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# **PARTICIPATORY DEMOCRACY IN EU AND AUSTRALIAN INTERNATIONAL INVESTMENT LAW POLICY PROCESSES**

JAMES DAY\*

## I INTRODUCTION

The debate surrounding the reach of bilateral investment and free trade agreements is fierce and well covered. Investor-state dispute settlement ('*ISDS*') mechanisms, for instance, are characterised as anything from indefensible affronts on states' ability to regulate to vitally important tools for encouraging foreign direct investment and facilitating economic growth.

As international investment law policy (such as in regard to *ISDS*) becomes more divisive, the perception grows that it is an area administered almost exclusively by the executive arm of government; away from the legislature and out of the public eye. This is despite these policies crystallising into agreements that are felt heavily in the domestic spheres, where laws are open to challenge, treasuries open to appropriation and markets open to international competition.

This perception is live in the EU and Australia, the subjects of this paper. The EU institutions face a public confidence that is at an all-time low, with a large part of this sentiment emanating from its investment law policy, whereas Australia has recently concluded a raft of free trade agreements ('*FTAs*') which are earning the ire of a people that are increasingly discontent with each one that is inked.

The EU and Australia have been chosen for this comparison due to their unique and innovative positions on international investment law. The EU has

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recently just proposed a major restructuring of the ISDS system to be adopted in the Transatlantic Trade and Investment Partnership ('*TTIP*') and has just amended the Comprehensive Economic and Trade Agreement with Canada to be in line with this proposal. Australia, meanwhile, stood almost alone six years ago in adopting a blanket refusal of ISDS provisions in their investment agreements and the recently-signed Transpacific Trade Partnership ('*TPP*') agreement includes an investment chapter containing a slew of innovative measures to protect the members' right to regulate.<sup>1</sup>

These decisions by Australia and the EU to take different stances on investment law are the outcome of democratic processes which are structured by legal frameworks. Lying at the heart of these legal frameworks is the democratic principle of participation of those people being represented. In the case of the EU, these are enshrined by article 11 of its 'constitution' (the Treaty on European Union ('*TEU*'))<sup>2</sup> which comprises three sub-principles: *openness*, *inclusiveness* and *responsiveness*. In contrast, Australia's constitution only briefly sets out its legal framework as a representative democracy, which necessarily inherits elements of participation in its administration of government.

So, in a field of law which is proving increasingly divisive and viewed as un-participatory, the question is asked: *which international investment law policy process lends more to principles of participation than the other?*

This question will be explored over the following comparative paper. That is:

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<sup>1</sup> *Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam*, signed 4 February 2016 (yet to be ratified). Full text released by the Australian government at <[www.dfat.gov.au](http://www.dfat.gov.au)>; for example see the specific industry carve-outs (art 9.9.3), the ability to trigger state-to-state consultations (art 9.11.3), the ability to make binding joint interpretations (art 9.22.3) and an explicit recognition that states can regulate to protect public welfare, health and environment (art 9.15).

<sup>2</sup> *Consolidated version of the Treaty on European Union*, open for signature 7 February 1992 [2012] C 326/13 (entered into force 1 November 2013) Art 11.

1. how the international investment law policies are made, through which legal structures, involving what stakeholders and through what forums; and
2. how these processes compare to one another by reference to the participatory principles of *openness*, *inclusiveness* and *responsiveness*.

Chapter I develops the idea of participatory democracy in the EU and Australia as the benchmark against which the two processes are measured. Chapter II examines the international investment law policy process of the EU and Chapter III does likewise for Australia. Particular focus will be put on the processes surrounding the TTIP and the TTP; two megaregional FTAs involving the EU and Australia that are currently in the process of being concluded. Chapter IV will assess these two subjects' international investment law policy processes as against the principles of democratic participation and then compare the two processes against each other as to which is more participatory.

## II PARTICIPATORY DEMOCRACY AS A BENCHMARK FOR COMPARISON

Both the EU and Australia are representative democracies: systems of rule that embrace elected officials who have undertaken to 'represent' the interests and views of the citizens under the framework of the 'rule of law'.<sup>3</sup> One of the pillars of representative democracies is the principle of participation of those people being represented; this principle underpins the strand of democratic theory known as 'participatory democracy'.

Participatory democracy is one of a number of strands of democratic theory which are conceived as being variants of, or complements to, representative democracies. Representative systems require these complements because, although they provide the citizens with the power to freely choose their representatives, the involvement of the citizens is otherwise 'sadly but

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<sup>3</sup> D Held *Models of Democracy* (Polity Press, vol 3, 2006) ('Held') 4.

inescapably limited in a large-scale, complex, densely populated society'.<sup>4</sup> It is this realism, together with scepticism of a system which forms policy and law on the basis of the preferences of the majority (and leaves the rights of the few exposed), which requires other forms of democracies to come in and provide checks and balances to the representative system.<sup>5</sup>

Participatory democratic theory is a relatively new strand (though can at its core be found in the formulation of democratic theory in Ancient Greece<sup>6</sup>) that is broadly based on the premises that:

- a) the freedoms and liberties espoused by liberal democratic theories must be contextualised by what liberties are actually tangible and can be achieved for everyday life;
- b) the state is 'inescapably locked into the maintenance and reproduction of the inequalities of everyday life' and it is therefore neither separate nor impartial;
- c) as a result, elections are insufficient to ensure accountability of the governing bodies; so
- d) the true way of ensuring accountability and maintaining liberty is with 'direct and continuous involvement of citizens in the regulation of society and state'.<sup>7</sup>

Indeed, according to this theory, upon a higher degree of participation, people will be more likely to believe that state decisions are binding,<sup>8</sup> develop a less

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<sup>4</sup> Ibid 85.

<sup>5</sup> J Uhr *Deliberative Democracy in Australia: the changing place of parliament* (Cambridge University Press, 1998) ('Uhr') 10.

<sup>6</sup> For example, see the famous speech at Pericles' Funeral in about 431BC: 'We do not say that a man who takes no interest in politics is a man who minds his own business, we say that he has no business here at all', referred to in Held above n 3, 14.

<sup>7</sup> Paraphrased from the theories of Macpherson and Pateman in Held above n 7, 209-214.

<sup>8</sup> Held above n 3, 212.

estranged view of the government and a more concerned view of the collective.<sup>9</sup>

Participatory democratic processes are fundamental institutions in the EU and Australian systems of government for complementing the broader form of representative government. This is especially so in international investment law, an area that is increasingly being cited as undemocratic.

#### *A Participatory Democracy in the European Union*

The EU is perhaps at the forefront of participatory democracy, enshrining participation as a legal norm in article 11 of the TEU.

The insertion of this provision in 2007 was a result of a gradual political and judicial development in the late 20<sup>th</sup> century, beginning with the perception that something more than just political representation was required to grant the governing body ‘legitimacy’ in its decision making.<sup>10</sup> This concept of legitimacy, initially developed by Habermas in 1976, is a core one when discussing the EU’s political and legal evolution.<sup>11</sup> With the incredible growth of international organisations following the Cold War, the previously held view that their legitimacy came from state consent was on shaky ground. Their actions were instead seen as requiring democratic justification which was insufficient.<sup>12</sup>

It was said that one way this insufficiency could be addressed was through *direct civic participation*, which compensates for the lack of direct national

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<sup>9</sup> Ibid; C Pateman *Participation and Democratic Theory* (Cambridge University Press, 1970).

<sup>10</sup> A von Bogdandy ‘The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations’ (2012) 23.2 *European Journal of International Law* 315, 325-6.

<sup>11</sup> Habermas says that where a government is in a continuous state of change and breakdown in policy (a rationality crisis) and becomes more interventionist to its people to avoid a national crisis, it becomes unable to meet the demands of its people and it crosses the line away from democracy and into a more oppressive model of governing; finding itself in a legitimacy crisis. See J Habermas *Legitimation Crisis* (Heinemann, 1976) discussed in Held above n 3, 192-196.

<sup>12</sup> von Bogdandy above n 10, 320.

parliamentary control.<sup>13</sup> As expressed in the ‘governance turn in EU-studies’,<sup>14</sup> if an organisation conducts itself in a transparent and responsive manner, it may be granted more democratic legitimacy in decision-making.<sup>15</sup>

Consequently, articles 9 to 11 of the TEU, the core of this approach to European democratic legitimacy, were born. Article 9 lays down the principle of equality,<sup>16</sup> article 10 explicitly characterises the EU as a representative democracy<sup>17</sup> and article 11 is the enshrinement of European participatory democracy.<sup>18</sup>

The inclusion of article 11 was the first acknowledgment of ‘constitutional relevance’ of participatory and consultative practices at the institutional level and, with the prescriptive use of ‘shall’, signalled the end of the discretionary manner by which the previous practices were undertaken.<sup>19</sup> Further, in

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<sup>13</sup> Ibid.

<sup>14</sup> Christian Marxsen ‘Participatory Democracy in Europe: Article 11 TEU and the Legitimacy of the European Union’ in F Fabbrini, E H Ballin, & H Somsen (Eds.) *What Form of Government for the European Union and the Eurozone?* (Hart Publishing, 2015) 151 (‘Marxsen’) 152.

<sup>15</sup> Acar Kutay ‘Limits of Participatory Democracy in European Governance’ (2015) 21.6 *European Law Journal* 803 (‘Kutay’) 806.

<sup>16</sup> Art. 9: ‘In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies.’

<sup>17</sup> Art. 10(1): ‘The functioning of the Union shall be founded on representative democracy.’

<sup>18</sup> Article 11:

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

<sup>19</sup> A Alemanno ‘Unpacking the Principle of Openness in EU Law Transparency, Participation and Democracy’ (2014) *European Law Review* 9.

creating a mechanism by which citizens can propose action, article 11(4) gave ‘teeth’ to the right to participate and established the first ‘transnational, direct democratic tool’ in history.<sup>20</sup>

The policy documents of the EU institutions, together with its commentary, illuminate democratic participation under article 11 as being comprised of three sub-principles:

- a) *openness*, which requires the participatory initiatives to be conducted in a transparent manner, which allows the public to access information on the input, process, outcome and also the motives of the institution;<sup>21</sup>
- b) *inclusiveness*, which requires the participatory initiatives to be available to general participation and public scrutiny, including as wide a cross-section of interests as possible,<sup>22</sup> and avoiding the over-influence of strong, organised groups;<sup>23</sup> and
- c) *responsiveness*, which requires the EU to provide feedback on the result of the public input and how it will be used.<sup>24</sup>

It is these three principles which have formed the basis of assessing and comparing just how participatory the international investment law policy processes of the EU and Australia are.

## B *Participatory Democracy in Australia*

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<sup>20</sup> Ibid 12.

<sup>21</sup> See European Commission, *European Governance - A White Paper*, 25 July 2001 (Communication) COM (2001) 428 (‘2001 White Paper’) 10; European Commission, *Plan-D for Democracy, Dialogue and Debate* 13 October 2005, COM (2005) 494 (‘Plan-D’) 9; discussed in Marxsen above n 14, 154; von Bogdandy above n 10, 329.

