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THE JAPAN AUSTRALIA INVESTMENT RELATIONSHIP: TREATIES THEN AND NOW

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[Australia continues to seek closer economic relationships with its Asian neighbours and other countries around the globe, particularly through the conclusion of treaties governing trade and investment matters. Australia's investment relationship with Japan is underpinned by several such agreements, from the 1957 Agreement on Commerce to the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership. As increasing material becomes publicly available regarding the negotiation of earlier economic treaties, lessons can be learned for ongoing negotiations and economic policies. This article considers the negotiation of the 1976 Basic Treaty of Friendship and Co-operation between Australia and Japan as a way of reflecting on the development of international investment law and its implications for Australia's trade and investment strategy. Even at that time, negotiators were aware of the potential for overly expansive interpretations of investment obligations to hinder Australian regulatory autonomy—something of much greater concern now that Japanese investors may bring claims directly against Australia as host State.]

Keywords: Australia; foreign investment; Japan; international law; treaty interpretation

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I Introduction

The international investment regime has come under increasing scrutiny in recent years, particularly in connection with investor–State dispute settlement ('ISDS') and the open-ended nature of substantive investment protections. As this scrutiny has intensified, more attention has been paid to the history of bilateral investment treaties ('BITs'). The international relations perspective of this history has been particularly rich. Lauge Poulsen has conducted wide-ranging interviews to understand why developing countries entered so many of these treaties despite their inherent risks, revealing the influence of bounded rationality in government behaviour.[1] Taylor St John has provided a historical institutionalist explanation, drawing on extensive archival material, of how investor–State arbitration came into being and is now such an entrenched and powerful force.[2] Poulsen, Waibel and Bonnitcha have, in a rare collaboration involving legal, economic and political insights, examined the political economy of the investment treaty regime against the background of history and current developments.[3] As a Professor of Law, Kenneth Vandevelde has chronicled the negotiation of the United States' ('US') postwar friendship, commerce and navigation ('FCN') treaties.[4]

Despite this heightened interest in historical records, little in depth work has to date focused on Australia's historical negotiation of trade or investment treaties, notwithstanding the progressive release of relevant materials in Australia. The Australian legislation governing archival records of the Commonwealth government was amended with effect from 1 January 2011, following which the period of 'open access' is transitioning, over a 10-year period, from 30 years since creation to 20 years since creation of the relevant record.[5] Thus, for example, most Commonwealth records created in 2000 will be generally accessible from 1 January 2021, subject to examination for exempt information.[6]

Just as Vandevelde has investigated US FCN treaties, one Australian FCN-like treaty exists and is worth exploring as a precursor to today's international investment agreements ('IIAs'). These agreements today largely take the form of BITs or preferential trade agreements ('PTAs') including investment chapters. Australia has 16 BITs in force[7] and 13 PTAs with investment

[1] Lauge N Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press, 2015).
[2] Taylor St John, *The Rise of Investor–State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press, 2018).
[3] Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017).
[4] Kenneth J Vandevelde, *The First Bilateral Investment Treaties: US Postwar Friendship, Commerce and Navigation Treaties* (Oxford University Press, 2017).
[5] *Archives Act 1983* (Cth) ss 3(7), 31(1).
[6] See National Archives of Australia, *Access to Records under the Archives Act* <https://www.naa.gov.au/help-your-research/using-collection/access-records-under-archives-act> (accessed 19 March 2020).
[7] Australia and Uruguay have agreed to terminate their older BIT upon entry into force of a newer one signed in 2019.

chapters in force (with two more signed but not yet in force).[8] Australia's only FCN-like treaty is with Japan, in addition to which Australia now has multiple other trade and investment agreements and negotiations.

The *Basic Treaty of Friendship and Co-operation between Australia and Japan* ('Basic Treaty') was signed in Tokyo in 1976 and entered into force in 1977;[9] it forms the focus of this article. Its 30th anniversary celebration in 2006 provided an opportunity for some scholarly reflections on its negotiation.[10] More recently, in 2014, Japan and Australia signed the *Agreement between Australia and Japan for an Economic Partnership* ('JAEPA'),[11] which is a PTA including an investment chapter but without an ISDS mechanism. Following the US withdrawal from the *Trans-Pacific Partnership* ('TPP') in early 2017, Australia and Japan were among 11 countries who signed the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ('CPTPP')[12] in 2018. The CPTPP entered into force for Japan and Australia, among others, on 30 December 2018, now creating an ISDS mechanism between the two countries for the first time. At the time of writing, Japan and Australia are among 16 countries negotiating the *Regional Comprehensive Economic Partnership* ('RCEP'), centred around the ten Member States of the Association of Southeast Asian Nations ('ASEAN') and the six countries with PTAs with ASEAN (in addition to Australia and Japan: China, India, New Zealand and South Korea).

These various newer agreements and negotiations provide an opportunity to reflect on the continuing Basic Treaty and its basic investment obligations in the light of more recent developments in jurisprudence and treaty drafting. They operate against the backdrop of the multilateral trade regime, first under the *General Agreement on Tariffs and Trade 1947* ('GATT 1947')[13] and now under the WTO,[14] of which both Australia and Japan are Members. The WTO contains some investment aspects, most notably through the *Agreement on Trade-Related Investment Measures* ('TRIMS Agreement')[15] and the application of the *General Agreement on*

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[8] PTAs signed but not yet in force are with Indonesia and the Pacific Agreement on Closer Economic Relations (PACER) Plus, which is between Australia, New Zealand, and eight Pacific Island countries.

[9] *Basic Treaty of Friendship and Co-operation between Australia and Japan*, signed 16 June 1976 (entered into force 21 August 1977).

[10] See Moreen Dee, *Friendship and Co-operation: the 1976 Basic Treaty between Australia and Japan* (Department of Foreign Affairs and Trade, 2006); Gary Woodard, Moreen Dee and Max Suich, *Negotiating the AustraliaJapan Basic Treaty of Friendship and Cooperation: Reflections and Afterthoughts*, Asia Pacific Economic Papers, No 362 (Australian National University, 2007).

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

[12] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018 (entered into force 30 December 2018 for Australia, Canada, Japan, Mexico, New Zealand and Singapore and 14 January 2019 for Viet Nam) ('CPTPP').

[13] *General Agreement on Tariffs and Trade 1947*, GATT Doc LT/UR/A–1/A/1/GATT/2, signed 30 October 1947.

