1. In/formalisation and glocalisation tensions in international arbitration

OVERVIEW

This introductory chapter outlines the core themes and scope of the ensuing 11 chapters. Overall, the book traces the trajectory of two growing fields of cross-border dispute resolution – international commercial arbitration (the focus of Part I of the Book) and international investment treaty arbitration (Part III) – as well as some crossovers between both (Part II). The analysis focuses on Australia and Japan, which bear important similarities in both fields but also a few significant differences, as located in Asia-Pacific and global contexts. The key theme is an evolving and complex tension between more formal versus informal approaches within international arbitration (‘in/formalisation’) and another between globalisation and national or local circumstances (‘glocalisation’). International arbitration was first quite informal yet global, then became more formalised under the influence of the common law tradition. It then saw some pushback towards more informal (or at least speedier) arbitrations amid further globalisation over the 1990s, a tendency now re-emerging amid the COVID-19 pandemic, but the past 10–15 years have seen resurgent costs and delays, which may well resurface unless we understand the dynamics of international arbitration.

1. INTRODUCTION

This book 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 past two decades) and international investment treaty arbitration (over the past decade). The analysis focuses on Australia and Japan, in Asia-Pacific and global contexts.

Divided into three parts, the book 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 proce-

dures, and (of particular concern) the resultant costs and delays. The second dimension is globalisation versus local or national idiosyncrasies ('glocalisation') related to 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 were efforts to restore more informality, through innovations to reduce costs and especially delays. Yet these problems resurfaced from the turn of the twenty-first century, especially over the past 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 past two decades suggests that a more informal and global approach may not persist. There seem to be persistent and evolving tensions in arbitration, and perhaps legal systems generally, along the dimensions of in/formalisations 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'); prioritising such reasons usually excludes, 'overrides, or at least diminishes the weight of, any countervailing substantive reason'.¹ The contrast was famously illustrated first 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 – with that of New Zealand² and Australia.³

The more formal approach includes more detailed 'black-letter law' provisions, which can enhance certainty, but can also lead to costs and delays in

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 Books 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 Luke Nottage, 'Changing Contract Lenses: Unexpected Supervening Events in English, New Zealand, US, Japanese, and International Sales Law and Practice' (2007) 14(2) *Indiana Journal of Global Legal Studies* 385.

resolving disputes. This tension is part of a wider tension between formalisation and informalisation in substantive and procedural law – what this book 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 which 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 the Second World War, 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 Nations Convention on Contracts for the International Sale of Goods, and the greater 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 book 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 in turn influenced 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 see ‘shades of delocalisation’ in ML adoptions,⁶ and still find

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 Matt Secomb, ‘Shades of Delocalisation: Diversity in the Adoption of the UNCITRAL Model Law in Australia, Hong Kong and Singapore’ (2000) 17 *Journal of International Arbitration* 123.

national variations in NYC implementation.⁷ In short, there exists ‘localised globalism’, especially in international commercial arbitration (‘ICA’), which resolves 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 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,⁸ although some leading practitioners particularly within the civil law tradition are now pushing back at this growing formalisation.⁹ 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. For example, asked about international arbitration’s ‘worst three characteristics’, 67 per cent of respondents listed ‘cost’ and 34 per cent listed ‘lack of speed’.¹⁰

Partly in response – but ironically, as this may inject more formality into the system, at least in the short term or if not well designed – international commercial courts offering an alternative to arbitration are proliferating. In parallel, the United Nations is promoting cross-border mediation, notably through its 2018

⁷ 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.

⁸ Lawrence Newman and Michael Radine, *Soft Law in International Arbitration* (Juris, 2014).

⁹ Cf Michael Schneider and others cited in Paul Friedland, ‘Soft Law and Power’ in Stavros Brekoulakis and Julian Lew (eds) *The Evolution and Future of International Arbitration* (Kluwer, 2016).

¹⁰ Queen Mary University of London (with White & Case) *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018, via <<http://www.arbitration.qmul.ac.uk/research/2018/>>) 8. (Multiple responses were possible, with 41 per cent also listing lack of effective sanctions in international arbitration, and 39 per cent listing lack of powers regarding third parties to disputes.) See also eg Nobumichi Teramura, *Ex Aequo et Bono as a Response to the Over-Judicialisation of International Commercial Arbitration* (Wolters Kluwer, 2020) especially chapter 1.