<sup>22</sup> See 2001 White Paper above n 21, 17; European Commission, *Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, 11 December 2002, COM (2002) 704 (‘Minimum Standards’) 17; discussed in Marxsen above n 14, 154.

<sup>23</sup> von Bogdandy above n 10, 329.

<sup>24</sup> See Plan-D above n 21, 19; Minimum Standards above n 22, 21; both discussed in Marxsen above n 14, 154.



Unlike the EU, Australia's adherence to participatory principles is largely uncodified, Articles 7 and 24 of the Australian Constitution provide that the Australian system of government is a representative democracy, with two fundamental tenets: popular control of government and political equality.<sup>25</sup>

As part of these two tenets lie a number of other values, that are not found in the Constitution, including the principle of participation of the people.<sup>26</sup> As Professor Crawford states, one of the core values of democracy is 'the right of all citizens to participate in the political life of their societies'.<sup>27</sup>

In 2011, when the Australian Parliamentary Library published a research paper on citizens' engagement in policy making,<sup>28</sup> it championed participation not only on the ethical basis of being 'the right thing to do', but also as a useful tool for decision and policy-makers alike. Engaging with citizens provides governments with an opportunity to access expert knowledge and also educate people about the policies themselves.<sup>29</sup>

Habermasian theories also made their way to Australian shores, however, and the principle reason for citizen participation therefore remains that of legitimising the policy decisions taken by the governing bodies (as in the EU).<sup>30</sup> As one Australian commentator put it,

public participation as an addition to representative processes may provide an antidote to national political elites or technocrats and also offer an

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<sup>25</sup> M Sawyer, N Abjorensen and P Larkin *Australia: the State of Democracy* (Federation Press, 2009) ('Sawyer') 2.

<sup>26</sup> *Ibid.*

<sup>27</sup> James Crawford, *International Law as an Open System: Selected Essays* (Cameron May, 2002) 39; discussed in Bryan Mercurio and Rebecca Laforgia, 'Expanding Democracy: Why Australia Should Negotiate for Open and Transparent Dispute Settlement in Its Free Trade Agreements' (2005) 6 *Melbourne Journal of International Law* 485 ('Mercurio and Laforgia') 509.

<sup>28</sup> Brenton Holmes 'Citizens' Engagement in Policymaking and the Design of Public Services' (2011) 1 *Parliament of Australia - Parliamentary Library* ('Holmes').

<sup>29</sup> *Ibid.* 4.

<sup>30</sup> *Ibid.*

effective way to overcome a citizen's sense of futility and powerlessness in the face of these larger forces.<sup>31</sup>

### 1 *Participatory Democracy in International Affairs*

The need for participation is enhanced in regard to treaty-making in Australia, which is enacted exclusively by the executive arm of government.<sup>32</sup> As the traditional litmus test of elections is not a feature of treaty-making in Australia, there is greater value placed on 'open continuous participatory decision-making processes'.<sup>33</sup>

An examination of Australia's treaty-making came to a head in the mid-1990s with the landmark *Trick or Treaty?*<sup>34</sup> report of the Senate Legal and Constitutional References Committee, which precipitated a number of reforms designed to strengthen the treaty-making process and give Parliament a greater role.<sup>35</sup> Since these reforms, however, concerns have resurfaced and are often levelled towards the government for committing to international obligations outside the public eye and without any parliamentary involvement. In a text written by four leading Australian public international lawyers, for example, it was submitted that despite a number of reforms to address these since the 1990s, 'the modest role now played by parliament has done little in reality to reduce the democratic deficit that prompted the fears in the first place'.<sup>36</sup>

The change of government in 2007 facilitated a number of further changes. In 2009, the government commissioned a review of the administration of government, which concluded the following:

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<sup>31</sup> Ibid 15.

<sup>32</sup> *Australian Constitution* s 61.

<sup>33</sup> See Mercurio and Laforgia above n 27, 509, quoting Professor Steve Charnovitz.

<sup>34</sup> Senate Legal and Constitutional References Committee, Parliament of Australia, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (November 1995).

<sup>35</sup> Senate Foreign Affairs Defence and Trade Committee, Parliament of Australia, *Blind Agreement: Reforming Australia's Treaty-Making Process* (June 2015) ('*Trade Committee Report*') 71.

<sup>36</sup> H Charlesworth, M Chiam, D Hovell, and G Williams, *No Country is an Island: Australia and International Law* (UNSW Press, 2006) 153.

We consider a final essential ingredient for high performance as a public service is the paramount principle of focusing on citizens in the formulation of policy advice. This can mean making sure that citizens' or clients' experiences of engaging with the program, service or regulation resulting from the policy intervention is at the forefront of the policy maker's mind. This will involve, where possible, actively engaging citizens and stakeholders in the policy formulation process so that their perspectives and ideas are taken into account.<sup>37</sup>

Yet, if there are plenty of governmental statements committing to public participation and engagement, the extent to which the rhetoric matches reality is more obscure.<sup>38</sup> This paper examines this question.

The sub-principles of participatory democracy based on article 11 of the TEU, of *openness*, *inclusiveness* and *responsiveness*, are used as the benchmark to assess and compare the features of both the EU's and Australia's international investment law policy processes. They are used to assess Australia's process as well, as it provides an instructive method of comparison where it does not itself have a codified participatory democratic norm, as the EU does in article 11.

### III EUROPEAN UNION

EU investment law policy is facing challenges. In light of the 'earthquake' election of late 2014, which now sees anti-establishment parties holding over 200 of the 751 seats in the Parliament,<sup>39</sup> there are real changes being necessitated in the decision-making process. Indeed, since the elections, EU Council President van Rompuy has issued a memorandum to other Heads of Government, believing that they should limit policy ambitions on the TTIP and 'not take on policy that can be better handled by individual states' due to the difficulty it will face in ratifying it.<sup>40</sup> As one commentator stated, the

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<sup>37</sup> Terry Moran, *Building the World's Best Public Service* (2009) 20.

<sup>38</sup> Holmes above n 27, 18.

<sup>39</sup> P Hugg and S Wilkinson 'The 2014 European Parliament Elections and the Transatlantic Trade and Investment Partnership: Economics and Politics Collide' (2015) 24 *Journal of Transnational Law & Policy* 117, 119-124.

<sup>40</sup> *Ibid* 146.

TTIP ‘remains a fragile creature, at the mercy of politicians and public opinion’.<sup>41</sup>

In light of this anti-EU sentiment in the international investment law space, it is perhaps even more important to facilitate participation in the policy process. This chapter analyses the processes for how international investment law policies are made and outlines the participatory initiatives in these processes.

### A *Process Generally*

At a starting point, as the EU is not a nation state, but rather an international organisation (or *staatenverbund*<sup>42</sup>), the institutions of the EU are only able to take action in an area that is conferred to it by the EU Treaties.<sup>43</sup>

The Treaty of Lisbon, amending the European Treaties, widened the areas that conferred the EU exclusive competence, including over the ‘common commercial policy’ on foreign direct investment.<sup>44</sup> This includes the exclusive competence to negotiate and conclude agreements with the traditional substantive provisions of Bilateral Investment Treaties (‘*BITs*’) and FTAs (such as ISDS guarantees).<sup>45</sup> These agreements bind all of the EU member states.

The European Parliament, Council of the EU (‘*Council*’) and European Commission (‘*Commission*’) contribute the most to the international investment law policy process.

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<sup>41</sup> Benjamin Fox, ‘From Trade Tariffs to Trust - TTIP a Year on’ *EU Observer*, July 28, 2014; Referred to in *ibid* 158.

<sup>42</sup> See decision of the German Constitutional Court in *Roquette Frères v. Council* [1980] ECR 3333; Ferri, Delia ‘European Citizens ... Mind the Gap! Some Reflections on Participatory Democracy in the EU’ (2013) 5.3 *Perspectives on Federalism* 56 (‘*Ferri*’) 61.

<sup>43</sup> *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992 [2009] OJ C 115/199 (entered into force 1 November 1993) (‘*TFEU*’) art 2(1).

<sup>44</sup> *Ibid* art 207(1).

<sup>45</sup> August Reinisch ‘The EU on the Investment Path - Quo Vadis Europe? The Future of EU BITs and Other Investment Agreements’ (2013) 12 *Santa Clara Journal of International Law* 111 (‘*Reinisch*’) 116. This interpretation of ‘foreign direct investment’ is that of the European Commission, though is subject to fierce debate.

First, the Parliament, comprised of directly-elected members, must pass any BIT or FTA and any legislation required to implement them.<sup>46</sup> In addition to having to agree to its final text, the Commission is required to keep the Parliament fully informed at all times of negotiations<sup>47</sup> and the Parliament itself may also take formal votes on the progress of, and make recommendations on, the negotiations of the agreement.

Second, the Council must give unanimous assent to any investment acts that are proposed to it, including BITs and FTAs. The Council is comprised of government representatives of the EU member states; the extent of the member states' formal involvement in the process.<sup>48</sup> The elected officials of the Parliament and the member state-representatives in the Council form a 'double representation' of the citizens, which has final say over any agreements.<sup>49</sup> Under article 218 of the TFEU, the Council authorises the Commission to open negotiations, adopt directives on the negotiations, authorise the signing of and conclusion of the agreement.

Finally, the Commission, particularly the Directorate General for Trade of the Commission ('*DG Trade*') oversees international trade and investment policy. DG Trade is led by the European Commissioner for Trade, currently Cecilia Malmström, who is voted into office by the Parliament. Article 17 of the TEU grants the Commission DG Trade (together with other Commission DGs) considerable powers as part of the executive branch of the EU.

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<sup>46</sup> These acts follow the 'ordinary legislative procedure'. See TFEU, above n 43 art 207(1),(2) and 218(6)(a)(v).

<sup>47</sup> TFEU above n43 art 207(4).

<sup>48</sup> They do however retain the right to review proposed EU legislation with respect to proportionality and subsidiarity and may challenge the legislation before the Court of Justice of the EU on these grounds. See the *Protocol on the Role of National Parliaments in the European Union*, CIG 14/07, TL/P/en 2 (3 December 2007); *Protocol on the Application of the Principles of Subsidiarity and Proportionality*, CIG 14/07, TL/P/en (6, December 3 2007).

<sup>49</sup> Cheneval, F. 'The Case for Democracy in the EU' in EUSA Conference Boston, March 2011, 18. This argument is strongly debated, however, with many of commentators suggesting the external powers of the EU contributes to the crisis of democratic legitimacy in the EU.

## B *Participatory Initiatives*

The EU has established a number of initiatives that increase the participation of its citizens in the international investment law policy process. The main initiatives are managed by the Commission, predominantly through consultations, dialogues and specific transparency initiatives. There are other initiatives managed outside the Commission, through the Parliament, the Ombudsman and at a non-institutional level.

