（要約）

論　文　題　目:
International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts

氏　名 Luke Richard NOTTAGE

This Thesis traces the trajectory of two growing fields of cross-border dispute resolution mainly by integrating, updating and expanding on selected works on international commercial arbitration (over the last two decades), and investor-state arbitration (over the last decade). The analysis focuses on Australia and Japan, which bear important similarities in both fields but also a few significant differences, located in Asia-Pacific and global contexts.

1. Introduction

Divided into three Parts, the Thesis examines how these partly overlapping fields have developed along two dimensions. The first is formalisation versus informalisation ('in/formalisation'). Formalisation is gauged by intervention by national courts compared to the autonomy given to disputing parties and arbitrators, but also the detail increasingly associated with arbitration procedures, and (of particular concern) the resultant costs and delays. The second dimension is globalisation versus local or national idiosyncrasies ('glocalisation') related with both types of arbitration. The chapters show how the two dimensions have been intertwined but evolving. The field of international arbitration in the 1950s and 1960s was small, informal and global. Over the 1970s and 1980s, it expanded by becoming more formal and more rooted in Anglo-American common law practice. Over the 1990s there had been efforts to restore more informality, through innovations to reduce costs and especially delays. Yet these problems have resurfaced from the turn of the 21st century, especially over the last 10-15 years. The COVID-19 pandemic of 2020 has forced many arbitrations more or less online, promising a step-down in costs and delays as well as further globalising the field. Yet experience over the last two decades suggests that a more informal and global approach may not persist. There seems to be persistent and evolving tensions in arbitration, and perhaps legal systems generally, along the dimensions of in/formalisation and glocalisation.

Overall, different legal systems vary in the extent to which they prioritise substantive reasons (open to 'moral, economic, political, institutional or other social' reasons) as opposed to formal reasons (legally authoritative reasons 'on which judges and others are empowered or required to base a decision or action' and that usually excludes, 'overrides, or at least diminishes the weight of, any countervailing substantive reason').[1] The contrast was famously illustrated first even within the common law tradition, showing how the United States ('US') has persisted with more substantive reasoning and various legal institutions supporting that orientation, compared to the English legal system. We can also usefully extend their analysis to contrast the more substantive approach taken generally and for contract law in Japan, with a modern legal system still influenced by the civil law tradition, compared with New Zealand[2] and Australia.[3]

---

[1] Patrick Atiyah and Robert Summers, *Form and Substance in Anglo-American Law* (Oxford University Press, 1987).

[2] See, expanding on my LLM Thesis for Kyoto University (1993), 'Form, Substance and Neo-Proceduralism: in Comparative Contract Law: Law in Thesiss and Law in Action in New Zealand, England, the US and Japan' (Ph.D in Law Thesis, Victoria University of Wellington, 2001) available at http://hdl.handle.net/10063/778.

[3] See eg, briefly, Luke Nottage, 'Changing Contract Lenses: Unexpected Supervening Events in English,

The more formal approach includes more detailed 'black-letter law' provisions, which can enhance certainty, but can also lead to costs and delays in resolving disputes. This tension is part of a wider tension between formalisation and informalisation in substantive and procedural law – what this Thesis dubs the 'in/formalisation' tension. Sometimes, disadvantages such as growing complexities, costs and delays can be reduced by interventions through individual judges, especially those working within the common law tradition, but this depends on what cases percolate up to the highest courts. Even within the common law tradition, legislative intervention is often needed to restate or clarify the law. Yet such reforms are influenced by the complexities of the legislative process and therefore the wider socio-political environment.