[14] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1984, 1867 UNTS 3 (entered into force 1 January 1995) ('*Marrakesh Agreement*').

[15] *Marrakesh Agreement*, annex 1A ('*Agreement on Trade-Related Investment Measures*') ('TRIMS Agreement').

Trade in Services ('GATS')[16] to commercial presence (mode 3 service supply). However, its impact on investment is limited, particularly given that the Doha Round of multilateral trade negotiations has effectively collapsed and the dispute settlement system is foundering due to United States blockage of the appointment of Appellate Body Members. I therefore leave the WTO agreements largely to one side in analysing the development of the investment relationship between Australia and Japan from the time of the Basic Treaty.

Part II of this article provides a short overview of the significant economic relationship between Japan and Australia, which has created the impetus for the types of agreements under consideration, including the Basic Treaty. Part III offers some general context for the negotiations towards the Basic Treaty, including some of the overarching difficulties in reaching agreement, such as disagreement as to where in the treaty and associated documents to include certain terms. The main body of the article in Part IV examines the substantive obligations in the Basic Treaty, with some comparison to equivalent obligations in modern IIAs. The bulk of this part addresses non-discrimination (in particular most-favoured nation ('MFN') treatment) and fair and equitable treatment, which are interlinked obligations in the Basic Treaty that were among the most difficult to negotiate. MFN treatment ensures that a host State will treat investments and investors from the home State no less favourably than investments and investors from any other country. Fair and equitable treatment is predominantly a non-contingent obligation, requiring an absolute standard of treatment regardless of how others are treated (but see further below).

The Basic Treaty shows an awareness by negotiators of various factors that have become clearer in the intervening years, such as: the significance of using particular terms or treaty tools when a tribunal comes to interpret the treaty; the need to take account of existing and future agreements; the distinction between obligations under domestic (including constitutional) law and those under international investment law; the pros and cons of an undefined standard such as fair and equitable treatment; and the heightened significance of such standards in the hands of an arbitral tribunal. As ISDS has entered the Australia–Japan relationship, the need for appropriate safeguards for regulatory autonomy of the host State has become more acute.

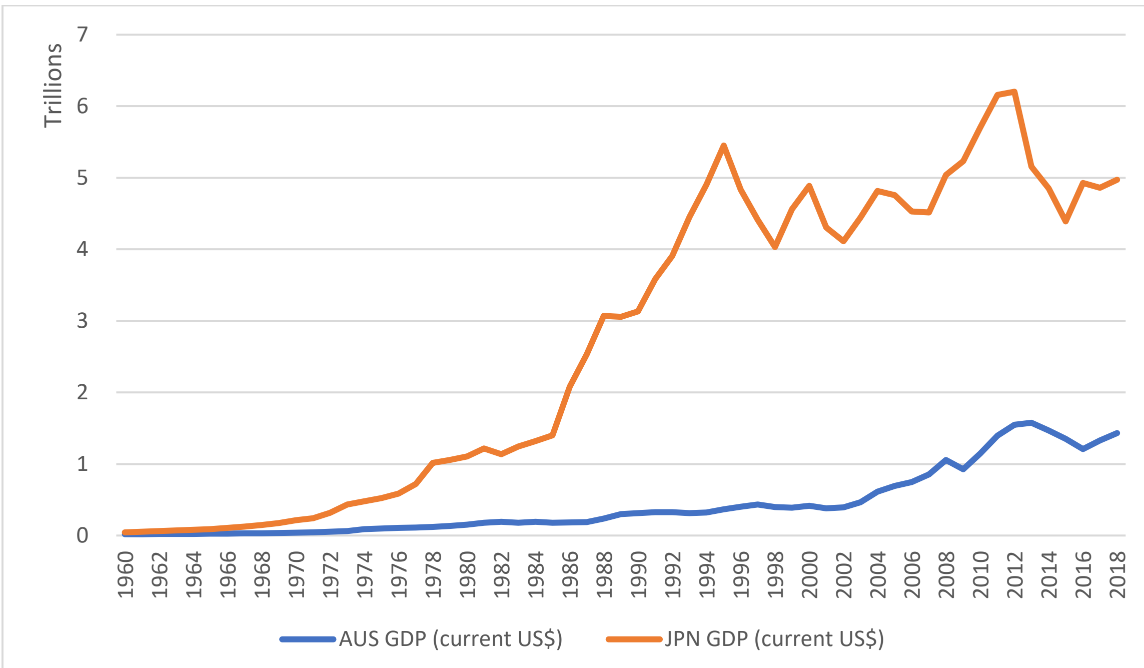
II ECONOMIC RELATIONSHIP OF JAPAN AND AUSTRALIA

> Australia does not have the same links with Japan as it has with Britain, New Zealand and the United States — links of kinship, history, culture, language, financial investment and shared strategic interests. … [But the countries have a] balanced relationship between two nations so disparate in terms of race, culture and economic power which transcends deeply-ingrained racial attitudes on both sides; and which has not yet been a feature of relationships between Asian and Western societies.[17]

[16] *Marrakesh Agreement*, annex 1B ('*General Agreement on Trade in Services*') ('GATS').
[17] Australian Government Publishing Service, *Australia–Japan Relations: Report of the Ad Hoc Working Committee on Australia–Japan Relations* (Canberra, May 1978) 19 ('1978 Ad Hoc Report').

In 2017, Australia touted sixty years of trade with Japan[18] since the signing by the two countries of the *Agreement on Commerce* in 1957,[19] designed to 'improv[e] and develo[p] the commercial relations between the two countries'.[20] Table 1 shows the growth of the countries' GDP between 1960 and 2018 based on World Bank data. Since the time of that original agreement, the countries' GDP have diverged substantially but are intrinsically linked. A 2000 report by an Australian Senate Committee noted the impact of 'sluggish economic activity' in Japan from the early 1990s on Australia's exports.[21]

Table 1: Japan / Australia GDP 1960-2018



Data source: World Bank <https://data.worldbank.org/indicator/ny.gdp.mktp.cd>

A 1978 report by an ad hoc Australian government committee described the 'heart of the Australian–Japanese trade relationship' as lying in 'the complementarity of Japan's basic import needs and Australia's ability and willingness to supply them'.[22] In particular, the trade relationship developed in the 1960s from growing Japanese demands for Australian minerals to support its world-leading steel industry, and corresponding increases in Australian capacity in

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[18] See, eg, Minister for Trade, Tourism and Investment, Media Release (17 April 2017) <https://www.trademinister.gov.au/minister/steven-ciobo/media-release/marking-60-years-australias-trade-and-investment-partnership-japan> (accessed 19 March 2020).