### 1 *Commission-based initiatives*

#### (a) *Consultations*

Perhaps the most advanced participatory initiative of the Commission is its stakeholder consultations, performed in discharge of their obligations under article 11(3) of the TEU. Defined as the processes taken ‘to trigger input from outside interest parties for the shaping of policy prior to a decision’ being made and subject to minimum standards,<sup>50</sup> these processes are predominantly pushed online through their platform *Your Voice in Europe*.<sup>51</sup> Consultations are published online, where citizens and stakeholder groups are invited to complete an online questionnaire (either multiple choice or more substantive responses). In some cases the Commission asks for written submissions to a hearing.<sup>52</sup> Although no citizens are excluded, in practice if not published as a ‘public consultation’, they are usually targeted towards specific stakeholder groups.

A number of consultations have been conducted by the Commission on specific questions of international trade and investment policy, including in

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<sup>50</sup> European Commission, *Communication from the Commission: Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*, COM(2002) 704, 15-16 and generally.

<sup>51</sup> European Commission, *Your Voice in Europe* (2014) <<http://ec.europa.eu/yourvoice/>> .

<sup>52</sup> Christian Marxsen ‘Open Stakeholder Consultations at the European Level- Voice of the Citizens?’ (2015) 21.2 *European Law Journal* 257 (‘Marxsen’) 262.

regard to trade relations with Japan, China the US, Thailand, Myanmar and Morocco.<sup>53</sup>

DG Trade also held a public consultation specifically on ISDS in the TTIP from March through July 2014 and received easily the highest level of participants out of any consultation.<sup>54</sup> The consultation outlined a possible EU approach and sought feedback on the same. A text outlining the ISDS mechanism in the EU-Canada agreement was provided to illustrate the approach. According to the Commission's report, four areas of concern were raised on ISDS in the TTIP:

1. the protection of the right to regulate;
2. the establishment and functioning of arbitral tribunals;
3. the relationship between domestic judicial systems and ISDS; and
4. the review of ISDS decisions through an appellate mechanism.<sup>55</sup>

Following the consultation, the Commission issued a 'concept paper', addressing these concerns for the purpose of discussion with the Parliament and the Council.<sup>56</sup> According to this paper, the Commission used the outcome of the TTIP consultations in developing its negotiating position (discussed below).<sup>57</sup>

#### (b) *Citizens Dialogue*

Since March 2014, the Commission has undertaken 'citizens' dialogues', an initiative akin to a 'town-hall meeting' to give the public opportunities to raise their concerns and challenge the European Commissioners on any relevant

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<sup>53</sup> European Commission, *Consultations*, <<http://trade.ec.europa.eu/consultations/>> .

<sup>54</sup> See European Commission, *Report – Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)*, SWD(2015), 13 January 2015 (*Report on ISDS Consultation*) 2-4

<sup>55</sup> *Ibid* 4.

<sup>56</sup> Directorate- General for Trade of the European Commission, *Investment in TTIP and beyond – the Path for Reform* (2015) ('*Concept Paper on TTIP*').

<sup>57</sup> *Ibid* 3.

issues that are important to them. These were started in a bid to regain the citizens' trust that has been steadily declining since the global financial crisis.<sup>58</sup>

This approach has been continued under the new Trade Commissioner Malmström. On 3 December 2015, for example, Commissioner Malmström keyed a citizens dialogue, titled *TTIP, CETA, TiSA – What does the new trade strategy bring for Europe?*, in which she clearly pointed to transparency as being a fundamental in TTIP negotiations.<sup>59</sup>

### (c) *Transparency Register*

The Transparency Register was set up in 2011 to allow organisation stakeholders to get informed and ask fundamental questions of the EU, such as what interests are being represented, who is representing these interests and on what budget.<sup>60</sup>

### (d) *Civil Society Dialogues*

In addition to the citizens' dialogues, another similar initiative is its Civil Society Dialogues. DG Trade created these in 1998 in order to exchange views on policy and related topical issues.<sup>61</sup> These dialogues consist of meetings

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<sup>58</sup> European Commission, *Citizens' Dialogues as a Contribution to Developing a European Public Space: Report from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* (2014) 12.

<sup>59</sup> 'So on transparency, the only liberal answer is: we need as much as possible. Access to information about the political process is essential for democracy to work. And that's why we have made TTIP the most open bilateral free trade negotiation in the world...Ladies and gentlemen, what all of these efforts show, I believe, is that it is possible to have an effective open trade policy that also safeguards democracy and is in line with European values' See speech by Cecilia Malmström, Commissioner for Trade at Event at Friedrich Naumann Stiftung, Berlin, *'TTIP, CETA, TiSA – What does the new trade strategy bring for Europe?'* 3 December 2015.

<sup>60</sup> European Commission, *Transparency Register* (2015)  
<[http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?locale=en&reference=WHY\\_TRANSPARENCY\\_REGISTER](http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?locale=en&reference=WHY_TRANSPARENCY_REGISTER)> 'Why a transparency register?'

<sup>61</sup> See generally DG Trade, *Civil Society Dialogue*, (European Union, 2011).



between DG Trade and civil society groups registered in the Transparency Register (above), usually together with industry experts on the given topic.

There are also specific dialogues on the EU's free trade and investment agreement negotiations. On 2 December 2015, for example, DG Trade held its 6<sup>th</sup> dialogue on the progress of TTIP negotiations.<sup>62</sup>

## 2 *Non-Commission-Based Initiatives*

### (a) *European Citizens' Initiative*

The European Citizens' Initiative is a mechanism backed by article 11(4) of the TEU and thus enjoys constitutional character. It gives EU citizens the power to 'take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the [EU] Treaties'.

The procedure requires a group of citizens from at least seven Member States to form a citizens' committee, register the initiative with the Commission and collect at least one million signatures within one year (from at least one quarter of Member States). Upon doing so, the Commission has three months to respond, setting out the action it intends to take (if any).<sup>63</sup>

As of January 2016, there had been no initiatives in relation to investment law, trade law or the TTIP. There has, however, been an attempted initiative, STOP TTIP, whose registration was rejected by the Commission. In its reasons, the Commission said that it was unable to accept the initiative because it requested the Commission to *not* do something (*not* enter into negotiations on the TTIP) which is outside the framework for the initiatives given by Regulation

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<sup>62</sup> European Commission, *Civil Society- Meetings* <<http://trade.ec.europa.eu/civilsoc/meetdetails.cfm?meet=11461>>.

<sup>63</sup> *Regulation 211/2011 of the European Parliament and of the Council* (16 February 2011) L 65/1.

211/2011.<sup>64</sup> The STOP TTIP has since appealed this decision to the CJEU and has continued to garner support, attracting over 3,400,000 participants as at March 2016.<sup>65</sup>

(b) *Parliamentary Committees – INTA*

In addition to the Commission's initiatives, there are Parliamentary processes which increase the participation of EU citizens. There is a permanent parliamentary standing Committee on International Trade ('*INTA*') which has purview over international investment law policy.<sup>66</sup>

*INTA*, as all of the Parliamentary committees, holds public hearings with industry experts to discuss trade and investment issues. In 2015, the EU's FTAs, the TTIP in particular, were a common thread in most of these hearings. These included hearings on the EU's future trade and investment strategy generally, its trade and investment relationship with Australia and New Zealand, the potential benefits of the TTIP for Europeans, its challenges, its ISDS and the regulatory aspects and a joint hearing with the Committee on Industry, Research and Energy on the impact on it in regard to its discreet policy areas.<sup>67</sup>

All of this public participation contributes to the workings of *INTA*, which make recommendations to the Commission and Parliament. In June 2015, it tabled a report in Parliament containing recommendations to the Commission on the TTIP negotiations (discussed further below).

(c) *European Economic and Social Committee*

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<sup>64</sup> European Commission, Secretary General, Letter to Mr Michael Feller, *Your request for registration of a proposed citizens' initiative entitled 'STOP TTIP'*, 10 September 2014.

<sup>65</sup> *Stop TTIP* <<https://stop-ttip.org/>>.

<sup>66</sup> European Parliament, *INTA* <<http://www.europarl.europa.eu/committees/en/inta/home.html>>.

<sup>67</sup> See events listed and reported in the website above n66.

The principal formal involvement of civil society is channelled through the European Economic and Social Committee ('EESC'). Created by the Treaty of Rome as an advisory body, the EESC has permanent legal character,<sup>68</sup> consisting of economic and social interest groups that are nominated by national governments and appointed by the Council. Article 304 of the Treaty on the Functioning of the European Union ('TFEU') requires the Parliament, Council and Commission to consult it, giving the EESC the right to participate in EU governance. It may also issue an opinion on its own initiative.<sup>69</sup> Since 2014, the EESC has issued four such opinions on investment law policy: one on the EU-Japan FTA<sup>70</sup> and three concerning the TTIP.<sup>71</sup>

In its 2014 opinion titled *Transatlantic trade relations and the EESC's views on an enhanced cooperation and eventual EU-US FTA*, the EESC stressed the importance of a transparent and inclusive dialogue with stakeholders throughout the process.<sup>72</sup>

### 3 *TTIP-Specific Initiatives*

Further to the initiatives discussed above, the Commission has also specifically adopted a number of initiatives to increase the citizen participation in the TTIP negotiations with the US.

Since the 2014 elections, especially, DG Trade has prioritised transparency throughout the negotiation TTIP process. In an official communication to the Commission, the new Commissioner Malmström proposed a 'Transparency Initiative', to 'increase transparency, and ... win public trust and support for

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<sup>68</sup> TFEU above n 43 art 301-304.

<sup>69</sup> Ibid art 304.

<sup>70</sup> European Economic and Social Committee, Opinion, *The role of civil society in the EU-Japan FTA* (15 October 2014) No. REX/389.

<sup>71</sup> European Economic and Social Committee, Opinion, *Transatlantic trade relations and the EESC's views on an enhanced cooperation and eventual EU-US FTA* (4 June 2014) No. REX/390 ('*TTIP Opinion*'); European Economic and Social Committee, Opinion, *TTIP and its impact on SMEs* (2 July 2015) No. REX/433; European Economic and Social Committee, Opinion, *Investor protection and investor to state dispute settlement in EU trade and investment agreements with third countries* (27 May 2015) No. REX/411.

<sup>72</sup> TTIP Opinion 1 above n 71, 1.10.

the TTIP’, including to publish more texts and provide a broader level of access of negotiating documents to the members of parliament.<sup>73</sup>

There are now many more negotiating documents being made public than there were previously. Following each round of negotiations, a negotiation progress report<sup>74</sup> and statement from the lead negotiator were subsequently released,<sup>75</sup> together with factsheets, negotiating texts, proposals and position papers.<sup>76</sup>

(a) *TTIP Advisory group*

In January 2014, the Commission established a 14-member TTIP Advisory Group, made out of industry stakeholders and experts from the environment, health, consumer and workers’ interests sectors. The group consults the Commission on specific issues which it has expertise in. It is chaired by the EU’s chief negotiator on the TTIP.<sup>77</sup>

As at February 2016, the group had held 23 meetings, reporting on each one of them. The reports indicate that ISDS was a frequently-discussed topic. These discussions were predominantly in the form of a Q&A session between the group members and the chair.<sup>78</sup> As at February 2016, the meetings reported that the ISDS proposal had not yet been addressed in negotiations.

