Philip Morris investment treaty arbitration claims over tobacco packaging regulation: out of puff?

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Overview

- Australia's (novel) tobacco plain packaging law:
  - Announced April 2010, enacted Nov 2011
  - HCt constitutional claim: rejected Oct 2012
    - No protection against indirect expropriation ('takings')
  - ISDS claim, HK BIT: rejected Dec 2015 (& costs: mid-2017)
    - No jurisdiction: PMA's restructuring / inv. was 'abuse of rights'
  - Inter-state WTO claim: rejected mid-2017 on merits [tbc]
- Uruguay's 2008-9 tobacco regulations:
  - ISDS claim under Swiss BIT: rejected July 2016
- Implications for Australian and regional FTAs

1. *Philip Morris Asia v Australia*

'… the PMA case has been seen as epitomising all that is wrong with treaty-based ISDS: an unlikeable, pseudo-American multinational invoking a little-known treaty and an opaque arbitral procedure to claim billion-dollar damages arising from legislation enacted to protect public health'

Hepburn & Nottage (2017) 18 JWIT 307-19 (version at http://ssrn.com/abstract=2842065)

But what happened?

- Profs Kaufmann-Kohler, McRae & Bockstiegel (chair) re Australia's objections on jurisdiction:
  - PMA's investment illegal under FDI screening law?
    - NO (eg Treasury official's 'no objection' letter!)
  - Dispute arose before Feb 2011 investment?
    - NO (crystalised when law enacted in Nov 2011)
  - HK restructuring, solely for ISDS, abuse of rights?
    - YES (background int'l law: dispute 'reasonably foreseeable')
- Decision on (esp. party) costs: still to come

Broader issues:

- Delay? 4-5.5 years - from Nov 2011 Notice of Arb
  - ISDS average: 3.2 to dismiss Jn, 3.6-4 years on merits
    - & cf WTO claim: 5.5 from Oct '12 to Panel draft (+ appeal?)
  - Even longer if Australia had prevailed in arguing for arbitration 'seat' to be England (not: Singapore)
    - As 'negative jurisdiction rulings' can be appealed to seat Ct!
- Costs? 'A$50m spent by Australian govt'?!
  - ISDS average: US$4.5m party costs (lawyers, experts etc) + US$0.85m tribunal costs (ad hoc UNCITRAL Rules)
  - Uruguay ICSID award: US$7m (of $10m) Resp costs
  - PMA Final Award (8/3/17): redacted! At least US$4.5m sought? Less some % due to failed defence re admission

- Transparency? Australia secured Tribunal order permitting public release of all documents
  - But later eg didn't release its merits defence: concerned re a procedural advantage to WTO claimant states
- 'Regulatory Chill'? Hard to prove a negative! But
  - Eg NZ enacted plain packaging law after (Jn!) award
    - Yet aware of Aust. health effects, eg via WTO (as third party)?
    - Generally, eg Canada: Cote (2014 LSE PhD) found little independent 'reg chill' effect from ISDS case potential
    - Assumes ISDS claimants win (or credible): cf result here?

2. How about *PMA et al v Uruguay*?

- '08 'Single Presentation Requirement' (1 variant per brand) & '09 '80/80 Regulation'
- Swiss cos & Uruguay sub (Sidley Austin, Lalive)
  - vs Foley Hoag (+ Bloomberg) & Yale law dean!
- Claimant spent $16m (> base compensation!)
- Tribunal: Born, Profs Crawford & Bernardini (chair)
- Claim rejected on merits:
  - no Expropriation
  - no breach of FET, denial of justice [Born partial dissent]

no Expropriation

(assuming: modified but unregistered TM still legal)

- TMs didn't give unalienable right to use
  - subject to host state's overriding reg power
- Indirect expropriation: only if
  - substantial deprivation or 'major adverse impact'
  - Not even PF for 80/80 Reg; nor SPR, based on whole biz impact
- Customary int'l law (& treaties) 'police powers' exception if bona fide measures for public health/welfare (based on Constitution, FCTC), non-discriminatory & proportionate
- Amicus curiae briefs (eg from WHO) & smoking rate decline

