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Australian Parliament:
Joint Standing Committee on Treaties / Senate's Foreign Affairs References Committee
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Dear Parliament

Submission to two Inquiries into the China-Australia Free Trade Agreement

This is a submission for the inquiries by (i) the Senate's Foreign Affairs, Defence and Trade References Committee (calling for Submissions by 28 August 2015),[1] and (ii) the Joint Standing Committee on Treaties (by 24 July 2015).[2]

I am assuming that those who have voiced opposition to any form of investor-state dispute settlement (ISDS), in earlier public inquiries, will re-agitate similar concerns about this procedure included in the China-Australia FTA signed and made public on 17 June 2015. As I have explained in my own submissions and oral evidence to Parliamentary hearings last year (on the "Anti-ISDS Bill") and this year (on Australia's treaty-making process),[3] such blanket opposition is comparatively unusual and presently unwarranted. This is particularly true of the China FTA presently under consideration, since the scope of ISDS-backed protections for investors is so narrow.[4] There is no need to resist ratification on the basis of such ISDS provisions.

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Nonetheless, the inclusion of ISDS in the China FTA has already attracted attention in the Australian media. Generally since 2004, my content analysis of major newspaper

[1] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/China-Aust_Free_Trade

[2] http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/17_June_2015

[3] See generally Jurgen Kurtz and Luke Nottage, "Investment Treaty Arbitration 'Down Under': Policy and Politics in Australia", *ICSID Review,* Vol. 30, No. 2, 2015, p. 465, with a longer version at http://ssrn.com/abstract=2561147.

[4] The rest of this submission elaborates on my Blog posting at http://blogs.usyd.edu.au/japaneselaw/2015/06/compromised_isds_china.html (with a version also appearing on the East Asia Forum blog), included in my draft paper "Investment Treaty Arbitration Policy in Australia, New Zealand – and Korea?" *Journal of Arbitration Studies* forthcoming (available on request).

THE UNIVERSITY OF SYDNEY

coverage of ISDS indicates significant polarisation of views. *The Australian* and the *Australian Financial Review* generally take a positive view of ISDS, whereas the *Sydney Morning Herald* and the *Melbourne Age* have long been resolutely opposed. Unsurprisingly, therefore, writing in the *Herald* on 22 June 2015, Peter Martin objected again to ISDS in the China FTA, citing the Australian Fair Trade and Investment Network (which has criticised ISDS in all the recent parliamentary hearings).[5] He argues that the ISDS procedures "are less open than the provisions in other agreements, including the Australia-Korea free trade agreement, not being subject to a requirement that the dispute hearings and associated documents be made public".[6] Citing the Australian Fair Trade and Investment Network (which has criticised ISDS in all the recent parliamentary hearings),[7] Academics based in Canberra and Toronto have made a similar critique.[8]

Yet, under the China FTA's Investment chapter Article 9.17 on "transparency", respondent (host) states must publicize the notice of arbitration and the tribunal's decisions etc. They may publicize pleadings and transcripts of hearings. They may also publicize submissions from the home (non-disputing) state if the latter agrees. The main difference with Article 11.21 of the Korea-Australian FTA is that hearings themselves shall be public only if the host state agrees (as with inter-state WTO proceedings, incidentally). But Australia would probably agree in the (unlikely) event of being subject to a claim. And proceedings under other recent investment treaties allowing for open hearings attract few spectators – especially if the host state can publicize transcripts and pleadings anyway. Interestingly, the ISDS procedures under the China FTA include a Code of Conduct for arbitrators (Annex 9-A), not elaborated in other Australian treaties but similar to requirements for arbitrators of inter-state disputes.

The more important point about the China FTA is that it limits substantive commitments protected by ISDS anyway, compared to say the Korea FTA. At present, the only ISDS-backed protection is "national treatment", so a discriminatory tax cannot be imposed on

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[5] Australian Fair Trade & Investment Network Ltd, "Analysis of temporary migrant worker arrangements and Investment Chapter of the ChAFTA", (2015), available at <http://aftinet.org.au/cms/node/977> (last visit on July 21, 2015).

[6] "Australia-China free trade agreement favours Chinese investors", *The Sydney Morning Herald*, June 22, 2015, available at <http://www.smh.com.au/business/australiachina-free-trade-agreement-favours-chinese-investors-20150621-ghthjr.html> (last visit on July 21, 2015).