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<sup>73</sup> Commissioner Malmstrom, *Communication to the Commission: concerning transparency in TTIP negotiations* (25 November 2014) No. C(2014) 9052 2.

<sup>74</sup> European Commission, *Report of the eleventh round of negotiations for the Transatlantic Trade and Investment Partnership*, 6 November 2015.

<sup>75</sup> European Commission, *TTIP round 11 Statement by EU chief negotiator Ignacio Garcia Bercero*, 23 October 2015.

<sup>76</sup> See DG Trade, *Trade – negotiating texts in TTIP* <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>>.

<sup>77</sup> See Press Release, European Commission, *Expert group to advise European Commission on EU-US trade talks*, 27 January 2014.

<sup>78</sup> For example see the discussion on the Commission’s proposal regarding ISDS in the TTIP and its meeting specifically addressing the investments chapter, where members raised their concerns to ISDS and the system proposed by the Commission, available at Transatlantic Trade & Investment Partnership Advisory Group, *Expert meeting on investment issues: meeting report, 9 October 2015* <<http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/#advisory-group>>.

(b) *European Ombudsman's Inquiry*

The European Ombudsman was created under the Treaty of Maastricht and now, under article 228 of the TFEU, has the power inquire into maladministration of the EU institutions.

On 29 July 2014, the Ombudsman began an inquiry on its own initiative into the transparency and accessibility of the TTIP negotiations under the Commission.<sup>79</sup>

As part of this inquiry, the Ombudsman conducted a public consultation, where the 'overwhelming majority' of over 6,000 responses were that 'the EU needs to be more transparent as regards TTIP, notably in relation to its contacts with business representatives'.<sup>80</sup>

In concluding its inquiry, the Ombudsman made ten suggestions for the Commission to increase transparency of the TTIP negotiations.<sup>81</sup> In response, the Commission said that it would consider the suggestions 'but it will have to do this within the context of the overall approach to transparency that will be set out by the Commission over the months ahead, and to which this inquiry is a valid contribution'.<sup>82</sup>

## IV AUSTRALIA

This area of law has also reached a flashpoint in Australia. This began in April 2011, when the then Gillard-led government made waves in the international investment law space by becoming the first developed country to publicly

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<sup>79</sup> European Ombudsman, *Decision of the European Ombudsman closing her own-initiative inquiry OI/10/2014/RA concerning the European Commission*, <<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark>> .

<sup>80</sup> Ibid.

<sup>81</sup> Ibid, Conclusion.

<sup>82</sup> European Commission, *Comments of the Commission on the European Ombudsman's own-initiative inquiry* (2015) Ref. OI/10/2014/RA .

discontinue its practice of agreeing to international agreements containing ISDS clauses.<sup>83</sup>

Since then, the public discourse on ISDS has risen exponentially and societal discontent follows it. Indeed, statistics show that the media reporting of the issue is easily ten-fold what it was in 2011.<sup>84</sup> This opposition to ISDS in Australia stems from an alliance of sorts between the political left, outraged by Phillips Morris' allegations of expropriation of its investments by the government in enacting anti-tobacco legislation, and the economic right, sceptical of the economic advantages brought by preferential trade agreements.<sup>85</sup>

The upshot of this has been an increase in public debate and deliberation on the issues surrounding Australia's international investment law policy. This is reflected in this increased media coverage and also an increased number of parliamentary reviews on proposed laws like the 'Anti-ISDS Bill' and bilateral FTAs.<sup>86</sup>

Australia's policy processes need to accommodate for this increase in the public discourse and the government is well aware. This chapter looks at the participatory initiatives that may accommodate this increase in public participation.

### A *Process Generally*

The power to enter into treaties is an exclusive right granted to the executive arm of government under section 61 of the Australian Constitution. The power

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<sup>83</sup> Australian Government, *Trading Our Way to More Jobs and Prosperity* April (2011) 14.

<sup>84</sup> See figure 1 in L Nottage 'The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration in Australia' (2015) *University of Sydney; Legal Studies Research Paper No 15/97* 9.

<sup>85</sup> L Nottage and J Kurtz 'Investment Treaty Arbitration 'Down Under': Policy and Politics in Australia' (2015) *University of Sydney; Legal Studies Research Paper No 15/06* 4.

<sup>86</sup> *Ibid* 18.

to implement and ratify treaties, however, rests with the legislative arm of government (the Parliament) under section 51(xxix).

Consequently, the government negotiates and signs a treaty and Parliament passes any legislation required to ratify the treaty. Once a treaty is signed, it is tabled in Parliament with a National Interest Analysis on why Australia should be party to the treaty. The treaty is then open to parliamentary debate and considered by parliamentary committee(s). The committee provides a report for Parliament and may make recommendations for future courses of action.<sup>87</sup> The treaty must then pass both Houses of Parliament, together with any other legislation required for its implementation before any action is taken under the treaty.

## B *Participatory Initiatives*

Participation in Australia's international investment law policy process is facilitated through the executive arm of government and Parliament. Both of these two arms of Australian Government provide ample opportunity for citizen and specific stakeholder participation.

### 1 *Government Initiatives*

The Australian Government implements its international trade and investment policies through the Department of Foreign Affairs and Trade ('DFAT'). 'Promoting trade' and 'attracting investment' form two of the four key pillars of the government's 'economic diplomacy agenda'; the cornerstone of its international foreign affairs policy.<sup>88</sup>

In implementing this agenda, DFAT undertakes a number of initiatives that increase the citizen and stakeholder participation in its international investment law policy.

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<sup>87</sup> DFAT, *Treaty making process* <<http://dfat.gov.au/international-relations/treaties/treaty-making-process/pages/treaty-making-process.aspx>>.

<sup>88</sup> DFAT, *Australia's economic diplomacy* <<http://dfat.gov.au/trade/economic-diplomacy/Pages/economic-diplomacy.aspx>>.

(a) *Consultations and Submissions Generally*

DFAT undertakes public and targeted consultations before entering into all of its international investment and trade agreements.<sup>89</sup> According to the government, these ensure that the stakeholders' views are essential to understanding the key commercial-level factors that are relevant to their negotiating priorities.<sup>90</sup>

First, anyone is invited to make submissions on the relevant agreement generally or on a specific issue, in as much detail as they wish. Second, it holds specific consultations with state and territory governments, industry groups and businesses, NGOs, but also academics and citizens generally. They are advertised in the media and on DFAT's website and are stated as forming the basis of the government's position on whether such agreements are in the national interest and not 'merely so that those with an interest feel included'.<sup>91</sup> They take the form of one-to-one meetings, group meetings, roundtables with industry representatives, professional bodies, or sector-specific stakeholders and public forums. In addition, in 2014 the government established a 20-member Trade and Investment Policy Council to facilitate dialogue with the business community and 'to contribute a commercial perspective to trade and investment policy'. The council is made out of industry experts across the main sectors of the economy.<sup>92</sup>

(b) *Provision of Information*

The DFAT online platform gives the public access to a huge amount of information on the government's international investment law policy. It's

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<sup>89</sup> See generally DFAT, *Public Consultations* <<http://dfat.gov.au/trade/agreements/Pages/public-consultations.aspx>> .

<sup>90</sup> Joint Select Committee on Trade and Investment Growth. *Inquiry into Business Utilisation of Australia's Free Trade Agreements* (2015) 66.

<sup>91</sup> Above n 88.

<sup>92</sup> Australian Government, 'A Charter: Economic Diplomacy and Australian Business', part of fact sheet series *Australia: Open for business* (2014).



‘Trade at a glance’ is an interactive website that gives information on all of Australia’s top trade and investment partners by imports, exports, goods and services.<sup>93</sup> There are fact sheets on all of Australia’s trade partners, an interactive map showing regional economies and statistics available on Australia’s trade and investment flows.<sup>94</sup> There are platforms dedicated to specific topics, such as foreign investment and ISDS.<sup>95</sup> There is also up to date information on ongoing negotiations of FTAs with other countries.<sup>96</sup>

There are also two regular newsletter services available for free subscription, one targeted to business (*Business Envoy*)<sup>97</sup> and one to the general public (*Tradetalk*)<sup>98</sup>.

### (c) *Government-Commissioned Independent Reviews*

The government also commissions independent bodies to undertake reviews of its international trade and investment policies. These reviews use public submissions and consultations to progress their inquiries. Two of these reviews undertaken by the previous Australian Labor Party-led governments had a significant impact on governmental policy.

First, in 2008, the Rudd-led government commissioned Mr David Mortimer AO and Dr John Edwards, of the Centre of Economic Development of Australia, to conduct a review of Australia’s export policies.<sup>99</sup>

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<sup>93</sup> See generally DFAT, *Australia’s trade at a glance* <<http://dfat.gov.au/trade/resources/trade-at-a-glance/Pages/default.aspx>>.

<sup>94</sup> See generally DFAT, *Trade and economic statistics* <<http://dfat.gov.au/trade/resources/trade-statistics/Pages/trade-statistics.aspx>>.

<sup>95</sup> See generally DFAT, *Trade and investment topics* <<http://dfat.gov.au/trade/topics/Pages/trade-and-investment-topics.aspx>>.

<sup>96</sup> See generally DFAT, *Status of FTA negotiations* <<http://dfat.gov.au/trade/agreements/Pages/status-of-fta-negotiations.aspx>> .

<sup>97</sup> See generally DFAT, *Business Envoy* <<http://dfat.gov.au/about-us/publications/trade-investment/business-envoy/Pages/business-envoy.aspx>>.

<sup>98</sup> See generally DFAT, *Trade Talk* <<http://dfat.gov.au/trade/resources/trade-talk/Pages/trade-talk-e-newsletter.aspx>>.

In conducting the review, they received 157 submissions and consulted directly with 194 stakeholders, from domestic governments to businesses, governmental departments, universities and individuals.<sup>100</sup>

Of its expansive range of recommendations, the review made particular reference to Australia's need to 'secure its prosperity in [the] new global economy'<sup>101</sup> and recommended:

- a) establishing new benchmarks for FTAs; and
- b) reinvigorating Asia Pacific Economic Community trade and investment agenda, with the long-term goal of achieving a region-wide FTA.<sup>102</sup>

Shortly after this review, the government commenced consultations on the TPP and prepared for negotiations, perhaps taking heed of this review's advice.

Second, in November 2009, the government requested the Productivity Commission, an independent government agency, to examine Australia's FTAs and their effectiveness in responding to recent economic and trade developments.<sup>103</sup> The Commission 'actively encouraged public participation' and received public submissions, held stakeholder meetings and convened various workshops with the stakeholders. As part of its findings of November 2010, the Commission controversially concluded that ISDS provisions do not have a significant impact on investment flows and there are 'considerable financial risks' emanating from such provisions.<sup>104</sup>

<sup>99</sup> David Mortimer, *Winning in World Markets* (2008) ('*Mortimer Report*') Appendix A-Terms of Reference.

<sup>100</sup> *Ibid* 166-172.

<sup>101</sup> *Ibid* 18.

<sup>102</sup> *Ibid*, key recommendations, 21.