[19] *Japan and Australia Agreement on Commerce (with exchange of notes)*, signed 6 July 1957, 318 UNTS 381 (as amended with effect from 27 May 1964).

[20] Ibid preamble.

[21] Parliament of the Commonwealth of Australia, Senate Foreign Affairs, Defence and Trade References Committee, *Japan's Economy: Implications for Australia* (Report 1, August 2000) 114 [6.4]–[6.5], 117 [6.13].

[22] 1978 Ad Hoc Report, 25.

this area.[23] These developments 'represented a watershed both in economic and political relations between Australia and Japan' but were not foreseen at the time of concluding the 1957 *Agreement on Commerce*.[24] Yet the committee was keen to point out that 'the major Australian resource projects which developed in this context … were promoted by Japanese needs, [but] … not initiated or financed by Japan'.[25] Hence, they did not 'place Australia in a neo-colonial relationship with Japan'.[26]

Today, the two countries still have a very close economic relationship, cemented by their various economic agreements. In 2017–2018, Japan was ranked:

- Australia's second two-way trading partner after China;
- second after China as a market for Australian goods and services exports;
- fifth as a source of international visitors into Australia; and
- fourth as a source of imports of goods and services into Australia.[27]

After its conclusion, and notwithstanding its symbolic goals from Australia's perspective the Basic Treaty was expected to improve 'the general political climate for new investment … from Japan's point of view', while enhancing the possibility of Australia becoming a larger recipient of Japanese investment 'aimed at securing supplies of raw materials and access to markets in host countries'.[28] The relationship today now clearly extends beyond trade to a solid investment connection. In 2018, as shown in Table 2, Japan was ranked second to the United States as a source of foreign direct investment ('FDI') in Australia.

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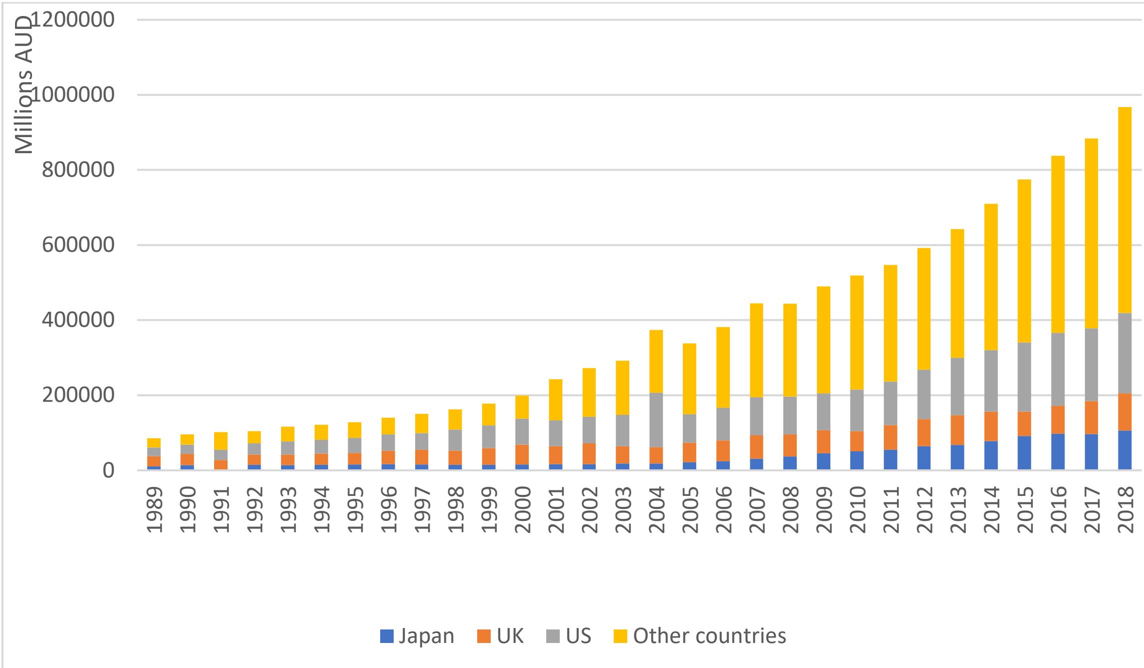
[23] 1978 Ad Hoc Report, 22–23. See also Australian Bureau of Statistics, *Special Article – A Century of Mining in Australia* (8515.0, 25 January 2001) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/featurearticlesbytitle/5AF6AA8AB17AF763CA2569DE00271B12?OpenDocument> (accessed 19 March 2020).
[24] 1978 Ad Hoc Report, 21–22.
[25] 1978 Ad Hoc Report, 36.
[26] 1978 Ad Hoc Report, 36.
[27] Commonwealth of Australia, Department of Foreign Affairs and Trade, *Trade and Investment at a Glance 2019* (2019) <https://www.dfat.gov.au/sites/default/files/trade-and-investment-at-a-glance-2019.pdf> (accessed 19 March 2020).
[28] 1978 Ad Hoc Report, 48.

Table 2: FDI into Australia 1989-2018



Data source: Australian Bureau of Statistics, International Investment Position, Catalogue 53520 (8 May 2019) (2001-2018); Supplementary Country Statistics 2000-2001, Catalogue 5352.0 (1992-2000, as at 30 June); Balance of Payments and International Investment Position Australia 1993-1994, Catalogue 5363.0 (1989-1991, as at 30 June)

III Context of the Negotiations towards the Basic Treaty

For some time before the conclusion of the Basic Treaty,[29] Japan had sought such a treaty as a means of avoiding the 'pre-war discrimination' experienced by the Japanese in Australia and elsewhere,[30] while Australia regarded it as unnecessary (because 'Japan received [MFN] treatment as a matter of course')[31] and inappropriate (because Australia had no other FCN-type treaties,[32] nor any as comprehensive as the Basic Treaty ultimately was).[33] This division between the countries' expressed interests persisted through the negotiation of the Basic Treaty. Australia wanted a broad, umbrella treaty of 'symbolic nature', essentially signifying the friendship between the two countries.[34] In contrast, Japan sought a more traditional FCN with legal guarantees along the lines of its pre-existing treaties of this kind (such as with the United

[29] Moreen Dee, 'The Negotiation of the 1976 Basic Treaty of Friendship and Cooperation between Australia and Japan: A Study of the Documents' in Woodard et al (n 10) 10, 11.
[30] 1978 Ad Hoc Report, 94–95.
[31] Ibid 95.
[32] Ibid.
[33] NAA: A1838, 3103/10/20/1 PART 20, 165/269, 'Basic Treaty of Friendship and Co-operation between Australia and Japan' [5].
[34] National Archives of Australia ('NAA'): A1838, 3103/10/20/1 PART 14 (missing 18 October 1975 to 21 January 1976 portion), 41/64, 'Inclusion in Departmental Brief for New Minister – The Treaty of Nara (26 November 1975)'. See also Dee (n 29) 13–14.

