 16 April 1998); *Agreement between the Government of Australia and the Government of Fiji on Trade and Economic Relations*, signed 11 March 1999 (entered into force 15 December 1999); *Agreement on Trade and Commercial Relations between the Government of Australia and the Government of Papua New Guinea*, (signed and entered into force 1 February 1977).

[47] *Australia–New Zealand Closer Economic Relations Trade Agreement*, signed 14 December 1982, [1983] ATS 2 (entered into force 1 January 1983) ('*ANZCERTA*'); *Protocol on Investment to the New Zealand-Australia Closer Economic Relations Trade Agreement*, signed 1 February 2011, [2013] ATS 10 (entered into force 1 March 2013).

[48] *AUSFTA*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).

[49] *Malaysia–Australia Free Trade Agreement*, signed 22 May 2012, [2013] ATS 4 (entered into force 1 January 2013). That exclusion of ISDS, however, is not material since the *AANZFTA* includes ISDS between Australia and Malaysia: *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010) ('*AANZFTA*').

[50] *Agreement between Australia and Japan for an Economic Partnership*, signed 8 July 2014, [2015] ATS 2 (entered into force 15 January 2015).

[51] *AANZFTA*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010).

[52] See generally Kurtz and Nottage, above n 34, 473.

[53] *Australia–Chile Free Trade Agreement*, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009).

[54] *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010).

[55] DFAT, above n 6, 14.

[56] See *2010 Productivity Commission Report*, above n 15. Indeed, the Trade Policy Statement acknowledged that the *2010 Productivity Commission Report* 'has been closely considered in the preparation of this review' and that the Government's new policy positions 'are highly consistent with' the recommendations of that report: at 16.

advisory body. The Commission's mandate is to provide the Australian Government with independent and economically rigorous advice,[57] and historically, it has been both rigorous and objective in its evaluation of the Australian policymaking process.

As such, the 2011 Trade Policy Statement's rejection of ISDS signified a material departure from Australia's longstanding practice. The position of the Australian Government shifted again just two years later as the newly elected Liberal-led Coalition Government reverted to the previous position of including ISDS on a 'case-by-case basis'.[58] In line with the Coalition's 'pragmatic approach to trade negotiations',[59] ISDS was included in the 2014 FTAs with Korea ('*KAFTA*')[60] and China ('*ChAFTA*'),[61] but not with Japan.

A few months later, in June 2015, the *2015 Productivity Commission Review* was released, expressing continued opposition to the negotiation and inclusion of ISDS clauses in investment agreements.[62] Shortly thereafter, Australia and the other 11 parties finalised the text of the *Trans-Pacific Partnership* (signed in February 2016),[63] and subsequently the *TPP-11* (signed in March 2018),[64] both of which contain ISDS as expected. In addition, Australia continues to negotiate the Regional Comprehensive Economic Partnership and other bilateral agreements that are also likely to include ISDS. The willingness to include ISDS more often than not suggests that the Coalition Government and Opposition Labor Party are both more pro-ISDS than the stated policy from 2011 would suggest. Left unaddressed, however, is whether a coherent policy exists with clear aims, objectives and parameters as to when and under what circumstances ISDS is acceptable or unacceptable.

C *Is There a Discernible Rationale to Include or Omit ISDS?*

Despite the Australian Government's foregoing proclamations against ISDS, it is difficult to discern an underlying rationale for Australia's policy on ISDS. This section analyses whether a historical correlation exists between the inclusion of ISDS and the perceived quality of the foreign State's legal and judicial system, or similarly, with the host State's GDP or real and anticipated FDI flows between the counterparty. One would expect that the utility of adopting an ISDS provision

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57 See *Productivity Commission Act 1998* (Cth) ss 6–8, 11.

58 Liberal Party of Australia, above n 14.

59 Ibid 4.

60 *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014).

61 *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015).

62 *2015 Productivity Commission Review*, above n 15, 77–82.

63 *Trans-Pacific Partnership Agreement*, Australia–Brunei Darussalam–Canada–Chile–Japan–Malaysia–Mexico–New Zealand–Peru–Singapore–United States–Vietnam, signed 4 February 2016, [2016] ATNIF 2 (not yet in force). See Office of the US Trade Representative, 'Trans-Pacific Partnership Ministers' Statement' (Ministers' Statement, Office of the US Trade Representative, 4 February 2016) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/February/TPP-Ministers-Statement>. According to a 'side agreement', ISDS does not apply between Australia and New Zealand: Letter from Todd McClay to Andrew Robb, 4 February 2016; Letter from Andrew Robb to Todd McClay, 4 February 2016 <http://tpp.mfat.govt.nz/assets/docs/side-letters/New%20Zealand-Australia%20Side%20Letter%20Relationship%20between%20TPP%20and%20Other%20Agreements.pdf>.

64 *TPP-11*, signed 8 March 2018, [2018] ATNIF 1 (not yet in force).

between two developed countries would be more nuanced, relative to those between a developed and a less-developed State. Similarly, there would appear to be less potential for Australian investors to use ISDS against a State where there is only a small amount of outbound investment, relative to states with greater FDI outflow (that is both historical FDI flows and potential FDI).

1 *Host Legal System*

Historically, one can perhaps find a correlation between ISDS and the counterparty's developmental state and legal system, such that Australian agreements negotiated with less-developed countries include ISDS. Upon further exploration, however, the strength of the correlation weakens. Australia has generally excluded ISDS with developed countries, such as New Zealand, the US and Japan. However, it also excluded ISDS with Malaysia. At the same time, Australia has included ISDS with Singapore (2003), Thailand (2005), Chile (2008), the *AANZFTA* (2009) and Korea (2014). Countries such as Korea, Chile and Singapore have what would be generally described as developed legal systems, on par with, if not more advanced than, one or more of the countries with which ISDS has been excluded.[65] It does not, therefore, appear that the state of a country's legal system is a determining factor in whether Australia seeks to include or exclude ISDS.

2 *Host State GDP*

The same contradictions appear in relation to a country's overall wealth. Again, Korea, Chile and Singapore are high-income countries. On the other hand, Thailand's economic development level is equivalent to Malaysia, yet those two countries are treated differently. Moreover, both are members of ASEAN, an agreement in which Australia includes ISDS. The point being, it is clear that level of economic development and GDP does not appear relevant to the decision to include or exclude ISDS.[66]

3 *FDI Flows between Counterparties*

Looking more closely at the statistics, there does not even appear to be a clear pattern or trend in relation to FDI flows and the inclusion of ISDS. It would appear, however, that Australia includes ISDS provisions in agreements where it is a net FDI-exporter and seeks to exclude such provisions in treaties where it is a net FDI-importer.[67] But, even here, the practice is inconsistent. Australia is a net FDI-exporter (or at least was at the time the relevant agreement was entered into) in relation to Chile and Thailand. However, it is a net FDI-importer in relation to

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65 For rule of law indicators, see World Bank, *Databank: Worldwide Governance Indicators* <http://databank.worldbank.org/data/reports.aspx?source=worldwide-governance-indicators>.

66 See World Bank, *Data Catalogue: World Development Indicators* <http://data.worldbank.org/data-catalog/world-development-indicators>.

67 Ibid.

Singapore, Korea, China and most ASEAN countries,[68] yet all of the relevant agreements with these countries include ISDS. This correlation is also imperfect where ISDS has not been included in an agreement. For instance, Australia is a net exporter of FDI with the US and New Zealand (again, at the time the relevant agreement was entered into), and a net importer of FDI from Malaysia and Japan — yet no ISDS is included in any of these treaties.[69]

Parts IV and V of this article will address whether these factors have been, or should be, utilised as official threshold criteria to invoke ISDS and to determine when ISDS should be included and/or placed on the negotiating table.

IV A Critique of Australia's Analysis of ISDS

This Part analyses both the findings and basis of the 2010 and 2015 Productivity Commission reports and the Trade Policy Statement, focusing on the particular framing of the international investment legal regime. This Part also demonstrates that many of the general issues surrounding ISDS, such as those described in Part I, were not addressed and analysed by the Productivity Commission or by the Australian Government in the formulation of its policy. Overall, we find the combined analysis of the Productivity Commission and the Trade Policy Statement to be incomplete and beset with internal contradictions. A summary of our findings is contained in the Appendix to this article.

A *Why the Productivity Commission Rejected Investment Agreements and ISDS*

The Productivity Commission's basis for rejecting the use of ISDS can be described as: (i) part of its principal approach in rejecting investment agreements; (ii) a specific rejection of the ISDS mechanism; or (iii) both (i) and (ii). Unfortunately, the Commission's reasoning blurs the issues and leaves the dividing line between (i) and (ii) unclear. In any event, the Productivity Commission's rejection of ISDS developed from the following premises:[70]

1. Bilateral trade and investment initiatives should not take precedence over multilateral and unilateral arrangements;
2. Foreign investors should not be provided greater rights over local investors;
3. Australia should not be exposed to regulatory chill;
4. There is no clear evidence that ISDS significantly increases inbound FDI or otherwise benefits Australia;[71]
5. There is no overall benefit to utilising ISDS; specifically, Australia's outbound investors do not and need not rely on the protections offered

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[68] See Australian Bureau of Statistics, *5352.0 — International Investment Position, Australia: Supplementary Statistics, 2015* (9 May 2017) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/5352.02015?OpenDocument>, table 2; table 5; DFAT, above n 41, 51–4; United Nations Conference on Trade and Development ('UNCTAD'), *Bilateral FDI Statistics* (April 2014) <http://unctad.org/en/Pages/DIAE/FDI%20Statistics/FDI-Statistics-Bilateral.aspx>.

[69] Ibid.

[70] See *2010 Productivity Commission Report*, above n 15, 271–4.

[71] Ibid 269.

by ISDS as alternatives such as insurance and access to local courts provide ample protection; and

6. There are inherent problems associated with the ISDS system, such as the large size and costs of investor claims, the latitude and inconsistency of investment tribunal determinations, the lack of rigorous rules governing the conduct of arbitration, the absence of an appeals process, the threat of 'institutional biases and conflicts of interest', and a lack of transparency.[72]

The Gillard Government's 2011 Trade Policy Statement literally followed all the recommendations of the Productivity Commission when announcing it would no longer seek to include ISDS provisions in any future treaties.[73] The Government's principal concerns stated in that document were: (1) conferring greater rights to foreign investors; and (2) the onset of regulatory chill.[74] The Trade Policy Statement similarly established generalised 'disciplines' to guide the contours of Australia's future trade policy, including a statement that bilateral and regional agreements must always give way to the multilateral regime.[75]

Before we address each of the Productivity Commission's six premises listed above, it is useful to first turn to our general concerns as to the Commission's methodology.