These factors help explain why, despite the wave of globalisation that intensified after World War II, we still find significant differences in the content, form and implementation of the law across national legal systems. In substantive law, for example, this includes England still refusing to adopt the 1980 United National Convention on Contracts for the International Sale of Goods, and more caution shown by Anglo-American lawyers regarding the even more open-textured UNIDROIT Principles of International Commercial Contracts. As noted in my related analysis in 2000,[4] this indicates 'glocalised localism', on the spectrum of 'glocalisation' – the tension between globalisation and national or even more local idiosyncrasies.[5]

The collection of ten publications adapted, updated and interwoven for this Thesis draws partly on research and publications for or related to my PhD in Law, which had focused on such tensions instead in *substantive* law (especially contract law), to examine how they play out in international arbitration *procedures*. The latter are by nature subject to globalisation, and contribute to it, because they apply to cross-border disputes involving commercial parties and/or states. Globalisation in and through international arbitration has also been promoted by international instruments, especially the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('NYC'), which influenced in turn the development of the UNCITRAL Model Law on International Arbitration ('ML') – available since 1985 as an increasingly popular template for enacting or reforming national arbitration legislation. Yet we find differing degrees of delocalisation in ML adoptions, and still find national variations in NYC implementation.[6] In short, there is 'localised globalism' especially in international commercial arbitration (ICA), resolving disputes between commercial parties – typically based on an underlying national contract law.

As for the in/formalisation tension, we find growing detail being added to the 'black-letter law'. This is evidenced

---

New Zealand, US, Japanese, and International Sales Law and Practice' (2007) 14(2) *Indiana Journal of Global Legal Studies* 385.

[4] Luke Nottage, 'Practical and Theoretical Implications of the Lex Mercatoria for Japan: CENTRAL's Empirical Study on the Use of Transnational Law' (2000) 4(2) *Vindobona Journal of International Commercial Law and Arbitration* 132.

[5] See also now generally Kun Fan, ''Glocalization' of International Arbitration – Rethinking Tradition: Modernity and East-West Binaries Through Examples of China and Japan' (2016) 11(2*) University of Pennsylvania Asian Law Review* 244.

[6] See generally the editor's overview and country reports including Luke Nottage and Chester Brown, 'Interpretation and Application of the New York Convention in Australia' in George Bermann (eds) *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer, 2017) 93.

not only by the original 1985 ML provisions, but also by extensive provisions on tribunal-ordered interim measures added in its 2006 amendment. More and more written detail is added, adding a measure of formalisation, even though these reforms and the original ML instrument are trying to promote party and tribunal autonomy vis-à-vis (putatively more formal) national courts. The ML and other instruments are also increasingly supplemented by comprehensive 'soft law', promoted for example by the International Bar Association, although some leading practitioners particularly within the civil law tradition are now pushing back at this growing formalisation. Concerns are again emerging about the costs and delays, and wider formalisation or 'judicialisation', associated with what was supposed to be a more informal and efficient means of cross-border dispute resolution compared to litigation.

Partly in response, but ironically as this may inject more formality in the system at last in the short term or if not well designed, international commercial courts are proliferating to offer an alternative to arbitration. In parallel, the United Nations is promoting cross-border mediation notably through its 2018 Singapore Convention on International Settlement Agreements Resulting from Mediation (partially mirroring the NYC).[7]

I. International Commercial Arbitration in Japan and Australia

Part I of this Thesis further explores both in/informalisation and glocalisation tensions, focusing mostly on ICA.

2. The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A View from the Periphery[8]

Chapter 2 outlines two important empirical studies from the 1990s, setting an historical and theoretical benchmark for assessing the past and future of international arbitration. Those highlighted a growing formalisation of international commercial arbitration's over the 1970s and 1980s, influenced by growing influence from Anglo-American legal practice. Yet this Chapter finds some pushback by the late 1990s towards more informal and global approaches. It also highlights further historical contingency by outlining Japan's attempts around then to revamp its arbitration law. Although that was partly aimed at meeting the evolving international standard, epitomised by the UNCITRAL Model Law, it was part of a much wider justice reform program over 1999-2004 focusing primarily on domestic dispute resolution. Such 'localised globalism' contrasts with Japan's efforts from 2018 to promote itself as another regional hub for international arbitration (outlined in Chapter 4), which therefore instead suggest more 'localised globalism'.