Singapore Convention on International Settlement Agreements Resulting from Mediation (partially mirroring the NYC).¹¹

2. INTERNATIONAL COMMERCIAL ARBITRATION IN JAPAN AND AUSTRALIA

Part I of this book further explores both in/formalisation and glocalisation tensions, focusing mostly on ICA. Chapter 2 sets a historical baseline analysing developments mainly in the ‘core’ of the arbitration world through to the late 1990s, as well as some implications for jurisdictions such as Japan seeking to move in from the ‘periphery’.¹² It also establishes a major theoretical framework that has influenced almost all my subsequent research into international arbitration, including later chapters in this book, and that continues to generate debate and insights among other commentators.¹³ In particular, Chapter 2 draws on interview-based sociological research by Dezalay and Garth that suggests there is a link between in/formalisation and glocalisation. They showed compellingly that international arbitration started to become more formalised as American (and then English) international law firms established branches in traditional venues such as Paris, bringing with their engagement in arbitrations more features of their national litigation processes.

However, Chapter 2 then identifies some pushback to consequent concerns about costs and delays, reinstating at least some informalisation by the late 1990s. Such pushback is difficult compared to national law reform, due to the decentralisation and inherent globalisation associated with ICA. Yet faster processes and perhaps even some lower costs were being promoted not only through a wave of arbitration rule amendments by the ‘core’ Western arbitral centres, but also by some rethinking of other norms and practices, as well as by early work towards amending the ML. Chapter 2 ends by sketching some implications for jurisdictions on the ‘periphery’, including Japan, as they continue to expand engagement with ICA. It suggests that although arbitration

¹¹ Available online at <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, 2021).

¹² 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.

¹³ David Caron, Stephan Schill et al (eds) *Practising Virtue: Inside International Arbitration* (Oxford University Press, 2015).

law reform might draw on the ML in seeking to attract more international arbitration cases, reform could be better focused on building up domestic dispute resolution. The Postscript notes that this did in fact happen when Japan passed its Arbitration Act 2003, with policymakers only 15 years later shifting towards building up Japan instead as a new regional hub for international dispute resolution.¹⁴

Chapter 3 is another foundational analysis,¹⁵ elaborating from a more doctrinal perspective on how both in/formalisation and glocalisation tensions were playing out in ICA by the turn of the twenty-first century through various ‘pressure points’ or hot topics in arbitration law and practice generally. Providing a general conceptual map, the chapter tries to depict as follows the extent of in/formalisation and glocalisation for various issues (reproduced from Figure 3.1).

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 arbitrators (No 5). Confidentiality is also relatively ambiguous in promoting informalisation (as explored further in Chapters 6 and 8 of this book). 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 greater since the original version of this chapter was published in 2003, as argued later in the book.

Chapter 4, focusing on Japan,¹⁶ and Chapter 5, on Australia,¹⁷ consider how these two jurisdictions have fared in developing international arbitration

¹⁴ James Claxton, Luke Nottage and Nobumichi Teramura, ‘Developing Japan as a Regional Hub for International Dispute Resolution: Dream Come True or Daydream?’ (2019) 47 *Journal of Japanese Law* 109.

¹⁵ 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* <<https://ssrn.com/abstract=838028>>. A version was also published as (Nakabayashi and Nasu, trans) *Tetsuzukikihan to Shite 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.

¹⁶ 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.

¹⁷ Updating and adding further empirical analysis to Luke Nottage, ‘International Commercial Arbitration in Australia: What’s New and What’s Next?’ 30(5) *Journal*

Figure 1.1 From informal/global to formal/national – and back?

law and practice. Both states are interesting to compare, for several reasons. Both have implemented the NYC (albeit with somewhat more difficulty in Australia) and the ML (albeit more belatedly for Japan). Both seek to promote themselves as regional hubs for cross-border business dispute resolution (but only more consistently for Japan since 2018). Yet neither country has yet attracted many ICA case filings, largely therefore missing out on a boom in several other parts of the Asian region.

Despite these similarities between Japan and Australia, and considerable convergence in ICA case law affirming more internationalist and pro-arbitration interpretations of the legislative framework, we can also observe the persistent pull of national legal traditions. Although not easily explained by a ‘culturalist’ theory about ‘traditional’ averseness to confrontation, Japan does seem to maintain a somewhat less formal approach in arbitration-related matters, carrying over for example a judicial practice of encouraging settlement (Arb-Med) and related concerns about minimising costs and delays. By contrast, Australia’s arbitration-related court cases have grown and continue

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.

to take quite a long time to resolve, with associated costs, despite legislative reforms – especially since 2010 – to the International Arbitration Act 1974 (Cth) and the substitution of a similarly ML-based regime for domestic arbitrations under State and Territory legislation. In addition, the Postscript to Chapter 5 shows that Australian lawmakers have not yet taken up various longstanding suggestions that would help reinstate more informalisation in and around arbitration proceedings.

