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Committee Secretary
Joint Standing Committee on Treaties
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Re: Submission to JSCOT on ratifying the *Second Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA)*[1]

I am pleased to recommend ratification by Australia as this Second Protocol significantly improves parts of the current treaty and adds some useful extra features, although there are some disappointments noted below cross-referencing my Submission to DFAT dated 5 March 2020 (appended herewith for convenience):[2]

1.1 For the chapters replaced on **Services** (8) as well as **Investment** (11), given the 12% fall in global FDI in 2022 and the shortfall especially for infrastructure and renewable energy needs,[3] it is pleasing to see that some major AANZFTA economies (including Malaysia and Indonesia) have adopted a negative list approach to better promote FDI. This allows **market access** by foreign investors from one AANZFTA state on the same basis as local or other state investors, unless limited by Annexes, and a ratchet mechanism taken by "most" AANZFTA states locking in liberalisation commitments has also usefully been added (paras 20, 21 and 54 of the National Interest Analysis 2023 ATNIA 13[4]). However other

[1] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/AANZFTASecondProtocol/Treaty_being_considered
[2] Also available at https://www.dfat.gov.au/trade/agreements/in-force/aanzfta/resources/aanzfta-resources#submissions
[3] https://unctad.org/publication/world-investment-report-2023
[4] https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/244_Joint_Committees/JSCT/2023/Second_Protocol_ASEAN_NZ_FTA/1_AANZFTANational_Interest_Analysis.pdf?la=en&hash=1E86AAAAED02C3FC11B8A6B6F1630FAE4DAA0197

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ASEAN member state (AMS) economies retain the less liberalising positive list approach, requiring scheduling of all market access commitments, and the agreed shift to a negative list approach unfortunately has no timeline (para 21).

1.2 Further, although the Services chapter expands Education Cooperation (para 43) it is unclear whether all AMS have agreed to cross-border supply of services even in pandemic or other emergency situations. This was a problem highlighted by my colleague A/Prof Jeanne Huang in another of Australia's Free Trade Agreements (FTAs),[5] as mentioned in my March 2020 submission.

2. Specifically on Investment chapter market **liberalisation** commitments (pre-establishment national treatment under Art 3 and most-favoured-nation treatment under Art 4), it is also somewhat disappointing that some commitments are "less ambitious" for some AMS than under the Regional Comprehensive Economic Partnership (RCEP) FTA, or have (unspecified) "expanded carveouts for additional obligations to enable regulatory flexibility" (para 55). Foreign investors and their legal advisors will incur extra transaction costs to dissect such discrepancies when making cross-border investment decisions. Hopefully also at least Australia will make public how it proposes to consult local businesses and groups about the ongoing negotiations with some AMS who are supposed to transition from a positive to negative list approach, even if the Protocol itself does not require this as recommended in my March 2020 submission.

3. Such transparency is also needed from the Australian government regarding Investment chapter **protections**, as we are told (para 56, *emphasis added*):

"For the ISDS mechanism, the upgrade sees a work program formed by the Parties to commence a review of the ISDS mechanism no later than 18 months after entry into force of the Upgrade (Article 17). This will conclude within 12 months from the date the review commences, unless the Parties agree otherwise. *No details for the work program have been agreed.* The Parties have also agreed to suspend the application of ISDS to the National Treatment obligation for breaches that arise within 30 months of the entry into force of the upgrade. These timeframes are not automatically linked. Accordingly, if Parties agree to extend review of the ISDS mechanism beyond 30 months, the timeframe for the suspension of the application of ISDS to the National Treatment obligation will

[5] https://erga-omnes.sydney.edu.au/2020/02/coronavirus-outbreak-and-teaching-chinese-students-online-legal-issues-that-australian-universities-should-know/

not automatically extend. ISDS will be disapplied between Australia and New Zealand through a treaty-level side letter (noted in paragraph 25)."