1 *General Concerns with the Methodology*

The Productivity Commission did not fully analyse or investigate any of the perceived criticisms. Instead, it relied on a few select reports and cases. Given the overall conclusion that '[e]xperience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions', the lack of breadth, depth and rigor in analysis is striking.[76] While the Productivity Commission acknowledged that some of the problems associated with ISDS can be ameliorated through the design of the relevant provisions, it nevertheless concluded that significant risks would remain — again without sufficient analysis or identifying exactly what risks, in its opinion, would remain.[77] If it had, of course, there would at least have been a benchmark on which further analysis could have been undertaken.

Curiously, while the Productivity Commission reports provide detailed analysis of traditional trade issues, the examination of investment issues and barriers is much more simplistic, shallow and cursory. Given the Government's reliance on the *2010 Productivity Commission Report* for a wholesale shift in policy, the brevity and selectiveness of the 2010 Report is rather surprising.

While it is unnecessary to review all of the Productivity Commission's methodological faults, it is useful to provide a few examples.

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72 Ibid 272.
73 See DFAT, above n 6, 18–9.
74 Ibid 14.
75 Ibid 9.
76 Ibid. See also Trakman, above n 27, 993.
77 See *2010 Productivity Commission Report*, above n 15, 276–7.

(a) *Conflation of Trade and Investment Issues*

Simply stated, the Productivity Commission does not seem to have a reasonable understanding of the field of investment as distinct from trade. Indeed, the Commission's asymmetrical focus on trade ramifications appears to have conflated the effects of regulatory barriers on investment and trade. For example, where the Commission selectively focuses on the liberalisation of border restrictions on capital (ie screening processes), it concludes that the direct economic impact of Australian investment and services provisions in FTAs 'to date have been modest'.[78] The cross-contaminating of results between investment and trade is problematic. Unlike in trade (and particularly trade in goods), the critical barriers of FDI are not as readily quantifiable as they seldom take the form of border measures (such as tariffs). Most investment restrictions take the form of behind-the-border regulatory interventions (such as discriminatory or arbitrary regulatory process). Yet, the Productivity Commission is rather disengaged with assessing the likelihood and economic impact of these behind-the-border barriers.

(b) *Lack of Analytical Depth*

Another serious concern is the Productivity Commission's failure to engage in any meaningful analysis of the investment jurisprudence or of Australia's treaty practice. Instead, the Commission mostly applied generic data to Australia's situation. One such example is the superficial reliance on data published by the United Nations Conference on Trade and Development ('UNCTAD'), which provides little indication of Australia's investment dynamic within the Asia-Pacific region.[79] Worse still, instead of engaging with or even citing case law, the Commission report relied on the selective citations from a single secondary source, which is again UNCTAD.[80] Such basic errors in research raise serious doubts about the quality of the report and the extent to which it was relied on to influence and shape policy.

(c) *Failure Adequately to Engage with the Benefits of ISDS*

While the Commission readily accepts the criticisms of ISDS, it appears almost hostile to the benefits of ISDS. For example, it is often stated in the literature that ISDS is an accepted and preferred method to combat blatantly protectionist or discriminatory acts by host States.[81] However, the Commission dismisses this claim almost out of hand. With only a cursory review of a few studies, the Commission concluded that there is 'evidence that, in practice, host governments are not

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78 Ibid 161. For commentary, see Kurtz, above n 23, 73.

79 See *2010 Productivity Commission Report*, above n 15, 268–9, 273–4; *2015 Productivity Commission Review*, above n 15, 77, 78. For commentary, see Kurtz and Nottage, above n 34, 472.

80 See, eg, *2010 Productivity Commission Report*, above n 15, 265.

81 See Steffen Hindelang and Markus Krajewski, 'Towards a More Comprehensive Approach to International Investment Law' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016) 1, 9; John Veroneau, *We Still Need Investor-State Dispute Settlement* (May 2015) Cato Unbound <https://www.cato-unbound.org/2015/05/13/john-k-veroneau/we-still-need-investor-state-dispute-settlement>.

systematically biased against foreign investors'.[82] Kurtz and Nottage question the rigour of the Commission in this regard by stating: 'In effect, the Commission, by relying on a handful of studies, has concluded that there is no risk of protectionism whatsoever at play in the formation of host State policy towards foreign investment.'[83]

The Commission's position is an obvious overstatement and, more fundamentally, a sweepingly broad statement to make on the basis of incomplete and selective research.

(d) *Failure to Consider the Circumstances of Current and Potential Treaty Counterparties*

Yet another concern is that the Productivity Commission did not consider whether the decision to include or exclude ISDS should be based on the particular treaty partner's circumstances, including forecasted investment flow or domestic legal protections available to investors. Such a comparative analysis could constitute a basis adequately to assess the utility of ISDS, particularly in the case where, as stated above, there does not appear to be any correlation between some of these circumstances and Australia's practice of including or excluding ISDS.

Generally, the *2010 Productivity Commission Report* and the *2015 Productivity Commission Review* fail to engage with the basis or reasoning to justify Australia's use of ISDS in past treaties. The Trade Policy Statement appears to have disregarded pertinent information such as inward and outward trends and expected forecasts into the future. In this regard, it is not only a matter of attempting to provide protections for outbound Australian investors, but also recognising that throughout Asia and other parts of the world traditional recipient states of investment are increasingly becoming outward investors and, as such, those states are likely to be seeking assurance for their investors. Again, one would expect that the Australian Government would have considered such trends, and attempted to determine the impact and implications of its policy shift on the direction of inbound FDI. This is particularly important as Australia is becoming increasingly dependent and economically tied to Asia, a region where almost all nations are accelerating the adoption of ISDS.

2 *Australia's Reasons for Rejecting ISDS*

This section provides a deeper analysis of the basis relied on by the Productivity Commission and Australian Government for rejecting ISDS.

(a) *Multilateralism and Unilateralism over Regionalism and Bilateralism*

The Trade Policy Statement stated that '[m]ultilateral agreements offer the largest benefits … [while] [r]egional and bilateral agreements must not weaken the multilateral system — they must be genuinely liberalising, eliminating or

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82 *2010 Productivity Commission Report*, above n 15, 269.
83 Kurtz and Nottage, above n 34, 471.

substantially reducing barriers to trade'.[84] Similarly, the Trade Policy Statement supported unilateral (domestic) reform for the purpose of attracting foreign investment.[85] Both the Productivity Commission and Trade Policy Statement advised against using the 'bargaining chip' approach to seeking investor protections from counterparties,[86] with the Government even eloquently stating: 'Using domestic reform as a bargaining chip in negotiations is akin to an athlete refusing to get fit for an event unless and until other competitors also agree to get fit.'[87]

In eschewing bilateralism and regionalism in favour of multilateralism, the Australian Government failed to appreciate the practical realities of establishing a global agreement.[88] The international investment regime has naturally and gradually evolved through a network of BITs and regional agreements and previous attempts to codify these efforts into a multilateral treaty have failed. Most recently, the Organisation for Economic Co-operation and Development ('OECD') failed in the 1990s in an attempt to negotiate a multilateral agreement on investment due to disagreements on particular substantive and procedural standards.[89] Perhaps at that time such a multilateral regime was premature and the attempt over-ambitious.[90] But even today, as traditional FDI importers become exporters, it would be difficult to achieve consensus on a multilateral treaty model. Differences in standards, both substantive and procedural, are common among domestic regimes and an attempt to establish a global standard may not be desirable. Thus, bilateral and regional agreements offer a more practical link to multilateralism allowing for a dynamic and naturally evolving process, rather than being forced by a top-down approach.

Another relevant consideration omitted from the Australian Government's analysis is the ability of investment treaties to allow states to 'tap into' a treaty network that provides better substantive standards of protection through the 'most favoured nation' ('MFN') clause.[91] For example, as a result of Australia securing an

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84 DFAT, above n 6, 9.

85 See ibid 7.

86 Ibid. This is encompassed in the Trade Policy Statement principle of 'unilateralism'. Recently, the Productivity Commission rejected as 'very high risk' a strategy of using ISDS as a 'bargaining chip', see *2015 Productivity Commission Review*, above n 15, 79.

87 DFAT, above n 6, 7.

88 It should be stated that it is difficult to delineate throughout the Trade Policy Statement and both the 2010 and 2015 reports of the Productivity Commission whether multilateralism is advocated solely for trade matters, or more generally for trade and investment.

89 Razeen Sappideen and Ling Ling He, 'Investor-State Arbitration: The Roadmap from the Multilateral Agreement on Investment to the Trans-Pacific Partnership Agreement' (2012) 40(2) *Federal Law Review* 207, 209; OECD, Negotiating Group on the Multilateral Agreement on Investment ('MAI'), *The Multilateral Agreement on Investment: Draft Consolidated Text*, DAFFE/MAI(98)7/REV1 (22 April 1998) <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>; OECD, Negotiating Group on the MAI, *The Multilateral Agreement on Investment: Commentary to the Consolidated Text*, DAFFE/MAI(98)8/REV1 (22 April 2018) <http://www1.oecd.org/daf/mai/pdf/ng/ng988r1e.pdf>; OECD, Negotiating Group on the MAI, *Selected Issues on Dispute Settlement (Note by the Chairman)* DAFFE/MAI(98)12 (13 March 1998) 5 <http://www1.oecd.org/daf/mai/pdf/ng/ng9812e.pdf>.

90 See Bryan Schwartz, 'The DOHA Round and Investment: Lessons from Chapter 11 of *NAFTA*' (2003) 3 *Asper Review of International Business and Trade Law* 1; Katia Tieleman, 'The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network' (Case Study, UN Vision Project on Global Public Policy Networks, 2000) 18 n 7 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.627.7992&rep=rep1&type=pdf>.

91 However some MFN clauses are conditioned only to operate prospectively and, as such, may only offer better investor protections as Australia's counterparties enter into new investment agreements.