[7] Australian Fair Trade & Investment Network Ltd, "Analysis of temporary migrant worker arrangements and Investment Chapter of the ChAFTA", (2015), available at <http://aftinet.org.au/cms/node/977> (last visit on July 21, 2015).

[8] Kyla Tienhaara and Gus Van Harten, "Half-baked China-Australia Free Trade Agreement is lopsided", *The Sydney Morning Herald*, June 19, 2015, available at <http://www.smh.com.au/comment/halfbaked-chafta-is-lopsided-20150619-ghs8fm> (last visit on July 21, 2015). Incidentally, their broader observation that Australia may have provided less liberalization than China in this FTA can be readily explained by Australia already having a much more liberalized economy in general.

Australian investments once made in China, for example. Another protection under the treaty is "most favoured nation" treatment, so Australian investments can benefit from stronger protections that China may offer other countries' investors under future treaties. But this is not currently enforceable via ISDS, only an inter-state arbitration process. Unlike the Korea FTA, China's FTA with Australia does not commit to "fair and equitable treatment", including "denial of justice" by local courts. Fortunately this protection is available under a 1988 bilateral investment treaty, but it can only be enforced under an inter-state arbitration process. It is possible that the Australian government did not want its investors embarrassingly making direct ISDS claims against China if they find themselves being egregiously treated in courts there. Australians have already had disturbing run-ins with the Chinese courts.[9]

Also writing for the *Sydney Morning Herald*, on 20 June 2015,[10] Michael West was worried about Chinese investors bringing ISDS claims if Australia refuses to grant a mining permit due to environmental concerns. But this would only be possible under this FTA if the refusal was discriminatory, and anyway investment chapter Article 9.8 provides an express general exception for proper environmental protection measures (similar to Article 11.9(4) of the Korea FTA investment chapter). Article 9.11 of the China FTA investment chapter also adds the following innovative provisions (not found in any other Australian FTAs) contained in Section B related specifically to ISDS:

> 4. Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under this Section.
> 5. The respondent may, within 30 days of the date on which it receives a request for consultations (as provided for in paragraph 1), state that it considers that a measure alleged to be in breach of an obligation under Section A is of the kind described in paragraph 4, by delivering to the claimant and to the non-disputing Party a notice specifying the basis for its position (a 'public welfare notice').
> 6. The issuance of a public welfare notice shall trigger a 90 day period during which the respondent and the non-disputing Party shall consult. The dispute resolution procedure contemplated by this Section shall be automatically suspended for this 90 day period.

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[9] John Garnaut, "A Chinese prisoner's dilemma as man begging for release from Australian prison risks upsetting the delicate relationship with China", *The Sydney Morning Herald*, April 4, 2015, available at <http://www.smh.com.au/business/china/a-chinese-prisoners-dilemma-as-man-begging-for-release-from-australian-prison-risks-upsetting-the-delicate-relationship-with-china-20150404-1m6gmc.html> (last visit on July 21, 2015).

[10] "Trade deals acronym really translates to 'we lose'", *The Sydney Morning Herald*, June 20, 2015, available at <http://www.smh.com.au/business/comment-and-analysis/trade-deals-acronym-really-translates-to-we-lose-20150619-ghrqm8.html> (last visit on July 21, 2015).

> 7. The issuance of a public welfare notice is without prejudice to the respondent's right to invoke the procedures described in Article 9.16.5 or Article 9.16.6.[11] The respondent shall promptly inform the claimant, and make available to the public, the outcome of any consultations.
> 8. In any proceeding brought pursuant to this Section, the tribunal shall not draw any adverse inference from the non-issuance of a public welfare notice by the respondent, or from the absence of any decision between the respondent and the non-disputing Party as to whether a measure is of a kind described in paragraph 4.

In addition, Article 9.18 later states:

> … 2. A joint decision of the Parties, acting through the Committee on Investment, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal *of any ongoing or subsequent dispute*, and any decision or award issued by such a tribunal must be consistent with that joint decision.
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> 3. A decision between the respondent and the non-disputing Party that a measure is of the kind described in Article 9.11.4 shall be binding on a tribunal and any decision or award issued by a tribunal must be consistent with that decision.