However, it is also evident from Chapter 4 that Japan has not yet completed any statutory reform whatsoever since enacting its own ML-based regime in 2003. Some legislative amendments – even mainly for marketing purposes abroad – and other changes to further reduce ‘institutional barriers’ to filing ICA cases in Japan are arguably needed if the country (or Australia) wishes to emerge as a significant regional hub. This is despite the opportunities created by the upheaval in international arbitration practice caused by the COVID-19 pandemic worldwide, which has highlighted ways to significantly reduce costs and delays through e-proceedings.¹⁸

3. CROSSOVERS FROM INTERNATIONAL COMMERCIAL TO INVESTOR-STATE ARBITRATION

Part II of this book sets these developments in a wider context, considering ‘crossovers’ in ICA and treaty-based investor-state arbitration (‘ISA’). Chapter 6 looks at the spread east of international arbitration since the 1990s, belying some earlier arguments that it would not take root due to generic ‘Asian values’ opposed to confrontation or adversarial argumentation.¹⁹ However, costs do not seem to have gone down, despite the generally lower cost base for services in at least some Asian jurisdictions that now offer credible alternative venues for ICA proceedings.

On the demand side, this is arguably due especially to the artificial advantage created for cross-border arbitration over litigation in enforcing arbitration agreements and eventual awards through the NYC regime. On the supply side, arbitration services are increasingly provided by law firms in Asia which have grown considerably in size, including in Japan, and which generally follow the ‘billable hours’ model for charging clients. This model can encourage delays and costs, especially if arbitrations remain mostly confidential – meaning

¹⁸ Nottage et al, eds (n 11); and Chapter 12 concluding this book.

¹⁹ 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.

service providers cannot easily be compared. Chapter 6 suggests that this becomes a particular concern for ISA based on proliferating investment treaties, given the greater public interests involved when a host state is a party and its measures are challenged under a public international law instrument. Asia-related ISA disputes have been comparatively few, but are expected to grow as institutional barriers to bringing or defending them diminish, including ready availability of experienced arbitrators, counsel and experts.²⁰

Figure 1.2 The weather map of international arbitration

Chapter 7 provides an even broader ‘weather map’, as reproduced above from Figure 7.1, charting the growth and trajectory of international arbitration worldwide.²¹ To update my 2003 assessment of the situation around the turn

²⁰ J Romesh Weeramantry, ‘Investment Arbitration in Asia: Five Perspectives on Law and Practice’ (2012) 28 *Arbitration International* 19; Vivienne Bath and Luke Nottage, ‘International Investment Agreements and Investor-State Arbitration in Asia’ (2020) 20/08 *Sydney Law School Research Paper* <<https://ssrn.com/abstract=3544458>>.

²¹ Adapting and updating Luke Nottage, ‘A Weather Map for International Arbitration: Mainly Sunny, Some Cloud, Possible Thunderstorms’ (2015) 26 *American*

of the twenty-first century (see Chapter 3): although there has been further globalisation, due to a parallel surge in treaty-based ISA cases there has been more formalisation of the overall field too. We find ever more detailed procedural (and substantive) provisions in burgeoning treaties, combined with significant costs and delays in ISA despite growing transparency,²² 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'.²³ 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. Second, this research largely confirms emergent polarisation among stakeholders and the general public concerning arbitration (as posited by Emmanuel 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 not only prompt further calls to formalise ISA, to shore up its legitimacy, but may also spill over to the field of ICA.

Chapter 8 focuses on confidentiality versus transparency in international arbitration, especially in Australia and Japan.²⁴ 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 onward, and confidentiality applies generally in Japan too because almost all cases seated there adopt arbitral rules that have (somewhat increasingly) strict

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.

²² Luke Nottage and Ana Ubilava, 'Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry' (2018) 21(4) *International Arbitration Law Review* 100.

²³ 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), manuscript available at <<https://ssrn.com/abstract=3116528>>.

²⁴ Somewhat updating Luke Nottage, 'Confidentiality versus Transparency in International Arbitration: Asia-Pacific Tensions and Expectations' (2020) 16 *Asian International Arbitration Journal* 1.

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 consistent with the greater public interests compared to most ICA cases. Despite differences between the two sub-fields, domestic political controversy over ISA generally means it 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.

4. INVESTOR-STATE ARBITRATION AND INTERNATIONAL INVESTMENT TREATIES

Part III of this book 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 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’.

As detailed in Chapter 9,²⁵ Australia is intriguing because from 2011 to 2013 the Labor–Greens Gillard government applied a Trade Policy Statement that eschewed any form of ISDS in future treaties (albeit focusing especially on 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 would be less attractive. If these two remaining routes were nonetheless pursued, their procedures might have been even more formalised (with associated costs and delays, including multiple appeals through

²⁵ 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).

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.

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.²⁶ 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 it achieved that in 2019. The second half of Chapter 10 then examines how Japan has gradually expanded its investment treaty programme 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,²⁷ 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'.

²⁶ 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.