Kingdom and United States),[35] creating significant negotiating tensions.[36] Australia understood a typical FCN treaty (which would have 'dangerous implications for the Government's policies')[37] to deal primarily with 'economic, commercial and navigation matters (unlike a more general treaty' such as entry and employment, taxation and fiscal matters, expropriation, import and export controls, and transit rights.[38] True to Australia's intentions, the Basic Treaty eventually concluded is more a novel hybrid than a traditional FCN treaty.

An agreement to conclude a Treaty of Friendship and Cooperation was announced by Prime Minister Gough Whitlam of Australia and Prime Minister Kakuei Tanaka of Japan in October 1973.[39] Negotiations commenced in December 1993, with a first draft treaty presented by Australia to Japan, containing general wording and 'best endeavours' commitments.[40] Japan followed with a counterproposal in May 1974, condensing several Australian-proposed provisions and traditional non-discrimination obligations.[41] By December 1974, the Japanese Prime Minister was Takeo Miki. The scope of the treaty and half the wording had been settled,[42] but a setback came in early 1975 when the parties discovered they had very different understandings of the MFN obligation,[43] as discussed further below.

Australia understood Japan to have a reputation for hard bargaining and maintaining extreme positions until the last possible moment.[44] Australian negotiators considered that they had made significant errors in initial negotiating approaches, being primarily negative and reactive, partly due to a lack of 'specialised economic knowledge' and 'treaty-making experience', to their disadvantage.[45] However, advantage shifted to Australia in March 1975 when it indicated that it

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[35] NAA: A1838, 3103/10/20/1 PART 20, 165/269, 'Basic Treaty of Friendship and Co-operation between Australia and Japan' [5].
[36] See, eg, NAA: A1838, 3103/10/20/1 PART 11, 126/283, 'Draft Submission for the Prime Minister (5 May 1975)' [5].
[37] NAA: A1838, 3101/10/20/1 PART 12, 122/304, Draft note from GV Brady (Assistant Secretary, North Asia Branch) to Mr Woodward (Secretary) [5].
[38] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 10/61, Attachment A (Should There Be a Treaty of Friendship and Co-operation with Japan?) [6].
[39] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 28/61, Attachment C (Background – Summary of Negotiations on the Basic Treaty) [1].
[40] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 28/61, Attachment C (Background – Summary of Negotiations on the Basic Treaty) [2].
[41] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 28/61, Attachment C (Background – Summary of Negotiations on the Basic Treaty) [2].
[42] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 28–29/61, Attachment C (Background – Summary of Negotiations on the Basic Treaty) [3].
[43] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 29/61, Attachment C (Background – Summary of Negotiations on the Basic Treaty) [4]. See also Dee (n 29) 14.
[44] NAA: A1838, 3103/10/20/1 PART 3, 27/243, 'Treaty of Nara – Summary Record of the Meeting at the Department of Foreign Affairs on Wednesday, 21 August 1974'.
[45] NAA: A1838, 3101/10/20/1 PART 12, 121–122/304, Draft note from GV Brady (Assistant Secretary, North Asia Branch) to Mr Woodward (Secretary). See also NAA: A1838, 3103/10/20/1 PART 22, 23/361. 'Australia's Umbrella Treaty with Japan – How Leaky?' [46].

was not willing to conclude a treaty at all costs.[46] Later in 1975, Australian officials and departments became suspicious and distrustful of Japan's intentions, hindering the negotiations.[47] Towards the end of that year, there was a dramatic change of government in Australia, with Malcolm Fraser becoming Prime Minister and the Liberal and Country Party government deciding to continue towards the conclusion of the treaty with Japan, despite not being formally committed to doing so.[48] Negotiations concluded in Canberra in May 1976.[49]

Apart from the meaning and scope of the MFN obligation, two key overarching problems in the negotiations concerned the name to be given to the treaty (which 'took up a great deal of time and aroused more emotion on the Japanese side than any other')[50] and the concept of ownership and control. Australia had favoured the name NARA Treaty because the Australian Prime Minister had formally proposed the treaty during a visit to Nara in Japan and NARA was an acronym for Nippon–Australia Relations Agreement.[51] Japanese distaste for the name stemmed from the tenuous connection to Nara as well as the fact that the word 'onara' means 'breaking wind' in Japanese.[52] With the change in government, Australia agreed to drop the name NARA Treaty.[53]

Australia wished to include in the treaty formal recognition of its ownership and control of its industries and mineral and energy resources,[54] whereas Japan favoured such a note only in ancillary documents, 'to retain some leverage with which to influence [Australian] policies in the future':[55]

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[46] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 23/61, Attachment B (Basic Treaty of Friendship and Co-operation between Australia and Japan – Negotiating Position and Other Outstanding Matters) [29]–[31].

[47] NAA: A1838, 3103/10/20/1 PART 11, 62/283, 'Inward Cablegram to Canberra – Nara Treaty, 27 June 1975' [3]; NAA: A1838, 3101/10/20/1 PART 12, 217/304, 'Inward Cablegram to Canberra – Nara Treaty, 26 August 1975'. See also Dee (n 29) 14.

[48] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 9/61, Attachment A (Should There Be a Treaty of Friendship and Co-operation with Japan?) [3] et seq.

[49] NAA: A12909, Submission No 371, Decision No 944 (2 June 1976), 8–10/33, Attachment A (Brief Report on Negotiations).

[50] NAA: A1838, 3103/10/20/1 PART 1, 106/283, 'Treaty of Nara' [C]. See also, eg, NAA: A1838, 3103/10/20/1 PART 2, 293/304, 'Treaty of Nara – Comments on Japanese Draft and Supplementary Explanation (16 May 1974)'.