No lack of 'fair & equitable treatment'

- 'arbitrary' measures?
  - SPR: consumers misconceived risks of 'mild' cigarettes (& PM misreps), FCTC evidence especially useful for smaller member states, reasonable when measure adopted (addressing real health concern, proportionate, no bad faith), 'margin of appreciation' (ECHR): tribunals 'should pay great deference to govt judgements in matters such as the protection of public health' (eg *Electrabel*, *Glamis*)
    - [Born dissent: 'margin' n/a, 'deference' BUT basically framed by proportionality analysis [cf eg Henckels '15] - too broad & hasty]
  - 80/80 Reg: similarly (& no evidence of lack of meaningful consultation or more illegal cigarette sales)

- Violation of ‘legitimate expectations’ & stability?
  - Given sector & int’l concern, expect more regulation!
  - No specific undertakings by host state
  - Can be first-movers (if rational & non-discriminatory)
  - Anyway: local sub continued to trade profitably!
- (Even if no FET, claimant might be barred by past fraudulent misreps re tobacco risks? [recall PMA])
- (PS Umbrella clause: but TMs not ‘commitments’)

no ‘Denial of Justice’

- Test: fundamentally unfair local Ct proceedings & outrageously wrong final binding decisions
  - High standard of proof (not just: error or incompetence), altho’ eg grave procedural errors

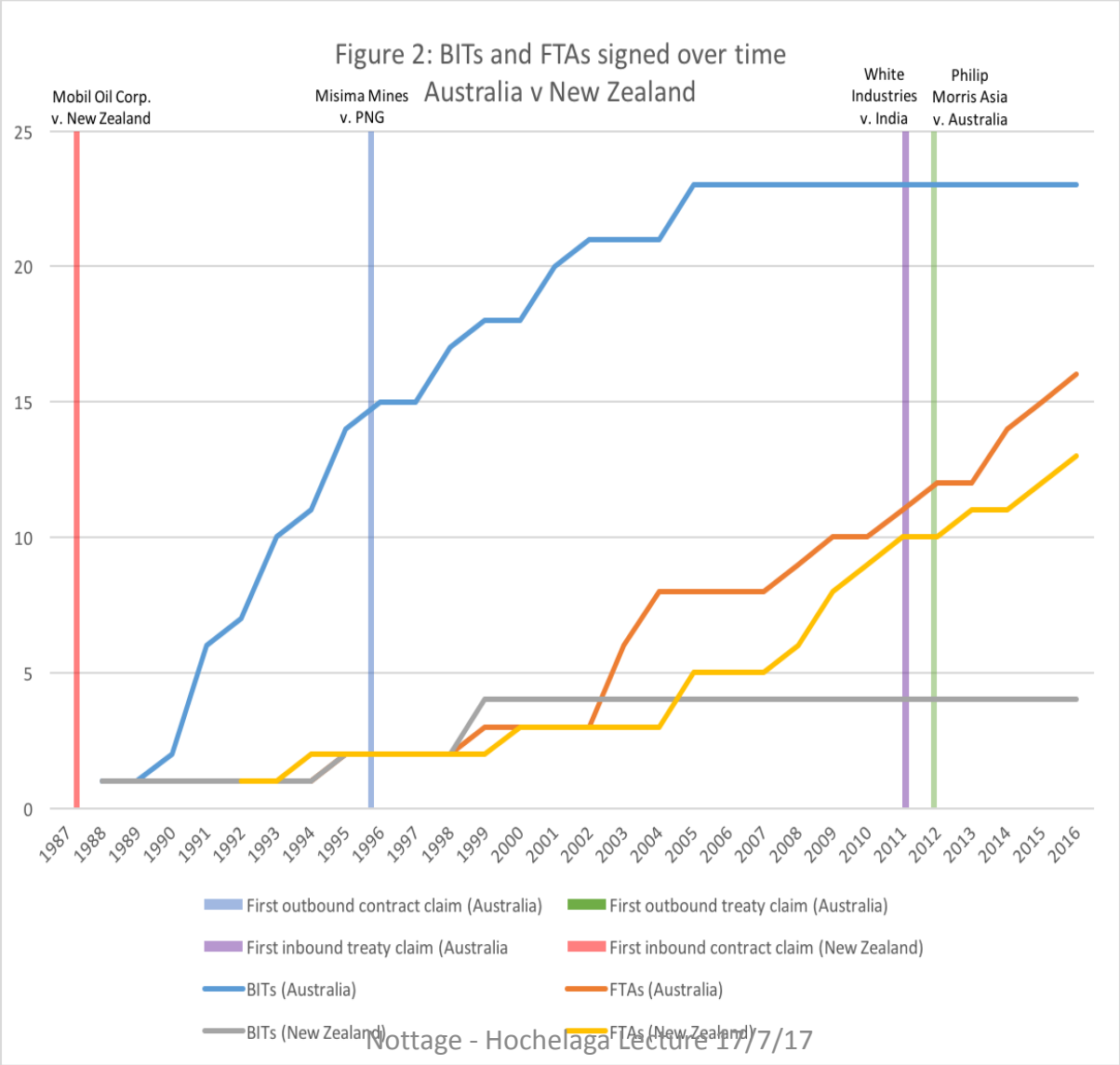
1. Sup Ct interpreted 80/80 Law as constitutional (as not allowing warnings covering >50%), but highest Admin Ct held 80% warnings Reg ok!
   - [Born dissent: preferred Paulsson re inconsistency, minority in ECHR Nejdet v Turkey (& distinguished)]

