



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)

5 March 2020

Department of Foreign Affairs and Trade's (DFAT)
Regional Trade Agreements Division

Dear DFAT

Re: **ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) upgrade**
consultation

Thank you for the opportunity to provide a submission to this important public consultation. I see some others are online,¹ and please upload there my present submission. Unfortunately other commitments probably preclude my attendance at the Thursday 2 April meetings in Sydney, but please let me know that day's timetable as one or more of my co-researchers cited below may be willing and able to attend.

1. For the **Services** chapter, an important matter for Australia to review will be provisions around delivery of **education**. The coronavirus epidemic this year has highlighted that Australia's FTAs (even more recent ones as with China) often do not include commitments allowing cross-border supply (ie service delivery over the internet), which may otherwise conflict with the national laws in our overseas partners.² As well as negotiating more expansive commitments, Australia should seek to draft in provisions around procedures for meeting and discussing urgently with counterparties about counter-measures during public health emergencies, as suggested by our A/Prof Jeanne Huang at the recent SCIL International Law in Review conference (in the context of China-Australia FTA upgrades). Such procedural provisions could also be extended to other chapters, including **Trade in Goods**.

2. For the **Investment** chapter, AANZFTA in 2009 originally lacked significant **liberalisation** commitments.³ A work program for negotiations around expanding market

¹ <https://www.dfat.gov.au/trade/agreements/in-force/aanzfta/Pages/general-review-of-the-asean-australia-new-zealand-fta.aspx>

² Huang, Jeanne, <https://erga-omnes.sydney.edu.au/2020/02/coronavirus-outbreak-and-teaching-chinese-students-online-legal-issues-that-australian-universities-should-know/>

³ 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 Verlagsgesellschaft:



access was envisaged but never completed.⁴ This AANZFTA upgrade should at least lock in (through Schedules) liberalisation commitments made under other treaties concluded by Australia with counterpart ASEAN states (including the still undisclosed RCEP), but should go further to provide “value added”. If a Work Program is agreed for further negotiations, the revised AANZFTA should include commitments about when and how to meet, including provisions allowing for public consultation.

3. For the **Investment** chapter, on **protections for foreign investors** (including significantly now into ASEAN compared to a decade ago),⁵ Australia presumably goes into upgrade negotiations using its most recent significant treaties as a starting point, especially the US-style template (building on NAFTA and epitomised by the CP/TPP) that has become the most common drafting approach around the Asia-Pacific region more generally.⁶ However, views around ISDS-backed protections have changed in recent years, regionally (with the EU proposing several novel features, impacting also on Asia⁷) and in multilateral forums (UNCTAD, ICSID and especially UNCITRAL). Australia needs to become more consistently pro-active (arguably working with close partners especially New Zealand) in addressing persistent concerns about ISDS-backed protections in investment agreements, and this review of AANZFTA therefore should propose:

Germany, 2015; Sydney Law School Research Paper No. 13/69. Available at SSRN: <https://ssrn.com/abstract=2331714>

⁴ Bath, Vivienne and Nottage, Luke R., International Investment Agreements and Investor-State Arbitration in Asia (February 26, 2020). Sydney Law School Research Paper No. 20/08. Available at SSRN: <https://ssrn.com/abstract=3544458> (footnotes omitted):

“The AANZFTA provides that the provisions on NT in the Investment Chapter will not come into effect until the Schedules of Reservations were finalized (Art 11.16) under a Work Program. Further negotiations on an MFN provision were also to take place under the Work Program (Art 11.16). This has not been completed. Indeed, review of the investment chapter was paused in 2017 pending the finalisation of the RCEP, although the Economic Ministers of ASEAN, Australia and New Zealand noted in late 2019 the Upgrade Negotiations to amend the AANZFTA (for the second time) as a result of a review which will include the investment chapter.”

⁵ See ASEAN Investment Report 2018 ch1, via <https://asean.org/asean-investment-report-2018-published/>

⁶ Alschner, Wolfgang and Skougarevskiy, Dmitriy, The New Gold Standard? Empirically Situating the TPP in the Investment Treaty Universe (November 20, 2015). *Journal of World Investment & Trade*, Vol. 17, pp. 339-373. Available at SSRN: <https://ssrn.com/abstract=2823476> or <http://dx.doi.org/10.2139/ssrn.2823476>

⁷ 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>



3.1 Minimising costs and delays through promoting amicable settlement,⁸ by **allowing a disputing party to require the other to attempt to mediate an investment dispute**, before proceeding to arbitration. (This was provided under Australia’s recently signed bilateral FTA with Indonesia, although that was seemingly proposed by Indonesia and only allows the host state to compel mediation,⁹ whereas an investor should be able to compel it too.).

3.2 **Maximising transparency** around ISDS (including disclosure around third-party funding) by explicitly adopting the UNCITRAL Transparency Rules (as under Australia’s recently revised BIT with Uruguay), and/or including similar provisions in the upgraded AANZFTA investment chapter text (as under the CP/TPP and/or Australia’s recent bilateral FTA with Peru).¹⁰ Greater transparency benefits almost all stakeholders, not just (especially democratically accountable) host states but also foreign investors (able therefore to better expose protectionist or other vested interests in host states, to the detriment of other groups in those host states).¹¹ This is also consistent with Australia’s current efforts to ratify the UN Mauritius Transparency Convention; but that only retrofits greater ISDS transparency around pre-2014 treaties even if counterparties ratify that multilateral instrument too in future.

