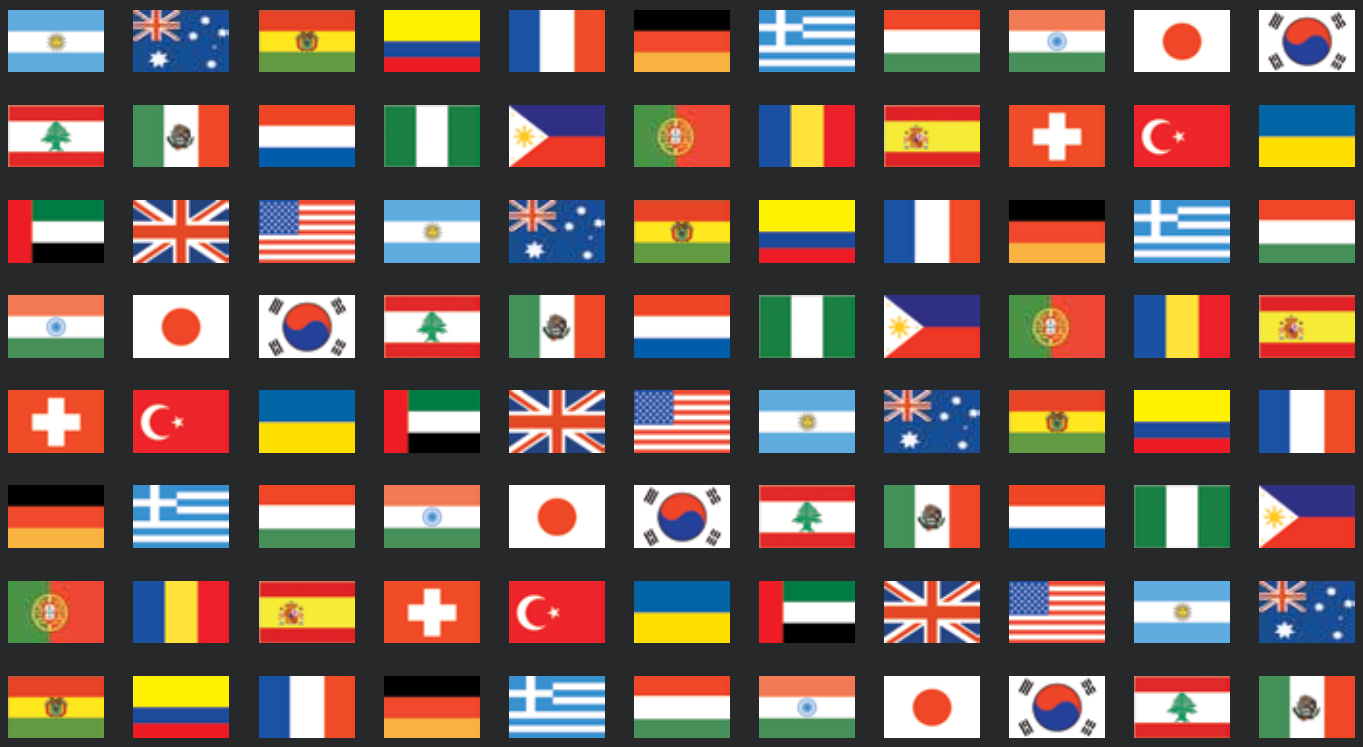
Investment Treaty Arbitration

In 25 jurisdictions worldwide

Contributing editors
Stephen Jagusch and Epaminontas Triantafilou



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GETTING THE DEAL THROUGH

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Investment Treaty Arbitration 2015

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Background

1 What is the prevailing attitude towards foreign investment?

Australia, generally, has a welcoming attitude towards foreign investment. Foreign investment only requires regulatory approval if it exceeds certain monetary or foreign government ownership thresholds. The Australian government retains discretion to prevent, or impose conditions, on certain investments that exceed the thresholds. Such investment proposals are reviewed case by case. The Australian government also has a broad discretion to reject proposals if the investment is not in the national interest (see question 4). The current administration has advanced an 'Open for Business' campaign to encourage and welcome foreign investment, although there is still some political resistance to foreign investment in certain industries.

