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Dr Luke Nottage ***BCA/LLB/PhD (VUW), LLM (Kyoto)***
Professor of Comparative and Transnational Business Law
Co-Director, Australian Network for Japanese Law (ANJeL)
Associate Director, Centre for Asian and Pacific Law (CAPLUS)

9 April 2018

Senate Foreign Affairs, Defence and Trade References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Re: Submission focusing on the Investment Chapter, for the **Inquiry into the Comprehensive and Progressive Transpacific Partnership** (CPTPP)*

My earlier Submissions in 2016 supported ratification of the TPP,[1] after carefully assessing the Investment Chapter.[2] I now support ratification of the CPTPP, which makes minimal changes to the Investment Chapter. Those are summarised in a recent update with A/Prof Amokura Kawharu on Australian and New Zealand investment treaty practice. Specifically:[3]

> The CPTPP will commit New Zealand [Australia and the remaining 9] signatories … to ISDS provisions, but their application to investment agreements and investment authorisations will be suspended.[4] In New Zealand's [and Australia's] case however, authorisations were already excluded from ISDS by virtue of Annex 9-H of the original TPP text.

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* For: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TPP-11

[1] Available via https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TPP/Submissions.

[2] Nottage, Luke R., The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification (April 20, 2016). Melbourne Journal of International Law, Vol. 17, No. 2, pp. 1-36, 2016; Sydney Law School Research Paper No. 16/28. Available at SSRN: https://ssrn.com/abstract=2767996

[3] Kawharu, Amokura and Nottage, Luke R., Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu (February 1, 2018). Sydney Law School Research Paper No. 18/03. Available at SSRN: https://ssrn.com/abstract=3116526, Part 2

[4] CPTPP Annex, para 2.

Faculty of Law
New Law Building F10
Eastern Avenue
The University of Sydney
NSW 2000 Australia

T +61 2 9351 0210
F +61 2 9351 0200

sydney.edu.au/law/anjel

ABN 15 211 513 464
CRICOS 00026A

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[In addition, Australia had only ever agreed to apply ISDS procedures in government contracts with foreign investors in its 2015 FTAs with Korea. In future contracts concluded between foreign investors and CPTPP host states, they remain free anyway to negotiate an arbitration clause that includes provisions similar to those provided in the CPTPP (such as enhanced transparency, compared to usual international commercial arbitration).]

A further change is that the minimum standard of treatment [or: fair and equitable treatment] protection has been suspended with respect to investments in the financial services sector.[5] Again, in New Zealand's [and Australia's] case, this change may prove less significant than it first appears. Most foreign investment in the New Zealand financial services sector is by Australian investors. They are already entitled to the minimum standard of treatment under the Investment Protocol to the Closer Economic Relations Trade Agreement between New Zealand and Australia,[6] albeit underpinned only by inter-state arbitration.

… New Zealand also exchanged bilateral side letters excluding ISDS with Australia (consistent with their past practice) and Peru, as well as (more symbolically [due to AANZFTA 2009 maintaining ISDS[7]]) with Brunei, Malaysia and Vietnam, and issued a Joint Declaration on ISDS reforms

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[5] CPTPP Annex, para 4. For further discussion of the changes between the TPP and CPTPP with respect to investment, see Jarrod Hepburn, 'Revived Trans-Pacific Partnership (TPP) treaty text is released, with a few tweaks to the previously negotiated investment chapter; Australia and New Zealand continue to disapply ISDS between them' on *Investment Arbitration Reporter* (21 February 2018).

[6] Protocol on Investment to the New Zealand – Australia Closer Economic Relations Trade Agreement ([2013] A.T.S. 10), art 12.

[7] Bath, Vivienne and Nottage, Luke R., The ASEAN Comprehensive Investment Agreement and 'ASEAN Plus' – The Australia-New Zealand Free Trade Area (AANZFTA) and the PRC-ASEAN Investment Agreement (September 26, 2013). INTERNATIONAL INVESTMENT LAW: A HANDBOOK, M. Bungenberg, J. Griebel, S.Hobe & A. Reinisch, eds., Nomos Verlagsgellschaft: Germany, 2015; Sydney Law School Research Paper No. 13/69. Available at SSRN: https://ssrn.com/abstract=2331714.]

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with Canada and Chile.[8] Despite these efforts, it seems that New Zealand has proven agreeable to quite limited actual changes to the TPP provisions on ISDS. Those were not renegotiated, for example, to add an appellate review mechanism. This is even though future agreement on such a mechanism is envisaged in TPP Article 9.23(11), and despite some form of appellate review being increasingly advocated by those unhappy about inconsistencies in rulings from traditionally-structured one-tier ISDS tribunals.[9]

However, I would encourage Australia to take leadership (preferably with New Zealand) in:

(a) commencing formal negotiations with the other signatories about superimposing an appellate review mechanism after ratification; and
(b) developing guidance or a code of ethics specifically for ISDS arbitrators (as required by TPP Article 9.22.6 before the treaty comes into force) that includes an express prohibition on "double-hatting" (arbitrators serving as counsel in other ISDS cases).[10]

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[8] [Ministry of Foreign Affairs and Trade, *CPTPP Joint Declaration*, <https://www.mfat.govt.nz/assets/CPTPP/CPTPP-Joint-Declaration-ISDS-Final.pdf>. We thank Murray Griffin for bringing this document to our attention. It is not listed among the CPTPP texts (including side instruments) online at https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/. This perhaps because the three states do not intend to be bound under international law by this joint statement of intent.]

