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)

26 August 2019

Joint Standing Committee on Treaties
PO Box 6100
Parliament House
Canberra ACT 2600

Re: **Australia-Indonesia CEPA (FTA) & Australia-Hong Kong revised Investment Agreement: compared**[1]

For my evidence being presented (26 August 2019) at the JSCOT treaty ratification inquiry, I will focus on the shaded rows in the comparative Table (appended) & Key Points below, but hope the rest of the Table also assists the inquiry and am happy to elaborate on the other rows/points:[2]

Key points:
(a) Both treaties are generally well drafted and balanced, in the familiar (US-inspired) CPTPP-like style, so should be ratified.
(b) The treaty with Indonesia is more pro-host-state (as indicated in red below). This may be why Australia doesn't seem to be proposing to terminate the existing BIT, but because AANZFTA also remains in effect with Australia (with clearer advance consent to ISDS arbitration[3] and significant pro-investor features), Australia should consider terminating the existing BIT (as it usually does when concluding broader new treaties).[4]

[1] See also helpful commentaries by UMelb Dr Jarrod Hepburn for iareporter.com (5 and 26 March 2019, respectively)
[2] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/A-HKFTA & https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Indonesia-AustraliaCEPA
[3] But cf Nottage, Luke R., Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis of Planet Mining v Indonesia and Regional Implications (April 14, 2014). Transnational Dispute Management, Vol. 12, No. 1, pp. 1-18, 2015; Sydney Law School Research Paper No. 14/39. Available at SSRN: https://ssrn.com/abstract=2424987.
[4] See also Voon, Tania and Mitchell, Andrew D., Old Agreements Must Be Terminated to Bring Life to Investment (May 18, 2019). Available at SSRN: https://ssrn.com/abstract=3390677.

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
luke.nottage@sydney.edu.au
sydney.edu.au/law/anjel

ABN 15 211 513 464
CRICOS 00026A

THE UNIVERSITY OF SYDNEY

(c) The treaty with Indonesia helpfully innovates in allowing the host state to require the foreign investor to mediate before filing for ISDS arbitration.[5] This is useful in light of recent empirical evidence from settlement patterns, suggesting that there exists more scope than perceived for pre-arbitral settlements (perhaps therefore with the help of formal mediation)[6] to address concerns over arbitration costs.[7]

(d) It is disappointing that double-hatting by arbitrators is not expressly prohibited in either treaty (unlike under the CPTPP), nor that there is any mention of (even potential future) appellate review mechanisms for ISDS arbitrators. But these are still not deal-breakers.[8]

(e) Ratification is important for Australia to retain credibility in debating and promoting further reforms to ISDS in multilateral forums (especially UNCITRAL), and to encourage Indonesia as it re-engages with ISDS-backed treaties after terminating many old ones amidst pressures towards "economic nationalism".[9]

Yours sincerely

[5] Nottage, https://www.eastasiaforum.org/2019/05/25/settling-investor-state-disputes-asia-pacific-style/

[6] 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.

[7] Nottage, Luke R., In/Formalisation and Glocalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia (2014). Formalisation and Flexibilisation in Dispute Resolution, J. Zekoll, M. Baelz, I. Amelung, eds, Brill, The Netherlands, 2014; Sydney Law School Research Paper No. 17/47. Available at SSRN: https://ssrn.com/abstract=2987674.

[8] 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.

[9] Nottage, Luke R. and Butt, Simon, Recent International Commercial Arbitration and Investor-State Arbitration Developments Impacting on Australia's Investments in the Resources Sector (April 16, 2014). ARBITRATION AND DISPUTE RESOLUTION IN THE RESOURCES SECTOR: A COMPARATIVE PERSPECTIVE, P. Evans and G. Moens, eds., Springer, 2015; Sydney Law School Research Paper No. 13/71. Available at SSRN: https://ssrn.com/abstract=2340810.

Australia-Indonesia CEPA (FTA) & Australia-Hong Kong revised Investment Agreement: compared[1]

Prof Luke Nottage (26 August 2019), for evidence given at JSCOT treaty ratification inquiry (focusing on shaded rows & Key Points below)[2]