3.3 Further enhancing legitimacy around ISDS by **expressly prohibiting “double-hatting”** (arbitrators acting also as counsel), as under the CPTPP Code of Conduct,¹² as well as recent EU treaties (albeit for its now-preferred “investment court” alternative to traditional ISDS). Curiously Australia has not provided such an express prohibition in any other treaty, even its recent FTA with Peru (although both states are supposed to issue

⁸ See generally, forthcoming in JWIT: Ubilava, Ana, Amicable Settlements in Investor-State Disputes: Empirical Analysis of Patterns and Perceived Problems (March 13, 2019). Sydney Law School Research Paper No. 19/17. Available at SSRN: <https://ssrn.com/abstract=3352181>

⁹ Ubilava, Ana and Nottage, Luke R., Novel and Noteworthy Aspects of Australia’s Recent Investment Agreements and ISDS Policy: The CPTPP, Hong Kong, Indonesia and Mauritius Transparency Treaties (March 4, 2020). Sydney Law School Research Paper No. 20/12. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3548358

¹⁰ Ibid.

¹¹ Burch, Micah and Nottage, Luke R. and Williams, Brett G., Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century (May 24, 2012). University of New South Wales Law Journal, Vol. 35, No. 3, pp. 1013-1040; Sydney Law School Research Paper No. 12/37. Available at SSRN: <https://ssrn.com/abstract=2065636>

¹² See Nottage, Luke R. and Ubilava, Ana, Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry (August 6, 2018). International Arbitration Law Review, Vol. 21, Issue 4, 2018; Sydney Law School Research Paper No. 18/46. Available at SSRN: <https://ssrn.com/abstract=3227401>; and Concept Paper on Arbitrator Independence via <https://www.cids.ch/academic-forum-concept-papers>



Guidance for ISDS arbitrators now that it is in force, so that prohibition might still be added there).

3.4 Australia should propose the “**public welfare notice**” **procedure** added uniquely in its FTA with China. This usefully suspends ISDS claims while the home state discusses with the host state potential defences relating to public welfare interests in the host state.¹³

3.5 However, as another aspect relating to public health risks such as coronavirus, the AANZFTA upgrade should consider express provisions **expediting cross-border movement of senior management** related to foreign investments, even in emerging emergency situations.

4. For the **Competition** chapter, this should be upgraded at least to CPTPP-style standards, but it should be boosted by **more expansive Consumer Protection provisions** especially now that ASEAN states have made significant (albeit sometimes patchy) progress in this field over last decade as part of building the ASEAN Economic Community.¹⁴ I understand my Business School colleague Prof Gail Pearson has completed an ACCC-funded scoping project, so urge that to be publically disclosed so further informed comment and publically discussed. I also repeat my longstanding calls for Australia to seek provisions in FTAs that require or at least allow respective regulators to exchange consumer product safety accident-related information with their counterparts abroad. This could also be extended to sharing information about consumer credit related risks.¹⁵

5. The AANZFTA upgrade should also propose a chapter on **Environmental Protection**, as this is another public concern around FTAs. In particular this should

¹³ For more details see 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>

¹⁴ Nottage, Luke R. and Malbon, Justin E. and Paterson, Jeannie Marie and Beaton Wells, Caron Y., ASEAN Consumer Law Harmonisation and Cooperation: Backdrop and Overarching Perspectives (June 3, 2019). Luke Nottage, Justin Malbon, Jeannie Marie Paterson and Caron Beaton-Wells, "ASEAN Consumer Law Harmonisation and Cooperation: Achievements and Challenges", Cambridge University Press (2019); Sydney Law School Research Paper No. #19/32. Available at SSRN: <https://ssrn.com/abstract=3398046>

¹⁵ Nottage, Luke R., Free Trade Agreement and Investment Treaty Innovations to Promote More Sustainable Financial Markets for Consumers (July 2, 2014). THE GLOBAL FINANCIAL CRISIS AND THE NEED FOR CONSUMER REGULATION: NEW DEVELOPMENTS ON INTERNATIONAL PROTECTION OF CONSUMER, C. Lima Marques, D. P. Fernandez Arroyo, I. Ramsay, G. Pearson, eds., Orquestra Editora, Brazil, 2012; Sydney Law School Research Paper No. 14/59. Available at SSRN: <https://ssrn.com/abstract=2461568>



incorporate this FTA's dispute settlement procedures into other listed environmental protection treaties. The inspiration should be the CPTPP, but drafting improvements are helpfully suggested by our A/Prof Jeanne Huang.¹⁶

Yours sincerely,



¹⁶ Huang, Jie Jeanne and Hu, Jiayang, Can Free Trade Agreements Enhance MARPOL 73/78 Compliance? (October 3, 2018). Tulane Maritime Law Journal, Vol. 43. 2018, pp. 59-91; Sydney Law School Research Paper No. 18/62. Available at SSRN: <https://ssrn.com/abstract=3259734>