2. Admin Ct rejected sub's challenge to SPR:

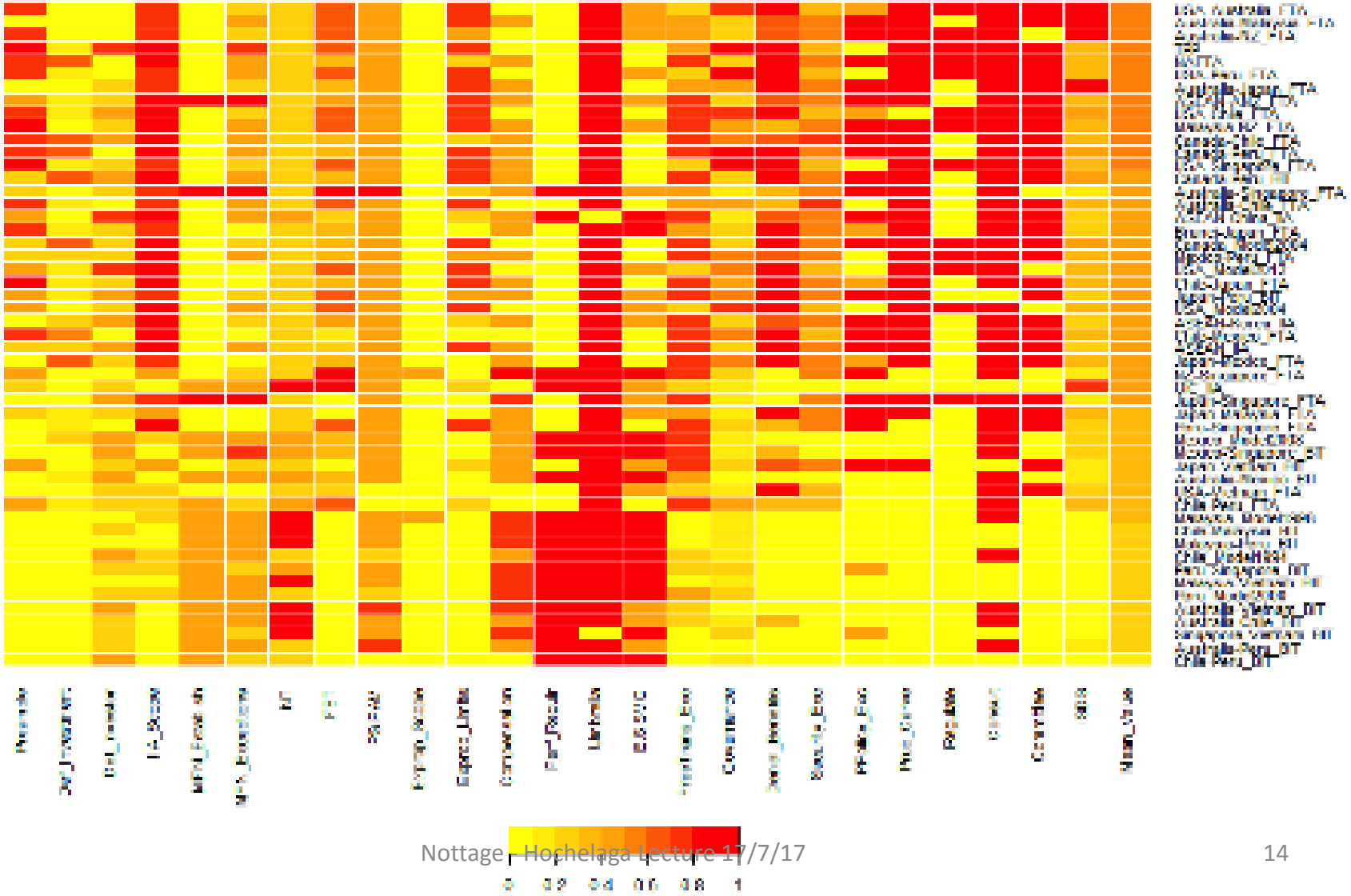
- Referred to arguments & evidence tabled in separate BAT challenge to the measure
  - But this didn't mean that 'in substance, the [Ct] failed to decide material aspects of [sub's] claim' so as to say that hadn't decided it at all
- Didn't correct or amend the judgment
  - But sub's request hadn't raised the ISDS claim that key arguments hadn't been dealt with in the Ct jt