[51] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 26/61, Attachment B (Basic Treaty of Friendship and Co-operation between Australia and Japan – Negotiating Position and Other Outstanding Matters) [41].

[52] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 26/61, Attachment B (Basic Treaty of Friendship and Co-operation between Australia and Japan – Negotiating Position and Other Outstanding Matters) [42].

[53] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 27/61, Attachment B (Basic Treaty of Friendship and Co-operation between Australia and Japan – Negotiating Position and Other Outstanding Matters) [43].

[54] NAA: A1838, 3103/10/20/1 PART 10, 45–49/153, 'Third Round of Nara Treaty Negotiations, 4–11 March 1975 in Tokyo'.

[55] NAA: A1838, 3103/10/20/1 PART 11, 108/283, 'The Treaty of Nara'. See also NAA: A1838, 3103/10/20/1 PART 8, 31/83, 'Treaty of Nara' [2].

> [T]he 'safe-guarding' clauses ... Japan first insisted be moved down from the Articles themselves to an Exchange of Notes, and then … down again to an Agreed Minute.[56]

> [I]f it proved absolutely impossible after all of this to get the Japanese to agree to an 'agreed' agreed minute, then the delegation is authorised to proceed to a noting agreed minute.[57]

Australia's concerns were ultimately contained merely in a 'Record of Discussion', of which Japan's representative took note, that:

> [I]t was Australia's position that the aspirations of each country in relation to the ownership and control of its resources and industries and to the rational and efficient development of its mineral and energy resources were to be taken into account by the two Governments.[58]

This statement contrasted with an earlier draft by Japan, for example, stating that 'it is the common understanding of the two Governments … that they will take into account the aspirations of each country (i) in relation to the efficient and rational development of its mineral and energy resources',[59] to which Australia wished to add the words 'ownership and control'.[60]

The statement in the Record of Discussion might still be relevant to interpreting the Basic Treaty pursuant to Article 31(2) of the *Vienna Convention on the Law of Treaties* ('VCLT'), on the basis that it constitutes part of the context of the treaty as 'an instrument … made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'.[61] Nevertheless, as the wording of the statement is very general and couched as a position of Australia, it would be unlikely to have a significant influence on interpreting any particular treaty term or provision. This issue may be compared to more recent efforts to preserve regulatory autonomy in IIAs, which Australia and other countries have tackled through a variety of drafting tools, to varying degrees of success. As with the Record of Discussion, on one view, these different drafting tools may have a more limited impact on outcomes than the treaty negotiators intend.[62]

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[56] NAA: A1838, 3103/10/20/1 PART 8, 31/83, 'Treaty of Nara' [2].
[57] NAA: A1838, 3103/10/20/1 PART 8, 5/83, 'Department' (29 January 1975).
[58] Basic Treaty, Record of Discussion, initialed in Tokyo (16 June 1976).
[59] NAA: A1838, 3103/10/20/1 PART 8, 4/83, 'Treaty of Nara – Japanese Draft' (22 January 1975).
[60] Ibid 5/83, 'Department' (29 January 1975).
[61] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('VCLT') art 31(2)(b).
[62] See Elizabeth Sheargold, *Sound and Fury: Assessing the Steps to Safeguard Regulatory Autonomy in the Drafting of Contemporary International Investment Agreements* (PhD Thesis, The University of Melbourne, 2018) <https://minerva-access.unimelb.edu.au/handle/11343/214687>.

IV Substantive Obligations in the Basic Treaty and Today

A *Aspirational Provisions*

The Basic Treaty contains many broad and apparently innocuous provisions that would be unlikely to create disputes today given their aspirational character. Article I:1 refers to 'enduring peace and friendship' as the 'basis of relations between Australia and Japan', while Article I:2 expresses the objective of the treaty as 'extend[ing] and strengthen[ing] relations between the Contracting Parties'. Article II provides for cooperation 'in accordance with the Principles of the Charter of the United Nations in maintaining and strengthening' relations between countries. Article III:1 provides for the parties to 'endeavour to facilitate, strengthen and diversify mutual understanding and co-operation in such areas of mutual interest as the political, economic, labour relations, human rights, legal, scientific, technological, social, cultural, professional, sporting and environmental fields'.

Article IV refers to international trade pursuant to the GATT 1947 as well as cooperation in connection with the International Monetary Fund and the Organisation for Economic Co-operation and Development. Articles V, VI, VII and X refer respectively to cooperation in: 'relations in the economic, trade and commercial fields'; 'in the trade in and development of' 'mineral resources, including energy resources'; 'in the exchange of capital and technology'; and in the 'development of shipping between the two countries'.

B *Expropriation*

A significant obligation in the Basic Treaty that is broadly recognisable in today's typical IIAs is the prohibition on unlawful expropriation. Article IX:4 provides:

> The *property* of nationals of one Contracting Party within the territory of the other Contracting Party shall not be compulsorily *taken* unless for a public purpose and unless prompt, adequate and effective compensation is paid. Without prejudice to the foregoing, with respect to all matters dealt with in this paragraph, the nationals of one Contracting Party shall be accorded within the territory of the other Contracting Party treatment which shall in no case be discriminatory between those nationals and nationals of any third country.[63]

To the criteria of public purpose, compensation, and non-discrimination would normally be added in typical IIAs that the expropriation is made 'under due process of law'.[64] Additional clarifications in modern IIAs include, for example, that the mere fact of non-payment of a subsidy does not constitute an unlawful expropriation,[65] and that non-discriminatory regulatory

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[63] Basic Treaty, art IX:4 (emphasis added).

[64] See, eg, *Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments*, signed 5 April 2019 (not yet in force) art 7.1(b).

[65] Ibid art 7.4.

actions designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriations.[66]

In drafting this provision, Australian negotiators noted that 'the Australian Government is in any case bound by the Constitution to give "just terms"'.[67] This remark was made in examining the interaction between obligations concerning expropriation and MFN, showing negotiators' awareness of the potential for provisions in the Basic Treaty merely to mirror existing domestic obligations as opposed to going beyond them. Indeed, the Australian Constitution precludes the Parliament of the Commonwealth of Australia from acquiring property from any (Australian) State or person other than on 'just terms'.[68] In the first investment treaty arbitration ever brought against the Australian government, claims including unlawful expropriation were made (but denied on jurisdictional grounds),[69] paralleling unsuccessful constitutional claims in the High Court of Australia of unjust acquisition of property.[70] However, given the complexity and longstanding nature of these obligations in international investment law and Australian constitutional law, they cannot be assumed to be identical.

