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The USMCA/CUSMA/T-MEC's Entry into Force: USMCA as Part of a Global Trend Away From ISDS – An Australian Perspective

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The investor-state dispute settlement (ISDS) arrangements provided in Chapter 14 of the United States-Mexico-Canada Agreement (USMCA) are a radical shift from those that have been in force for the past 25 years under Chapter 11 of the North American Free Trade Agreement (NAFTA). As explored in Wednesday's post, Canada has effectively opted-out of ISDS under USMCA with the exception of legacy claims and any pending NAFTA claims (see USMCA Annex 14-C). Although the United States (US) and Mexico have consented to ongoing ISDS under USMCA, the scope of obligations which can be the subject of a claim under Annex 14-D is highly restricted (although a wider range of claims can be brought with respect to government contracts covered by Annex 14-E).

In an early examination of Chapter 14 of USMCA on this blog, Robert Landicho and Andrea Cohen asked whether, in light of contemporaneous developments in Europe, USMCA is 'part of a global trend away from investor-state arbitration?' In a subsequent post Nikos Lavranos continued this inquiry, situating USMCA within a trend in recent North American and European treaty practice which he aptly termed 'ISDS à la carte.' This contribution offers an Australian perspective on USMCA's unique ISDS arrangements and whether there is a global trend away from ISDS. Australia's evolving position on ISDS shows increased caution about consenting to investor-state arbitration, but also that the exclusion or limitation of access to arbitration under one treaty does not necessarily signal a permanent rejection of ISDS.

A Brief History of Australia's Evolving Approach to ISDS

Although Australia was a relative latecomer to the world of bilateral investment treaties (BITs), its approach to ISDS has undergone several significant shifts. From 1988 through to the early 2000s, Australia concluded BITs with twenty-one states in the Asia Pacific, Europe and Latin America.

These BITs were based on a model agreement, and all included consent to ISDS.[1)] In the mid-2000s Australia's approach to ISDS became more varied, as it began to enter into free trade agreements (FTAs) with chapters on investment. In 2004, Australia rejected the inclusion of ISDS in the Australia – US Free Trade Agreement (AUSFTA), making Australia something of a pioneer of the à la carte approach to ISDS.

In April 2011 the government of then-Australian Prime Minister Julia Gillard issued a trade policy statement which pledged that Australia would not pursue the inclusion of ISDS in any future trade or investment agreement. At that time ISDS was a relatively prominent domestic political issue, in large part because of the arbitration brought by Philip Morris regarding Australia's tobacco plain packaging rules. However, the absolute rejection of ISDS by Australia was short-lived. A change of government in September 2013 saw a return to the policy of considering whether to consent to ISDS in each treaty on a case-by-case basis. All but one of the FTAs which Australia has concluded since 2013 have incorporated ISDS mechanisms,[2] and concerns about the impact of these treaties on regulatory sovereignty has been addressed through other international investment agreement (IIA) reforms, such as clarifying that 'distinguish[ing] between investors or investments on the basis of legitimate public welfare objectives' will not violate the national treatment obligation, and by providing general exceptions for measures that may be found to be in breach of an obligation (such as Articles 18 and 19 of the Hong Kong – Australia Investment Agreement (2019)).

Non-Participation in ISDS: Canada's Approach under USMCA Compared to Australia's Treaty Practice

The USMCA marks a notable shift in Canadian policy, since all previous Canadian IIAs have included ISDS mechanisms. As USMCA is a tripartite agreement, Canada's non-participation in the ongoing ISDS mechanisms established by Annexes 14-D and 14-E has been achieved by defining a 'qualifying investment dispute' as 'a dispute between an investor of an Annex Party and the other Annex Party', where 'Annex Party' means only the US or Mexico. Mexican investors will still have a potential avenue for claims against Canada under the Comprehensive Agreement on Trans-Pacific Partnership (CPTPP) (and vice-versa for Canadian investors). But, by opting-out of ISDS under the USMCA, Canada will no longer face claims from US investors once the period for legacy claims expires three years after the termination of NAFTA under paragraph 3 of Annex 14-C.

Australia has excluded ISDS arrangements from treaties with some of its close allies and trading partners, most notably the US and New Zealand.[3] Prior to the conclusion of USMCA, AUSFTA was the only US IIA which did not allow for recourse to ISDS. AUSFTA contains no consent to ISDS from either party, although Article 11.16 of AUSFTA states that the treaty parties will consult on the possible creation of ISDS procedures if either party 'considers that there has been a change in circumstances affecting the settlement of disputes.' To the knowledge of the author, no consultations have been initiated under this provision. Australia has also excluded ISDS from its treaties with New Zealand. The Investment Protocol to Australia and New Zealand's Comprehensive Economic Relations and Trade Agreement (ANZCERTA) does not make any mention of investor-state arbitration. Australia and New Zealand have used side letters to exclude the operation of ISDS as between themselves under the Australia – New Zealand – Association of South East Asian Nations (ASEAN) FTA (AANZFTA) (2009) and the CPTPP.