3. The Procedural Lex Mercatoria: The Past, Present and Future of International Commercial Arbitration[9]

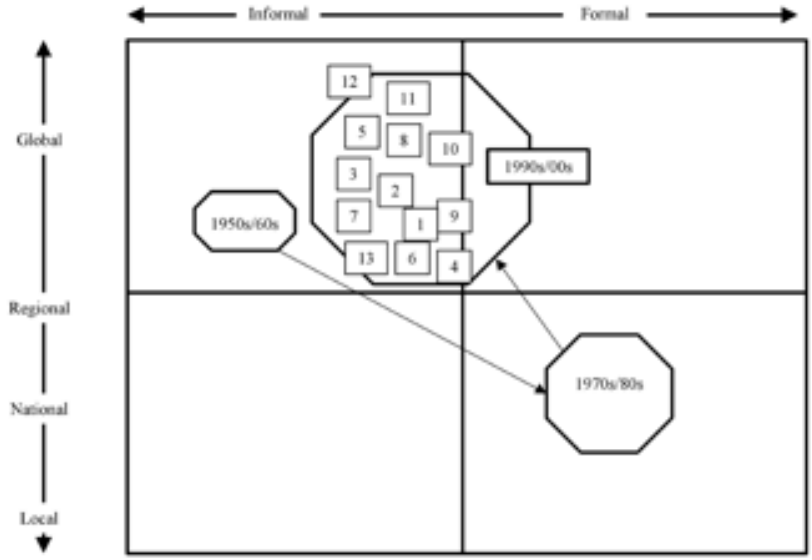
---

[7] Available via https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements. See generally Luke Nottage et al (eds) *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer, January 2021).

[8] Adapted and updated from Luke Nottage, 'The Vicissitudes of Transnational Commercial Arbitration and the *Lex Mercatoria*: A View from the Periphery' (2000) 16 *Arbitration International* 53. A much shorter and earlier version of this article was published in Japanese as Luke Nottage (Noboru Kashiwagi, trans), '*Kokusai Shoji Chusai to Lex Mercatoria no Hensen [Transformations in Transnational Commercial Arbitration and the Lex Mercatoria]*' (1999) 113 *Ho no Shihai* 100.

[9] Updating somewhat Luke Nottage, 'The Procedural *Lex Mercatoria*: The Past, Present and Future of International Commercial Arbitration' (2003) 03/1E *Kobe University CDAMS Discussion Paper*, also at https://ssrn.com/abstract=838028. A version was also published as (Nakabayashi and Nasu, trans) *Tetsuzukikihan to Shite*

Chapter 3 is another foundational analysis, elaborating from a more doctrinal perspective how both in/formalisation and glocalisation tensions were playing out in ICA by the turn of the 21st century through various 'pressure points' or hot topics in arbitration law and practice generally. As a rough conceptual map, it tried to depict as below the extent of in/formalisation and glocalisation by focusing on various illustrative issues.



no Lex Mercatoria: Kokusai Shoji Chusai no Kako, Genjo, Mirai [The Procedural *Lex Mercatoria*: The Past, Present and Future of International Commercial Arbitration], in Akira Saito and Yasushi Kinumaki (eds), *Kokusai Keiyaku Ruru no Tanjo [The Birth of Transnational Contracting Rules]* (Dobunkan, 2004) 113.

For example, confidentiality (Issue No '13') is seen as a principle that is less pervasive and therefore globalised in ICA (due to its omission from the ML and several national arbitration laws) compared to say legal norms around arbitrator neutrality (No 5). Confidentiality is also relatively ambiguous in promoting informalisation (as explored further in Chapters 6 and 8 of this Thesis). It can encourage arbitrators to be more robust in managing procedures and more succinct in writing awards, promoting informality. Yet it also veils the process and even outcomes from other parties, making it difficult to assess whether arbitrators and lawyers are providing the most cost- and time-effective services. This problem has probably become stronger since the original version of this Chapter was published in 2003, as argued later in the Thesis.