3. Implications for Australia & Region

(generally: Kawharu & Nottage, 2016-7)



Recent A-P treaties *expressly* follow more pro-host-state NAFTA(+) model



Esp. substantive 'State Regulatory Space': Broude et al (2017) JIEL https://ssrn.com/abstract=2944846

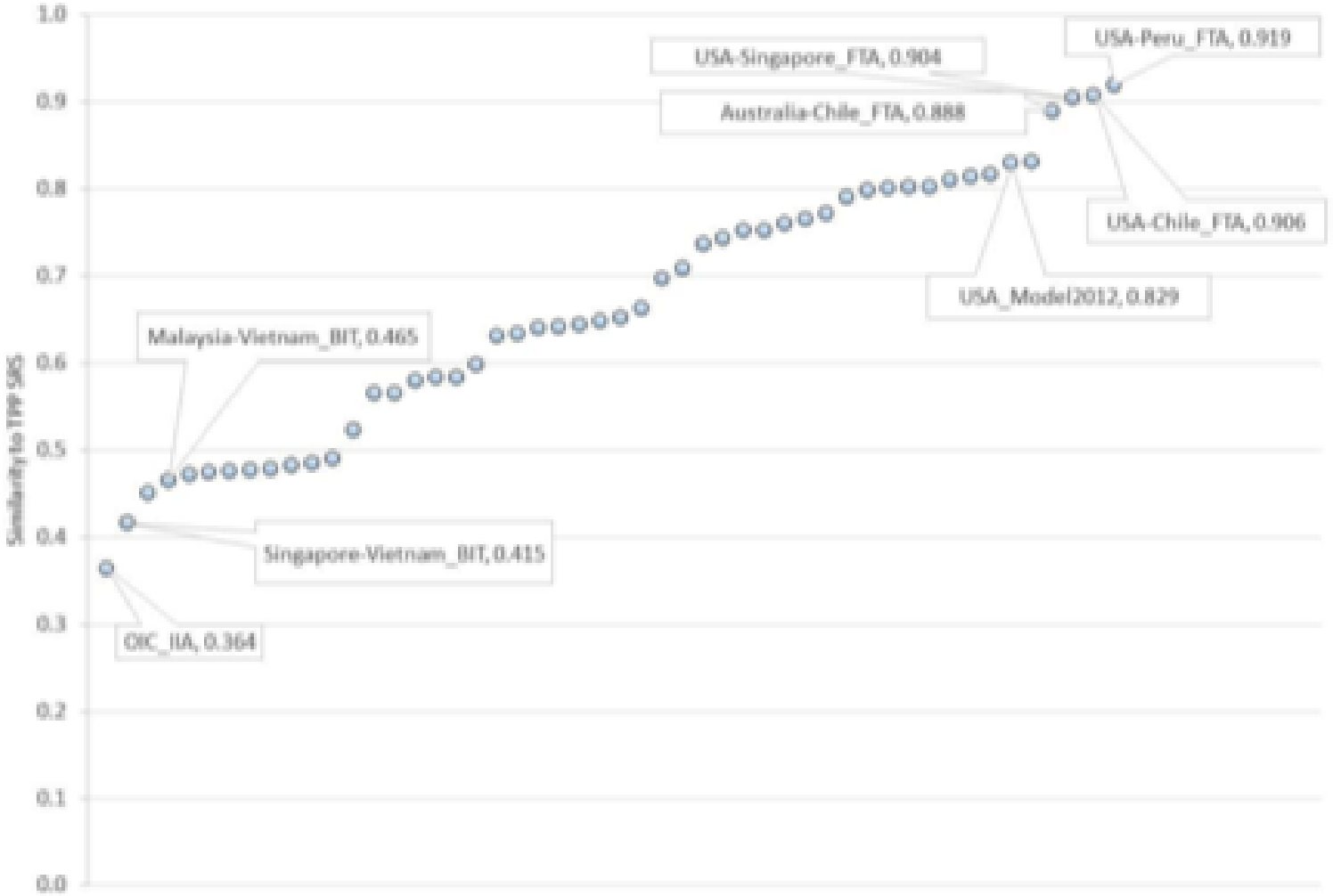


Figure 2: SRS Similarity of Fifty Investment Agreements with the TPP (*SIM_ALL*)