The Australian Department of Foreign Affairs and Trade explained the exclusion of ISDS from AUSFTA was a 'reflecti[on of] the fact that both countries have robust, developed legal systems for resolving disputes between foreign investors and government.' Although not officially stated, an additional motivation was likely that Australia was not willing to expose itself to the risk of

litigation from US investors, having witnessed Canada's experience as a respondent in early NAFTA Chapter 11 arbitrations.[4] Despite its unwillingness to include ISDS in AUSFTA, in 2016 Australia signed on to the Trans-Pacific Partnership Agreement (TPP), which would have allowed US investors to bring investor-state claims against Australia under Section B of Chapter 9. In the domestic review of the TPP, specific concerns were raised about the prospect of allowing US investors to bring claims against Australia. At the time, ISDS was an issue which received significant public attention due to the high-profile Philip Morris arbitration. However, the decision to sign on to ISDS in the TPP was justified by the government on the basis that the 'qualifications and definitional limitations in the TPP ISDS process intended to protect Governments that regulate in the public interest [were] sufficient to prevent an ISDS finding against Australia.' Despite the US later withdrawing from the TPP, the willingness of Australia to sign a treaty that opened up the possibility of claims from US investors was a significant change from the AUSFTA, and demonstrates the potential for opposition to ISDS to fluctuate over time.

The Restricted Scope of ISDS Between the US and Mexico Under USMCA

Although USMCA provides Mexican investors with ongoing access to ISDS against the US (and vice-versa), the scope of claims that can be made is relatively restricted. Under Article 14.D.3.1 claims can only be made with respect to expropriations (but excluding indirect expropriations), or for breach of the obligations to accord national treatment or most-favoured nation treatment (but excluding claims relating to the establishment or acquisition of investments). Only Annex 14-E allows claims for breach of any obligation, but that Annex is restricted to claims relating to government contracts in covered sectors (such as oil and gas or electricity generation). Explaining the US's reticence to include wide consent to investor-state arbitration in the USMCA before a Congressional committee, US Trade Representative Robert E. Lighthizer asked 'why should a foreign national … have more rights than Americans have in the American court system?'.

Similar concerns to those expressed by Ambassador Lighthizer were part of the motivation for the Gillard government's policy of rejecting the inclusion of ISDS provisions in future IIAs. But as noted above, Australia's absolute rejection of ISDS was short-lived. Rather than excluding ISDS, recent Australian IIAs contain a range of other safeguards for regulatory autonomy. In particular, some contemporary Australian IIAs have shielded certain categories of measure from ISDS claims, such as the well-known denial of benefits provisions for tobacco control measures under Article 29.5 of the CPTPP and the exclusion of public health measures from the scope of ISDS under Article 14.21.1(b) of the Indonesia – Australia Comprehensive Economic Partnership Agreement (IA-CEPA).

In contrast to Annex 14-D of USMCA, Australia has generally not sought to protect its regulatory autonomy by limiting the range of obligations which can be the subject of ISDS claims. The notable exception is the China – Australia FTA (2015) (ChAFTA), which states in Article 9.12.2 that ISDS claims can only be brought for breach of the national treatment obligation. However, the investment chapter of ChAFTA is unusual because it only contains a narrow range of obligations – omitting typical IIA provisions such as fair and equitable treatment and expropriation – and it co-exists with the China – Australia BIT (1988).[5] Under Article 14.6 of the IA-CEPA an investor-state claim cannot be made for breach of the prohibition on performance requirements. Aside from these examples, Australia has generally not sought to minimise the risks of ISDS by limiting the

range of substantive obligations which can be the basis for an investor claim. It will be interesting to see whether, in future treaties, Australia is inspired by the approach taken in Annex 14-D of USMCA.

Conclusions – USMCA, Australia and the Global Trend Away from ISDS

The ISDS provisions of USMCA are a major departure from NAFTA, and represent part of a wider trend in which states are approaching investor-state arbitration with greater caution. For countries that share at least some concern about the extent to which ISDS impacts on regulatory autonomy, such as Australia, Annex 14-D of USMCA may provide a novel model for future IIAs. However, Australia's varied approaches to ISDS over the past fifteen years demonstrate that trends away from ISDS are not necessarily linear. Australia rejected ISDS in the AUSFTA back in 2004, but it signed on to the TPP in 2016 – a time at which the global tide had already started to turn against ISDS. It is possible that the USMCA parties may have similar fluctuations in their policy on ISDS in future.

For the full scope of our coverage of USMCA to date, click here.

References

?1 However, in the Australia – China BIT this consent was ostensibly limited by article XII:2(b) to disputes concerning the amount of compensation payable for expropriation.

?2 ISDS was absent from the 2014 Japan – Australia Economic Partnership Agreement (JAEPA), which states in article 14.19.1 that the parties may consider adopting an ISDS mechanism as part of a review of the agreement. However, ISDS is available as between Australia and Japan under Chapter 9 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

?3 The 2014 Japan – Australia Economic Partnership Agreement (JAEPA) and the 2012 Malaysia – Australia FTA (MAFTA) also do not include ISDS. However, ISDS is provided for these treaty parties through the CPTPP and, for Malaysia, under the AANZFTA.

?4 See William S Dodge, 'Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1.

?5 Under Article 9.9 of ChAFTA, the parties committed to a future work program to negotiate a more comprehensive investment chapter. To date, no newer investment chapter has been concluded.

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