<sup>103</sup> Australian Productivity Commission. *Research Report - Bilateral and Regional Trade Agreements*, (2010) ('*Productivity Commission Report*'), iv ('Terms of Reference'), 1.

<sup>104</sup> *Ibid* xxxvi ('chapter 14 findings').

In April 2011, four months following the Commission's report, the then Gillard-led government denounced its use of ISDS in its FTAs and investment agreements and made it official policy not to use them.<sup>105</sup> The government stated that in coming to its position on ISDS, the Commission's report had been 'closely considered' and that the new policy was 'highly consistent' with their recommendations.<sup>106</sup>

It is clear that the Commission considered the public submissions in forming this position. It makes many references to public submissions and quotes them in a number of instances, for example when discussing:

- a) the regulatory chill effect of ISDS;<sup>107</sup>
- b) the higher level of rights afforded to foreign investors by ISDS mechanisms;<sup>108</sup>
- c) the degree of freedom of arbitral tribunals in ISDS cases;<sup>109</sup>
- d) the possibility of conflicts of interest and institutional biases in arbitration, lack of transparency and the costs incurred;<sup>110</sup> and
- e) if Australia should not adopt treaties with ISDS or not.<sup>111</sup>

Perhaps critically, it did not rely on any public submission or consultation specifically in support of ISDS, stating it:

received no feedback from Australian businesses or industry associations indicating that ISDS provisions were of much value or importance to them. Indeed, as far as the Commission is aware, no Australian business has made use of ISDS provisions in Australian [FTAs or investment agreements].<sup>112</sup>

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<sup>105</sup> DFAT, *Trading Our Way to More Jobs and Prosperity* April (2011), 14.

<sup>106</sup> Ibid 16.

<sup>107</sup> Ibid 271, referring to submissions of Professor Van Harten and AFTINET.

<sup>108</sup> Ibid 272, referring to AFTINET's submission.

<sup>109</sup> Ibid 272, referring to Dr Kyla Tienhaara's submission.

<sup>110</sup> Ibid 273, referring to Dr Kyla Tienhaara's and the Law Council of Australia's submissions.

<sup>111</sup> Ibid 276, referring to Aisbett and Bonnitche's, Dr Luke Nottage's and the Law Council of Australia's submissions.

<sup>112</sup> Ibid 270.

## 2 *Parliamentary Initiatives*

In addition to being comprised of elected members, the Australian Parliament also provides a number of opportunities for further public participation in the policy process.

### (a) *Parliamentary Committees*

Parliamentary committees are a major participatory component of Australia's legislative arm of government, giving the public an outlet to directly participate in the law-making process and help members of parliament access a wide range of community and expert views.<sup>113</sup>

The role undertaken by the committee depends on the terms of reference referred to it by either House of Parliament, Minister or by law.<sup>114</sup> This reference procedure is said to be a 'commitment to greater public participation with committees as the point of public access'.<sup>115</sup>

Upon being referred a matter, the committee advertises the terms of reference in the media and invites submissions from the public or any other stakeholder, where anyone may lodge a written submission.<sup>116</sup> The committee then holds a public hearing, with some of those who made submissions being invited to give evidence for the committee to clarify the submissions and examine opposing views with them.<sup>117</sup> Following the hearings and review of all the evidence, the committee prepares a report to be presented to Parliament, with recommendations for future action. Reports of dissenting committee members

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<sup>113</sup> John Halligan 'Parliamentary Committee Roles in Facilitating Public Policy at the Commonwealth Level' (2008) 23.2 *Australasian Parliamentary Review* 135 ('Halligan') 136.

<sup>114</sup> Australian Parliament, *About Parliament – Infosheet 4 – Committees* <[http://www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/Powers\\_practice\\_and\\_procedure/00\\_-\\_Infosheets/Infosheet\\_4\\_-\\_Committees](http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_4_-_Committees)>.

<sup>115</sup> Uhr above n 5, 129, using 'Mabo legislation' as analogy.

<sup>116</sup> Halligan above n 113, 136, 141-2.

<sup>117</sup> Above n 114.

are also published. The report, submissions made to the committee and the transcript of proceedings are available online.

The following standing (permanent) and select (temporary) committees have played a large part in the participatory functions of the Australian international investment law policy process.

*(i) Senate Standing Committee on Foreign Affairs Defence and Trade*

The Senate Standing Committee on Foreign Affairs, Defence and Trade Committee takes an active role in scrutinising the government's proposed bills and policy in general. In recent years it has undertaken inquiries into each of the proposed FTAs with Korea, Japan and China and also undertook an inquiry into the Commonwealth's treaty-making process generally.<sup>118</sup>

The committee received 94 submissions and held two days of public hearings with witnesses from public authorities, academics, trade unions and NGOs. A large number of the submissions were from 'individuals concerned about the secrecy surrounding the negotiations of bilateral and regional FTAs, in particular the Trans-Pacific Partnership'<sup>119</sup> but also industry bodies, unions, academics and other stakeholders. In its report, it found the evidence to be 'overwhelmingly critical, and occasionally scathing' of DFAT's assertions that the current system was sufficient.<sup>120</sup>

It concluded that there was 'no doubt that in respect of the Commonwealth treaty-making process there is a groundswell for change'<sup>121</sup> and made 10 recommendations in order to ensure a higher level of consultation and information provided before agreements are signed and increase the role of the Parliament.<sup>122</sup>

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<sup>118</sup> Trade Committee Report above n 35, 2.

<sup>119</sup> Ibid 3.

<sup>120</sup> Ibid 71-73.

<sup>121</sup> Ibid 71.

<sup>122</sup> Ibid; *ibid* xiii-xiv ('Recommendations').

(ii) *Joint Standing Committee on Treaties*

Since 1996, the Joint Standing Committee on Treaties has been appointed at the beginning of each Parliamentary term by Resolution of Appointment of the two Houses of Parliament jointly. This committee reviews each one of Australia's FTAs that it enters into, together with the National Interest Analyses and proposed treaty actions arising from the FTA.<sup>123</sup>

(b) *Private Members Bills*

Another way the Parliament may play a role in the international investment law policy process is through the legislative proposals of non-government members; Private Members Bills.<sup>124</sup> As they require the majority of the members to support them, they rarely crystallise into law, though they are still useful as a technique of generating debate on a matter. Two such bills have been proposed by non-government members in recent years and have added to the public discourse on international investment law policy.

First, in February 2012, independent Mr Katter introduced a bill to Parliament concerning the treaty-making process in Australia generally. This *Treaties Ratification Bill 2012* contained just one substantive provision, s4:

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<sup>123</sup> The Resolution of Appointment allows the committee to inquire into and report on:

‘a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;

b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:

(i) either House of the Parliament, or

(ii) a Minister; and

c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.’

See Joint Standing Committee on Treaties, Parliament of Australia, *Resolution of Appointment* (1996).

<sup>124</sup> See generally factsheet at Australian Parliament, *About Parliament – Infosheet 6 - Opportunities for private members*

<[http://www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/Powers\\_practice\\_and\\_procedure/00\\_-\\_Infosheets/Infosheet\\_6\\_-\\_Opportunities\\_for\\_private\\_Members](http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_6_-_Opportunities_for_private_Members)>.

The Governor-General must not ratify a treaty unless both Houses of the Parliament have, by resolution, approved the ratification.

The bill was referred to the Joint Standing Committee on Treaties for legislative inquiry, which tabled its report on the bill in Parliament in August 2012.<sup>125</sup> The committee recommended against the bill's passing, due to the practical issues it would cause, that there was no provision for treaties in times of emergency and the likelihood of political parties obstructing certain treaties.<sup>126</sup> It did, however, agree with the member that greater transparency is required in the treaty-making process and was 'disappointed that the process has not been pursued'.<sup>127</sup>

Second, in March 2014, a Senator of the Australian Greens Party introduced the *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*. It also had just one substantive provision, s3:

The Commonwealth must not, on or after the commencement of this Act, enter into an agreement (however described) with one or more foreign countries that includes an investor-state dispute settlement provision.

The bill was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report. It received easily the highest number of responses of any committee inquiring into an international investment law-related bill, receiving 142 written submissions and over 11,000 emails.<sup>128</sup> It held a public hearing on 6 August 2014.

The majority of submissions supported the purpose of the bill.<sup>129</sup> Despite this support, however, the committee took greater credence from those submitters arguing against the bill, including academics, and also the major Australian

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<sup>125</sup> Joint Standing Committee on Treaties, Parliament of Australia, *Report 128: Inquiry into the Treaties Ratification Bill 2012* (2012).

<sup>126</sup> Ibid 19-22.

<sup>127</sup> Ibid 14.

<sup>128</sup> Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014* (2014) 2.

<sup>129</sup> Ibid 5.

companies and businesses in support of ISDS.<sup>130</sup> Notwithstanding these bills' failure, they both contributed to the debate on treaty-making process in Australia and has been referred to on a number of times since.<sup>131</sup>

### 3 *Trans-Pacific Partnership*

Like the TTIP in Europe, the TPP in Australia has garnered a huge amount of public debate. When it was concluded and signed on 6 October 2015, there were a number of parts that fanned this public debate, including the insertion of an ISDS mechanism in the investment chapter.<sup>132</sup>

At the time of writing, the TPP was before the legislatures of each party for ratification. In Australia, before any binding treaty action is taken, the text and a National Interest Analysis like those done for previous FTAs is tabled in Parliament. The Joint Standing Committee on Treaties will conduct an inquiry and prepare a report for the legislature, which will consider any legislative changes necessary for the agreement to be implemented.<sup>133</sup>

Public consultations commenced on 3 October 2008 'in line with the Government's commitment to ensuring Australia's trade objectives are pursued on the basis of full community consultation' and would form the basis of the government's priorities and for Australia's participation in the negotiations.<sup>134</sup> Initial reports on these concluded that there was 'widespread interest in and support for Australia's participation in the TPP'.<sup>135</sup> In this first set of consultations, concerns over ISDS were already articulated.<sup>136</sup>

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<sup>130</sup> See for example *ibid* 13-14.

<sup>131</sup> For example see Trade Committee Report above n 35, 19-20.

<sup>132</sup> See chapter IX of published text, above n 1.

<sup>133</sup> Australian Government, DFAT, *Trans-Pacific Partnership Agreement: Background document: implementation deadline*, 24 November 2015.

<sup>134</sup> Hon Simon Crean MP, *Priorities and objectives for participation in the Trans Pacific Partnership* (2008) <[http://trademinister.gov.au/speeches/2008/tpp\\_priorities.html](http://trademinister.gov.au/speeches/2008/tpp_priorities.html)> .

<sup>135</sup> *Ibid*.

<sup>136</sup> *Ibid*, stating that 'some participants cautioned that trade policy not undermine the ability of governments to regulate in the public interest and in the interest of protecting the environment.



On 20 Nov 2008, the then Trade Minister Simon Crean announced that Australia would participate in TPP negotiations and the first round took place in March 2010. Between this round and November 2011, there were nine negotiating rounds. There are reports made on each round which are published online.<sup>137</sup> Although these reports outline generally what had been discussed, none of them specifically mention ISDS or investment protection.