4. Japan's Arbitration Law of 2003: Early and Recent Assessments[10]

Chapter 4 outlines how Japan's Arbitration Act 2003 was part of justice system reforms focused on domestic dispute resolution, although based on the UNCITRAL Model Law. The Act left few major interpretive issues, and created scope eventually to enhance international arbitration in Japan. Yet neither type of cases has grown significantly. There were also significant continuities evident from the persistent use of Arb-Med to promote early settlement during arbitrations. The stagnation in annual arbitration filings cannot be linked to adverse Japanese case law. That developed in an internationalist, pro-arbitration spirit, evident through a comparative analysis for example with Australian case law. Other institutional barriers to arbitration remain, despite Japan's new initiatives since 2018 demonstrating 'localised globalism'. General, organisational and legal culture in Japan will likely keep mutually reinforcing economically rational motivations helping to curb costs and delays in dispute resolution, even as Japan now seeks to promote international arbitration through updated global models.

5. International Commercial Arbitration in Australia: What's New and What's Next?[11]

The first part of **Chapter 5** argues that not much had changed by 2013, after Australia amended in 2010 its International Arbitration Act 1974, incorporating most of the 2006 revisions to the UNCITRAL Model Law. There was no evidence yet of a broader anticipated 'cultural reform' that would make international arbitration speedier and more cost-effective. One dispute engendered at least five sets of proceedings, including a constitutional challenge. Case disposition statistics for Federal Court cases decided three years before and after the 2010 amendments revealed minor differences. Various further statutory amendments therefore seemed advisable to encourage a more internationalist interpretation. However, the latter part of this Chapter notes only a few minor legislative revisions, beginning from 2015. There also remains a significant step-up in annual cases filed under the Act, and some improved Federal Court case disposition times only since 2017. Despite generally more pro-arbitration case law, challenges therefore remain in pushing international arbitration in Australia towards a more informal (especially time- and cost-

[10] Updating Luke Nottage, 'Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?' (2004) 7 *International Arbitration Law Review* 55, then adding extensive new analysis of how the 2003 legislation has been interpreted and influenced arbitration practice.

[11] Updating and adding further empirical analysis to Luke Nottage, 'International Commercial Arbitration in Australia: What's New and What's Next?' 30(5) *Journal of International Arbitration* 465, with a longer version in Justice Nye Perram (ed) *International Commercial Law and Arbitration* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2013) 287.

effective) and global approach.

II. Crossovers from International Commercial to Investor-State Arbitration

Part II of this Thesis sets these developments in a wider context, considering 'crossovers' in ICA and treaty-based investor-state arbitration (ISA).

6. In/formalisation and Glocalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia[12]

Chapter 6 elaborates international (commercial) arbitration has experienced a dramatic diffusion from West to East, but 'in/formalisation' and 'glocalisation' tensions endure. Empirical research shows that delays and especially costs have been escalating world-wide, reflecting and promoting formalisation. This is not just due the growing volume and complexity of deals and disputes. It parallels a dramatic worldwide expansion of international law firms, and large home-grown law firms emerging in Asia. Confidentiality in arbitration exacerbates information asymmetries for users, dampening competition. Such developments are particularly problematic as large law firms have moved into investment treaty arbitration. Yet moves underway towards greater transparency in that burgeoning and overlapping field could eventually help reduce some of these problems. Somewhat ironically, they are likely to persist in the world of international commercial arbitration despite the growing concerns of users themselves, including a new wave of Asian companies that have started to resolve commercial disputes through international arbitration.