MFN investment guarantee in the *ChAFTA*, it may now 'capitalise' on any better terms China subsequently offers to third party investors.[92] These benefits are automatic, without the need to incur transaction costs in renegotiating the original treaty. The use of an MFN clause in the *ChAFTA* could be especially beneficial in light of the strong network of economies that China is currently negotiating agreements with, namely the US and the EU. Given the negotiating power of these two economies, it is likely that these agreements will contain more substantial investment protections than those contained in the *ChAFTA*. Where ISDS does not exist in treaties, Australian investors will not be able to make use of MFN and other clauses adequately to protect and enforce their rights.

Until a multilateral system eventuates, there are two other tangible benefits for Australia to continue engaging with the bilateral and regional process. First, Australia can use competing templates of investment agreements to develop best practices (of legal norms and procedural rules) to advance the specific needs and priorities of Australia. Second, Australia is better positioned to shape the ISDS mechanism according to its concerns as a crafter, drafter and mere participant as the system evolves, rather than after having entirely exited that system.

(b) *Conferring Greater Rights on Foreign Investors*

That foreign investors have greater rights than any other local investor is one of the major premises of the Australian Government's approach for rejecting ISDS.[93] But in adopting this approach, it reinterpreted (or misinterpreted) the national treatment principle to argue against ISDS, with the Trade Policy Statement stating:

> The Gillard Government supports the principle of national treatment — that foreign and domestic businesses are treated equally under the law. However, the Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses.[94]

The national treatment principle is a norm permeating the *acquis* of both investment[95] and trade law,[96] and providing for equal competitive opportunity

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[92] *ChAFTA*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) art 9.4. See also *KAFTA*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014) art 11.4.

[93] This approach was derived from the 2010 and 2015 reports from the Productivity Commission. See *2010 Productivity Commission Report*, above n 15; *2015 Productivity Commission Review*, above n 15.

[94] DFAT, above n 6, 14.

[95] See *Feldman v Mexico* (Award, ICSID Arbitration Tribunal, Case No ARB(AF)/99/1, 16 December 2002) reported in (2003) 18(2) *ICSID Review* 488, 555 [169], 561 [183]; *SD Myers Inc v Canada* (Partial Award, UNCITRAL Arbitration Tribunal, 13 November 2000) reported in (2003) 15(1) *World Trade and Arbitration Materials* 184, 228–9 [193]–[195].

[96] See Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/RW, AB-1998-4 (22 October 2001) [108]–[109]; Panel Report, *Japan — Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/R, WT/DS10/R, WT/DS11/R (11 July 1996, unadopted) [5.138]. The WTO provides relatively limited protections for investors, offering incomplete protections in the *TRIMS Agreement* and for so-called Mode 3 of services sectors and certain violations (such as, national treatment commitments), yet these protections are general in nature and, unlike ISDS, the WTO does not provide direct remedies to investors: *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1868 UNTS 186 (entered into force 1 January 1995) annex 1A ('*Agreement on Trade-Related Investment Measures*' ('*TRIMS Agreement*')). For more on the WTO, see Simon Lester, Bryan Mercurio and Arwel Davies, *World Trade Law* (Hart Publishing, 3rd ed, 2018).

between foreign and domestic firms. In the investment context, it means that a foreign investor should not be treated *less* favourably as compared to the local investor.[97] Given that such substantive rights take a different form to the laws of the host State, the national treatment principle is designed as a common benchmark to facilitate equality between foreign and local investors.

Curiously, the Trade Policy Statement and Productivity Commission reports claim that ISDS effectively requires the host State to provide the foreign investor positive discrimination in their favour, and receive substantive rights over-and-above that of a domestic investor.[98] Consequently, the Productivity Commission (relying solely on one academic submission) concluded that ISDS can thereby disadvantage the opportunities of domestic investors, as compared to those of foreign investors.[99] As such, the Productivity Commission quoted the submission of Aisbett and Bonnitcha stating that 'productivity may fall as a result of the investment agreement as efficient domestic producers are displaced by less efficient but better politically-insured foreign firms'.[100]

The weight of evidence (including by Nobel Laureate Joseph Stiglitz)[101], however, sees the guarantee of national treatment as a tool to improve competition in the host State market by allowing the most efficient and innovative investor to operate in the host State's market. The Australian position is therefore based on a flawed premise: such obligations are equally designed to remove any discrimination *against* the foreign investor, not as a guarantee to discriminate *in favour of* that investor.

(c) *The Hypothesis of Regulatory Chill*

Both reports of the Productivity Commission and the Trade Policy Statement claim that ISDS places undue restrictions on governments regulating in the public interest.[102] This claim was principally based on Australia's exposure to potential ISDS claims,[103] especially the then pending *Philip Morris* case (challenging legislation on plain packaging of tobacco products), and particularly on Australia's mounting costs to defend that claim.[104]

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97 For an analysis of the differing contexts of national treatment, see Todd J Weiler, 'Treatment No Less Favorable Provisions within the Context of International Investment Law: "Kindly Please Check Your International Trade Law Conceptions at the Door"' (2014) 12(1) *Santa Clara Journal of International Law* 77, 92, 95. It should be noted that there remains some debate as to whether such standards provide for the 'best treatment' or merely equality of opportunity. See Andrew Newcombe and Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) § 4.26.

98 *2010 Productivity Commission Report*, above n 15, 272, 274; DFAT, above n 6, 14.

99 *2010 Productivity Commission Report*, above n 15, 272, 274. The Productivity Commission relied on Emma Aisbett and Jonathan Bonnitcha, Submission No 45 to Productivity Commission, Australian Government, *Review of Bilateral and Regional Trade Agreements* (10 April 2010).

100 *2010 Productivity Commission Report*, above n 15, 272, quoting Aisbett and Bonnitcha, above n 99, 4.

101 See Stiglitz, above n 23, 548 (arguing, however, that BITs 'should be narrowly focused on the issue of discrimination').

102 See *2010 Productivity Commission Report*, above n 15, 271, 274; DFAT, above n 6, 14.

103 See *2015 Productivity Commission Review*, above n 15, 77–8.

104 See ibid 78, 163; DFAT, above n 6, 14.

Australia's investment policy should not be disproportionately based on how many claims it has or may face and, similarly, how many claims Australian investors have or will make. At best, whether Australia faces claims or Australian investors use the system to litigate against other states should be considered equally with other guiding criteria. That being the case, as to the Productivity Commission's apprehension regarding potential exposure to ISDS cases, it is interesting to note that '[o]ver 90 percent of the nearly 2,400 BITs in force have operated without a single investor claim of a treaty breach' and that while '[t]he number of disputes filed in the past 10 years has increased', the increase 'has been proportional to the rise in outward foreign capital stock'.[105] The *Philip Morris* claim was the first known claim against Australia, while Australian investors have enforced their rights using ISDS in at least four cases.[106]

The Productivity Commission inference that investment agreements can lead to regulatory chill is likewise not based in evidence. On the contrary, the Commission made no attempt to provide any supporting studies or evidentiary basis to determine whether the concern is more apparent than real. Had the Commission researched the literature, it would have found that studies canvassing a broad range of cases have not found any evidence of regulatory chill.[107]

More controversially, an argument could even be made that 'regulatory chill' is not to be feared and that some 'chill' could even be prudent for Australia's regulatory framework, and thus a benefit to all Australian nationals.[108] Australia benefits from its embrace of international investment standards such as fairness and a reasonable expectation of a predictable investment environment in that these standards prevent sudden reversals of (politically-based) policies that expose all investors to harm.[109] Accordingly, in certain circumstances, international legal protections may be seen to reinforce democratic values of investors (local and foreign) and the general public, rather than undermine them.

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[105] Scott Miller and Gregory N Hicks, *Investor-State Dispute Settlement: A Reality Check* (Center for Strategic & International Studies, 2015) v.

[106] *White Industries Australia Ltd v Republic of India* (Final award, UNCITRAL Arbitration Tribunal, IIC 529 (2011), 30 November 2011); *Tethyan Copper Co Pty Ltd v Islamic Republic of Pakistan* (ICSID Arbitration Tribunal, Case No ARB/12/1); *Churchill Mining and Planet Mining Pty Ltd v Republic of Indonesia* (Award, ICSID Arbitration Tribunal, Case No ARB/12/40 and 12/14, 6 December 2016); *Kingsgate Consolidated Ltd v The Kingdom of Thailand* (UNCITRAL Arbitration Tribunal). At the time of writing the *Tethyan Copper* and *Kingsgate* arbitrations were pending.

[107] See European Federation for Investment Law and Arbitration ('*EFILA*'), 'A Response to the Criticism against ISDS' (Report, EFILA, 17 May 2015) 26–30 <http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf>; Christine Côté, *A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment* (PhD Thesis, The London School of Economics and Political Science, 2014) <http://etheses.lse.ac.uk/897/>; Julie Soloway, '*NAFTA's* Chapter 11: Investment Protection, Integration and the Public Interest' (2003) 9(2) *IRPP Choices* 1, 19.

[108] See 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"' (Legal Studies Research Paper No 11/32, Sydney Law School, University of Sydney, June 2011) 13.

[109] Indeed, Associate Commissioner Stoler stated in his dissent: 'there is reason to believe that a little bit of "regulatory chill" might be a good thing, even in Australia': *2010 Productivity Commission Report*, above n 15, 321.

Indeed, even if the prospect of regulatory chill is potentially real, our underlying concern and criticism of the Australian Government remains — its position was not premised on a thorough assessment of the relevant literature or contextualised in any way.

(d) *The Finding that ISDS Does Not Attract FDI*

The *2010 Productivity Commission Report* stated that 'committing to ISDS provisions does not influence foreign investment flows into a country'[110] and maintained this position in the 2015 report.[111] Such a position is problematic for a host of reasons. It is true that recent econometric studies as to a causal relationship between investment treaties and an increase in inbound foreign investment have yielded conflicting results.[112] However, we have noted above the difficulty is isolating the effects of investment agreements and ISDS on FDI flows from other potential economic factors. There is also a real risk that as additional investment agreements are entered into and standards continue to rise that trade and investment may be incrementally diverted away from countries which lack the full suite of expected protections.[113]

Notwithstanding these issues, the main issue with the Productivity Commission reports is again that instead of fully engaging with this complex literature, the Commission rather surprisingly considered only one study (that was in itself more than 10 years old and inconclusive) for its sweeping conclusion that ISDS does not lead to increased foreign investment.[114] As such, while the econometric evidence relating to FDI flows and investment agreements with ISDS remains mixed and based on aggregate worldwide FDI, the Productivity Commission ought to have identified these shortcomings and thus qualified the conclusion of the reports on this basis.[115]

To be fair, the *2015 Productivity Commission Review* does begin to address the empirical data on the destination of inbound and outbound FDI.[116] Somewhat strangely, however, the Commission concluded that since FDI flows in the largest quantities to developed states that have ISDS provisions, ISDS provisions are not necessary in order to foster further flows. In similar circular reasoning, the Commission essentially concluded in regards to outbound FDI to less-developed countries that since these countries represent a small proportion of Australia's total

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110 *2010 Productivity Commission Report*, above n 15, 269.