In September 2011 and as a result of growing public perception of the negotiations being secretive and behind closed doors, the parties publicly released the letters to each other setting out the handling of negotiating texts. The model letter stated that all negotiating documents were confidential and could only be provided to government officials or persons participating in the consultation process.<sup>138</sup>

Following the 9<sup>th</sup> round of negotiations in November 2011, the parties' Trade Ministers issued a report on negotiations to date and released a 'broad outlines' of the agreement, including on an investment chapter. It said:

**Investment.** The investment text will provide substantive legal protections for investors and investments of each TPP country in the other TPP countries... The investment text will include provisions for expeditious, fair, and transparent investor-State dispute settlement subject to appropriate safeguards, with discussions continuing on scope and coverage. The investment text will protect the rights of the TPP countries to regulate in the public interest.<sup>139</sup>

From December 2011 through August 2013, there were a further ten negotiating rounds, all of which were reported online. Each round of negotiations included a number of stakeholder events, with 'Stakeholder Forums' typically being involved, which typically attracted 250 to 300

The CFMEU and AFTINET raised concerns about investor-state dispute settlement and the regulation of foreign investment'.

<sup>137</sup> See reports on negotiations listed at DFAT, *Trans Pacific Partnership – News* <<http://dfat.gov.au/trade/agreements/tpp/news/Pages/news.aspx>>.

<sup>138</sup> DFAT, *Trans Pacific Partnership – Release of confidentiality letter*, <<http://dfat.gov.au/trade/agreements/tpp/news/Pages/release-of-confidentiality-letter.aspx>> .

<sup>139</sup> DFAT, *Trans Pacific Partnership – Enhancing Trade and Investment, Supporting Jobs, Economic Growth and Development: Outlines of The Trans-Pacific Partnership Agreement* <<http://dfat.gov.au/trade/agreements/tpp/Pages/enhancing-trade-and-investment-supporting-jobs-economic-growth-and-development-outlines-of-the-trans-pacific-partnership-ag.aspx>>.

participants. None of these mentioned negotiations on ISDS or investor protection.

From October 2013 there were also a further 12 meetings of the chief negotiators and 9 meetings of the Ministers or Leaders of the parties. Like the negotiating rounds, each of these meetings are reported online, if brief. None of these mentioned negotiations on ISDS or investor protection.

On 6 October 2015, the TPP was concluded and the government duly announced its signing. Trade Minister Andrew Robb announced that a ‘robust and modern investor-state dispute settlement mechanism will protect Australian investors overseas, as well as the government's right to regulate, including on public health.’<sup>140</sup>

On 9 February 2016, the government tabled the text of the agreement and an accompanying National Interest Analysis in Parliament. The analysis reports that 83 public submissions were received and 485 stakeholders were consulted throughout and following the negotiations.<sup>141</sup>

## V ASSESSMENT AND COMPARISON OF PARTICIPATION

The EU’s and Australia’s international investment law policy processes and structures are assessed according to their levels of openness, inclusiveness and responsiveness; the three sub-principles of participation as laid down by article 11 of the TEU.

### A *Assessment of participation in the EU*

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<sup>140</sup> Press Release, Minister for Trade and Environment, *Historic Asia-pacific trade agreement opens new era of opportunities* (6 October 2015) <<http://www.pm.gov.au/media/2015-10-06/historic-asia-pacific-trade-agreement-opens-new-era-opportunities>>.

<sup>141</sup> DFAT, *Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam*, National Interest Analysis [2016] ATNIA 4, Annexure 1, 2-15.

## 1 *Openness*

At the outset, it can be said that the EU is at least aware that its international investment policy processes should be more open. This is made clear by looking at the contrast in approaches of the Commission, prior to and following the 2014 election.

In relation to the TTIP, prior to the election for example, the then Trade Commissioner Karl de Gucht, was pushing the TTIP almost exclusively on the back of the advantages offered by it.<sup>142</sup> Since then, however, Commissioner Malmström has consistently pushed the need for transparency in negotiating it; remarking in an official policy document that *'I'm determined to make these the most transparent EU trade talks ever'*.<sup>143</sup> She has committed to publishing more documents on trade and investment negotiations, including the final text as agreed.<sup>144</sup>

This new approach ties in with the 'Transparency Initiative' outlined above, which has improved the level of openness in a process that was previously seen as secretive and opaque. Since the change of commissioner, there have been reports made on the progress of TTIP negotiations following each round.

The openness of the process is increased further by the workings of the Parliament, particularly the INTA committee. By holding its hearing in public, together with public workshops and presentations, the public is further able to access information on the EU's progress on international investment law policy and its position at the time.

Finally, the openness is bolstered by the information available on the initiatives themselves. The Commission's online platform 'Your Voice in Europe' and DG Trade's online platform 'Trade Policy and You' has

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<sup>142</sup> See generally for example DG Trade, *Trade and Investment 2014* (2014).

<sup>143</sup> DG Trade, *Inside TTIP: An Overview and Chapter-by-Chapter Guide in Plain English* (2015).

<sup>144</sup> European Commission, *Trade for All - New EU Trade and Investment Strategy* (2015) 18-19.

information on consultations, civil society dialogues, publications, events and the possibility of a weekly newsletter. There are also separate online platforms for the INTA Committee and the European Citizens' Initiative. These all make it far easier for the public to access information on the investment law policy process and how they may participate further.

In relation to the TTIP specifically, there is publicly accessible information on the input,<sup>145</sup> the process,<sup>146</sup> outcome<sup>147</sup> and motives<sup>148</sup> of the Commission. The parameters for openness provided in chapter one, therefore, show a favourable assessment.

(a) *Deficiencies*

The glaring omission, is the scarcity of reporting on the progress of the issue of ISDS in the TTIP, with reports stating that this issue has not to date been addressed. This very question was put to the chief negotiator in the TTIP Advisory Group, where he 'explained that these are market access discussions... [and that] there are no ongoing discussions with the US about investment protection or ISDS'.<sup>149</sup> Given the immense public scrutiny and divisive nature surrounding this issue, it is questionable whether the Commission is being truly open in its reporting in this respect.

This view is commonly held. Indeed, over 3.4 million citizens who have supported the STOP TTIP citizens' initiative centre their criticism on how the 'democratic dimension of the planned agreement: rules, which have far-reaching consequences for 500 million EU citizens in 28 member states, are

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<sup>145</sup> Report on ISDS Consultation above n 54.

<sup>146</sup> See for example European Commission- Directorate- General for Communication, *Free Trade Is a Source of Economic Growth* (2014) 9 ('How free trade agreements are reached...').

<sup>147</sup> Concept Paper on TTIP above n 56.

<sup>148</sup> See for example DG Trade, *Inside TTIP: An Overview and Chapter-by-Chapter Guide in Plain English*. (2015) 41-42.

<sup>149</sup> Trade advisory group meeting on 9 October 2015, above n 78.

negotiated behind closed doors',<sup>150</sup> and this sentiment was echoed by the majority of participants to the Ombudsman's consultation on the transparency of TTIP negotiations. This feeling has not waned since the introduction of the new Trade Commissioner's Transparency Initiative.<sup>151</sup>

## 2 *Inclusiveness*

The assessment of the inclusiveness turns on whether the participatory initiatives are available to general participation and public scrutiny, including as wide a cross-section of interests as possible, and avoid the over-influence of strong, organised groups.

In regard to achieving a wide cross section, many of the initiatives put forward are open to all EU citizens. The Citizens' Dialogues are on a 'first come, first served' basis (in the words of the Commission), public consultations are open for anyone online throughout the consultation period, INTA Committee hearings are public and these affect the recommendations that it prepares and are adopted by the Parliament, any EU Citizen may begin a European Citizens' Initiative or a petition and the information workshops and seminars held by DG Trade are open for anyone who can attend.

There are also ample opportunities for the public to get involved in consultations, as they are conducted in various forms by the Commission, INTA and the Ombudsman. The TTIP consultation should be lauded as a successful initiative in attracting well over 100,000 citizen participants.

There is also a clear, strong push by the EU to include civil society in the process and rightly so, as the 'primary dimension of citizen involvement

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<sup>150</sup> Above n 65.

<sup>151</sup> See for example anti-lobbying NGO Corporate Europe at *Corporate Europe* <<http://corporateeurope.org/international-trade/2015/05/ttip-talks-despite-pr-still-under-cloak-secrecy>>.

through consultations can only be one that is representative'.<sup>152</sup> DG Trade's civil society dialogues, consultations and invitations for participation are instructive of this. Civil society's voice as a whole is also strongly represented through the EESC, which specifically enjoys a constitutional right to be consulted by the EU institutions, and also the TTIP Advisory Group, specifically set up to oversee TTIP negotiations.

(a) *Deficiencies*

Despite the ample opportunities, in regard to the Commission's consultations generally, there appears to be a significant lack of representation of the public generally. Except for the consultation on the TTIP and ISDS, there was almost no citizen participation. In other consultations conducted by the Commission, for example, there was only one (or even no) individual public participants.<sup>153</sup> In many cases also, as one commentator found, "ordinary citizens" are not knowledgeable enough to complete the questionnaires prepared by the Commission, especially when a consultation concerns niche areas or technical issues.<sup>154</sup>

Further, it has been suggested that individuals prefer to give their opinion in a simple way, such as petitions, rather than providing substantive answers (which is supported in this case by the strong numbers for the STOP TTIP citizens' initiative). As Marxsen argues, 'citizens understand that joining forces is the way to intervene at the European level much more than providing individual, isolated views'.<sup>155</sup> Further, although European Citizens' Initiatives

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<sup>152</sup> Marxsen above 52, 276.

<sup>153</sup> See results of consultations on the EU's relations with Japan, Myanmar and Mexico available at: DG Trade, *Summaries of contributions to the Public Consultation on: 'The future of EU Japan trade and economic relations'*, (17 February 2011) 2; European Commission, *Public consultation on the future investment relationship between the EU and Myanmar* <[http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=176](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=176)>; European Commission, *European Commission, Published Results: IASG-EU-Mexico* <<https://ec.europa.eu/eusurvey/publication/IASG-EU-Mexico>>.

<sup>154</sup> Ferri above n 42, 75.

<sup>155</sup> Marxsen above n 52, 272-3.

may be initiated by any EU citizen, they still demand significant resources, networks, organisation capacity and public relations to pass the initial hurdles – perhaps the most demanding of which is needing to obtain 1,000,000 participants.<sup>156</sup> The requirements for being registered are also overly technical and provide the Commission too much discretion to reject submitted initiatives. This is epitomised in the Commission’s refusal to register the STOP TTIP initiative, despite it garnering easily the most participants of any of the proposed initiatives to date. Consequently, they are, despite the title, ‘in fact not primarily a mechanism for the involvement of individual citizens’.<sup>157</sup>

There are also concerns as to the cross-section of civil society being included. In regard to the consultations, previous studies have shown generally that ‘organisations with a business or industry background dominate the consultative process’.<sup>158</sup> This leaves the level of participation of not-for-profit organisations or public interest organisations lacking, where participating at the EU level is prohibitively cost intensive.<sup>159</sup>

### 3 *Responsiveness*

The responsiveness of the policy process is the most difficult to assess as it is difficult to know exactly what the institutions consider, and to what extent, in the deciding on the direction of the EU international investment policy.