Due to USA, FTAs, new-gen, PacRim

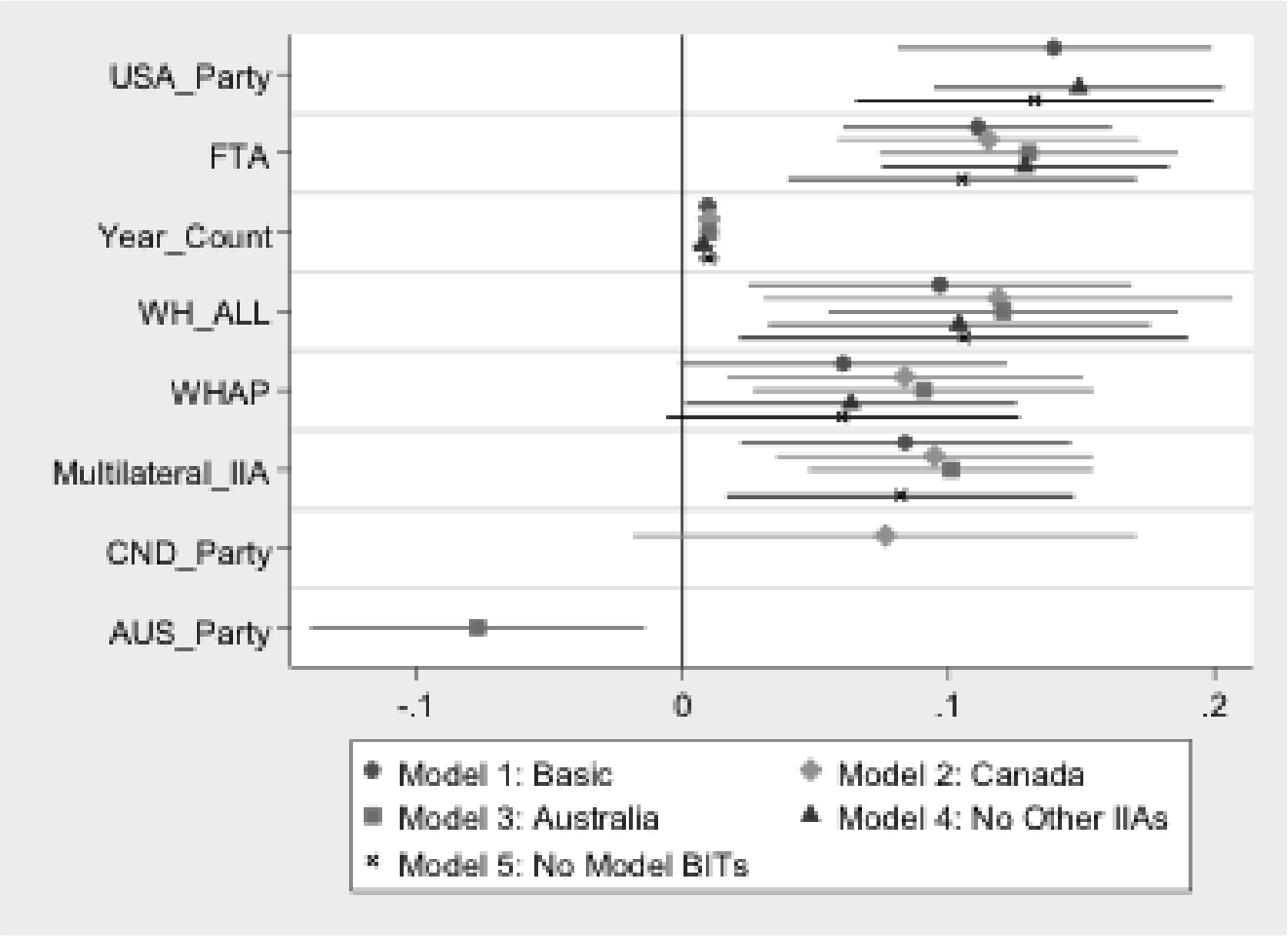


Figure 4: The Determinants of Similarity on SRS Indicators with the TPP

Kawharu & Nottage (2016-7)http://ssrn.com/abstract=2845088

TPP (+ Nottage MJIL '16 = SSRN)

- Omits: investments 'in accordance with host state law' [but implied?*]
- Expropriation: (US) Annex
- FET (incl. denial of justice contrary to 'due process')
- Preambular 'rt to regulate'
- ISDS: ltd 'fork in road', early dismissal, transparency, option to exclude tobacco claims (taken also in Aust-Sing FTA amendment)