111 See *2015 Productivity Commission Review*, above n 15, 80–2.

112 See Kurtz and Nottage, above n 34, 470–71. For a comprehensive overview of the principal empirical studies, see Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2010) 51(2) *Virginia Journal of International Law* 396, 405–14.

113 See Armstrong and Nottage, above n 24, 12.

114 The Commission relied on the World Bank's *World Business Environment Survey* (2000).

115 Of note, the *2010 Productivity Commission Report* notes the steep growth in outward investment by domestic companies in the resources sector, but fails to consider the impact of excluding ISDS protections on these investors' operating risks: above n 15, 33. Incidentally, following the publication of the *2015 Productivity Commission Review*, an econometric study found a positive and significant correlation between investment agreements with ISDS provisions and FDI outflows from OECD countries over the period 1985–2014. See Armstrong and Nottage, above n 24.

116 See *2015 Productivity Commission Review*, above n 15, 81.

outbound FDI, ISDS does not appear materially to contribute to outward investment.[117] Interestingly, the Commission reported but failed to engage with the statistics showing that despite the small proportion of outbound FDI with treaty partners adopting ISDS, the percentage has doubled over the past 10 years — perhaps as a result of the large number of investment agreements negotiated since the 1990s.[118]

There are additional errors with the Productivity Commission's 2015 analysis. First, its analysis is limited to a sample of two states (Singapore and Hong Kong), on the basis that those are in the 'top ten source and destination' jurisdictions.[119] Second, the timeframe chosen (namely, 2003–13) is somewhat arbitrary. For example, the Australia–Hong Kong BIT entered into force in 1993 and it is likely that any influence to FDI that ISDS would have been concentrated throughout the 1990s.[120] The Productivity Commission makes the same error in measuring FDI for a series of aggregated 'Other ISDS' states where again most of those investment treaties date from the 1990s.[121]

Second, the Productivity Commission fails to appreciate that the success or failure of ISDS need not be solely measured by FDI statistics. One example of unmeasurable benefits is the ability to provide investors with a reasonable degree of comfort (of stability and predictability), which can influence the decision to invest in a particular jurisdiction. Another related example is the promotion of the tighter integration of industrial supply chains throughout North America as a result of the *NAFTA*.[122]

The Productivity Commission's failure to appreciate important, but less obvious, factors is not only reflected in the Commission's analysis of FDI statistics, but also in its subsequent conclusion that, on the basis that only three Australian investors have commenced ISDS proceedings, there is an 'apparent lack of evidence regarding the effects' of ISDS.[123] A representation of three investors initiating legal action does not necessarily indicate that other investors are not relying on ISDS provisions to guide their decision to invest and/or not utilising this enforcement mechanism in negotiations with the host State.

The *2015 Productivity Commission Review* concluded that a detailed impact assessment that quantifies the national economic impact and distributional effects, as well as the costs and benefits of, inter alia, ISDS ought to be 'comprehensively analyse[d] … well before' signing a particular investment agreement.[124] While it is certainly prudent for a nation to carry out feasibility studies before entering into an agreement, the Productivity Commission has set an unreasonable, and even impossibly high, standard. Andrew Stoler, a dissenting member of the *2010*

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117 Ibid.

118 Namely from 3.4% in 2003 to 6.4% in 2013: ibid.

119 Ibid.

120 See Armstrong and Nottage, above n 24, 6: '[S]ome studies have found that the impact of BITs has become smaller over time.'

121 *2015 Productivity Commission Review*, above n 15, 81.

122 See Wharton School, University of Pennsylvania, *NAFTA's Impact on the US Economy: What Are the Facts?* (6 September 2016) <http://knowledge.wharton.upenn.edu/article/naftas-impact-u-s-economy-facts/>.

123 *2015 Productivity Commission Review*, above n 15, 81–2.

124 Ibid 82.

Productivity Commission Report bluntly states that if governments 'don't have the tools to make those kind of measurements, it's not exactly fair game to insist that you have to make those measurements before you decide whether the agreement is a good one or not'.[125]

(e) *Cursory Treatment of the Benefits of ISDS*

The Productivity Commission determined, both in 2010 and 2015, that since there were no apparent market failures requiring rectification, there was no overall benefit of utilising ISDS.[126] Yet, the Commission's analysis of the potential benefits arising from ISDS was less detailed when compared to the analysis of the costs of implementing ISDS (even though incomplete and including several disconcerting assumptions). The Commission did not mention any literature or provide real world examples of ISDS being used directly or even indirectly to enforce treaty protections, nor did it concede that ISDS may, in some instances, provide more complete investor protection than the alternatives it sets out. This is unfortunate and, again, gives the impression that the 2010 and 2015 reports not only lack rigour, but are inherently biased.

(i) The Absence of 'Systemic Bias' against Foreign Investors

At its core, the analysis and conclusions of the 2010 and 2015 reports of the Productivity Commission on the utility and purpose of ISDS result from an erroneous assumption: that foreign investors do not 'face systematic biases against them' compared to local investors.[127] The assumption was based not on a study of the rich literature on this point, but on two studies (both based on the same survey) published in the mid-2000s.[128] Of greater significance is the fact that these studies solely focus on the Southeast Asia region and are, thus, of limited relevance to Australian investment flows. Further, these findings contradict various recent studies that more concretely demonstrate the concerns of foreign investors operating in such countries as China,[129] Vietnam[130] and Indonesia.[131] In short, reports of unfair and discriminatory treatment against foreign investors is not only well-known, but also commonplace.

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125 Australian Broadcasting Corporation ('ABC'), 'Interview: Andrew Stoler', *Lateline*, 29 June 2015 <http://www.abc.net.au/lateline/content/2015/s4264128.htm>.

126 See *2010 Productivity Commission Report*, above n 15, 269–70; *2015 Productivity Commission Review*, above n 15, 61.

127 *2010 Productivity Commission Report*, above n 15, 269 (citations omitted).

128 Ibid.

129 See Vivienne Bath, 'The Quandary for Chinese Regulators: Controlling the Flow of Investment into and out of China' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 68.

130 See Hop Dang, 'Legal issues in Vietnam's FDI Law: Protections under Domestic Law, Bilateral Investment Treaties and Sovereign Guarantees' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 225.

131 See Simon Butt, 'Foreign Investment in Indonesia: The Problem of Legal Uncertainty' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 112.

Consequently, the statement that there is 'evidence that, in practice, host governments are not systematically biased against foreign investors'[132] is not only sweepingly broad, but does not logically support the Productivity Commission's conclusion that ISDS does not offer foreign investors any comfort or protection against discriminatory or unfair interventions. Instead, the Commission largely reduced its analysis to the question of whether there was any measurable economic market failure that could be overcome by ISDS.

(ii) The Lack of Industry Feedback

Again rather peculiarly, the *2010 Productivity Commission Report* justified its position by stating that it received no feedback from Australian businesses or industry associations as to the value of ISDS protections.[133] While the lack of input was indeed an oversight by the business and legal community, it may be too far a step to conclude that a lack of submissions to a broad enquiry on trade and investment agreements indicates a lack of interest in or support of ISDS. Indeed, the more likely inference is that stakeholders were not attuned to the Commission's project as the vast majority of the 2010 report focused on trade rather than investment and that smaller investors may have less knowledge of the benefits of ISDS and fewer resources to dedicate to making submissions to government committees. Indeed, the Commission's conclusion is even inconsistent with the Trade Policy Statement's claim that '[i]n the past, Australian governments have sought the inclusion of [ISDS] in trade agreements with developing countries at the behest of Australian business.'[134]

More importantly, in making its conclusion the Commission unduly dismissed the factual record that demonstrates the value of ISDS to Australian industries. Indeed, Australian foreign investors have availed themselves of the benefits of ISDS in claims against India, Indonesia and Pakistan.[135] Other investors have, no doubt, used the presence of ISDS in an investment treaty to successfully resolve disputes before they reach binding arbitration.

(iii) The Asymmetrical Cost-Benefit Analysis

Underlying the Productivity Commission's flawed analysis is an asymmetrical cost-benefit calculation. For example, the costs incurred (by the Australian Government) are not counterbalanced by both: (i) the benefits from inbound investors into Australia; and (ii) the benefits to Australia's outbound capital.[136] Unlike foreign traders, investors are exposed to the inherent immobility of FDI, with long-term projects, and high up-front (sunk) capital costs, with minimal or no alternative use value. Such limiting factors were not considered by the Australian Government or the Productivity Commission. The Australian Government simply

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132 *2010 Productivity Commission Report*, above n 15, 269.
133 See ibid 270.
134 DFAT, above n 6, 14.
135 italaw, *Newly Posted Awards, Decisions & Materials* (22 February 2018) <https://www.italaw.com/>.
136 See generally Kurtz and Nottage, above n 34.

minimised and dismissed Australian investor risks,[137] and, in so doing, effectively placed a burden on Australian investors to take into account the associated economic, political and legal risks, while removing its responsibility to protect its investors.

In addition, the Productivity Commission, and subsequently the Australian Government, failed to recognise or engage with the possibility that a withdrawal from ISDS may tempt foreign investors to relocate productive operations (that are beneficial to Australian industries and consumers) away from Australia in order to obtain enhanced treaty benefits elsewhere (through legitimate investment agreement planning). Similarly, the Productivity Commission and Government also failed to address whether the withdrawal from ISDS might incentivise savvy Australian investors to structure investments through intermediary countries with existing investment treaties containing ISDS provisions rather than risk being deemed an 'Australian investor' and losing the opportunity to fully enforce treaty rights.

(iv) Exaggerated Benefits of Substitutes of ISDS

The Commission inadequately identified and evaluated alternative strategies to protect Australian foreign investors. The suggested alternatives for foreign investors — namely recourse to domestic courts, obtaining political risk insurance and using investment contracts to mitigate risk— are problematic in both their methodology and outcome. Each is briefly addressed in turn.