²⁷ See four and seven treaty-based outbound claims reported respectively via the UN Conference on Trade and Development ('UNCTAD') *Investment Dispute Settlement Navigator*, <<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/105/japan/investor>> and <<https://investmentpolicy.unctad.org/investment-dispute-settlement/country/11/australia/investor>>, plus several more separate Australian investor claims based on contractual consent to the jurisdiction of the International Centre for the Settlement of Investment Disputes via <<https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>> (accessed on 27 August 2020). Many of these claims, along with inbound claims made or threatened against Australia, are discussed in Chapter 11 and further in Amokura Kawharu and Luke Nottage, 'The Curious Case of ISDS Arbitration Involving Australia and New Zealand' (2018) 44 (2) *University of Western Australia Law Review* 32.

Chapter 11 provides a comprehensive analysis of Australian investment treaty and ISDS practice.²⁸ It mentions my separate analysis²⁹ 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 an 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 the tribunal's interpretation, 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).

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.³⁰ If domestic politics change again in Australia, a new

²⁸ 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 section 6 Postscript and Appendix.

²⁹ 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>>. A recent positive jurisdictional decision by a tribunal in a claim brought by Tantalum under Australia's BIT with Egypt (ICSID Case No ARB/18/22), which included similar 'shall consent' wording, reportedly found that the treaty was intended to provide immediate consent to ISDS. See Lisa Bohmer, 'Tribunal in Egyptian Mining Arbitration Finds Advance Consent to ICSID Arbitration in Australia-Egypt BIT', *Investment Arbitration Reporter* (12 October 2020).

³⁰ 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

Labor-led government might revert to eschewing ISDS (like New Zealand from late 2017³¹), thus undermining globalisation – unless and until a new, widely accepted international model is substituted.³²

Meanwhile, Australia will mostly keep seeking ISDS in its treaties, while being pragmatic enough to not insist on it in individual cases. For example, in late 2019 Australia reportedly agreed with 14 other states to leave out ISDS, for now, under the Regional Comprehensive Economic Partnership (‘RCEP’) FTA. However, for Australia (as with Japan), ISDS is largely available under other treaties, as summarised in Table 1.1 overleaf.³³

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.³⁴ 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. However, its history of flexibility in negotiations and drafting (and even its own tradition impacting on ICA, outlined in Part I of this book) 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.

Hepburn and Luke Nottage, ‘A Procedural Win for Public Health Measures’ (2016) 18 *Journal of World Investment and Trade* 307.

³¹ 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.

³² 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.

³³ 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.

³⁴ 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, 2021) 115, with a manuscript at <https://ssrn.com/abstract=3548358>. See also James Claxton, Luke Nottage and Ana Ubilava, ‘Pioneering Mandatory Investor-State Conciliation Before Arbitration in Asia-Pacific Treaties: IA-CEPA and HK-UAE BIT’ *Kluwer Arbitration Blog* (5 September 2020).

Table 1.1 *Separate ISDS-backed investment treaty commitments among RCEP parties (and India)*

	ASEAN	Australia	NZ	Korea	Japan	China
ASEAN	Yes (ASEAN Comprehensive Investment Agreement)	Yes	Yes	Yes	NO (with Philippines) but ISDS-backed BITs or FTAs with all other ASEAN states	Yes (for most commitments)
Australia	Yes	n/a	NO	Yes	Yes (CPTPP)	Yes (but BIT & FTA both limited)
NZ	Yes	NO	n/a	Yes	Yes (CPTPP)	Yes
Korea	Yes	Yes	Yes	n/a	Yes (BIT and trilateral IIA)	Yes (trilateral Investment Agreement & FTA)
Japan	NO (with Philippines) but with all others via BIT or FTA)	Yes (CPTPP)	Yes (CPTPP)	Yes (BIT & trilateral IIA)	n/a	Yes (trilateral IIA)
China	Yes (for most commitments)	Yes (but limited)	Yes	Yes (FTA & trilateral IAA & FTA)	Yes (trilateral IIA)	n/a
(India)	(NO – ISDS in 2014 Investment Agreement, but not yet in force)	(NO – BIT terminated in 2017, but sunset clause maintaining ISDS for existing investments)	(NO treaty)	Yes (CEPA)	(Yes – FTA)	Yes (BIT 2006)

5. CONCLUSION

Overall, this book 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.

The concluding 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 more cost- and time-effective procedures, and a more informal approach to arbitration generally. It might also generate a more global approach, including more diversification of arbitral seats, and new opportunities for Australia and Japan. Yet there may also be a significant ‘reversion to the mean’.³⁵ Chapter 12 therefore ends rather 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 twenty-first century.

³⁵ Luke Nottage, ‘Will the COVID-19 Pandemic Be a Long-Term Game Changer for International Arbitration?’ *Kluwer Arbitration Blog* (16 July 2020).