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)

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Joint Standing Committee on Treaties (JSCOT)
PO Box 6021
Parliament House
Canberra ACT 2600 … jsct@aph.gov.au

Re: Submission focusing on the **Investment Chapter**, for the **Peru-Australia FTA**[*]

I understand that the Government has agreed to accept further submissions regarding ratification of this bilateral FTA. This follows persistent debate in Parliament over very similar investor-state dispute settlement (ISDS) provisions included in CPTPP, for which legislation needed for that to come into force was recently passed.

I support ratification of this bilateral Free Trade Agreement, as I did for the CPTPP. As stated when giving oral evidence to this Committee regarding the CPTPP, we must remember that "the perfect is the enemy of the good". Although the ISDS procedure in both could be further improved in future treaties, it should not become a deal-breaker for this one. **The ISDS-backed protections strike an acceptable balance** between providing a credible option for investors to enforce the substantive commitments offered by the host state, and the state's autonomy to regulate genuinely and proportionately in the public interest.

They are certainly an improvement in that respect than the more general and arguably more pro-investor ISDS-backed provisions in the **current bilateral investment treaty, which will usefully terminated when this FTA comes into force**.

Anyway, Peru is expected to ratify the CPTPP, which already has six ratifications so will come into force from January 2019. Then **the CPTPP's very similar ISDS-**

[*] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/AspectsPAFTArevisited

backed commitments will apply with respect to Australia even without the bilateral FTA.

As with the CPTPP, there is also already scope within this Peru FTA to address more specifically some ongoing concerns about ISDS. In particular, Australia can (and should) take an active role in developing a Code of Conduct for ISDS arbitrators, which must be done before the FTA comes into effect (Article 8.23.5). For example, based on my research for the UGeneva-led *Academic Forum on ISDS* regarding arbitrator neutrality (aiming to provide guidance to UNCITRAL delegates investigating the possibility and modalities of reforming the ISDS system), I recommend already adding an express prohibition on "double-hatting" (ISDS arbitrators serving as counsel or expert on other cases). This is better than relying on ad hoc determinations under applicable arbitration rules, law and IBA guidelines.

In addition, under Article 8.24.11 Australia shall "consider" adding an appellate review mechanism "if" such an institutional mechanism is developed elsewhere (eg through UNCITRAL multi-laterally, or regionally perhaps alongside the CPTPP). It should already commence negotiations with Peru about adding such a mechanism, but this can be agreed separately even after ratification of this FTA.

Upon or even after ratification, Australia could also agree with Peru to make a separate joint declaration on how it views ISDS provisions, as done by New Zealand and two other states alongside the CPTPP.[1]

More generally, my Responses to Questions on Notice to the CPTPP inquiry, later developed into a academic article[2] and reproduced in my **Appendix**, show that **wider concerns over ISDS (costs, delays and transparency) are not as evident empirically** as many have asserted. In addition, contrary to the main arguments of

[1] See Ministry of Foreign Affairs and Trade, *CPTPP Joint Declaration*, <https://www.mfat.govt.nz/assets/CPTPP/CPTPP-Joint-Declaration-ISDS-Final.pdf>.
[2] **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

Australia's Productivity Commission that led to the Gillard Government eschewing ISDS in treaties over 2011-13,[3] 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;[4]
- Australian investors now make good use of ISDS protections to recoup losses incurred by alleged treaty violations, notably by developing states;
- 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 some old treaties without CPTPP-like elaborations,[5] as well as the ambit claims recently by some US investors.[6]

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[7] but even recently in New South Wales.[8]

Nonetheless, costs and especially delays associated with ad hoc ISDS arbitration reinforce arguments for Australia to transition towards a two-tier "permanent

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[3] 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

[4] 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

[5] 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

[6] Australia's inbound and outbound ISDS claims are reviewed in:

[7] 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

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

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investment court" along the lines of the EU's recent treaties with Canada, Vietnam and Singapore, or some variant.[9]

In conclusion, **rather than blocking ratification of this FTA, 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**.[10]

Yours sincerely

[9] 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

[10] This proposal has been made and sometimes accepted in various earlier parliamentary inquiries: 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; and Mitchell et al, op cit.