Court Processes

Past statements of the Australian Government and the two Productivity Commission reports did not fully analyse whether domestic courts provide effective recourse for Australian foreign investors, as well as whether there is a net benefit in permitting investors to choose between initiating domestic court actions as an alternative to ISDS. Rather, the Productivity Commission conceived that the most practical option was to resort to domestic courts. Logically, the fact that the Trade Policy Statement and Productivity Commission make a case against utilising ISDS does not, in itself, infer that domestic courts should be preferred. Simply stated, the Australian Government failed to consider the ramifications for Australian foreign investors of relying on domestic courts. Table 1 (below) provides a brief comparison of the benefits and criticisms of arbitration as compared to domestic courts.

[137] 'If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries': DFAT, above n 6, 14.

Table 1: General benefits and criticisms of ISDS arbitration, compared to domestic court process[138]

Benefits of Domestic Court Actions	**Benefits of ISDS Arbitration**
Domestic courts are bound by established forum procedures and predictable rules of evidence.	Flexible process.
Courts usually have safeguards to correct errors in law and any curtailment of procedural rights, through appeal procedures.	Ability to apply to domestic court (for non-ICSID cases)[139] to have an award set aside for procedural safeguards (departure of established process and failure to provide adequate reasons for award). Annulment proceedings are an extraordinary process and more limited in scope than appeal to a domestic court.
Inconsistency of international arbitration awards. National law ought to govern the rights of foreign investors.	Relative to the various laws of various host states, the applicable law (the terms of the investment agreement) in ISDS is uniform and predictable.
Domestic courts ought to decide cases involving foreign investors according to domestic law, and incorporate international investment laws into that domestic law. It is a traditional characteristic of sovereignty.	Allowing domestic courts to determine investment disputes according to domestic law, and incorporating international investment laws into that domestic law, would result in inconsistent determinations between states and would likely be subject to determinations that provide greater deference to the host State.
Domestic laws are considered, including public interest concerns, and are more likely to be applied consistently. Arguably, host States are more likely than ISDS tribunals to apply a public interest defence with greater deference to the host State.	Domestic laws are not irrelevant and are considered, depending on the nature of the claim (eg an umbrella clause) or the express provision of the investment agreement (referring to domestic law).
A domestic court of the State that is party to an investment treaty is the appropriate forum to resolve an investment dispute.	Where the actions or omissions of the domestic court of the State that is party to an investment treaty is the subject of a dispute, that domestic court is not the appropriate forum to resolve an investment dispute.

[138] See also Trakman, above n 42, 166–73.
[139] International Centre for Settlement of Investment Disputes ('ICSID').

Investment Contracts and Political Risk Insurance

Resort by the Productivity Commission and the Australian Government to investment contracts (with dispute resolution clauses) may sound like a simple and attractive alternative, but, in practice, may not be viable.[140] First, such a contract would likely be subject to the law of the host State (despite attempts to 'contract out')[141] and, in the absence of an agreement with ISDS, investors would remain vulnerable to arbitrary or discriminatory application of the law.

Second, the Productivity Commission's analysis of political risk insurance is incomplete. The *2010 Productivity Commission Report* solely focused on the availability of political risks insurance against expropriation, but failed to look at the practical reality.[142] In practice, such coverage is often short-term, limited and only available up to a certain monetary amount. Importantly, political risk insurance against expropriation does not typically cover other forms of illegitimate government interference commonly protected by other international investment norms, such as 'fair and equitable treatment'. In recent years, investors have relied on the 'fair and equitable treatment' obligation more frequently and successfully than other breaches, such as expropriation.[143] Similarly, political risk insurance policies[144] may be easier and more cost effective to procure where there is an investment agreement between the investor's home State and the host State. In this regard, Gordon states: 'Risk assessments under many [political risk insurance] programs often look at the existence of BITs or other agreements'.[145] As such, political risk insurance is unlikely to be an adequate substitute for a treaty containing ISDS.[146] Dissenting Commissioner Stoler bluntly stated that the argument for the possibility to obtain political risk insurance as a substitute for treaty-based investor protections 'is analogous to arguing against the need for a fire department because homeowners can buy property insurance'.[147]

Overall, while the Productivity Commission provided some sensible strategies analysing the value of the investment treaty regime (such as the impact

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[140] Even the Productivity Commission conceded that such a strategy 'is more feasible for large businesses': *2010 Productivity Commission Report*, above n 15, 270.

[141] Namely, the law of host State may be invoked under conflict of laws rules. As such, the law may not be desirable or provide effective protection and/or enforcement mechanisms.

[142] *2010 Productivity Commission Report*, above n 15, 270.

[143] See UNCTAD, *Breaches of IIA Provisions Alleged and Found*, Investment Policy Hub <http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches>. These statistics, however, do not necessarily reflect the availability of other obligations (as that varies between each agreement), as well as merits of the cases on which success is judged (as that varies between each claim).

[144] Such policies in the market include 'Confiscation Expropriation Nationalisation' ('CEN'), which protect the investor where the loss results directly from defined political and social perils, and 'Contract Frustration and Contract Repudiation', which are broader than CEN policies and can provide some cover in respect of the commercial or credit risk of States and their entities where default may be caused by simple economic mismanagement.

[145] Kathryn Gordon, 'Investment Guarantees and Political Risk Insurance: Institutions, Incentives and Development' [2008] *OECD Investment Policy Perspectives* 91, 107.

[146] See Luke Nottage, 'The "Anti-ISDS Bill" before the Senate: What Future for Investor-State Arbitration in Australia?' (Legal Studies Research Paper No 14/76, Sydney Law School, University of Sydney, August 2014) 5.

[147] *2010 Productivity Commission Report*, above n 15, 320.

assessment prescribed in the 2015 review),[148] the Commission overestimated the risks of ISDS, while significantly underestimating both its general and specific benefits. The Commission also too casually posed alternatives to ISDS that, in practice, pale in comparison to ISDS and fall well short of providing security and predictability to investors.[149]

B *Overall Impact of the Australian Government's ISDS Position: Avoiding the Most Important Issue*

In the absence of a transparent investment policy, we can only surmise whether and, if so, to what extent the temporary mining boom, the *Philip Morris* claim against Australia, serious institutional concerns about ISDS or a general apprehension with bilateral and regional trade arrangements played a role in the Australian Government's 2011 Trade Policy Statement. What is clear, however, is that the Government failed to isolate these concerns from one another and, as a result, failed to engage in a meaningful debate regarding the merits of ISDS.

A broad policy statement that is fundamentally based on protecting sovereign interests and ignores the merits of ISDS can have various practical flow-on effects. These effects differ in scope, ranging from impacts on the development of Australia's industries, to Australia's position in the global political economy and the broader international investment regime. This section also makes the case that, like any other comparative advantage, Australia ought to utilise its respected, first-rate domestic legal system to obtain reciprocal benefits throughout bilateral agreements. Yet, we propose that this should only be utilised once some threshold criteria (such as current and anticipated FDI flows with the counterparty, its GDP and/or the status of its legal system) have been met.

Given Australia's position in the global political economy, an outright blanket rejection of ISDS founded on inadequate discourse, incomplete analysis and specious methodology could have unintended consequences. One such potential consequence, or ripple effect, will be Australia's loss of influence in improving the functioning of the integrated investment treaty system. Removing itself outright from the pervasive international system will deny Australia the opportunity to revise or improve the legal norms. For a country of its size, Australia has had considerable influence in the direction of certain treaty language, in particular for ensuring treaties contain safeguards for non-discriminatory public welfare measures taken by the State.[150] Withdrawing from the regime would mean Australia would no longer be able to craft and shape treaty language — in the process, of course, Australia's influence in this domain would wane considerably.

Similarly, removing itself from the regime may affect Australia's competitiveness as future investment agreements increase standards and potentially

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[148] Further, the *2010 Productivity Commission Report* commences its analysis with a sensible method of testing the value of investment decisions, by stating that such assessments 'first need to establish whether there is market failure or other economic concern that provisions in [investment agreements] could effectively address': ibid 257.

[149] For a similar conclusion, see Nottage, above n 108.

[150] See, eg, *Agreement to Amend the Singapore–Australia Free Trade Agreement,* signed 13 October 2016, [2017] ATS 26 (entered into force 1 December 2017) art 22 ('*SAFTA*').

make signatory counties more attractive investment destinations. This is particularly important at the present time when large regional treaties are being negotiated and as China's 'Belt and Road' Initiative searches for large-scale investment initiatives.[151] Australia, with its investors, is a player in these developments, and it would seem prudent to be a crafter and drafter of investment norms, rather than enter the stage late without any power to influence the development of the norms.

Australia's position in the Trade Policy Statement is clear — ISDS should not be used as a bargaining chip to obtain favourable concessions — and appears to be based on the notion of protecting sovereignty. However, again, it ignores the reality of the dynamics of the negotiation process. Trade and investment negotiations, or in fact any international negotiation, involve a reduction of sovereignty in some sense as the parties agree to an obligation ostensibly in return for an overall benefit. In the context of the investment legal regime, states agree to limit their discretion in the treatment of foreign investors, in consideration for certain benefits and concessions and (in no small part) to attract capital. A blanket refusal to use the 'ISDS card' not only removes a large degree of flexibility from the negotiators, but also denies Australia's ability to use its comparative advantage as leverage throughout the negotiations, which, in this case, is a more advanced domestic legal system. That is, if Australia has the benefit of an advanced domestic court system, surely it should realise that advantage throughout treaty negotiations, just as it would for any other of its industrial advantages (such as beef and agricultural production). This is not even a theoretical point, with evidence that Australia did just this in the *TPP* negotiations by using its anti-ISDS reservation as a bargaining chip against the US's desire to extend the length of test data protection for biologic pharmaceuticals.[152] Taking away this potential to bargain and achieve a more tailored and potentially more appropriate agreement seems not to be in Australia's interests.

To date, the Australian Government's position and debate has revolved around the specifics of ISDS and avoiding the most important issue: the lack of applicable guidelines in Australia to form the basis of a prudent treaty strategy. ISDS and other concessions are only one component of the larger agreement, but, in reality, any provision (including ISDS) should only be entered into where there is a net perceived long-term benefit to Australian industries and investors, consumers, and the overall national economy.[153] While ISDS appears to facilitate these goals by providing the right to enforce the underlying treaty obligations, Australia should have criteria that it applies before considering whether to place ISDS (or any concession or issue) on the negotiating table.