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[4] See also Voon, Tania and Mitchell, Andrew D., Old Agreements Must Be Terminated to Bring Life to Investment (May 18, 2019). Available at SSRN: https://ssrn.com/abstract=3390677.
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Key provisions	With Indonesia (signed 4 March 2019) ch4[10]	With Hong Kong (signed 26 March 2019)[11]
SUBSTANTIVE PROTECTIONS		
Scope of covered measures	Applies to measures from "central, regional or local govt … and any person [delegated] incl. SOE when … exercises govt authority" (14.2.2 + n8)[12]	- similar (but no specific reference to levels of govt or SOEs)
National treatment ("non-discriminatory treatment as compared with a party's own investors")	- Extends (like MFN) to treatment re "establishment, acquisition"; - treatment "in like circumstances" (4 + n9: assessed based eg on "legitimate public welfare objectives"	- Only (like MFN) re "expansion, mgt, conduct, operation and sale" etc of investments (14.4); - "in like circumstances" (n3)
Most-Favoured Nation treatment (MFN: "("non-discriminatory treatment as compared with a non-Party's investors")	- n/a if investor invokes rights in another treaty [eg White Industries v India!], only actual treatment (14.21(1)(a)) [with then costs/summary dismissal ?] - n/a to invoke ISDS etc in another treaty (14.5.3)	- similarly n/a (5.5) - "expansion" only covers investments not subject to prior approval process - similarly n/a (5.4)
Fair & Equitable Treatment	- "minimum standard" includes FET and "full protection & security" but ltd to customary intl law standard (14.7) - not merely from breach of another/treaty provision, nor disappointed investor "expectations" - FET "requires" no denial of justice [non-exhaustive?]	- similarly (8) re first two - "includes" obligation not to deny justice in local courts etc (8.2(a): like TPP)
Non-conforming measures	- schedules limit MFN (& NT etc) eg for indigenous services, social welfare, utilities, creative arts (7) - restrictions re IP rights if laws consistent with the treaty and not disguised restriction on trade/inv (7.6)	- similar concepts (14.4)
Prohibited performance	(WTO+ but) not subject to ISDS, only inter-state DR (14.6	n/a [but unnecessary in HK?]

[9] Nottage, Luke R. and Butt, Simon, Recent International Commercial Arbitration and Investor-State Arbitration Developments Impacting on Australia's Investments in the Resources Sector (April 16, 2014). ARBITRATION AND DISPUTE RESOLUTION IN THE RESOURCES SECTOR: A COMPARATIVE PERSPECTIVE, P. Evans and G. Moens, eds., Springer, 2015; Sydney Law School Research Paper No. 13/71. Available at SSRN: https://ssrn.com/abstract=2340810.

[10] https://dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/pages/indonesia-australia-comprehensive-economic-partnership-agreement.aspx

[11] https://dfat.gov.au/trade/agreements/not-yet-in-force/a-hkfta/Pages/the-investment-agreement-text.aspx

[12] This test for attribution may be narrower than under customary international law: Shirlow, http://arbitrationblog.kluwerarbitration.com/2019/04/24/the-indonesia-australia-comprehensive-economic-partnership-agreement-repeated-debates-new-issues-and-open-questions

requirements on investors	n12)	
Compensation for Expropriation	Annex limiting "indirect expropriation" claims for regulatory measures bona fide	- adds "except in rare circumstances" proviso [but never successfully invoked by investors when claiming anyway?]
Transparency re laws/regs	n/a	Under (17)
Senior management & boards	Limitations on nationality requirements for investor's enterprise (14.10)	n/a [but less needed in HK?]
Promote regulatory objectives	If "measure consistent with this Chapter", can ensure investment "sensitive to environmental, health, public morals, social welfare, consumer protection or … cultural diversity" (14.16)	n/a [but only indirect anyway?]
Corporate Social Responsibility	Encourage investors to "voluntarily incorporate" norms (14.17)	n/a [but aspirational anyway?]
Denial of benefits by host state	Incl "after an investor has submitted a claim to arbitration" (Art 14.13 n20)	- may deny "at any time" (14)
General exceptions	No ISDS claim re measures "designed and implemented" to protect … public health, or re investments established via illegal conduct (unless "minor or technical breaches of law" [cf fraudulent licences in *Churchill/Planet Mining v Indonesia*] … etc: host state can make "preliminary objection" (Art 14.21)	- n/a [although should fail anyway for bona fide proportionate measures; neither treaty adds innovative "public welfare notice" procedure as in Australia-China FTA]
	(Like GATT XX): measures necessary to protect public morals, health (including related environmental protection), compliance with laws re deceptive practices or personal data or safety, national treasures, or conserving exhaustible national resources if with restrictions on domestic production or consumption - unless unjustifiable discrimination or disguised trade/investment restriction (treaty ch17:3)	- omitting "living or non-living" before exhaustible national resources (18.1)
	Or: measures necessary to protect national treasures or specific sites of historical or archaeological value, or	