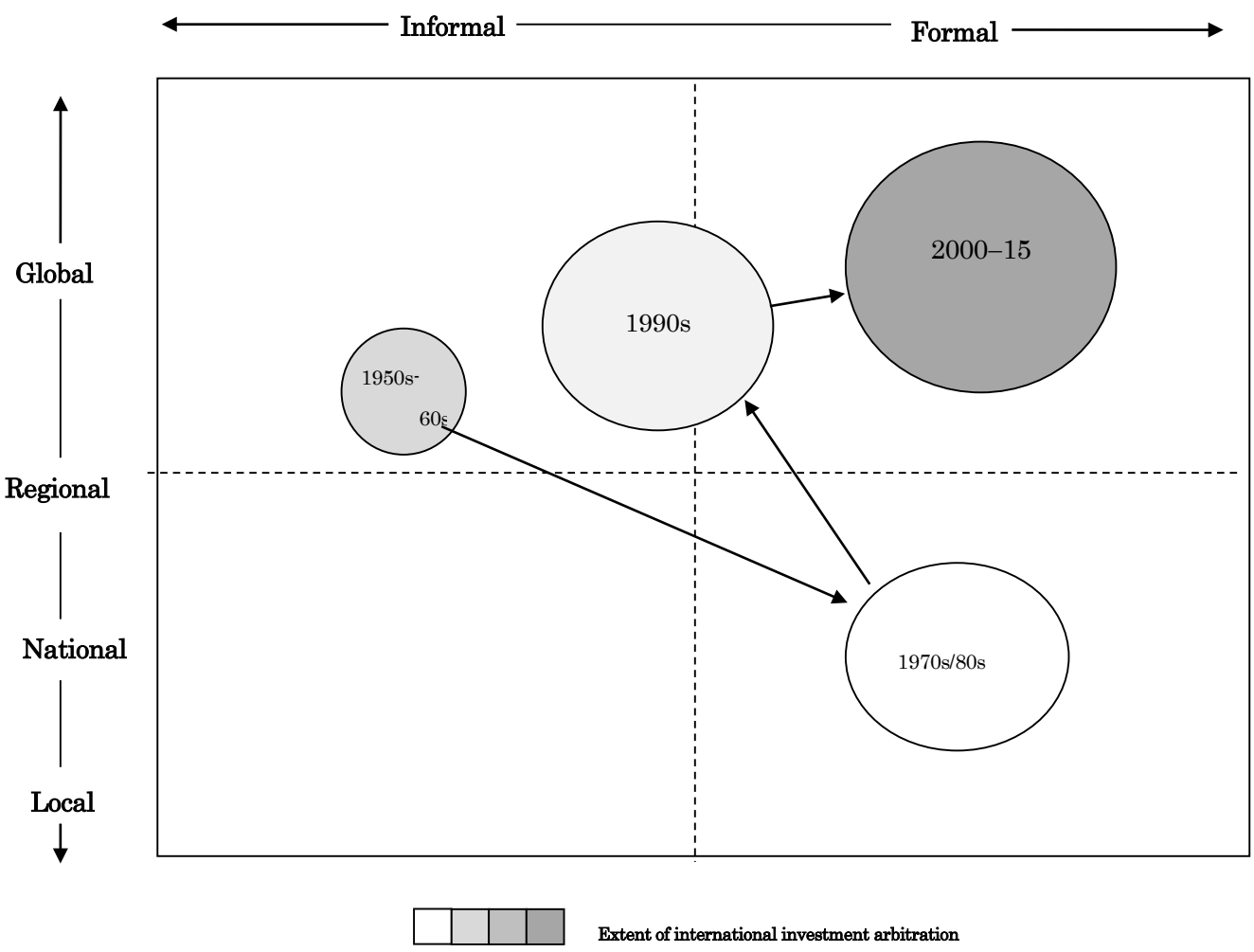
7. A Weather Map for International Arbitration: Mainly Sunny, Some Cloud, Possible Thunderstorms[13]

Chapter 7 provides an even broader 'weathermap', charting the growth and trajectory of international arbitration world-wide:

---

[12] Abridging and updating Luke Nottage, 'In/formalization and Glocalization of International Commercial Arbitration and Investment Treaty Arbitration in Asia' in Joachim Zekoll, Moritz Baelz and Iwo Amelung (eds) *Formalisation and Flexibilisation in Dispute Resolution* (Brill, 2014) 211.

[13] Adapting and updating Luke Nottage, 'A Weather Map for International Arbitration: Mainly Sunny, Some Cloud, Possible Thunderstorms' (2015) 26 *American Review of International Arbitration* 495, with a version also in Stavros Brekoulakis, Julian Lew and Loukas Mistelis (eds) *The Evolution of International Arbitration* (Kluwer, 2016) 59.