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[151] See National Development and Reform Commission, Ministry of Foreign Affairs and Ministry of Commerce of the People's Republic of China, 'Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road' (Policy, National Development and Reform Commission, 28 March 2015) <http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html>.

[152] See Gareth Hutchens, 'An Economic Analysis of the TPP? Don't Hold Your Breath', *The Sydney Morning Herald* (online), 6 October 2015 <http://www.smh.com.au/federal-politics/political-news/an-economic-analysis-of-the-tpp-dont-hold-your-breath-20151006-gk2fic.html>; Remy Davison, 'Ratifying the TPP May Be Tough, but Australia Needs it', *The Conversation* (online), 7 October 2015 <https://theconversation.com/ratifying-the-tpp-may-be-tough-but-australia-needs-it-48663>.

[153] See Bryan Mercurio, 'Should Australia Continue Negotiating Bilateral Free Trade Agreements?: A Practical Analysis' (2004) 27(3) *University of New South Wales Law Journal* 667, 701.

V Suggested Reform of Australia's Investment Policy

This Part explores whether a principled, but flexible, investment and ISDS policy can be formulated with specific regard to Australia's interests and taking account of the regional and global political economy. It will specifically address whether the concerns of the Productivity Commission and the 'case-by-case' approach as applied by the current Government can be reconciled.

We propose two components to a consistent ISDS policy: (1) a principled threshold to determine when ISDS will be on the negotiating table (such as net FDI flows and legal protections and enforcement mechanisms available for outbound investors); and (2) a template or model BIT (with ISDS provisions and substantive investment obligations) that should be considered throughout the treaty negotiations if the ISDS threshold is met. Before advancing this proposal, we address the content of the model BIT, and suggest provisions that respond to the abovementioned concerns of the Productivity Commission.

A *Suggested Reform Measures ('ISDS+'): Exploring Novel Incentives*

Australia would be prudent to consider adopting reform measures that have recently been included in investment treaties and model BITs elsewhere. Again, it is more than a little curious that the 2010 and 2015 Productivity Commission reports failed to consider the new models of investment protections, but based their analysis on outdated practices from antiquated treaties. By ignoring recent treaties, the Commission failed to cover the substantial reforms and departures from investment treaty practice of the 1980s–2000s. Some of the more important trends in treaty drafting, which we refer to as 'ISDS+', are outlined below.

1 *Protection to Regulate for Public Interest*

ISDS provisions can be drafted to address apparent concerns of 'regulatory chill', and there is of course no magic formula in doing so. Such concerns can be addressed in a variety of ways. The treaty can expressly provide for the protection of the State's legitimate public interests, such as public health and morals, culture, natural resources and the environment. One example of what has become a common provision in relation to expropriation, comes from the *AUSFTA* and reads:

> Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations.[154]

In conjunction with a narrowing of obligations as seen above, treaties can include a general exception clause that further protects measures 'necessary' to

[154] *AUSFTA* signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) annex 11-B(4)(b). See also *United States–Korea Free Trade Agreement*, signed 30 June 2007 (entered into force 15 March 2012) annex 11-B(3)(b) ('*KORUS-FTA*'); EU–Singapore Comprehensive Free Trade Agreement, in negotiation, annex 9-A; *SAFTA*, signed 13 October 2016, [2017] ATS 26 (entered into force 1 December 2017) annex 8-A(3)(b).

safeguard public interests such as health, environment, morals and culture. Such clauses are modelled after the general exceptions of the World Trade Organisation's ('WTO') *General Agreement on Tariffs and Trade* ('*GATT*') (art XX)[155] or *General Agreement on Trade in Services* ('*GATS*') (art XIV)[156] and generally provide:

> Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures: (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; (b) necessary to protect human, animal or plant life or health; or (c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[157]

States have also created other public policy regulatory space along various planes, including vertical arrangements such as industry-sector carve-outs (ie natural resources, tobacco, mining industry, etc)[158] or for various types of measures, such as taxation.[159] Another possibility is to utilise a hybrid approach that provides carve-outs pertaining to a particular substantive obligation, such as national treatment or MFN.

Such exceptions could also utilise and adopt the 'legitimate regulatory distinction' test[160] applied in the WTO under art 2.1 of the *Technical Barriers to Trade Agreement*.[161] Under this analysis, a violation of, say, the national treatment

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[155] See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 190 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*' ('*GATT*') art XX). For further discussion on the utility of *GATT* art XX-type exceptions in investment agreements, see Dickson-Smith, above n 16.

[156] See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1869 UNTS 183 (entered into force 1 January 1995) annex 1B ('*General Agreement on Trade in Services*' ('*GATS*') art XIV).

[157] *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, signed 9 September 2012 (entered into force 1 October 2014) art 33(2). While the wording varies between agreements, such a clause appears in an increasing number of agreements including the following: *ChAFTA*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) art 9.8; *KAFTA* signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014) art 22.1(3); *Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, 2012, art 6 ('*US Model BIT*'). For commentary, see Simon Lester and Bryan Mercurio, 'Safeguarding Policy Space in Investment Agreements', Institute of International Economic Law, Georgetown Law Centre, *IIEL Issue Brief* 12/2017.

[158] *SAFTA*, signed 13 October 2016, [2017] ATS 26 (entered into force 1 December 2017) ch 8 art 22; *ChAFTA*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) art 29.5.

[159] This indeed would appeal to Australia's taxing practices for mining companies: see Luke Nottage, 'Throwing the Baby Out with the Bathwater: Australia's New Policy on Treaty-Based Investor-State Arbitration and its Impact in Asia' (2013) 37(2) *Asia Studies Review* 253, 263.

[160] The adverse effects on imported products in the form of reduced competitive opportunities is not discriminatory as long as those effects stem exclusively from a legitimate regulatory distinction. See Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R, AB-2012-1 (4 April 2012) [182].

[161] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1868 UNTS 120 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade* ('*TBT Agreement*')). Article 2.1 of the *TBT Agreement* is specific to national treatment and MFN treatment, rather than a general horizontal exception.

obligation is permitted so long as the respondent State can demonstrate that there is a rational nexus between the detrimental treatment and the policy objective of the measure. A similar approach has been applied in the investment context in *Pope & Talbot v Canada* and *Feldman v Mexico*[162] and *Bilcon v Canada* tribunals.[163]

The recently negotiated *TPP*, even if it will not come into force, remains indicative of drafting trends. In this regard, the *TPP* is perhaps the gold standard (from the perspective of the degree of state sovereignty retained) for its attempt to exempt 'public interest' regulation and 'to protect legitimate government regulation in the areas of health and the environment'.[164] For example, the *TPP* contains a novel, if controversial, type of the vertical carve-out whereby states defending an ISDS claim brought by a tobacco company can unilaterally preclude such a claim by invoking the 'denial of benefits' clause. While such clauses appear to be more effective for states than the general policy exceptions, a blanket tobacco company preclusion is potentially problematic as it may itself lead to abuse and, given that the State can raise the defence after the filing of a claim, such clauses raise serious due process concerns.

Another innovation along these lines is included in the *ChAFTA*, which allows for a joint state interpretation of a public welfare regulatory measure. Under that process, once an allegation as to a public welfare regulation is raised, the respondent State may issue a 'public welfare notice' specifying why the measure falls within the exception (also drafted similar to the *GATT* art XX exceptions).[165] The proceedings are then suspended for the treaty parties (ie China and Australia) to determine whether the alleged measure falls with the exception.[166] Such a determination by the treaty parties is binding on the tribunal.[167]

The semantics of each individually crafted clause is beyond the scope of this article; the point here is simply that exceptions and limitations to obligations exist and are readily drafted into modern investment treaties. These provisions seek to safeguard the sovereign's inherent regulatory powers (to regulate for health, safety, morals and general welfare) with the overall goal of encouraging investment. Throughout the treaty negotiation process, Australia may 'ratchet' up or down such regulatory protections as it sees fit and depending on the particular counterparty's

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[162] *Pope & Talbot Inc v Canada* (Award, Lord Dervaird, Benjamin J Greenberg and Murray J Belman, 10 April 2001) reported in [2001] IIC 193, 228–9 [78]–[79]. See also *Feldman v Mexico* (Award, ICSID Arbitration Tribunal, Case No ARB(AF)/99/1, 16 December 2002) reported in (2003) 18(2) *ICSID Review* 488, 560–62 [181]–[184].

[163] *Clayton v Canada* (Award, Permanent Court of Arbitration, Case No 2009-04, 17 March 2015) reported in [2015] IIC 688, 912 [723]–[725] (the majority of the tribunal applied a similar approach for national treatment protection under *NAFTA* art 1102).

[164] Daniel Hurst, 'Australia and the Trans-Pacific Partnership: What We Do and Don't Know', *The Guardian* (online), 6 October 2015 <http://www.theguardian.com/business/2015/oct/06/australia-and-the-trans-pacific-partnership-what-we-do-and-dont-know> (citations omitted).

[165] The *ChAFTA* provides that '[m]easures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim': *ChAFTA*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) art 9.11.4.

[166] Ibid art 9.11.5–6.

[167] Ibid art 9.18.3. If the treaty parties are unable to make a determination throughout the 90-day consultation period, the determination reverts to the investor-state tribunal.

circumstances. A complementary reform option is to maintain a broader membership of potential tribunal panellists (perhaps through a prescribed list of candidates) with expertise in not only international investment and/or trade law, but also public health, environmental and human rights law.[168] Similarly, the appointed tribunal could be encouraged (or required) to rely on consultants with this expertise for assistance and guidance (depending on the nature of the dispute). In addition, it could be mandatory that those arbitrators nominated by the parties have demonstrated a minimum understanding and experience in applying the *Vienna Convention on the Law of Treaties* in a consistent manner.[169] Such proposals have yet to be developed throughout the international investment regime. In fact, even the EU's recent Investment Court proposal contained in the *CETA*[170] falls short of this level of specificity, but does specify that the judges appointed have a requisite degree of competence, including 'demonstrated expertise in public international law'.[171]

It would be prudent for the Australian Government to consider such options as further safeguards of legitimate and non-discriminatory public policy. They are current, relevant and advanced by some measure over the provisions existing in older investment treaties.