Turning to the deficiencies first, on the Europeans Citizens Initiative generally, responses by the Commission have been criticised as lacking ambition,<sup>160</sup> being ‘contrary to the principle of ‘participatory democracy’<sup>161</sup>

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<sup>156</sup> Marxsen above n 14, 166.

<sup>157</sup> Ibid.

<sup>158</sup> Marxsen above n 52, 273.

<sup>159</sup> Ibid; Ferri above n 42, 70.

<sup>160</sup> Right2Water, Press Release *Commission Lacks Ambition in Replying to first European Citizens’ Initiative*, 19 March 2014; discussed in Marxsen above n 14, 167.

<sup>161</sup> One of Us, Press Release *from the Executive Board of the European Citizens Initiative*, 5 June 2014; discussed in Marxsen above n 14, 167.

and plainly ignoring the requests made by the initiative.<sup>162</sup> It has subsequently been suggested that ‘unless the Commission finds ways to take the proposals more seriously, it is highly unlikely that [they] will play any significant role in the future.’<sup>163</sup> In the international investment policy realm, it appears to be a missed opportunity by the Commission electing not to consider the STOP TTIP initiative, if not even in an informal manner, given the wide support that it has collected.

In regard to its response to civil society participation, its involvement in the TTIP Advisory Group questions the quality of response it provides. From a review of the meeting reports, it does not appear that the group was given any substantial information that was not already made public and instead of a two-way discussion, where the members could influence the direction of negotiations, it appeared much more akin to a Q&A session, where the members’ views would not likely be taken into account. Likewise, the Commission’s response to the Ombudsman’s suggestions regarding transparency appeared non-committal and the actual effect of the suggestions must therefore be questionable.

Other mechanisms, such as the EESC have been subject to empirical analyses on their effect on decision-making and it is generally agreed that they do have an influence, if restricted.<sup>164</sup> Specifically on the TTIP, the EESC’s opinion on the TTIP discussed above may well have had an impact on the policy stance of the EU, as a number of recommendations were adopted by the Commission in their negotiating position on ISDS (though these recommendations were not particularly unique).<sup>165</sup>

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<sup>162</sup> Press Release, Stop Vivisection, ‘A disappointing response’, 5 June 2015 <<http://stopvivisection.eu/en/content/press-releases> on 28 December 2015>.

<sup>163</sup> Marxsen above n 14, 168.

<sup>164</sup> Ferri above n 42, 64.

<sup>165</sup> Particularly, the EESC’s call for the Commission to consider the UNCTAD proposals for Reform of ISDS were taken up in part.



More broadly, there is no part of article 11 of the TEU, nor any other provision or regulation, which requires the EU institutions to consider the views put forward by the people and civil societies in making its decisions and to what extent.<sup>166</sup> This allows the Commission to fail to adequately report on the outcome of its participatory initiatives, leaving citizens to rely on an ‘underlying faith that bureaucrats will act in an enlightened manner, seeking input from outsiders when appropriate and taking proper account of the information received’.<sup>167</sup>

(a) *TTIP Consultation, Concept paper and Proposed ISDS provisions*

Perhaps the clearest and most positive view of the responsiveness of the EU can be found in the Commission’s concept paper and proposed ISDS provisions for the TTIP in response to the public consultation on ISDS in the TTIP.

First, the public’s views and suggestions on ISDS in the TTIP were summarised and reported in the Commission’s report on the consultation,<sup>168</sup> identifying four prevailing issues of concern arising from the public consultation:

1. the protection of the right to regulate;
2. the establishment and functioning of arbitral tribunals;
3. the relationship between domestic judicial systems and ISDS; and
4. the review of ISDS decisions through an appellate mechanism.

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<sup>166</sup> Ferri above n 42, 68.

<sup>167</sup> Reeve T Bull ‘Public Participation and the Transatlantic Trade and Investment Partnership’ (2014) 83 *George Washington Law Review* 1262, 1278.

<sup>168</sup> Report on ISDS Consultation above n 54.

Second, these four issues were addressed in the Commission's concept paper and a specific response and suggested negotiating position was given for each issue.<sup>169</sup>

Third, significantly, each one of these proposed negotiating positions were adopted by the Commission in the EU's proposal for ISDS in the TTIP, which was tabled in November 2015.<sup>170</sup>

Further, on 29 February 2016, the EU and Canada agreed to amend, among others, the ISDS mechanism in the Comprehensive Economic and Trade Agreement. These amendments are largely based on the EU's proposal for ISDS in the TTIP.

It is clear that the Commission has responded to each of the principal concerns raised by the public consultation, as each one of them has been specifically addressed and then used as a basis for its negotiating position with the US. Consequently, it is possible that in this case the views of less than 150,000 citizens (in a populace of more than half a billion) made a significant and direct impact on the international investment policy of the EU; surely a sterling example of the responsiveness of participatory democracy in action.

## B *Assessment of participation in Australia*

### 1 *Openness*

Australia's processes are on its face very open. The amount of available information on each one of its investment and FTAs is substantial. It provides information on the agreement itself, its various trading partners, fact sheets on specific topics and a continually updated news service, with two specific trade and investment related newsletters.

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<sup>169</sup> Concept Paper on TTIP above n 56.

<sup>170</sup> European Commission, *European Union's Proposal for Investment Protection and Resolution of Investment Disputes in the Transatlantic Trade and Investment Partnership* (2015).

Each report undertaken by the parliamentary committees, independently commissioned experts or government (DFAT) are all made publicly available, together with the submissions made for the purposes of reports, details of participants in private consultations and transcripts of public hearings (in the case of the committee hearings).

Where the openness of the process falls down significantly, however, is the information provided to the public during negotiations of a given FTA. This sentiment has been consistently echoed when discussing the international investment law policy process in Australia.

As the Senate Foreign Affairs Defence and Trade Committee found, the principal concern is that the texts of the FTAs are only presented to Parliament and the public after they are signed, leaving it with an ‘all-or-nothing’ choice,<sup>171</sup> being:

...counter-intuitive for complex trade agreements which are years in the making to be negotiated in secret, subject to stakeholder and parliamentary scrutiny for a few short months with no realistic capacity for text to be changed, and then for implementing legislation to be rushed through parliament unamended. This comes very close to making a mockery of the process and of parliament's involvement.<sup>172</sup>

For the government’s part, it maintains that the ‘fundamental rationale for [the confidentiality] is, if you start releasing your bottom line, your negotiating strategy, and everyone can see it, then you are not going to get the best outcome’.<sup>173</sup>

This contradiction in the views of committees is largely explained by the party politics in Australia. As Sawyer states, outcomes of parliamentary committees are usually pre-determined by party positions.<sup>174</sup> Indeed, since the change of government in September 2013, when a committee has recommended

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<sup>171</sup> Trade Committee Report above n 35, ‘Forward’.

<sup>172</sup> Ibid.

<sup>173</sup> Evidence of Assistant Secretary of DFAT in hearing on treaty making process by Foreign Affairs and Trade Committee. See Trade Committee Report above n 35, 43.

<sup>174</sup> Sawyer above n 25, 255.

implementing a treaty, it has had more members of the Liberal (governing) Party and when it has recommended against implementing it, it has had more members of the Labor (opposition) Party or Australian Greens.<sup>175</sup>

*Example of deficiencies*

The relative lack of openness in FTA negotiations is made no clearer than by the conduct of the government throughout its negotiations on the TTP.

After 9 rounds of negotiations, which were under strict terms of confidentiality,<sup>176</sup> where apparently investor protection and ISDS in particular was not mentioned, or if it was it wasn't reported publicly, and then after the Ministers' report to the leaders again not mentioning it, the 'broad outlines' of the agreement stated that the agreement would include ISDS.

Then following a further ten negotiating rounds and numerous meetings of the chief negotiators and the Ministers, all of which were reported online, still there was no mention any negotiations on ISDS or investor protection. It was not until the TPP was announced on 6 October 2015, over five years after negotiations commenced, that an official announcement concerning ISDS in the TPP was made.

Importantly, throughout this period of frequent negotiating and numerous meetings, public debate was intensifying, beginning in 2011 with the Government's decision to remove all ISDS provisions in future agreements

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<sup>175</sup> For example, in the report on Australia's FTA with China, the Joint Standing Committee on Treaties recommended it be passed, but the dissenting reports were all submitted by members of the Labor Party. See *Report 154: Treaty Tabled on 17 June 2015- Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China* (2015), 67 (first sentence), stating that 'the China-Australia free trade agreement (ChAFTA) is an unbalanced agreement as a result of the Coalition government's eagerness to complete the negotiations to an artificial deadline'.

<sup>176</sup> See model letter released by governments, above n 138.

(discussed above) and shown in a dramatic rise in media reporting referring to ISDS from this period onwards.<sup>177</sup>

Yet, despite this boom in public interest and the constant reporting on the progress of negotiations, there was no government reporting on this most divisive issue. This is a considerable shortcoming in the openness of the Australia's process.

## 2 *Inclusiveness*

The Australian Government strives to ensure that its processes are available to general participation and public scrutiny. Certainly, one of Australia's principal strengths is the continual invitation for submissions and consultations from the public. In all of the independently-commissioned reviews, committee inquiries and throughout the negotiations, invitations for public submissions have been published in the media and online.

For example, in the case of the inquiry into the *Trade and Investment (Protecting the Public Interest) Bill* the Parliamentary committee received over 11,000 emails in support. This process gives the community a chance to have input on legislation that affects them and 'guides' negotiators throughout FTA negotiations.<sup>178</sup> As Halligan states, these functions 'involve the broader community in the policy making process, providing a forum for policy debate and the committee as an extension of the democratic process that becomes thereby more participatory'.<sup>179</sup>

As regards consultations, it is clear that attempts are made to gain ongoing feedback from stakeholders throughout the government's negotiations on

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<sup>177</sup> See table in L Nottage 'The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration in Australia' *University of Sydney; Legal Studies Research Paper No 15/97* (2015) 9.

<sup>178</sup> Trade Committee Report above n 35, 16.

<sup>179</sup> Halligan above n 113, 142.

FTAs. DFAT estimated that it consulted with more than 1,000 participants regarding the TPP.<sup>180</sup>

In addition to consultations with stakeholders, the government undertakes considerable consultations with experts. This is shown in it commissioning experts to undertake a number of lengthy reviews discussed above. Further, in addition to informal consultations undertaken by DFAT, the Parliamentary committees discussed above all hold public hearings and invite participants that have made submissions to the committee to attend to give evidence. These hearings result in public reporting, culminating in a higher level of public participation than what occurs in the parliamentary chambers. These functions therefore provide a formal channel of communication between the public and Parliament, encouraging greater community participation.<sup>181</sup>

(a) *Deficiencies*

Despite these steps taken to include the public in its international investment law policy making, there remains a number of deficiencies in Australia's attempt to do so. The principal concern is the lopsided nature of participation between stakeholders with business interests against NGOs, not-for-profit associations and individuals.