Informal
Formal
Global
Regional
National
Local
2000–15
1990s
1950s-
60s
1970s/80s
Extent of international investment arbitration

Updating my assessment in 2003 of the situation around the turn of the 21st century (Chapter 3), although there has been further globalisation, due to a parallel surge in treaty-based ISA cases there has also been more formalisation of the overall field. We find ever more detailed procedural (and substantive) provisions in burgeoning treaties, combined with significant costs and delays in ISA despite growing transparency, alongside more formalisation in ICA. However, Chapter 7 ends by speculating that more transparency around ISA eventually may help users to better assess value for money even in ICA, given the significant overlap (for now) between practitioners in both sub-fields.

To tease out further tensions in in/formalisation and glocalisation, it is also useful for readers to consider my recent partly empirical study taking an even wider bird's eye view, by examining 'international arbitration and society at large'.[14] That study first provides further quantitative evidence of the growing formalisation of the field – evident for example in greater influence from lawyers authoring publications, presenting at major arbitration conferences, and serving on committees developing soft law instruments. Secondly, this research largely confirms emergent polarisation among stakeholders and the general public concerning arbitration (as posited by Gaillard). This can be seen through growing and mostly negative media references (in Australia and elsewhere) to ISA or investor-state dispute settlement (ISDS) more generally. Such polarisation and controversy may prompt further calls for formalising not only ISA, to shore up its legitimacy, but also spill over to the field of ICA.

8. Confidentiality versus Transparency in International Commercial and Investor-State Arbitration in Australia and Japan[15]

Chapter 8 focuses on confidentiality versus transparency in international arbitration, especially in Australia and Japan. The two jurisdictions differ because Australia added to its ML-based regime an automatic confidentiality obligation for ICA proceedings. However, this occurred only from 2015, and confidentiality applies generally in Japan too because almost all cases seated there adopt arbitral rules that have (somewhat increasingly) strict confidentiality obligations. Australia also differs because from 2018 it made an exception for ISA proceedings seated there, which Japan does not need to do because its *Arbitration Act 2003* does not add automatic confidentiality anyway. Both countries furthermore increasingly specify transparency obligations in their investment treaties relating to ISA, following growing calls worldwide and consistently with the greater public interests compared to most ICA cases. Despite differences between the two sub-fields, domestic political controversy over ISA generally may be difficult for Australia (or Japan) to add provisions for confidentiality around ICA-related proceedings in court, as in some other leading Asia-Pacific arbitration hubs.

III. International Investment Treaties and Investor-State Arbitration

Part III of this Thesis focuses more squarely on international investment treaty making and ISA policy and practice, especially in Australia and Japan. Active engagement with ISA arguably helps promote a more globalised outlook

[14] Luke Nottage, 'International Arbitration and Society at Large', in Andrea Bjorkland, Franco Ferrari and Stefan Kroell (eds) *Cambridge Compendium on International Arbitration* (Cambridge University Press, 2020) forthcoming, manuscript already available at https://ssrn.com/abstract=3116528.

[15] Somewhat updating Luke Nottage, 'Confidentiality versus Transparency in International Arbitration: Asia-Pacific Tensions and Expectations' (2020) 16 *Asian International Arbitration Journal* 1.

generally concerning international arbitration. Yet, as mentioned above, engagement brings concerns about costs and delays as well as pressures towards other types of formalisation, such as ever-growing specificity of provisions in treaties, arbitration rules and related 'soft law'.

9. Throwing the Baby with the Bathwater: Australia's 2011-13 Policy Against Treaty-Based Investor-State Arbitration[16]

As detailed in **Chapter 9**, Australia is intriguing because from 2011-2013 the Labor-Greens Gillard Government applied a Trade Policy Statement that eschewed for future treaties any form of ISDS (albeit focused especially in the ISA procedure). If this more nationalistic approach had persisted, and indeed spread among Australia's negotiating counterparties or other states in Asia, it would have signalled an overall diminution in globalisation for the field of international arbitration. Further, the new approach might have reduced costs and delays generally because foreign investors could no longer bring claims directly against host states. Instead, they would have had to encourage their home states to initiate inter-state arbitration (as typically provided also in investment treaties), which might have happened less; and/or initiated claims in the courts of host states, which might not provide protections to the international standard and so be less attractive. If these two remaining routes nonetheless were pursued, their procedures might have been even more formalised (with associated costs and delays, including multiple appeals through domestic courts) given the even greater public interest generally in such procedures. However, from late 2013 a new Coalition Government reverted to Australia's previous policy of agreeing to ISDS on a treaty-by-treaty assessment.