	measures necessary to support creative arts of national value (17.4), but affected Party can seek with the host state "consultations with a view to reaching agreement on any necessary adjustment required to maintain the overall balance of commitments undertaken by the Parties" (17.5)	
Other exceptions	**Security** exception like WTO GATT XXI, but adding "critical public infrastructure" (17.3.b.iii)	- similar (19)
	Taxation, unless breaching Expropriation or free capital Transfers protections - then ISDS possible but both Parties can agree no violation (17.4)	- similar (13)
	Temporary **balance of payments safeguards** (17.5: like WTO)	- similar (20)
* (financial markets regulation)		**Prudential measures** exception (21)
Foreign investment screening	Inter-state arbitration and ISDS excluded for Australia's FIRB decisions on admission, and any future Indonesian analogue (Annex 14-C)	- similar
PROCEDURAL PROTECTIONS	*(ISDS – especially investor-state arbitration)*	*(or anyway: inter-state arbitration/panel)*
Tobacco measures	n/a [Indonesia's WTO claim vs Australia!]	ISDS option excluded (Section C n14) [like CPTPP option, & rev'd Singapore-Australia FTA; but successful claims rare?]
Dual nationals	Natural person with nationality of a Party may not pursue an ISDS claim (14.30.3)	(if both HK PR and citizen or PR of Australia, deemed exclusively of Party with which has "predominant link": 1 definitions)
Mandatory investor-state mediation (unique![13] But curiously, Australia & Indonesia haven't signed	Host state can (but needn't) **require** mediation first, (only day before?) 180 days after investor seeks consultations (14.23), before filing investor-state arbitration after another	n/a

[13] Certainly not "fairly typical": cf Ebert, http://arbitrationblog.kluwerarbitration.com/2019/04/27/the-indonesia-australia-comprehensive-economic-partnership-agreement-the-good-the-not-so-good-and-the-in-between/

2019 Singapore Mediation Convention[14])	180 days (14.26.2(a)) [so: max delay 6 months before arb; Indonesian govt @ UNCITRAL?]	
Limitation period for claims	Must file arbitration within 3.5 years of knowing breach and damage (14.26.1)	Similarly (27.1)
Arbitration options	arbitration under local courts or UNCITRAL Rules or ICSID Rules or any other agreed Rules (14.25)	no option of ICSID [but n/a anyway for HK]
Transparency (often urged by developed host states & may increase costs, but also maybe useful for investors in seeking settlements[15])	- make public arb tribunal "awards & decisions" (not settlements!), subject to confidentiality or own law's requirements or (self-judged) security exceptions - non-disputing State can request Notice of Arb at own cost (14.31.6) - if investor chooses ICSID (rather than UNCITRAL) Rules arbitration then not supplemented by 2014 UNCITRAL Transparency Rules[16]	Greater transparency: - transmit automatically to non-disputing party & make public notice of intent or arb, pleadings etc, hearing minutes or transcripts, tribunal orders as well as "awards and decisions" (30.1) - open hearings, in principle (30.2) - amicus curiae submissions (29.3)
Third-party funding	Party must disclose to tribunal the name/address of any funder (14.32)	n/a [despite new HK law re disclosure!]
Arbitrators (neither directly prohibits "double-hatting" as counsel elsewhere, as under CPTPP new Code of Conduct[17])	Subject to Annex 14-A (14.27.7), eg not influenced by "public clamour"! With "expertise or experience in public intl law, intl trade or investment law rules" (14.27.2)	Subject to Code of Conduct for Panellists of inter-state disputes (28.4)
*** Financial services disputes**	n/a	Extra expertise or experience, if practicable, etc (25)
Preliminary objections: expedited procedure	- By host state if (14.3) claim excluded from treaty scope (14.20) or otherwise outside tribunal's jurisdiction	- If claim submitted (as matter of law]can't generate final award (under 35) or is

[14] https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en

[15] 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.

[16] Unless investor or host state opt-in to such Transparency Rules, or both Australia & Indonesia ratify the Mauritius Transparency Rules now under parliamentary inquiry: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/ISDSUNConvention

[17] Via https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Pages/official-documents.aspx. Cf my proposal in earlier CPTPP ratification inquiry, elaborated at Nottage and Ubilava op cit. See also my co-authored Academic Forum for ISDS working group 6 "Concept Paper" on arbitrator independence, via https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Pages/official-documents.aspx.

	- unsuccessful claimant must "all costs and attorney's fees" of host state's if against art 14.21 (incl 1(a) re MFN – above; public health, illegal conduct, claims "frivolous or manifestly without merit"	"manifestly without merit" (29.4-7) - incl. reasonable costs, after considering whether claim frivolous
Security for costs	Ordered by tribunal if "reasonable grounds" claimant can't pay costs order [Australia govt @ UNCITRAL?]	n/a [left to background Rules and/or law)
Consolidation	For ISDS arbitrations [not mediations!] with common issue of law or fact (14.29)	Much more detailed (34)
Expert reports		(additional possibility for) any "factual issue concerning **scientific matters**" (33)
Joint interpretation	"shall, on its own account or at the request of a disputing party", be requested by the tribunal of both states Party, re "any provision … in issue in a dispute" [always?!] (14.33.2), but not binding on tribunal unless they so declare [encouraging (further) de facto mediation through home state?]	[if and when provided?] always binding on the arbitral tribunal (31.2)
Draft award on liability	- n/a [might avoid delay but could promote settlement or minimise challenges to final award / execution]	Send non/disputing parties, who have 60 days to comment, then final award within another 45 days (29.10: like WTO)