2 *Preventing Abusive Practices*

A general concern surrounding ISDS is that it exposes a State to 'abusive' foreign investors, who could commence premature and pernicious claims or create opportunistic claims through restructuring of multinational corporations and treaty shopping. Here again, the Productivity Commission and the Australian Government collectively failed adequately to consider that treaties may be drafted in such a manner to carefully circumscribe ISDS access through measures such as:[172]

- Prescribing the definition of 'investor' to restrict the range of investors who qualify for protection under the treaty;
- Conditioning the commencement of an ISDS claim on a requirement that the investor exhaust local remedies (ie domestic courts or administrative tribunals of the host State). This condition may prescribe time limits (time-caps) in order to prevent abusive delays by the host State;

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168 See Thomas Faunce, 'Australia's Embrace of Investor-State Dispute Settlement: A Challenge to the Social Contract Ideal?' (2015) 69(5) *Australian Journal of International Affairs* 595, 607.

169 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).The nomination of arbitrators could first be vetted by the Secretary-General on this basis prior to the appointment. On interpreting investment agreements consistent with the Convention, see Andrew D Mitchell and Tania Voon, 'PTAs and Public International Law' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge University Press, 2009) 114, 116–8.

170 For a detailed analysis of the structure and effect of the Investment Court System in the *CETA* and proposed in the *TTIP*, see Dickson-Smith, above n 16, 794–809.

171 *CETA*, signed 30 October 2016 (entered into force 21 September 2017) art 8.27(4); Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce: Chapter II — Investment, European Commission proposal dated 12 November 2015 arts 16–17 <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf> ('*EU TTIP Proposal November 2015*').

172 To clarify, the Productivity Commission did indeed suggest that a treaty could be drafted to refine definitions, however, the question raised is whether the Commission did so adequately with respect to this particular enquiry: see, eg, *2010 Productivity Commission Report*, above n 15, 274–5.

- Including denial of benefits provisions (such as those in *NAFTA* and *CAFTA*)[173], or bolstering the existing traditional provisions (as has been done in the *TPP-11*);[174]
- Including a specific summary procedure for claims alleged to be manifestly without merit (such as those in the *CETA* and proposed by the EU in the *TTIP*);[175]
- Including provisions to allow states to bring counterclaims against the foreign investor that initiated the claim, before the same tribunal;[176]
- Including a prescribed cap on the scope of substantive protections (such as fair and equitable treatment or MFN treatment), where there are concerns that certain international standards risk exposing the state to a standard greater than the domestic law.[177]

3 *General Procedural Controls*

Similar controls can be made to address the concerns of excessive procedural rights granted to foreign investors, and to address transparency concerns by states and the general public, such as:

- Prescribing ISDS provisions that mandate a negotiation and conciliation process as a condition to commencing investor–State arbitration. These may prescribe time limits with the ability of the parties to certify, on consent, that mediation has failed (in order to avoid undue delays).[178]
- Providing robust protections that appropriately balance transparency of proceedings, and preserving confidential information of the disputing parties.[179]
- Streamlining procedures that customarily create procedural bottlenecks, such as establishing standing panels to promptly determine arbitrator

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[173] *NAFTA*, signed 17 December 1988 (entered into force 1 January 1994) art 1113; *Central America Free Trade Agreement*, signed 5 August 2004 (entered into force 1 January 2009) art 10.12 ('*CAFTA*').

[174] See *TPP-11*, signed 8 March 2018, [2018] ATNIF 1 (not yet in force) art 9.15.

[175] See *CETA*, signed 30 October 2016 (entered into force 21 September 2017) art 8.18(3); *EU TTIP Proposal November 2015*, above n 171, ch II s 3 arts 16–17.

[176] This practice is unique, and controversial (especially as to the scope of such claims and jurisdiction of the tribunal). See *Metal-Tech Ltd v Uzbekistan* (Award, ICSID Arbitration Tribunal, Case No ARB/10/3, 4 October 2013) reported in (2014) 26(1) *World Trade and Arbitration Materials* 37; *Al-Warraq v Indonesia* (Final Award, UNCITRAL Arbitration Tribunal, 15 December 2014) reported in [2014] IIC 718; *Perenco Ecuador Ltd v Ecuador* (Interim Decision, ICSID Arbitration Tribunal, Case No ARB/08/6, 11 August 2015).

[177] Again, these clarifications of standards may be sector-specific, rather than general: see Nottage, above n 108, 19–20.

[178] Further, the benefits of gaining better procedural rights through a third-party treaty and an MFN clause (resulting from *Maffezini v Spain* (Award, ICSID Arbitration Tribunal, Case No ARB/97/7, 13 November 2000)) mean that issues can be expressly foreclosed. This is the approach recently taken in the *ChAFTA*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) art 9.4(2).

[179] Arguably, however, this is not as much a concern as it once was, and tribunals are developing a practice that creates an adequate balance, through the detailed redaction procedures for sensitive information and closed-circuit hearings: see generally Trakman, above n 27.

challenges.[180] Similarly, standing panels could be established to consistently interpret the institutional rules (the *ICSID Convention*,[181] *ICSID Arbitration Rules*,[182] and *UNCITRAL Arbitration Rules*[183]) in order to address concerns as to their inconsistent application.

4 *Review Procedures for Legal Interpretations*

While the *ICSID Convention*[184] maintains safeguards for parties regarding the conduct of the arbitration,[185] no practice exists to review awards for legal errors. The incorporation of an appeals process in the *ICSID Convention* has been considered but abandoned not only during the initial negotiations, but also at several stages thereafter.[186] That said, recent concerns as to the consistency of legal interpretations, which were not anticipated in 1965 when the Convention was signed, have caused the international community to reconsider the feasibility of an appellate mechanism. This mechanism became a central issue in the EU preceding the signing of *CETA* and throughout the *TTIP* negotiations.[187]

An appellate mechanism may be prescribed either within the underlying bilateral or regional agreement or perhaps through an independent multilateral agreement (similar in application to the *ICSID Convention*). Some recent treaties do provide a mechanism for states to establish such a body, such as the *CETA*,[188]

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[180] See, eg, the procedure proposed by the EU in the *TTIP*, whereby a challenge is determined by the 'President' of the tribunal: Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce, European Union proposal dated 31 July 2015, s 3 art 11(2)–(4) ('*EU TTIP Proposal July 2015*').

[181] See *Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('*ICSID Convention*').

[182] See ICSID, *Rules of Procedure for Arbitration Proceedings* (adopted 10 April 2006) ('*ICSID Arbitration Rules*').

[183] See United Nations Commission on International Trade Law ('UNCITRAL'), *UNCITRAL Arbitration Rules* (adopted 6 December 2010).

[184] See *ICSID Convention* opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

[185] Such as those relating to fundamental procedural issues, such as a serious departure from a fundamental established process. See ibid art 52(b), (d)–(e). Article V of the *New York Convention* provides for similar grounds on which an award may be refused to be recognised by a signatory court: *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, signed 10 June 1958 (entered into force 7 June 1959) ('*New York Convention*').

[186] See 'Summary Records of the Fifth Session' [1953] I *Yearbook of the International Law Commission* 1, 46; ICSID Secretariat, 'Possible Improvements of the Framework for ICSID Arbitration' (Discussion Paper, ICSID, 22 October 2004) [14]–[16], annex <https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf >.

[187] European Commission, 'Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)' (Report, European Commission, 13 January 2015) <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>.

[188] See *CETA*, signed 30 October 2016 (entered into force 21 September 2017) art 8.28.

US–Chile FTA (2003),[189] *CAFTA–DR* (2004),[190] and *KAFTA*,[191] as well as other US agreements,[192] though the parties have yet to constitute such a body.

B *Exploring a Model Treaty with Guiding Threshold Criteria*

While Australia's 'case-by-case' treaty policy appears to be pragmatic and flexible, uncertainty remains as to Australia's expectations throughout treaty negotiations. A predictable and objective approach promotes efficiency and manages expectations of the counterparty, as well as the concerns of the public and statutory bodies designed to review the effects of the agreements before their implementation (such as the Joint Standing Committee on Treaties).

1 *Threshold Criteria*

Predetermined criteria that trigger when ISDS should be included in an agreement may consist of the net (current and predicted) FDI flows with the counterparty, as well as the legal protections an Australian foreign investor may expect in the host State. For example, we would expect the Australian Government to be encouraging the adoption of ISDS in agreements where Australia is a net-exporter of FDI with the counterparty (and/or has a promising potential to be a net-exporter, taking into account the current and projected GDP of the counterparty). The standard of the legal system in the counterparty would likewise be relevant to the decision of whether to include ISDS, with Australia likely to seek the inclusion of ISDS when dealing with a counterparty with an undeveloped or rudimentary legal system. Yet, for practical reasons, this criterion need not rise to the level of specificity that the *2015 Productivity Commission Review* proclaimed. It may involve, for example, simply calculating whether Australian investors will be provided marginal procedural rights over-and-above a domestic court, as compared to the similar marginal procedural rights provided to an investor of a counterparty (adjusted by the anticipated investment volume and net investment flows).

2 *Purpose of a Model BIT*

The purpose of a model BIT is to establish at the outset a coherent principled investment strategy that has ideally been vetted by the general citizenry and leaves less scope for a State to have treaty terms dictated by the counterparty. Thus, a model BIT is an offensive (rather than defensive) strategy consisting of 'best practices' of investment provisions. A complementary model BIT can address and circumscribe the particular concerns of the State, such as the scope of 'investor' and 'investment',

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189 See *United States–Chile Free Trade Agreement*, signed 6 June 2003 (entered into force 1 January 2004) annex 10-H.

190 See *Dominican Republic–Central America Free Trade Agreement,* signed 5 August 2004 (entered into force 1 January 2009) annex 10-F.

191 See *KAFTA*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014) arts 11.22(3), 11.23(1).

192 See *KORUS-FTA*, signed 30 June 2007 (entered into force 15 March 2012) art 11.20(1), annex 11-D; *United States–Panama Trade Promotion Agreement*, signed 28 June 2007 (entered into force 31 October 2012) art 10.20(10), annex 10-D.

and the relative and absolute standards of treatment to be conferred to foreign investors while balancing domestic interests, such as health, environment, morals and culture, and those other 'ISDS+' provisions described above. A model BIT thereby not only reduces transaction costs in the negotiating process, but also become a useful tool for tribunals to reference when interpreting a particular treaty provision.

At present more than 50 countries (including the US, Canada and China) have drafted model BITs.[193] Indeed, Canada's model BIT (FIPA) successfully shaped its investment agreements with nine African states,[194] and China's model BIT has been flexibly applied in its agreements with Canada,[195] Japan and Korea. Australia should follow these countries in drafting a template that meets its needs and effectively balances protections with State and public interests in order to make negotiations easier, tribunal interpretations more predictable and the ISDS system more credible and transparent to the public at large.