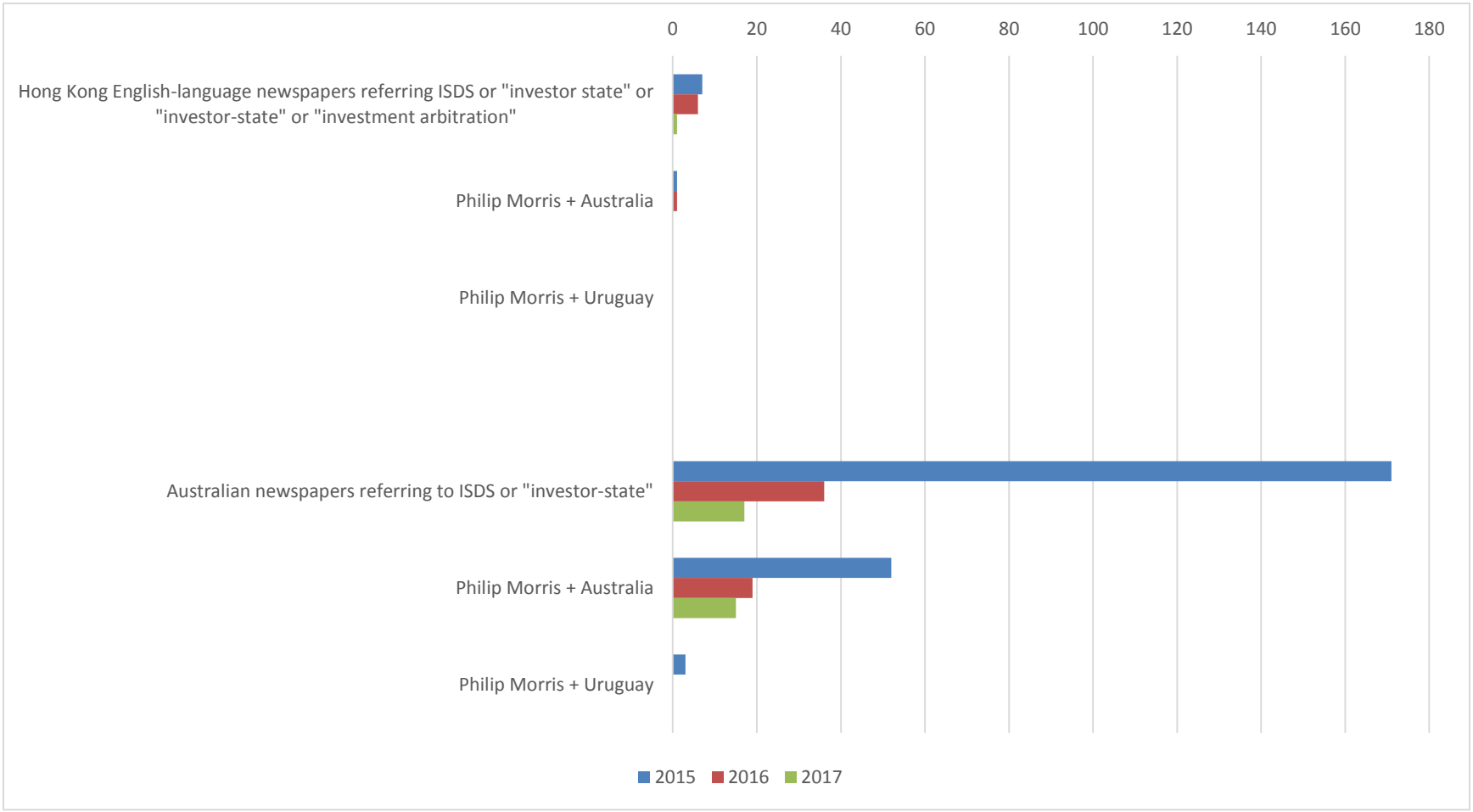
RCEP (eg leaked Oct '15)

- Australia: more AANZFTA-like admission requirement
- NZ: 'severe', & exclude 'rare circumstances' proviso
- India: proposed FET list (as in its Model BIT, recent EU)
- General exceptions?
- ISDS: proposed by China (envisaging appellate review?), Japan & Korea … *but now Indian Model BIT or even EU-style Inv Court?*

Conclusions

- More needs to be done re ISDS delays & esp. costs, hence two-tier investment court (or hybrid)
  - More leadership by Aust (with NZ?) in RCEP & bilaterals
- Yet both Philip Morris decisions are quite comforting
  - Consistent with trend with more pro-host state treaty drafting since turn of 21C, but also decisions of investment tribunals under older treaties (Langford & Behn '16 EJIL = http://ssrn.com/abstract=2835488)
    - More experienced arbitrators interpreting treaty texts, and/or better using general international law principles
  - Deserve wider press, especially Uruguay award
    - Ltd reporting (PTO) suggests psychological as well political biases?

cf Newspapers (2015 – June 2017)



Further reading:

- Nottage, 'Rebalancing Investment Treaties and Investor-State Arbitration' (2016) 17 JWIT 1015 (https://ssrn.com/abstract=2795396)
  - Reviewing CUP '15 books by Caroline Henckels (proportionality/deference)& Lauge Poulsen (BIT negos)
  - Elaborated in Mohan & Brown (eds, forthcoming CUP)
- Nottage, Australia, in de Mestral (ed) *Second Thoughts: Investor-State Arbitration Between Developed Democracies* (CIGI 2017): draft at https://ssrn.com/abstract=2802450
- JWIT special issue soon on ASEAN, and wider Asia book http://blogs.usyd.edu.au/japaneselaw/2017/02/intl_inv_arb_asia_book_proposal.html