

Australia's Conflicting Approach to ISDS: Where to From Here?

Kluwer Arbitration Blog

June 4, 2015

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Please refer to this post as: Edwina Kwan, 'Australia's Conflicting Approach to ISDS: Where to From Here?', Kluwer Arbitration Blog, June 4 2015, <http://arbitrationblog.kluwerarbitration.com/2015/06/04/australias-conflicting-approach-to-isds-where-to-from-here/>

Keeping abreast of Australia's stance on ISDS can be a confusing exercise. Australia's approach to investor-state dispute settlement (ISDS) continues to be hotly debated in the wake of recent revelations by Wikileaks that the investment chapter of the Trans-Pacific Partnership (TPP) is likely to include ISDS provisions. The Australian government's stance on ISDS has undergone a number of dramatic turnabouts since the initial controversy sparked by the first investment treaty claim to be commenced against Australia by Phillip Morris in 2011.

With the exception of the government's rejection of ISDS provisions in the Australia US Free Trade Agreement in 2003 and the 1982 Free Trade Agreement with New Zealand (on the basis that each country had its own robust legal system for resolving disputes), Australia has historically included ISDS provisions in its trade agreements. To date, Australia has adopted ISDS provisions in five free trade agreements (Chile, Singapore, Thailand, Korea and NZ-ASEAN). Australia also has ISDS provisions in 21 bilateral investment treaties, including with Hong Kong, Argentina, India, Hungary and Vietnam.

Despite its historical support for ISDS, in April 2011, the then Labor-led Australian government announced that it would no longer include ISDS provisions in bilateral and regional trade agreements. This significant policy shift is said to have been based on principles of preserving the government's right to regulate in the public interest and to provide no greater rights to foreign investors. However the timing of the announcement, a mere couple of months before the formal commencement of the first investment treaty claim against Australia by Phillip Morris was not lost on observers who were then witness to significant public backlash against ISDS provisions.

The basis of Phillip Morris' claims were that the Australian government had breached its obligations under the Hong Kong Australia bilateral investment treaty by expropriating its intellectual property and failing to accord it fair and equitable treatment as a result of the tobacco plain packaging laws enacted in Australia. Although the outcome of the Phillip Morris case is far from resolved, with the tribunal hearing Australia's preliminary procedural objections in February 2015, the public debate that it has triggered in Australia remains high on the agenda.

In September 2013, there was yet another shift in Australia's stance on ISDS with the formation of a new Coalition-led government that declared that it would consider ISDS provisions on a case-by-case basis. This led to ISDS provisions being included in free trade agreements entered into with Korea in December 2014 and reportedly also with China in an agreement that was signed in November 2014, but not with a recently concluded free trade agreement with Japan.

In March 2015, a draft of the investment chapter of the TPP that is currently being negotiated was published by Wikileaks. The draft chapter includes ISDS provisions to which Australia has added a footnote stating that it does not consent to any claim being submitted to arbitration in accordance with the ISDS provisions. This is consistent with Australia's 2011 policy against ISDS. According to the draft, no other country has registered an objection to the ISDS provisions in the TPP. More interestingly, the leaked chapter also includes additional wording that the deletion of the footnote is "subject to certain conditions" although the conditions are not listed. It is these last words that have sparked further speculation that Australia is considering agreeing to ISDS provisions in the TPP if certain conditions are met. Annex II-M to the leaked investment chapter also states that any measures undertaken by the Australian government in relation to "the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and the Office of the Gene Technology Regulator" would be subject to specific exemptions from ISDS provisions under the TPP. Notably, Annex II-M is in square brackets indicating that it is still under debate.

Although these carve outs are yet to be agreed and the leaked draft chapter is just that, with the United States strongly opposed to any ISDS exemptions particularly in the pharmaceutical and agribusiness sectors, it is by no means clear that the text will be finalised in this form. However, the draft does serve to demonstrate that Australia's position on ISDS continues to lack a cohesive approach. Whether the TPP includes full ISDS provisions, or carve outs specifically excluding Australia from ISDS in certain sectors, the outcome of the TPP negotiations will undoubtedly set the stage for the negotiation of future investment treaties by states in the Pacific region. Australia's role in such future investment treaty negotiations is likely to be framed by its approach to ISDS in the TPP which may also have a wider impact, contributing to the ongoing discussions across the globe (in particular, within Europe on the TTIP) regarding the value of ISDS and the scope to bring about reform to the ISDS system.