The primary reason for the High Court's denial of the constitutional claim was the reasoning of the majority that an acquisition of property requires a conferral of a 'proprietary' benefit,[71] which did not arise from the challenged measures (Australia's 'plain' tobacco packaging requirements).[72] The Court noted that this understanding of 'acquisition' under the Australian Constitution might differ from the notion of a 'taking' under the Fifth Amendment of the United States Constitution.[73] Similarly, an indirect expropriation would not necessarily require a proprietary acquisition. However, Australia's most recently signed BIT, as an example, does contain a proprietary element:

> An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.[74]

It is nevertheless possible that an indirect expropriation might arise from an *interference* with a property right or interest that does not entail conferral or *acquisition* of a proprietary benefit.

[66] Ibid Annex B [3(b)].
[67] NAA: A1838, 3103/10/20/1 PART 9, 49/195, 'For Cabinet – Nara Treaty' [8].
[68] *Australian Constitution*, s 51(xxxi).
[69] See *Philip Morris Asia Ltd v Australia*, PCA Case No 2012–12, Award on Jurisdiction and Admissibility (17 December 2015). See also Jarrod Hepburn and Luke Nottage, 'A Procedural Win for Public Health Measures' (2017) 18 *Journal of World Investment & Trade* 307.
[70] See *JT International SA v Australia; British American Tobacco Australasia Ltd v Australia* (2012) 250 CLR 1. See also Tania Voon, 'Acquisition of Intellectual Property Rights: Australia's Plain Tobacco Packaging Dispute' (2013) 2 *European Intellectual Property Review* 113.
[71] *JT International SA v Australia; British American Tobacco Australasia Ltd v Australia* (2012) 250 CLR 1, [69] (Hayne and Bell JJ); [42] (French CJ); [118], [131], [147] (Gummow J); [305] (Crennan J); [365] (Kiefel J).
[72] *Tobacco Plain Packaging Act 2011* (Cth); Tobacco Plain Packaging Regulations 2011 (Cth).
[73] See, eg, *JT International SA v Australia; British American Tobacco Australasia Ltd v Australia* (2012) 250 CLR 1, [42] (French CJ).
[74] *Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments*, signed 5 April 2019 (not yet in force) Annex B [1].

This distinction makes clear how an investment treaty claim of unlawful expropriation under one of Australia's IIAs might succeed while a constitutional claim of unjust acquisition on the same facts might simultaneously fail. By now this distinction has become clear to the Australian government. But the wording of the Basic Treaty, which refers to 'taking' of 'property' (including rights and interests therein),[75] might be closer to Australia's constitutional provision on acquisition of property than to broader concepts of indirect expropriation.

C *Non-Discrimination and Fair and Equitable Treatment*

'[F]air and equitable' mean[s] 'a fair go'.[76]

> Without changing existing Australian legislation and policies in any way, we were able to reassure Japan in a formal legal document that it would not be discriminated against in the areas specified.[77]

1 *Articles VIII and XI*

The core substantive obligations of the Basic Treaty are contained in Articles VIII and IX, as elaborated in associated documents. These two provisions encompass, in addition to expropriation, both non-discrimination and fair and equitable treatment, among other things (eg full protection and security).[78] Article VIII:1 provides:

> Each Contracting Party shall accord to the nationals of the other Contracting Party *fair and equitable treatment* with respect to their *entry into*, sojourn or residence in, travel within and departure from its territory, provided that in no case shall such treatment be *discriminatory* between nationals of the other Contracting Party and nationals of any third country.[79]

Article IX:3 provides, similarly:

> Each Contracting Party shall accord within its territory to the nationals of the other Contracting Party *fair and equitable treatment* with respect to matters relating to their *business and professional activities*, provided that in no case shall such treatment be *discriminatory* between nationals of the other Contracting Party and nationals of any third country.[80]

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[75] Basic Treaty, Agreed Minutes [2].
[76] NAA: A1838, 3103/10/20/1 PART 22, 19/361. 'Australia's Umbrella Treaty with Japan – How Leaky?' [40].
[77] 1978 Ad Hoc Report, 95.
[78] Basic Treaty, art IX:1.
[79] Basic Treaty, art VIII:1 (emphasis added).
[80] Basic Treaty, art IX:3 (emphasis added).

2 *Relationship between Non-Discrimination and Fair and Equitable Treatment*

The concepts of non-discrimination and fair and equitable treatment are explicitly combined in the Basic Treaty in a way that does not appear common in today's IIAs, which instead tend to separate fair and equitable treatment from MFN treatment.[81]

Nevertheless, non-discrimination is frequently understood as a key element of fair and equitable treatment based on the reasoning of investment treaty arbitral tribunals. For example, the tribunal in *Saluka v Czech Republic* held:

> A foreign investor whose interests … is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or *discriminatory* (i.e. based on unjustifiable distinctions).[82]

Similarly, the *Waste Management II* tribunal found fair and equitable treatment infringed by conduct that is:

> Arbitrary, grossly unfair, unjust or idiosyncratic, is *discriminatory* and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety …[83]

Moreover, even where an IIA has distinct provisions covering non-discrimination and fair and equitable treatment, non-discrimination arguably forms part of the fair and equitable treatment standard through its derivation from the customary international law standard, in the absence of contrary wording.[84] This intertwining of the concepts of non-discrimination (particularly MFN treatment) and fair and equitable treatment is reflected in the negotiation and drafting of the Basic Treaty.

3 *Exceptions to MFN Treatment*

The Basic Treaty includes a Protocol that sets out several important exceptions to the MFN obligation (as attached to the fair and equitable treatment obligation). For example, the Protocol provides that nothing in the Basic Treaty entitles Japan to claim the benefit of any privilege accorded by Australia pursuant to the Commonwealth of Nations or to Ireland or Papua New Guinea or their nationals or companies.[85] Similarly, nothing in the Basic Treaty entitles either party to claim the benefit of any privilege: accorded by the other to any developing country for the purpose of economic development or technical assistance (corresponding to 'special or

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[81] See, eg, *Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments*, signed 5 April 2019 (not yet in force) arts 4, 5.

