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1 November 2017

Hon Stephen Ciobo MP  
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### ***Rethinking Investment Treaties given NZ Government's New Policy against ISDS***

Since 2015 one of us (Nottage) has exchanged correspondence with your predecessor urging the Australian government to undertake a public consultation into devising a model investment treaty or FTA chapter, or at least model provisions, which might attract some bipartisan support. Submissions and evidence along those lines were also given to and largely accepted by various parliamentary inquiries, while arguing that Australia's recent US-style investment treaties (including Investor-State Dispute Settlement provisions) were mostly appropriate.

A reassessment by Australia is now even more necessary as the recently elected New Zealand Prime Minister has reportedly declared that: *'We remain determined to do our utmost to amend the ISDS provisions of TPP. In addition, Cabinet has today instructed trade negotiation officials to oppose ISDS in any future free trade agreements.'*<sup>1</sup> Our close partner's new stance is particularly problematic for ongoing negotiations for the (ASEAN+6) Regional Comprehensive Economic Partnership, the key alternative to the Trans-Pacific Partnership agreement for regional economic integration. The problem is compounded because India will be proposing a highly-restricted form of ISDS for RCEP based on its new Model Bilateral Investment Treaty, which is also likely to be unacceptable to negotiating parties (including Australia) that have significant outbound investment interests.

A possible compromise for RCEP, and future investment treaties to be concluded by Australia (such as a revised TPP or FTAs with India or indeed Indonesia) is a permanent "Investment Court", along the lines promoted by the European Union since 2015 and now being investigated at the multilateral level by the United Nations.<sup>2</sup> We suggested this mechanism – or some variant, as discussed in Part 6.B our recent joint research paper<sup>3</sup>

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<sup>1</sup> [http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=11939067](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11939067)

<sup>2</sup> UNCITRAL, Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS) (Note by the Secretariat, 20 April 2017) pp8-14.

<sup>3</sup> Kawharu, Amokura & Nottage, Luke R., Models for Investment Treaties in the Asian Region: An Underview (2017) Arizona Journal of International and Comparative Law:



– to New Zealand’s Trade Minister (and Australia’s Shadow Minister) in the attached letter last week. We now urge you too to consider this way forward for Australia regarding the vexed issue of ISDS, as well as other possibilities to move towards more EU-style treaty drafting regarding substantive commitments offered to foreign investors.

Yours sincerely,

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### ***Labo(u)r-led initiative by Australia-NZ for FTA / investment treaty (re)negotiation***

The new Labour-led Government in New Zealand and the Labour Opposition in Australia have an historic opportunity to collaborate in showing **regional and global leadership in international investment law**.

In particular, for treaties not yet in force (like the Trans-Pacific Partnership Agreement) and certainly for treaties under negotiation (such as those now commencing with the European Union and the long-delayed 'ASEAN+6' Regional Comprehensive Economic Partnership or RCEP), **we urge you to promote an 'international investment court' system**. This would present an attractive alternative to the traditional investor-state dispute settlement (ISDS) option for enforcing substantive treaty commitments.

The EU developed this alternative in 2015 after extensive public consultations. The investment court system has already been agreed in the investment chapters of its FTAs with Canada and Vietnam, respectively, although its operation is dependent on these provisions on the investment court (plus provisions dealing with FDI) being approved by all EU states. The United Nations Commission on International Trade Law has also agreed to investigate the possibility of establishing a similar investment court at the multilateral level, for all states then to subscribe to with respect to their investment treaties,<sup>1</sup> but these deliberations will take many years. Meanwhile, Australia and New Zealand should begin promoting this concept as an attractive middle way forward in treaty (re)negotiations, as a 'collective middle power' in the region with many shared interests and understandings regarding high-quality foreign investment.

The investment court system reflects a maturing of the way that investor claims are resolved from the ad hoc approach of the usual ISDS mechanism. This is because each state would pre-select experts on retainers, to serve as judges assigned to particular claims if and when brought by foreign investors concerned about alleged mistreatment contrary to treaty commitments. With the usual ISDS mechanism, generally each disputing party (the investor and the host state) each appoints an arbitrator, who then try to agree on a chairperson for the ad hoc tribunal. Another key aspect of the investment court is that it involves two tiers,

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<sup>1</sup> UNCITRAL, Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS) (Note by the Secretariat, 20 April 2017) pp8-14.



allowing other pre-selected judges to review initial decisions if there is an appeal for serious errors of law. These two features effectively address the major public concerns (although sometimes overstated) regarding the current ISDS procedure: tribunals that may be inexperienced or imbalanced, and uncertainty or unpredictability of results.

However, the investment court alternative to ISDS still allows investors to bring direct claims if host states violate substantive treaty commitments. This is important because an inter-state arbitration process can easily become overly politicised, and disproportionately favours large over small- to medium-sized enterprises venturing overseas.

In addition, recent econometric research funded through the Australian Research Council over 2014-7 finds that ISDS provisions allowing foreign investors direct claims against host states have contributed significantly to world-wide outbound FDI flows from OECD member states, especially into non-OECD (developing) countries, and especially when treaties are promptly ratified after signature.<sup>2</sup> However, this research also finds an even stronger positive impact from weaker-form ISDS provisions (qualified in some way). One policy implication is that a toned-down mechanism like an investment court system is most likely to promote foreign investment effectively.

However, this research does not support getting rid of direct claims altogether, as India is close to proposing in its recent Model Bilateral Investment Treaty that presumably is now framing India's negotiating position in bilateral FTA negotiations with Australia as well as in RCEP negotiations. Although India will now be very unlikely to agree to traditional ISDS provisions, it might accept investment court provisions as a compromise solution.

Our further joint research into investment regulation and treaties in both Australia and New Zealand<sup>3</sup> also identifies several substantive provisions where more contemporary EU-style, rather than US-style (TPP) drafting, may achieve a clearer balance between investor and host state interests. We would be happy to elaborate on any of these points.

We urge you again to pursue a practical joint initiative in both countries' respective FTA practice, with the long-term goal also of developing a multilateral investment court.

Yours sincerely

*Luke Nottage*

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<sup>2</sup> Armstrong, Shiro & Nottage, Luke R., The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis (2016) Sydney Law School Research Paper No. 16/74 <https://ssrn.com/abstract=2824090> (abridged in Chaisse & Nottage eds, *International Investment Treaties and Arbitration Across Asia*, Brill, January 2018)

<sup>3</sup> Kawharu, Amokura & Nottage, Luke R., Models for Investment Treaties in the Asian Region: An Underview (2017) Arizona Journal of International and Comparative Law: <https://ssrn.com/abstract=2845088>