[9] See generally eg Jaemin Lee, 'Taming Investor-State Arbitration? Joint Committees and Binding Interpretations' in Julien Chaisse and Tsai-yu Lin (ed), *International Law and Government: Essays in Honour of Mitsuo Matsushita* (Oxford University Press, 2016).

[10] Neither the Singapore-EU FTA nor the amended SAFTA Code of Conduct expressly prohibits arbitrators serving elsewhere as counsel. (This contrasts with the Investment Court judges under Article 8.30(1) of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), signed in October 2016: European Commission, 'EU-Canada Comprehensive Economic and Trade Agreement (CETA)' <http://ec.europa.eu/trade/policy/in-focus/ceta/>.) Yet recent empirical research suggests that the ISDS system is not working itself clean with respect to such "double-hatting", as leading arbitrators still tend to appear also as counsel in other matters: Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 *Journal of International Economic Law* 301. For further concerns that Australia's treaties do not contain an express prohibition on double-hatting, see Andrew Mitchell,

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These initiatives would go a long way towards assuaging public concerns about ISDS, which may in turn be undermining support for commercial arbitration and ADR generally.[11] Such initiatives might also prompt Australia (and New Zealand) to go the next step and propose an EU-style permanent investment court procedure (as in the EU-Vietnam and EU-Canada FTAs), in both countries' future treaties such as the (ASEAN+6) Regional Comprehensive Economic Partnership.[12] Nonetheless, neither of these matters should be a deal-breaker, preventing the CPTPP from coming into force.

Overall, contrary to the main arguments of Australia's Productivity Commission that led to the Gillard Government eschewing ISDS in treaties over 2011-13,[13] there is good evidence that:

- even qualified procedural rights for investors to bring direct action against host states for expropriation or other violation of substantive treaty commitments, in addition to the option of inter-state arbitration, has led historically to increased FDI on a world-wide basis;[14]
- Australian investors now make good use of ISDS protections to recoup losses incurred by alleged treaty violations, notably by developing states;

Elizabeth Sheargold and Tania Voon, *Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment* (Elgar, 2018) 195.

[11] Nottage, Luke R., International Arbitration and Society at Large (February 1, 2018). CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION, A. Bjorklund, F. Ferrari, S. Kroell (eds), Forthcoming ; Sydney Law School Research Paper No. 18/04. Available at SSRN: https://ssrn.com/abstract=3116528.

[12] Kawharu, Amokura and Nottage, Luke R., Models for Investment Treaties in the Asian Region: An Underview (September 21, 2016). Arizona Journal of International and Comparative Law, Vol 34, No. 3, pp. 462-528, 2017 ; Sydney Law School Research Paper No. 16/87. Available at SSRN: https://ssrn.com/abstract=2845088

[13] Nottage, Luke R., The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic's View of Australia's 'Gillard Government Trade Policy Statement' (June 10, 2011). Transnational Dispute Management, Forthcoming; Sydney Law School Research Paper No. 11/32. Available at SSRN: https://ssrn.com/abstract=1860505

[14] Armstrong, Shiro Patrick and Nottage, Luke R., The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis (August 15, 2016). Sydney Law School Research Paper No. 16/74. Available at SSRN: https://ssrn.com/abstract=2824090

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- the risk of successful claims against Australia and hence supposed "regulatory chill" should be minimal – as shown by the outcome of the Philip Morris claim (and the merits decision in its claim against Uruguay over tobacco regulation) even under old treaties without TPP-like elaborations,[15] as well as the ambit claims recently by some US investors.[16]

Encouraging investors to make and maintain investments in reliance on investment treaty protections is also better than leaving them to "manage" them eg though bribery. After all, corruption in public office has been a problem not only in developing countries in Asia[17] but even recently in New South Wales.[18]

Lastly, this Committee should further encourage the Government to engage in wider and structured public consultation with a view to developing (at least partially bipartisan) model investment treaty provisions for Australia.[19] This would extend beyond the outreach roundtables on international trade and investment law helpfully organised by DFAT in recent years.

Yours sincerely

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[15] Hepburn, Jarrod and Nottage, Luke R., Case Note: Philip Morris Asia v Australia (September 29, 2016). The Journal of World Investment and Trade, Vol. 18, No. 2, pp. 307-319, 2017; Sydney Law School Research Paper No. 16/86. Available at SSRN: https://ssrn.com/abstract=2842065

[16] Australia's inbound and outbound ISDS claims are reviewed in Kawharu and Nottage, above n3, Part 4.

[17] See Nottage, Luke R. and Thanitcul, Sakda, International Investment Arbitration in Southeast Asia: Guest Editorial (November 1, 2016). Sydney Law School Research Paper No. 16/95. Available at SSRN: https://ssrn.com/abstract=2862272, expanded in chapter 1 of Julien Chaisse and Luke Nottage (eds) *International Investment Treaties and Arbitration Across Asia* (Brill, January 2018) at https://brill.com/abstract/title/36129

[18] See eg https://www.smh.com.au/politics/nsw/liberal-mp-defends-corrupt-labor-minister-20180215-p4z0g9.html.

[19] See further Nottage, Luke R., Investment Treaty Arbitration Policy in Australia, New Zealand – and Korea? (August 13, 2015). Journal of Arbitration Studies, Vol. 25, No. 3, pp. 185-226, 2015; Sydney Law School Research Paper No. 15/66. Available at SSRN: https://ssrn.com/abstract=2643926; and Mitchell et al, op cit.

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