[82] *Saluka Investments BV (Netherlands) v Czech Republic*, UNCITRAL, Partial Award (17 March 2006) [309] (emphasis added).

[83] *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004) [98] (emphasis added).

[84] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (2013, Oxford University Press) 245–247.

[85] Basic Treaty, Protocol [1(c)].

differential treatment' in WTO parlance); in the nature of special tax advantages accorded on the basis of reciprocity or by virtue of agreements for the avoidance of double taxation or the prevention of fiscal evasion; or relating to passports or visas accorded by virtue of special agreements or other arrangements.[86]

4 *Differing Conceptions of MFN Treatment*

As foreshadowed above, the differing understanding of the concept of MFN treatment by Australia and Japan was perhaps the most significant issue in the creation of the Basic Treaty.[87] Australia considered that MFN required a comparison between treatment of a Japanese investor and that of a third country investor in like circumstances *at the same time*.[88] In contrast, Japan contended that MFN treatment meant retrospectively giving Japanese investors the benefit of policies that might have already expired. Thus, for example:

> [A]t least one Japanese automobile manufacturer would be entitled to establish a wholly-owned subsidiary in Australia under the same conditions that General Motors Holden was established in the 1940's, despite the fact that the relevant Australian policies have long since changed.[89]

This scenario appeared not merely hypothetical but the crux of the dispute in negotiations, with the parties eventually agreeing that 'Australia is not bound to give Nissan or Toyota exactly the same treatment as that which was given to General Motors when it set up a wholly owned subsidiary of the American company in Australia at a time when Australia's national policies allowed this'.[90] Australian negotiators even wondered if the Japanese interpretation of MFN treatment had been 'concocted because [of] a combination of the degeneration in the atmosphere of negotiations and the introduction at that time of new restrictions on imports of motor vehicles'.[91] Another example with which Australian negotiators were concerned was the potential for a 'Japanese bank to establish a subsidiary in Australia, in contravention of existing Australian policy, because a French bank (Banque Nationale de Paris) has operated an office in Melbourne since last century'.[92]

[86] Basic Treaty, Protocol [1(a)].
[87] See NAA: A1838, 3103/10/20/1 PART 20, 175/269, 'Background Briefing for Media Representatives Accompanying the Prime Minister to Japan and China'.
[88] NAA: 12909, Submission No 299, Decision No 513 (30 April 1976), 12/18, Attachment A, [10].
[89] NAA: 12909, Submission No 299, Decision No 513 (30 April 1976), 12/18, Attachment A, [11].
[90] NAA: A1838, 3103/10/20/1 PART 20, 165/269, 174/269, 'Background Briefing for Media Representatives Accompanying the Prime Minister to Japan and China'.
[91] NAA: A1838, 3103/10/20/1 PART 18, 187/211, 'Basic Treaty with Japan' [5]. See also NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 29/61, Attachment C (Background – Summary of Negotiations on the Basic Treaty) [5].
[92] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 29/61, Attachment C (Background – Summary of Negotiations on the Basic Treaty) [4].

Australia regarded the final MFN formulation as 'novel in international law'.[93] Consistent with Australia's position, Agreed Minutes concluded together with the Basic Treaty confirm the parties' understanding as follows:

> It is confirmed that the treatment prescribed in [Articles VIII:1 and IX:3] will in effect be treatment which is no less favourable than that accorded to nationals of any third country, it being understood that these provisions in no way require either country to accord to nationals of the other country treatment which has been accorded to nationals of any third country under policies which are then no longer operative.[94]

This statement converts a more general fair and equitable treatment obligation into an MFN-centred obligation. As explained further below, this statement played an important role in moderating the fair and equitable treatment obligation to assuage Australia's concerns.

5 *Scope of the Fair and Equitable Treatment Obligation*

The statement quoted above does not form part of the core treaty text, as Australia might have preferred. Nevertheless, as part of the Agreed Minutes (in contrast to the 'noting' by Japan of Australia's position on ownership and control in the Record of Discussion, mentioned above), this statement would inform the interpretation of the relevant treaty provisions, as part of the context of the Basic Treaty under VCLT Article 31(1) and more specifically as an instrument related to the Basic Treaty (if not part of it) under VCLT Article 31(2). This recorded understanding therefore appears to remove from the content of fair and equitable treatment requirements that go beyond the concept of MFN treatment as Australia had proposed it. One reason for this outcome was to avoid a situation where non-discriminatory conduct might nevertheless be found inconsistent with the fair and equitable treatment standard, and where a party might be required in fact to grant preferential treatment in order to meet that standard.[95]

Despite these 'safeguard' clauses, some Australian departments expressed concerns about the vagaries ('vagueness and lack of definition')[96] of the fair and equitable treatment obligation, which 'has no specific content'[97] or 'precise meaning in international law' (according to legal advice from the late Sir Elihu Lauterpacht).[98] Australia was particularly concerned to avoid an

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[93] NAA: A1838, 3103/10/20/1 PART 20, 175/269, 'Background Briefing for Media Representatives Accompanying the Prime Minister to Japan and China'.

[94] Basic Treaty, Agreed Minutes [1].

[95] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 16/61, Attachment B (Basic Treaty of Friendship and Co-operation between Australia and Japan – Negotiating Position and Other Outstanding Matters) [9]. See also 18/61, [12].

[96] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 18/61, Attachment B (Basic Treaty of Friendship and Co-operation between Australia and Japan – Negotiating Position and Other Outstanding Matters) [12].

[97] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 20/61, Attachment B (Basic Treaty of Friendship and Co-operation between Australia and Japan – Negotiating Position and Other Outstanding Matters) [17(c)].

