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Potential Investor-State Dispute Settlement Provisions in Trans-Pacific Partnership Agreement – A Change in Policy for Australia?

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The proposed Trans-Pacific Partnership Agreement (**TPPA**) – a multi-lateral agreement proposed between a number of countries, currently including Australia, Canada, Japan, Malaysia, Mexico, Peru, the United States and Vietnam (although it is hoped to be an open platform welcoming other countries to participate) – is currently the subject of much debate. TPPA countries will potentially account for approximately 39% of the world's GDP, with Australia's portion of trade representing AUD215 million. By 2025, the TPPA is expected to account for USD233 billion in trade per year, and is said to set the "economic architecture" for the region.

But will the TPPA contain investor-state dispute settlement (**ISDS**) provisions? It is not unreasonable to assume that such a large regional investment framework would contain such provisions, but the potentially significant effects of ISDS provisions in investment treaties seems to have been outweighed by other considerations.

Historically, Australia's participation in treaties containing ISDS provisions has been more limited than that of other jurisdictions in South America, Europe and the United States. In 1991, Australia enacted amendments to its International Arbitration Act 1974 (Cth) (**IAA**) (the statute governing international arbitration in Australia) to give effect to the Washington Convention, affording jurisdiction to the International Centre for the Settlement of Investment Disputes (**ICSID**) to hear disputes referred to it concerning investments made by a foreign investor of a Contracting State in another Contracting State. Further, Australia has entered into bilateral investment treaties (**BITs**) with 21 countries which adopt arbitration as a dispute resolution mechanism, including China, Indonesia, Argentina, Philippines and Vietnam. In spite of the significant Australian investment into Africa, Australia has no formal bilateral arrangements with countries in Africa other than with Egypt. Australia has also entered into free trade agreements with Chile, Singapore, Thailand, and the ASEAN-Australia-New Zealand agreement which contain ISDS provisions.

The general approach of the Australian Government whether or not to sign treaties with ISDS provisions is on a case-by-case basis. Like many other governments, the Australian Government is cautious not to include ISDS provisions where they might limit Australia's ability to govern in the public interest. Two competing tensions arise: Australian investment abroad is afforded greater protection by ISDS provisions, but the Australian Government may face the risk of claims being brought by foreign investors in Australia. Businesses seek the former, whereas the latter appears to remain a concern to the Australian Government.

Whilst Australia's involvement in treaty arbitration has been less common than in other jurisdictions, commercial awareness of treaty protection in Australia is rising and Australian companies, the majority of which are related to the mining industry, have begun considering treaty protection as a valid form of protection before investing in the Asia-Pacific or Africa.

In the past, questions arose over the Australian Government's exposure to liability under various investment treaties arising from its adoption of the Pharmaceutical Benefits Scheme (**PBS**). The Australian Government sought to protect the PBS in any international trade agreements to ensure health was maintained as an issue of public policy, and that intellectual property rights relating to new pharmaceutical products were not affected. Further questions arose following the Australian Government's enactment of the Minerals Resource Rent Tax 2012 (Cth) that imposed increased taxes on miners on net profits over AUD75 million. This enactment, however, is likely to be repealed within the year by the Coalition Government. Although to our knowledge no major claims have been brought by foreign investors under these measures, it may be too soon to tell.

Perhaps the most prominent example of a state-investor dispute in Australia is the inbound claim against the Australian Government made by Philip Morris Asia Limited (a Hong Kong incorporated entity that was acquired by Philip Morris Australia), pursuant to the Hong Kong-Australia BIT under the auspices of the UNCITRAL Arbitration Rules 2010. The claim concerned Australia's enactment of the Tobacco Plain Packaging Act 2011 (Cth) which enforced the use of plain packaging on all tobacco products sold in Australia. The measures imposed by this legislation are alleged to have had the effect of causing tobacco manufacturers to suffer loss and damage through decreasing the value of its intellectual property. The Philip Morris arbitration is in its preliminary stages and we will continue to monitor its progress.

The dispute follows a number of recent constitutional challenges in the High Court of Australia, where cigarette manufacturing claimants argued that the plain packaging legislation was in effect an attempt on behalf of the state to acquire intellectual property rights and goodwill without compensation. Interestingly enough, the enactment of this legislation also led to numerous requests for dispute consultations with Australia from WTO members Ukraine, Honduras, Dominican Republic, Cuba and Indonesia, pursuant to a number of international trade agreements including the TRIPS Agreement and GATT 1994. A number of members have also requested that a panel be established to open discussions on the implication of Australia's measures, pursuant to the TRIPS Agreement and GATT 1994. Other WTO members may join as third parties in these panel discussions.

Whereas the inclusion of ISDS provisions in investment treaties was an uncontroversial political issue in the past, the Philip Morris arbitration and the inevitable conception of the TPPA has created significant debate in Australia and forced a divide between the Labour and Coalition Governments' approach to the issue. In 2004, the then Coalition Government rejected the US's proposal to include ISDS provisions in the Australia-United States Free Trade Agreement due to strong public opposition. The Coalition Government currently in office appears prepared to consider the inclusion of ISDS provisions in international agreements, but again, this is likely to be on a case-by-case basis.

Should the final TPPA include ISDS provisions, this will mark Australia's increasing promotion of international trade and investment protection, in contrast to the previous Labour Government's position which appeared to be firmly against ISDS provisions. The TPPA is likely to be finalised in the next year.

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