10. Investor-State Arbitration: Why Not in the Japan-Australia Economic Partnership Agreement?[17]

Chapter 10 explores some subsequent developments for Australia, noting that free trade agreements (FTAs) with China and Korea agreed to ISDS-backed commitments, but the bilateral FTA with Japan did not. It suggests that Japan probably did not offer enough in return for its professed call for ISDS during negotiations, for the Coalition Government to agree but suffer further political difficulties – in getting the centre-left Labor Opposition to vote with the upper house of Parliament for enactment of tariff reductions needed before ratifying the FTA with Japan. Japan probably also expected to obtain ISDS anyway, to protect its large outbound investments in Australia, through ongoing negotiations for a regional FTA – and in fact achieved that from 2019. The second half of this Chapter then examines how Japan has gradually expanded its investment treaty program to protect its outbound investors, especially since 2002 with more consistency in achieving ISDS-backed commitments. Yet Japan still displays flexibility (as with the omission in the bilateral FTA with Japan, or in treaty drafting generally). Its outbound investors also bring relatively few formal claims even compared to Australia, seemingly instead using treaties as leverage to obtain a better negotiated settlement while avoiding ISA costs and delays. For both countries, therefore, we again can identify considerable 'localised globalism'.

---

[16] Adapting and updating 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) *Asian Studies Review* 253, reproduced in Kate Barclay and Graeme Smith (eds) *East Asia's Demand for Energy, Resources and Food: The International Politics of Resources* (Routledge, 2015).

[17] Extensively updating and extending Luke Nottage, 'Investor-State Arbitration: Not in the Australia-Japan Free Trade Agreement, and Not Ever for Australia?' (2014) 38 *Journal of Japanese Law* 37.

11. Investor-State Arbitration Policy and Practice in Australia[18]

Chapter 11 provides a comprehensive analysis of Australian investment treaty and ISDS practice. It also mentions my separate analysis[19] examining the possibility that some of Australia's earlier standalone bilateral investment treaties (BITs) departed significantly from the then (and still current) consensus that host states should commit in advance to the ISA option. In a claim brought by outbound Australian investor under a 1992 BIT with Indonesia (replaced by a bilateral FTA in 2020), a tribunal argued that because the BIT merely stated that the host state 'shall consent', the investor could not commence arbitration directly, and that this was consistent with several other Australian BITs. That analysis critiques this analysis, which would also impact on a few Japanese BITs using similar phrasing (as mentioned in Chapter 10). As such, the critique restores more 'globalism' than 'localism' to the overall treaty practice in Australia (and Japan). The Chapter adds that a recent investment tribunal reportedly upheld jurisdiction under Australia's BIT with Egypt that provided that the host state 'shall consent' to ISA.

A major focus of **Chapter 11** is the political polarisation over ISDS that escalated particularly around 2011 under the Gillard Government's new Trade Policy Statement, and when the first-ever ISDS claim was brought against Australia. That claim was brought by Philip Morris Asia relating to tobacco plain packaging legislation, and although dismissed on jurisdictional grounds in late 2015, it led to extensive and ongoing public debate including regarding costs, delays, transparency and potential 'regulatory chill' on governments related to ISA.[20] If domestic politics change again in Australia, a new Labor-led government might revert to eschewing ISDS (like New Zealand from late 2017[21]), thus undermining globalisation – unless and until a new widely accepted international model is substituted.[22]

Meanwhile, Australia will mostly keep seeking ISDS in its treaties, while being pragmatic enough to not insist on it in individual cases. For example, Australia reportedly agreed with 14 other states in late 2019 to leave out ISDS for now under the Regional Comprehensive Economic Partnership ('RCEP') FTA. However, for Australia (as with

---

[18] Abridged from Luke Nottage 'Investor-State Arbitration Policy and Practice in Australia' in Armand de Mestral (ed), *Second Thoughts: Investor-State Arbitration Between Developed Democracies* (Centre for International Governance Innovation, 2017), with updates through to August 2020 especially in the Part VI Postscript and Appendix.