[98] NAA: A1838, 3101/10/20/1 PART 12, 107/304, Submission to Secretary on Nara attached to note from Assistant Secretary GV Brady (16 September 1975) [23(c)].

obligation of national treatment in the Basic Treaty and did not want the fair and equitable treatment provision to incorporate such an obligation.[99] However, Australia ultimately agreed to the inclusion of an 'undefined' fair and equitable treatment provision, with reference to non-discrimination and inclusion of the Agreed Minutes. The reasons for doing so included that the 1957 *Agreement on Commerce* already included an undefined obligation to accord 'fair and equitable treatment'[100] with respect to 'imports of products for immediate or ultimate consumption in governmental use and not otherwise for re-sale or use in the production of goods for sale'.[101]

Another important reason for Australia deciding to accept the final formulation of fair and equitable treatment was that,[102] at Australia's insistence,[103] dispute settlement under the Basic Treaty is limited to consultations between the parties.[104] Japan's preference for allowing recourse to the International Court of Justice ('ICJ') was excluded,[105] and the Basic Treaty contains no ISDS mechanism. Australia foresaw the potential for a tribunal to take an overly expansive view of a broadly worded fair and equitable treatment obligation: 'our tolerance of the concept "fair and equitable" depended on the assumption that there would be no judicial settlement of disputes'.[106] Perhaps Australia was concerned that, if left to a judge, even the Agreed Minutes might be dismissed in reaching an overly expansive view of fair and equitable treatment:

> If Japan could in fact take us to the International Court in the event of a dispute, then the Court would have to decide on the meaning of 'fair and equitable'. This would mean that Australia had placed itself in a position of having lost discretion over its own affairs.[107]

That potential has arguably eventuated, not through the ICJ, but in subsequent investment treaty arbitrations. For example, in a highly controversial 2015 decision, the majority of an investment

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[99] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 19/61, Attachment B (Basic Treaty of Friendship and Co-operation between Australia and Japan – Negotiating Position and Other Outstanding Matters) [13]. See also NAA: A1838, 3101/10/20/1 PART 12, 145/304, 'Japanese Comments on Fair and Equitable (3 April 1975).

[100] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 20/61, Attachment B (Basic Treaty of Friendship and Co-operation between Australia and Japan – Negotiating Position and Other Outstanding Matters) [17(d)].

[101] *Japan and Australia Agreement on Commerce (with exchange of notes)*, signed 6 July 1957, 318 UNTS 381 (as amended with effect from 27 May 1964) art III:2.

[102] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 20/61, Attachment B (Basic Treaty of Friendship and Co-operation between Australia and Japan – Negotiating Position and Other Outstanding Matters) [17(b)]. See also NAA: A1838, 3101/10/20/1 PART 12, 206/304, 'Draft'.

[103] NAA: A12909, Submission No 47, Decision No 140 (20 January 1976), 18/61, Attachment B (Basic Treaty of Friendship and Co-operation between Australia and Japan – Negotiating Position and Other Outstanding Matters) [10(f)].

[104] Basic Treaty, art XII: 'Each Contracting Party may make representations to the other Contracting Party on matters arising out of or in connexion with the implementation of the present Treaty. Any such representations shall receive sympathetic consideration. Where appropriate the Contracting Parties shall together consult on such matters'.

[105] NAA: 12909, Submission No 299, Decision No 513 (30 April 1976), 14–15, [18]–[19].

[106] NAA: A1838, 3101/10/20/1 PART 12, 206/304, 'Draft'.

[107] Ibid.

treaty tribunal found a Canadian breach of the fair and equitable treatment standard, particularly because an environmental impact assessment focused on 'core community values' not grounded in Canadian environmental law in refusing approval for a quarry project.[108]

Today, Australia and Japan have various forums for dispute settlement with respect to economic matters, including the WTO dispute settlement system, State to State dispute settlement under the JAEPA, and ISDS under the CPTPP (subject to suspension of certain provisions as agreed by the CPTPP parties). Concerns identified by Australian negotiators in the 1970s with the breadth and uncertainty of the fair and equitable treatment obligation remain. Now, these concerns are dealt with through clarifications of the substantive treaty obligation as well as developments in treaty drafting with respect to dispute settlement.

For example, the JAEPA provision on fair and equitable treatment states explicitly that that concept does not require 'treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens' and that 'A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article'.[109] Other Australian IIAs now go further in protecting regulatory sovereignty, for example providing:

> For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, whether or not there is loss or damage to the covered investment as a result.[110]

As regards ISDS, the CPTPP provides for transparency of arbitral proceedings[111] and currently excludes claims on the basis of investment authorisations or investment agreements.[112] Again, more recent Australian IIAs contain additional protections for the host State with respect to ISDS, such as allowing the treaty parties to issue a binding interpretation of a treaty provision[113] or a binding joint decision that a matter is excluded from ISDS[114] as it is against a measure that is 'non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order'.[115]

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[108] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Canada*, PCA Case No 2009–04, UNCITRAL, Award on Jurisdiction and Liability (17 March 2015), [502]–[547], [591]–[594].
[109] JAEPA art 14.5.
[110] *Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China* (signed 26 March 2019, not yet in force) art 8.4.
[111] TPP art 9.24 as incorporated in CPTPP.
[112] CPTPP art 2, annex [2].
[113] *Free Trade Agreement between Australia and the People's Republic of China*, signed 17 June 2015 (entered into force 20 December 2015) ('ChAFTA') art 9.18.2.
[114] ChAFTA arts 9.11.5, 9.18.3.
[115] ChAFTA Art 9.11.4.

V CONCLUSION

Much has changed since the negotiation of the Basic Treaty. Yet many of the concerns of its negotiators remain today, such as the potential for an IIA to impose a higher or different standard with respect to expropriation than that required under the *Australian Constitution*, and the dangers of allowing a tribunal to rule on a traditional fair and equitable treatment standard without little further definition. As ISDS now forms part of the Australia–Japan relationship pursuant to the CPTPP, some of the approaches in the Basic Treaty to these questions are no longer appropriate; additional safeguards are necessary to prevent over-intrusion by arbitral tribunals into Australia's regulatory sovereignty. These include procedural protections for ISDS claims and clarifications to substantive investment obligations.

Given the secrecy with which IIAs are negotiated, the use of archival material is important in shedding light on the rationales of and processes followed by negotiators. Even the negotiation of the Basic Treaty, despite the multiple subsequent commercial treaties between Australia and Japan that now exist, can provide valuable lessons for consideration in today's treaty framework. Negotiators understood the difference between a treaty term and a note in an agreed minute or record of discussion, with the latter at greater risk of being overlooked or downplayed by a treaty interpreter. They understood how a more problematic provision such as fair and equitable treatment might be less risky in the absence of ISDS or formal State–State dispute settlement. Today we can see how negotiators' concerns have been borne out, with fair and equitable treatment subject to expansive understandings in the hands of some arbitral tribunals and the implementation of threats of ISDS against Australia for the first time. As Australia continues to seek more PTAs and IIAs it is important to continue to reflect on these kinds of eventualities and to consider how best to respond in modern treaty drafting.