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2018 in Review: Australia and New Zealand

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Last year was a busy one for arbitration practitioners in Australia and New Zealand, and 2019 looks set to be even busier. In 2018, both countries initiated a range of arbitration reforms, initiatives and negotiations which give insights into the likely general direction of travel for both countries in the coming year. This post focusses upon the practice of these States in respect of investor-State arbitration in particular. It highlights two common themes that have emerged from developments in 2018 which are likely to have a continued impact on the approaches of both countries to investor-State arbitration in 2019.

Is there a Future for Investor-State Dispute Settlement ('ISDS') in Australia's and New Zealand's Treaties?

Throughout 2018, both Australia and New Zealand confronted questions about the future inclusion of investor-State arbitration in their trade and investment treaties. While New Zealand's 2018 practice indicates the likelihood of continued opposition to ISDS, Australia's approach was more mixed, though may stabilise following the 2019 federal election.

An event of key significance for both countries in 2018 was the ratification of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP", or "TPP-11"). Many years in the pipeline, this significant trade pact entered into force on 30 December 2018 for Australia, Canada, Japan, Mexico, New Zealand and Singapore. This followed Australia's ratification, which brought the number of ratifications to the requisite threshold for the agreement to enter into effect. True to its 2017 announcement that it would seek to "oppose ISDS in any future trade agreements", New Zealand in early 2018 signed side letters with CPTPP States to either exclude ISDS entirely, or to restrict its application (for example, by subjecting ISDS to specific consent following the failure of other attempts at settlement). While Australia signed a side letter to exclude ISDS between itself and New Zealand, it has agreed to ISDS with all other CPTPP parties. This reflects the Australian government's continued approach of considering the inclusion of ISDS provisions "on a case-by-case basis in light of the national interest". While Australia's opposition party supported Australia's ratification of the CPTPP, it has nevertheless indicated that it will – if elected in 2019 – "seek to remove ISDS provisions from existing free trade agreements and legislate so that a future Australian government cannot sign an agreement with such provisions". Depending upon the outcome of the coming federal election, then, Australia's case-by-case approach may be replaced by opposition akin to New Zealand's.

Australia and New Zealand also continued negotiations throughout 2018 of the Regional

Comprehensive Economic Partnership ("RCEP"). New Zealand hosted one of the 2018 negotiating rounds at which the negotiating States continued negotiations towards an Investment chapter. The RCEP has largely been negotiated in secret, and the *Guiding Principles and Objectives* do not detail whether or not RCEP States will include ISDS in any future agreement. Early indications are that ISDS may be provided in a reduced form, but it is nonetheless possible that New Zealand and/or Australia will seek to exclude the application of ISDS using an approach similar to that employed by New Zealand in respect of the CPTPP. There are indications, however, that both countries may in any case be asked to withdraw from RCEP negotiations in the future.

In 2018, both Australia and New Zealand initiated negotiations with the European Union ("EU") towards respective bilateral free trade agreements. The EU has not included the issue of ISDS in its mandate for negotiations due to requirements related to Member State approvals of such provisions. It is possible, nonetheless, that the EU will seek separate agreements in the future to cover such issues. The EU has been a vocal proponent of a multilateral investment court in opposition to the traditional model of investor-State arbitration. To the extent that future bilateral negotiations extend to issues of investment protection, both Australia and New Zealand may need to consider EU proposals to this effect. The coming year (and beyond) is therefore likely to prompt both countries to consider how far their opposition to ISDS extends, and whether it applies only to arbitration or also to the EU's judicial model.

Can Investor-State Arbitration be Reformed to Address Existing Concerns?

During 2018, Australia and New Zealand also tackled difficult questions related to existing structures of investor-State arbitration. Australia, for example, conducted parliamentary scrutiny processes focussing upon the Peru-Australia free trade agreement and the CPTPP. A range of concerns about ISDS emerged during these processes, including scope for developing appellate mechanisms, codes of ethics, and rules on precedent. The scrutiny process also brought to light challenges associated with Australia's current (flexible) approach to the negotiation of trade and investment treaties, including its case-by-case negotiation of ISDS provisions. The Joint Standing Committee on Treaties, for example, issued two reports on the Peru-Australia FTA (a first in August 2018, and a second in November 2018). The second committee process was initiated to respond to the opposition party's concern about potential overlaps between the Peru-Australia FTA and the CPTPP, which it feared would result in a "noodle bowl effect of multiple and overlapping trade agreements". It also sought consideration of its position that "there is no good reason for ISDS mechanisms at all".