VI Conclusion

Two years after the announcement of the Trade Policy Statement, Australia's recently elected Liberal Government retreated from a blanket policy of excluding ISDS, both through its own policy statements and in practice. This leaves the current political-legal environment unclear. While the current Australian Government has not rejected the Trade Policy Statement — indicating instead that ISDS will be considered on a (seemingly unguided) case-by-case basis — the 2010 and 2015 recommendations of the Productivity Commission linger and remain the official investment strategy and policy advice for the Executive Government. Consequently, uncertainty abounds in Australia's approach to future treaties. Australia's current policy is one of mixed messages, such that it is difficult to delineate the rationale for advocating multilateral over bilateral arrangements – especially where both negotiating processes rely on the same method of trading concessions in order to reach a mutually agreeable result. Those mixed messages, as well as its overtly cautious reaction to the *Philip Morris* claim, makes any issues raised as to the legitimacy of the ISDS system unsustainable. This is further aggravated by the Government's inconsistent treaty practice in, for instance, treaties with Japan, Korea and China.

Putting aside the various misconceptions and inconsistencies detailed throughout this article, the debate on Australia's ISDS policy has yet to be clearly delineated — neither a blanket rejection of ISDS (Trade Policy Statement and Productivity Commission's approach) nor a pure case-by-case basis without

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193 See UNCTAD, 'World Investment Report 2015: Reforming International Investment Governance' (Report, 2015) 108–10 <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245>.

194 See Rainbow Willard and Sarah Morreau, 'The Canadian Model BIT — A Step in the Right Direction for Canadian Investment in Africa?' on *Kluwer Arbitration Blog* (18 July 2015) <http://kluwerarbitrationblog.com/blog/2015/07/18/the-canadian-model-bit-a-step-in-the-right-direction-for-canadian-investment-in-africa/>.

195 See Trakman, above n 42, 161; Catherine H Gibson, 'Canada, China, and the Anti-BIT' on *Kluwer Arbitration Blog* (9 April 2015) <http://kluwerarbitrationblog.com/blog/2015/04/09/canada-china-and-the-anti-bit/>.

established parameters is sustainable. Instead, we recommend a logically consistent ISDS policy that clearly establishes: (1) when ISDS can be placed on the negotiating table; and (2) an appropriate type of the ISDS mechanism.

Flexibility can still be achieved with the adoption of threshold criteria, such as the counterparties legal system. Such a policy can also be moulded to address concerns such as regulatory chill and regulatory policy space. This approach can be achieved in a flexible, yet principled, manner through the use of the model BIT.

The failure to make clear and to consistently take advantage of its comparative advantage and other priorities effectively underutilises Australia's inherent advantages and threatens the country to succumb to what Donald Horne's described in *The Lucky Country*.[196] Horne went on to state that Australia 'lives on other people's ideas, and, although its ordinary people are adaptable, most of its leaders (in all fields) so lack curiosity about the events that surround them that they are often taken by surprise'.[197] It is easy to declare that Australia has, since the 1960s, adapted to generate international competitive industries and, in so doing, facilitated economic growth that, in turn, increased investment capital to allow Australian companies to invest overseas.

What is not easy, however, is to calculate how much of Australia's position on agreements and ISDS has been undermined by the economic nationalism that has permeated politics since the 1960s. Retreating from the regional and bilateral system to give way to the multilateral regime (as the Trade Policy Statement and Productivity Commission espouse) is one thing (however unfeasible). Rejecting with it the ISDS system based on ideological grounds to, in effect, return to a Calvo Doctrine[198] path of domesticating investment disputes, is another. Doing so without adequate debate, with insufficient analysis and based on questionable premises, is an entirely different matter.

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196 See quote accompanying above n 1.

197 Horne, above n 1, 209.

198 See Patrick Juillard, 'Calvo Doctrine' in *Max Planck Encyclopedia of Public International Law* (at January 2007).

Appendix: Concordance of General Concerns, Australia's Approach and Suggested Reform Measures

Global concern as to ISDS	**Australian understanding (through Trade Policy Statement and 2010 and 2015 Productivity Commission reports)**	**Suggested solution (effected through treaty text or by the incorporation of procedural rules)**	**Current examples of solution**
Investment agreements (with ISDS) do not encourage FDI flows.	Addressed, but engagement with aggregated data was inadequate and focused on trade flows.	Commission econometric report that specifically addresses: (1) the correlation with respect to investment agreements with ISDS; and (2) Australia's investment environment.	Economic study performed by Armstrong, Kurtz, and Nottage.[199]
No protections are provided to Australian outbound investors.	Raised as a concern, but summarily dismissed as a real issue.	Obtain better data that ascertains the nature of outbound investors, and practical benefits.	EU Public Consultation process in 2015.[200]
Asymmetrical nature of ISDS; states cannot sue foreign corporations.	Raised, but solution not addressed.	• There are provisions under the *ICSID Convention* that have been interpreted to allow for counterclaims. • In any event, should states be able to bring claims against investors?	*ICSID Convention* art 46.[201]

[199] See Armstrong and Nottage, above n 24.

[200] See European Commission, above n 187.

[201] This provision has been interpreted in *Metal-Tech Ltd v Uzbekistan* (Award, ICSID Arbitration Tribunal, Case No ARB/10/3, 4 October 2013) reported in (2014) 26(1) *World Trade and Arbitration Materials* 37; *Al-Warraq v Indonesia* (Final Award, UNCITRAL Arbitration Tribunal, 15 December 2014) reported in [2014] IIC 718; *Perenco Ecuador v Ecuador* (Interim Decision, ICSID Arbitration Tribunal, Case No ARB/08/6, 11 August 2015).

Global concern as to ISDS	**Australian understanding (through Trade Policy Statement and 2010 and 2015 Productivity Commission reports)**	**Suggested solution (effected through treaty text or by the incorporation of procedural rules)**	**Current examples of solution**
Policy encroachment (Regulatory chill).	Raised, but solution not addressed.	• There is no empirical evidence of regulatory chill. • Drafting solution similar to *GATT* art XX.	*TPP*, *CETA*, *KAFTA* art 11.5; *KORUS-FTA* art 2.1; Argentina–NZ BIT art 5.3; US Model 2012, *TTIP* (EU's draft text)[202]
Inconsistent tribunal interpretations and decisions.	Raised in passing, but without analysis or suggested reform.	• Establish a review court, or a tribunal with fixed members. • Also adopt mechanism for the joint interpretation of treaty provisions. Further, such treaties provide for a revision timeline to update and clarify.	*CAFTA*; *KORUS-FTA* and *KAFTA* (Joint Committee); *NAFTA* (Free Trade Commission).[203] US Model BIT 2012; *TTIP* (EU's draft text)
Excessive scope for investor claims.	Not considered.	Limit types of claims (through the definition of 'investment') or types of regulatory action (excluding taxation measures from expropriation).	*NAFTA* art 1108, Japan–Switzerland BIT (2009); Germany Model BIT (2005); UK–Barbados BIT (1993).

[202] See *EU TTIP Proposal July 2015*, above n 180, ch 1 art 1-1(1), which preserves the rights of states to regulate for measures necessary to achieve legitimate policy objectives, for public health, safety, environment and public morals and cultural diversity.

[203] See, eg, *NAFTA*, signed 17 December 1988 (entered into force 1 January 1994) ch 11. The FTC, in July 2001 delivered an interpretation relating to the international law standard of treatment under art 1105. See NAFTA Free Trade Commission, 'North American Free Trade Agreement: Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001) <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp>.

Forum shopping available to foreign investor.	Not considered.	• Provide for a State to invoke a denial of benefits clause for abusive claims; a requirement to exhaust local remedies, and MFN exclusions relating to obtaining better ISDS rights.[204] • Fee-shifting rules (especially for frivolous claims).	*TTIP* (EU's draft text); Indian Model BIT; Southern African Development Community ('SADC') Model BIT.
Global sustainable development.	Not considered.	• Provide an obligation of corporate sustainable development. • Alternatively, carry out Trade Sustainability Impact Assessment prior to negotiations: see Korea–EU FTA.[205]	US Model BIT 2012; *AUSFTA* art 19.4.
Conflicts of interest of arbitrators.	Raised in passing, but without analysis.	Mandate the disclosure of relationships between the parties.	*TTIP* (EU's draft text).

[204] Following *Maffezini v Spain* (Award, ICSID Arbitration Tribunal, Case No ARB/97/7, 13 November 2000).

[205] See European Commission, Trade, 'Trade Sustainability Impact Assessment of the EU–Korea FTA: Draft Final Report — (Phase 3)' (Report, European Commission, June 2008) <http://trade.ec.europa.eu/doclib/docs/2008/december/tradoc_141660.pdf>; Colin Kirkpatrick et al, 'The Trade Sustainability Impact Assessment (SIA) on the Comprehensive Economic and Trade Agreement (*CETA*) between the EU and Canada: Final Report' (Report, European Commission, June 2011) <http://mpra.ub.uni-muenchen.de/28812/>.

Global concern as to ISDS	**Australian understanding (through Trade Policy Statement and 2010 and 2015 Productivity Commission reports)**	**Suggested solution (effected through treaty text or by the incorporation of procedural rules)**	**Current examples of solution**
Transparency and confidentiality of proceedings.	Not considered.	• Provide more prescribed third party intervener rights and *amicus curiae* submissions. • Greater disclosure, but with provision for redactions or safeguards.	*KAFTA* art 11.21; *TPP*; *TTIP* (EU's draft text).[206]
Expense of proceedings for the State.	Raised in passing, but without analysis.	Authorise greater arbitrator control, such as capping costs.	
Length of proceedings.	Raised in passing, but without analysis.	• Time limits for proceedings. • Fee-shifting rules (especially for frivolous claims).	*TTIP* (EU's draft text) (for appeals).

[206] *EU TTIP Proposal November 2015*, above n 171, ch II s 3 art 23 may be invoked by any natural or legal person which can establish a direct and present interest in the result of the dispute. Also, the intervener's interest is limited to 'supporting, in whole or in part, the award sought by one of the disputing parties'. The draft *TTIP* also incorporates the recent *UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration*, opened for signature 17 March 2015 (entered into force 18 October 2017).