[19] Luke Nottage, 'The Limits of Legalisation in Asia-Pacific Investment Treaty Arbitration' in Julien Chaisse and Tsai-Yu Lin (eds) *International Economic Law and Governance: Essay in Honour of Mitsuo Matsushita* (Oxford University Press, 2016) 153, updating 'Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis and Regional Implications of *Planet Mining v Indonesia*' (2015) 12(1) *Transnational Dispute Management* also available at https://ssrn.com/abstract=2424987.

[20] See also eg Luke Nottage and Jarrod Hepburn, 'Investment Treaty Arbitration Claims Over Tobacco Plain Packaging: Running Out of Puff?' in Puja Kapai and Hughes Tang (eds) *The Flow of Change: Celebrating Twenty Years of the Hochelaga Lectures* (University of Hong Kong Faculty of Law, 2018) 159-82. That added an analysis of the Philip Morris claim against Uruguay, which failed on the merits, to Jarrod Hepburn and Luke Nottage, 'A Procedural Win for Public Health Measures' (2016) 18 *Journal of World Investment and Trade* 307.

[21] Amokura Kawharu and Luke Nottage, 'Has ISDS Gone Rogue for Australia and New Zealand? CPTPP (C-3PO), RCEP (R2-D2) and Beyond' *Yearbook on International Investment Law and Policy 2017*, 536.

[22] Compare generally Amokura Kawharu and Luke Nottage, 'Models for Investment Treaties in the Asian Region: An Underview' (2017) 34(3) *Arizona Journal of International and Comparative* Law 461.

Japan), ISDS is largely available under other treaties.[23] However, combined with this globalisation impulse, Australia is likely to keep looking for ways to reduce costs and delays around ISA. It agreed for example to an unusual provision in its FTA signed with Indonesia in 2019, whereby the host state could compel the investor to attempt mediation before ISA – although this innovation was probably prompted by Indonesia.[24] Japan is well positioned to keep partnering with Australia in this endeavour. Admittedly, its much larger outbound investments may make it keener on achieving ISDS in future treaties. Nonetheless, its history of flexibility in negotiations and drafting (and even its own tradition impacting on ICA, outlined in Part I of this Thesis) could motivate Japan to come up with or share in innovative compromises that help achieve a new combination of globalisation and informalisation for international arbitration.

* * *

Overall, this Thesis charts the evolution of both ICA and ISA, especially since the 1990s, focusing on Australia and Japan but in regional and global contexts. It shows the usefulness of applying the themes or vectors of in/formalisation and glocalisation for assessing past developments, and for charting future trajectories.

12: Conclusions: Beyond the Pandemic – Towards More Global and Informal Approaches to International Arbitration

Chapter 12 begins by considering the longer-term implications of the COVID-19 pandemic from 2020, which has forced much international arbitration online. This may entrench or even expand a significant shift towards a more cost- and time-effective procedures, and a more informal approach generally to arbitration, combined with a more global approach including more diversification of arbitral seats – including new opportunities for Australia and Japan. Yet there may also be a significant 'reversion to the mean'. This Chapter therefore ends more normatively with recommendations for more productive cooperation bilaterally, but also regionally, among academics, lawyers and arbitrators, judges and governments. It identifies some key organisations and opportunities for promoting and sustaining a global and at least somewhat more informal approach to international arbitration through the rest of the 21st century.

---

[23] Adapted (including citations omitted) from Luke Nottage and Bruno Jetin, 'Asia-Pacific Trade, Investment and Dispute Resolution' in Luke Nottage et al (eds) *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer, 2021) 1.

[24] Ana Ubilava and Luke Nottage, 'Novel and Noteworthy Aspects of Australia's Recent Investment Agreements and ISDS Policy: The CPTPP, Hong Kong, Indonesia and Mauritius Transparency Treaties' in Luke Nottage et al (eds) *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer, forthcoming early 2021), with a manuscript at https://ssrn.com/abstract=3548358.