Exclusion of ISDS between Australia and New Zealand, to rely only on inter-state dispute settlement (arbitration) under the treaty or local courts/laws to protect the substantive commitments made to foreign investors, continues a longstanding practice of Australian governments (both Labor and Coalition) and is understandable given the particularly close economic, political and legal relations bilaterally.[6] However there is a concern that Australia's current Labor government, which reintroduced from late 2022 a blanket policy against agreeing to any form of ISDS in new investment chapters or treaties (albeit not necessarily, it seems, in protocols to existing treaties like AANZFTA),[7] could sway other AANZFTA states to similarly excise the ISDS mechanism altogether from this treaty regime.[8] Although this would leave ISDS protections in place among some pairings of AANZFTA states under other bilateral or regional (notably CPTPP) treaties,[9] some of those (eg between Australia and Thailand) are now dated. Given various advantages in retaining a dispute settlement procedure that foreign investors can invoke directly against a miscreant host state,[10] it would be better to upgrade such treaties (as has already occurred in the Australia-Singapore

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[6] Nottage, Luke R., Asia-Pacific Regional Architecture and Consumer Product Safety Regulation for a Post-FTA Era (October 4, 2011). Sydney Law School Research Paper No. 09/125, Available at SSRN: https://ssrn.com/abstract=1509810

[7] See my posting at https://arbitrationblog.kluwerarbitration.com/2022/12/21/australias-disengagement-with-investor-state-arbitration-a-sequel/

[8] In October 2023 it was reported that the then New Zealand government "indicated that it attempted to have ISDS removed from AANZFTA entirely during the upgrade negotiations but was unable to do so" (https://www.wfw.com/articles/investment-changes-coming-to-asean-australia-new-zealand-free-trade-agreement/) but Labor subsequently lost the election and the new government may revert to accepting ISDS on a case-by-case assessment (as with successive Coalition Governments in Australia).

[9] For the current situation see the Table at Nottage, Luke R. and Jetin, Bruno, New Frontiers in Asia-Pacific Trade, Investment and International Business Dispute Resolution (June 25, 2020). in L. Nottage, S. Ali, B. Jetin & N. Teramura (eds), "New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution", Wolters Kluwer (2021), also Sydney Law School Research Paper No. 20/35, Available at SSRN: https://ssrn.com/abstract=3635795

[10] See my concluding chapter in Mohan and Brown (eds) *The Asian Turn in Foreign Investment* (CUP 2021) at https://www.cambridge.org/core/books/asian-turn-in-foreign-investment/B19491DA50CEDD9B4989592B5C40402C

FTA) in parallel with a comprehensive review of ISDS provisions in the current AANZFTA to target specific improvements. This Australian government should consult widely among local experts and stakeholders in this process, drawing also on its predecessor's public consultation to guide revisions of Australia's past treaties – for which I contributed a Submission dated 13 September 2020 (also appended for convenience).[11] For example, as mentioned in my March 2020 submission to the AANZFTA Protocol review:

3.1 To minimise costs and delays in resolving disputes, the ISDS provisions should add a mandatory requirement to try **mediation** before commencing arbitration (as found already in the Australia-Indonesia FTA, replacing an old bilateral investment treaty).[12]

3.2 The **transparency** provisions in AANZFTA should be extended beyond publication of tribunal awards and decisions (Art 14), consistently with Australian having retrofitted greater transparency obligations to pre-2014 treaties concluded by other states who have similarly ratified the Mauritius Transparency Convention.[13] As the AANZZFTA investment chapter (11) has "replaced" the old under this Protocol, this should mean that investors choosing ISDS under the UNCITRAL Arbitration Rules need to abide by similarly broad transparency provisions in such Rules (as amended in 2013). However, investors retain the option of proceeding under ICSID or other Rules, so enhanced transparency provisions need to be drafted into AANZFTA for such cases.

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[11] Also, with other submissions and discussion paper, at https://www.dfat.gov.au/trade-and-investment/discussion-paper-review-australias-bilateral-investment-treaties

[12] See now also Claxton, Nottage and Ubilava (2020) https://arbitrationblog.kluwerarbitration.com/2020/09/05/pioneering-mandatory-investor-state-conciliation-before-arbitration-in-asia-pacific-treaties-ia-cepa-and-hk-uae-bit/ and Ana Ubilava's USydney PhD thesis related book (2023) at https://brill.com/display/title/63844?language=en.