For example, the numbers that are available on the TPP show that during negotiations, submissions to and consultations with government is dominated by business, trade associations or unions.<sup>182</sup> The level of individual and NGO

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<sup>180</sup> Trade Committee Report above n 35, 45.

<sup>181</sup> Halligan above n 113, 147-8.

<sup>182</sup> DFAT held consultations with 485 participants, approximately 406 of which were business interests, trade associations or unions, 36 with individuals and 16 NGOs. It also received 83 submissions, approximately 54 of which were from business interests, trade associations or unions, 15 from individuals and 5 from NGOs.

See list of participants in Australian Government Department of Foreign Affairs and Trade, *Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam: National Interest Analysis* [2016] ATNIA 4, Annexure 1, 2-15.

participants is far lower. Consequently, while it is important for the government to access business input to assist it in understanding ‘commercial-level factors’,<sup>183</sup> the cross-section of individuals and civil society being included in the process favours the profit-seeking participants with strong resources.

Further, Parliamentary committees are not referred inquiries into any FTAs until after they were signed, seriously calling into question the utility of the public making submissions and attending hearings into these committee inquiries. As the Senate Foreign Affairs Defence and Trade Committee found, ‘it is pointless for [committee] inquiries to begin after agreements are signed’.<sup>184</sup> It has also been suggested that the quality of stakeholder consultation through treaty negotiations is not as effective as it could be, due to the apparent lack of access to documents through the negotiating stage. It is said this makes stakeholders having to speculate on the contents of an agreement, and compromises the level of expert input available to DFAT. As one submitter to the parliamentary committee said, ‘it is nice to have the conversation, but it is not a very high value engagement at the moment’.<sup>185</sup>

These criticisms have again, however, come from committees with an opposition party-majority membership. In other inquiries, the current consultation process has been mostly welcomed<sup>186</sup> and industry representatives are generally satisfied with the current process.<sup>187</sup> Further, although the committee consultations are conducted after the agreements have

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<sup>183</sup> Joint Select Committee on Trade and Investment Growth. *Inquiry into Business Utilisation of Australia’s Free Trade Agreements* (2015) 66.

<sup>184</sup> Trade Committee Report above n 35, ‘Forward’.

<sup>185</sup> *Ibid* 46.

<sup>186</sup> For example, see Joint Select Committee on Trade and Investment Growth. *Inquiry into Business Utilisation of Australia’s Free Trade Agreements* (2015) 66.

<sup>187</sup> See for example, evidence of Export Council of Australia in Trade Committee Report above n 35 at 45: ‘We have attended a number of the DFAT consultation sessions and we are firmly of the view that they do communicate as extensively as they can and they do take into account commentary which is made’.

been signed, DFAT consultations and submissions are invited and publicised even before negotiations commence. As said by the Joint Standing Committee on Treaties, it ‘urges stakeholders to take full advantage of the existing opportunities for consultation during the negotiations of bilateral trade agreements and to be proactive in putting their case to the negotiators’.<sup>188</sup> It is perhaps a case of the government showing us the door, but not being able to walk us through.

### 3 *Responsiveness*

The responsiveness of the Australian process is again difficult to assess. Certainly, it appears that it relies strongly on expert advice which, in turn, considers community views. The previous Gillard-Government responded to expert and community concerns that the government’s right to regulate would be restricted under ISDS in FTAs. This response is made clear in April 2011, four months following the Productivity Commission’s report, when it denounced its use of ISDS in its FTAs and investment agreements. The government stated that in coming to its position on ISDS, the Commission’s report had been ‘closely considered’ and that the new policy was ‘highly consistent’ with their recommendations. Considering the wide level consultation that the Productivity Commission took into account on community views, and also that apparently there were no active supporters of ISDS in the Commission’s eyes, it is a reasonable conclusion that its community consultation played a large part in changing this policy.

This is also illustrated in its response to the independent review of Australia’s export policies. Conducted by economic commercial experts and considering a wide range of stakeholder submissions and consultation, among a number of core recommendations was that Australia should aim to achieve an Asia-Pacific region-wide FTA. Just two months following these recommendations,

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<sup>188</sup> Joint Standing Committee on Treaties, *Report 142: Treaty Tabled on 13 May 2014- Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea* (2014) 46.



the then Trade Minister announced that Australia would participate in TTP negotiations.<sup>189</sup>

Nowadays, there is less indication from the government on what has influenced its international trade and investment law policy. Perhaps the fact that it is difficult to assess is in itself is a mark against the process, as the Australian Government has very rarely released much more than cursory details of which consultations and submissions it considered in making its decisions. The National Interest Analyses, the principal reports prepared by the government itself on each FTA following their signing, for example, focuses on the arguments for implementing an FTA, but only gives scant detail on what impact the stakeholder views had on this decision. In addition, there has been no report on the work of the Trade and Investment Policy Council, which was specifically set up to facilitate dialogue between the Minister and the business community.

The example of the TTP negotiations again also indicates a poor receptiveness to the public input in the process. In the context of wide media attention, a Private Members Bill that garnered 11,000 emails in support and public recommendations against the adoption of ISDS clauses, the government quietly agreed to ISDS in the TPP, albeit with exceptions, with so-far very little explanation of how or why it came to this position. If this remains the case before the agreement is ratified, it would demonstrate a considerable flaw in the participatory democratic process of Australia's international investment law policy.

### *C Comparison of both processes*

As against each other, it is first clear that the EU has a higher number of participatory initiatives designed to ensure it remains as open as possible.

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<sup>189</sup> Mortimer Review above n 99 dated 1 September 2008 and the announcement to enter negotiations came on 20 November 2009.

Certainly, since the change of the DG Trade Commissioner, the Transparency Initiative, which aims at enhancing the FTA negotiations as being more transparent than ever, has increased the level of information available to the public and other stakeholders. This, together with the Transparency Register and the constant public appearances of EU officials (through consultations, dialogues, debates, INTA hearings and the social networking) on its face projects a very open policy process. Australia's process also appears open, with a substantial amount of accessible information on each agreement, commissioned report, committee report and public and stakeholder submission.

Despite the appearance of being open, however, both the EU and Australia have glaring omissions in what they provide to the public *during* FTA negotiations. This is evident in the negotiations of both of their biggest investment-related agreements to date; the TTIP and TTP. Their respective positions on ISDS were kept dormant in every one of their negotiating reports. This was at a time when ISDS was (and continues to be) the most divisive issue surrounding international investment law. The excuse that the issue hadn't been explored yet is not sufficient.

Notwithstanding this, the EU has recently shown a marked improvement in its openness and this is none clearer than in releasing its negotiating position for ISDS in November 2015 (before the negotiations have been concluded) and, for this reason, it is submitted that its process is more open than Australia's.

Second, the EU appears to have more inclusive initiatives, through the sheer number of ways that the public and stakeholders may participate. The various dialogues, formal online consultations, committee hearings, European Citizens Initiative and civil society involvement through the EESC and other formal consultations leave the people with ample opportunity to get involved. Despite the number, however, these 'soft mechanisms' lack proper, wider

representation and require a technical knowledge or an abundance of resources to fully participate.

In contrast to the EU, there are no specific, targeted initiatives by the Australian government to include the people in the investment law process. However, the stakeholders and public are always invited to make submissions and contact the relevant institution throughout every stage of the investment law policy process; be it during the initial consultations years before negotiations commence, continuous informal consultations through negotiations, expert consultation on specific industry fields and throughout the committee scrutiny of the relevant investment-related agreement. It is true that the recent statistics illustrate concerning lopsidedness towards profit-seeking associations or businesses, but this is the case in the EU's consultations as well. Further, although the utility of including the public at the committee stage after the agreement has already been signed is questionable, the culmination of the public's involvement at every step of the process can only have a positive effect on the process more broadly. It is for this reason that Australia's process may be regarded as being more inclusive.

Finally, it is clear that the EU's response to the results of a number of its own initiatives was little more than indifference, refusing to look at easily the most popular European Citizens' Initiative, denying findings of the Ombudsman regarding its transparency and using the TTIP Advisory Group as a Q&A session without taking in any recommendations.

In comparison, the Australian process under the previous government was clearly responsive to community and expert concerns about ISDS where it changed its policy and, though this has changed to a case-by-case assessment of ISDS, its policy still allows for action should attitudes change once again. Apart from this response (five years ago), though, there is little to guide us as to what the current government considers in forming its policy, which is an indictment in itself. The reporting of consultations is scant and the response to

committees is heavily influenced by party politics. Generally, it appears that Australia places greater credence on expert opinion than it does public opinion.

Conversely, though both processes have their own flaws, the formidable illustration of the EU changing its policy on ISDS in the TTIP in response to the consultation on this issue is surely an admirable example of ways that governments could respond to public participation in this area of law. The current EU process, therefore, must be regarded as more responsive.

## VI CONCLUSION

The EU and Australia were identified as representative democracies that both hold closely the principles of participation to fill the gaps where free elections alone are insufficient to grant the government legitimacy. These gaps are wide in the area of international investment law, as the elected officials play an even lesser role in the process than in domestic law-making. As participatory democratic theorists in both the EU and Australia have contended, only direct civic participation can act as the panacea for these democratic wounds.

In comparison to one another, it is submitted that Australia's international investment law policy process is more inclusive, but the EU's is more open and responsive to the public and could be used as a starting point for other states. Despite this conclusion, however, this comparison has confirmed what many have recently articulated more broadly. That is, if their participatory processes fill the legitimacy gaps where representative democracy cannot, there may lay many more gaps that remain exposed.

Yet, what stems from this finding? If it is true that the EU's processes are more participatory, it follows that the EU has a higher level of democratic legitimacy than Australia. However, it does not necessarily follow that its policy and position on investment law is more effective. In regard to the EU, which is lambasted on a daily basis for its lack of transparency and public say

in its trade and investment policy, it surely is not as technocratic and dismissive of the public's views as is made out. It has just dramatically changed its traditional stance on ISDS as a result of public pressure and for this, from a democratic perspective, it should be applauded.

On the part of Australia, which places a higher value on expert consultation, there is an argument that this, rather than buckling to populist beliefs, leaves it better equipped to efficiently and effectively conclude an FTA which is tailored to the specific trade partner. This is seen by its recent promulgation of multiple agreements, with many more in the pipeline (including with the EU). It is not for this paper to assert that shying away from public participation could be advantageous for a government, but if relying on experts more than the masses is good enough for Plato,<sup>190</sup> there must be merit in the argument.

Nevertheless, as Australia and the EU continue to rattle through agreements that will change the landscape of trade and investment law across multiple regions, this comparison has shown that, for two representative democracies that would claim to be more participatory than most, neither could be used as a perfect model for others in facilitating participation in their international investment law policy processes.

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<sup>190</sup> See Plato's seminal *The Republic*, recounted in Held above n 3, 23, where Plato likened a democracy to a ship, where the captain is unable to sail due to the crew's attempts to interfere and lamenting that a democracy 'treats all men as equal, whether they are equal or not'.