The government majority in the Committee dismissed these concerns, adopting the position that ISDS mechanisms currently being negotiated by Australia have been accompanied by "improved safeguards". The majority also dismissed "ongoing concerns over the increasing complexity created by the number of trade agreements, particularly multiple agreements with the same partner". Noting that Australia already has "multiple existing agreements" with the same partners, the majority endorsed such overlaps as a means for Australia to "achieve greater market access" and to "produce benefits for exporters". Such overlaps are likely to continue, particularly in a context where Australia is negotiating other multilateral agreements (like the RCEP) with existing multilateral treaty parties. The issues associated with such overlap will be further compounded by the absence of a model treaty (or even a standard approach to ISDS), which might assist Australia to secure a better level of consistency between instruments under negotiation.

In 2018, New Zealand also turned its attention to improvements to existing ISDS frameworks,

including a more detailed analysis of how ISDS might impact the rights and interests of indigenous peoples. To this end, New Zealand launched a consultation process to consider the possible development of an "ISDS Protocol" to better fulfil its obligations under the Treaty of Waitangi. The consultation paper proposes consideration, *inter alia*, of the possibility of appointing a lawyer with expertise on "Treaty of Waitangi issues, te ao M?ori, and tikanga M?ori" where an ISDS claim is filed against New Zealand. The proposal envisages that such an expert could productively "work as an integral part of the New Zealand government legal team defending the ISDS case". This initiative mirrors initiatives launched by other countries to make trade and investment agreements more inclusive (including, for example, Canada, which has launched a consultation on trade and gender).

Both Australia and New Zealand have also sought to engage multilaterally with ISDS reform efforts. Australia is, for example, a member of the United Nations Commission on International Trade Law and so has participated in the deliberations of the Commission's Working Group III on investor-State dispute settlement reform. New Zealand has also participated in the sessions of the Working Group as an observer. In this setting, Australia has emphasised the need for measures to secure greater transparency in investor-State arbitration, public confidence in the independence of arbitrators, and the predictability of arbitral decision-making. These discussions will continue into 2019, giving both countries an opportunity for continued consideration of whether reform to investor-State arbitration is desirable and, if so, what reform might be necessary.

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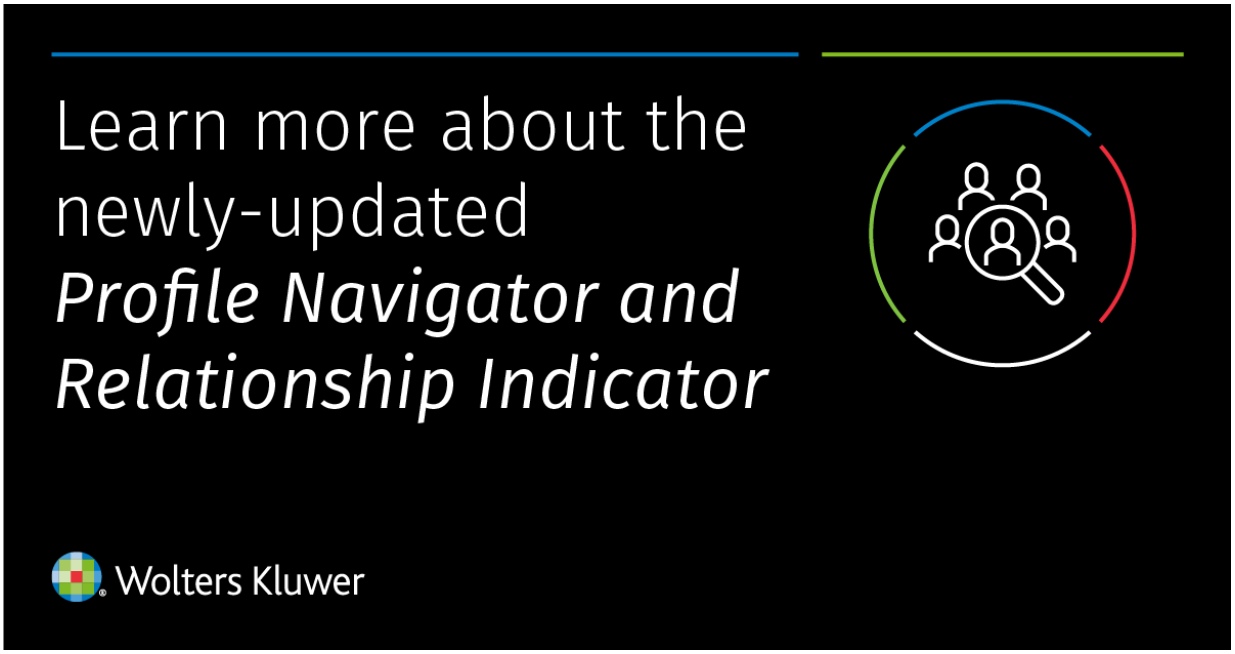

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