[13] See further now 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). in Nottage, Luke; Ali, Shahla; Jetin, Bruno; Teramura, Nobumichi (eds), "New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution", Wolters Kluwer (2021); also Sydney Law School Research Paper No. 20/12, Available at SSRN: https://ssrn.com/abstract=3548358 or http://dx.doi.org/10.2139/ssrn.3548358

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3.3. To promote (reasonable perceptions of) independence of ISDS arbitrators, there should be specific exclusion or at least limitation of **double-hatting** (whereby such arbitrators also serve as counsel in often similar cases). In addition to the CPTPP Code of Conduct mentioned in my March 2020 submission, reference should be made to the proposed UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution:[14] article 4 prohibits the arbitrators from concurrently acting as a legal representative or an expert witness in another arbitration proceedings for a period of three years after serving as an arbitrator. This topic also deserves wide public consultation.[15]

Overall, the Australian government will also need to coordinate such consultations, and then input into AANZFTA deliberations on its ISDS provisions, with Australia's engagement already in the RCEP deliberations underway to consider adding to that treaty (involving all AANZFTA parties plus Japan, Korea and China) provisions about ISDS.

4. As for the Competition chapter (7), it is very disappointing that very little was added regarding **consumer protection** harmonisation or collaboration despite the extensive resources devoted over many years by Australia (and other governments and international organisations) to building mutual understanding and capacity in this important field for cross-border traders and investors, including a scoping study commissioned for this AANZFTA review (mentioned in my March 2020 submission) and a new monthly newsletter from the ACCC. Instead the Protocol only adds this comparatively short Article 7 on consumer protection,[16] focusing mostly on creating minimal protections against *misleading*

[14] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_code_of_conduct_for_arbitrators_advance_copy_publ.pdf
[15] Compare eg Khan (2023) https://arbitrationblog.kluwerarbitration.com/2023/12/29/the-double-hatting-paradox-in-investment-arbitration-justification-for-abolition/ with my JWIT article (2020) with Ratner et al at https://brill.com/view/journals/jwit/21/2-3/article-p441_8.xml?language=en
[16] Compare generally now also Hertogen, An, A New Frontier? Consumer Protection in International Trade Agreements, 30(2) Competition and Consumer Law Journal (2023), Available at SSRN: https://ssrn.com/abstract=4493446

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practices (but not wider unfair practices,[17] or unfair consumer contracts, or unsafe products):

> 1. The Parties recognise the importance of consumer protection law and the enforcement of such law as well as cooperation among the Parties on matters related to consumer protection in order to achieve the objectives of this Chapter.
> 2. Each Party shall adopt or maintain laws or regulations to proscribe the use in trade of *misleading practices, or false or misleading descriptions*.
> 3. Each Party shall establish or maintain an authority or authorities to effectively implement its consumer protection laws and regulations.
> 4. The Parties recognise the importance of issuing public advisories or warnings against *misleading practices* or false or misleading descriptions in a manner compatible with their respective laws and regulations.
> 5. Each Party also recognises the importance of improving awareness of and access to consumer rights and consumer redress mechanisms, including the roles of consumer organisations and industry self-regulation in raising awareness of consumer rights. Each Party also recognises the importance of learning from international best practices.
> 6. The Parties may co-operate and co-ordinate on matters of mutual interest related to consumer protection. Such cooperation and co-ordination shall be carried out in a manner compatible with the Parties' respective laws and regulations and within their available resources.
> 7. The Parties may, through their respective authorities, exchange information in relation to the administration and enforcement of their consumer protection laws. Any exchange of information shall be compatible with their respective laws, regulations and important interests, within their available resources, and subject to the requirements and protections in Article 5 (Confidentiality of Information).

Article 7.7 will not allow Australian consumer regulators to share eg mandatory accident reports from suppliers with their counterparts in other AANZFTA states

[17] Already implemented say in Singapore and being considered, in addition to prohibiting unconscionable conduct, for the Australian Consumer Law: https://treasury.gov.au/consultation/c2023-430458

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unless the Australian Consumer Law confidentiality provisions are amended (s132A). However after ratification of this Protocol this possibility should be investigated, coordinated through the federal Treasury as well as the ACCC.[18]

5. The Protocol's chapter on **Environmental Protection** (13) is helpful, drawing again on the CPTPP. However it does not fully address the drafting concerns raised by A/Prof Jeanne Huang mentioned in my March 2020 submission.

Overall, therefore, this Protocol has achieved some significant improvements after a long consultation and negotiation process, impeded by the pandemic. It should be ratified by the Australian government needs then to be open and consultative about aspects left open like the shift of some AMS to a negative list approach to market access, discussions about ISDS, and better coordination to harmonise and enhance consumer protection.

Yours sincerely,

[redacted]

[18] This could be done in conjunction with finalising a public consultation about amending the Law to allow adoption of foreign safety standards: https://treasury.gov.au/consultation/c2021-223344