The italicized wording in Article 9.18(2) shows that the joint Committee, comprising representatives of both states, can agree on how to interpret any uncertainty in the provisions of this FTA even with respect to ISDS proceedings already filed by the home state's investor. If they declare that the scope of the protection is not as alleged by the investor, the latter's claim should not succeed before the tribunal. This mechanism, helping primarily to safeguard host state interests, is broader than the innovative "public welfare notice" mechanism added in Article 9.11 and Article 9.18(2). It does have parallels with provisions contained in earlier Australian FTAs (including Article 11.22(3) of the Korea FTA), in turn influenced by US treaty practice.[12] But those provisions lacked the italicized wording and therefore can give rise to the question of whether the joint

[11] These provisions deal with expedited objections regarding matters of law or jurisdiction of the tribunal, and track Article 11.20(5)-(6) of the *Korea-Australia Free Trade Agreement*, Republic of Korea-Australia, signed April 8, 2014 [2014] ATS 43 (entered into force December 12, 2014).
[12] See the comparative table appended in Luke Nottage, "The 'Anti-ISDS Bill' before the Senate: What Future for Investor-State Arbitration in Australia?", *International Trade and Business Law Review*, Vol. XVIII, 2015, p. 245, available at <http://ssrn.com/abstract=2483610> (last visit on July 21, 2015).

Committee's interpretation can bind presently-constituted tribunals dealing with pending disputes, or instead only future tribunals.[13]

In his *Sydney Morning Herald* article, West also fretted over other claims if a Chinese mining venture's costs blow out in Australia, but the China FTA does not provide relief just for that. He also warns generally about the risks of ISDS for Australia, citing a French company's claim versus Egypt. But he did not mention a more pertinent claim: Al Jazeera claimed last year that Egypt had closed down its media operations and detained (regime-critical) journalists. Other media companies have brought ISDS claims against Chile (after Pinochet's coup), Hungary, Ukraine and the Czech Republic.[14] ISDS-backed commitments therefore can help enhance good governance in host states, as well as cross-border trade and investment.

Both Martin and West were also worried that the China FTA's investment chapter is not "finalized", particularly regarding ISDS. Article 9.9 does indeed provide for negotiations after a work program reviewing the chapter (and the 1988 BIT) is completed within 3 years of the FTA entering into force. This will consider adding provisions such as fair and equitable treatment, compensation for expropriation (partially covered by ISDS in the 1988 bilateral treaty), "application of investment protections and ISDS to services supplied through commercial presence", as well as "scheduling of investment commitments by China on a negative list basis". This actually presents a good opportunity for broader public consultation on the compromise achieved between investor and host state rights reinforced through ISDS in this FTA, alongside the protections under the 1988 treaty due for renewal again anyway in 2018, or on whether the protections go too far in some respects but not far enough in others.[15]

Finally, if and when the China FTA comes into force containing any form of ISDS-backed protections, Australia's FTA in force with Japan (which presently lacks ISDS protections) does contain an unusual Article 14.19.2. This requires bilateral negotiations to be

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[13] Tomoko Ishikawa, "Keeping Interpretation in Investment Treaty Arbitration 'on Track': The Role of States Parties", *Transnational Dispute Management,* Vol. 1, 2014, available at <http://www.transnational-dispute-management.com/article.asp?key=2048> (last visit on July 21, 2015).

[14] Luke Eric Paterson, "Analysis: As Al Jazeera Media Network notifies Egypt of possible arbitration claim, what legal arguments loom in such a case?", *Investment Arbitration Reporter*, April 28, 2014, available at <http://www.iareporter.com.ezproxy1.library.usyd.edu.au/articles/analysis-as-al-jazeera-media-network-notifies-egypt-of-possible-arbitration-claim-what-legal-arguments-loom-in-such-a-case/> (last visit on July 21, 2015).

[15] Foreign investors concerned about the limited protections under the present bilateral FTA, even in conjunction with the 1988 BIT, may seek to channel their investments via a third country with more extensive treaty protections. However, such treaties may limit this possibility through "denial of benefits" or other provisions, or this strategy may not be feasible due to tax or other commercial considerations.

THE UNIVERSITY OF SYDNEY

commenced within 3 months, and a report within 6 months, if "Australia enters into any multilateral or bilateral international agreement providing for a mechanism for the settlement of an investment dispute between Australia and an investor of another or the other party to that agreement, with a view to establishing an equivalent mechanism".

This is another good reason for Australia to undertake wider public consultations to develop a model investment treaty or chapter, or at least model provisions, in order to improve public debate particularly over ISDS, as recommended by the majority Reports from the inquiries into the Anti-ISDS Bill last year and Australia's treaty-making process this year.[16] Otherwise, misapprehensions and concerns are likely to keep proliferating.

Yours sincerely

Luke Nottage

[16] http://blogs.usyd.edu.au/japaneselaw/2015/06/senates_report_treaties.html