2 What are the main sectors for foreign investment in the state?

The main sectors for foreign investment as of December 2013 were mining (36.6 per cent at A$230.3 billion), manufacturing (14.1 per cent at A$88.6 billion), finance and insurance (11.2 per cent at A$70.3 billion) and wholesale and retail trade (9.1 per cent at A$57.5 billion).

3 Is there a net inflow or outflow of foreign direct investment?

Foreign investment into Australia increased by approximately A$250 billion to A$2,462 billion for the year ended 31 December 2013. Foreign direct investment accounted for A$630 billion or 26 per cent of total investment. The leading investor countries were the United States, the United Kingdom, Japan, Singapore, Hong Kong and Switzerland.

The level of outbound foreign investment from Australia increased by approximately A$248 billion to A$1,632.3 billion for the year ended 31 December 2013. Foreign direct investment accounted for A$495 billion or 30 per cent of this total investment. The leading destinations for Australian investment were the United States, the United Kingdom, New Zealand, Germany, Canada and Japan.

Accordingly, in the year ended 31 December 2013, there was a net inflow of foreign direct investment of approximately A$135 billion.

4 Describe domestic legislation governing investment agreements with the state or state-owned entities.

Foreign investment in Australian is regulated nationally under the Foreign Acquisitions and Takeovers Act 1975 (FATA). The FATA identifies certain investments and thresholds that come within the approval authority of the Treasurer of Australia. Under the FATA the Treasurer has the discretion to prevent an investment if it is determined that allowing the transaction to proceed would be against the national interest (sections 18, 19 and 21A).

The Treasurer's authority extends to investments that exceed monetary thresholds, investments by an entity that is owned or controlled by a foreign government, certain investments in land and in specific industries. Under the FATA, a foreign enterprise is considered state-owned if at least 15 per cent of its shareholding is held by a foreign government, or the enterprise is controlled by another entity which is at least 15 per cent foreign government-owned. Any foreign investor intending to make an investment, including acquiring shares in a corporation or buying land of a value above prescribed thresholds, must notify the Treasurer of the intention to make that investment. Once notification has been received by the Treasurer, the proposed investment will be reviewed by the Foreign Investment Review Board (FIRB), which provides recommendations to the Treasurer. Foreign investors (other than an entity owned by a foreign government) making investments below that value threshold are not obliged to notify the Treasurer.

International legal obligations

5 Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party also indicating whether they are in force.

Australia is party to 21 bilateral investment treaties (BIT). These are with Argentina, Chile, China, Czech Republic, Egypt, Hong Kong, Hungary, India, Indonesia, Laos, Lithuania, Mexico, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Sri Lanka, Turkey, Uruguay and Vietnam. The first BIT entered by Australia was with China in 1988 and the most recent was with Turkey in 2009. All 21 BITs contain investor-state dispute resolution provisions. The BIT with China only provides for arbitration in relation to expropriation.

Australia is also a party to seven free trade agreements (FTA) each of which contains an investment chapter outlining the treatment of investments from each nation, incentive markets and exceptions. These are with New Zealand, Singapore, Thailand, the United States, Chile, Malaysia and the Association of South East Asian Nations (ASEAN) with New Zealand. Investor-state dispute resolution is permitted in four of the seven FTAs currently in force.

In 2014 Australia signed an FTA with Korea and an economic partnership agreement (EPA) with Japan. At the time of this publication both agreements were subject to the completion of domestic processes before coming into force. The Korea FTA includes investor-state dispute resolution provisions. The EPA with Japan does not.

Australia is engaged in seven other FTA negotiation processes. These include three bilateral FTA negotiations (with China, India and Indonesia respectively) and four plurilateral agreements (the Trans-Pacific Partnership Agreement, the Pacific Trade and Economic Agreement, the Regional Comprehensive Economic Partnership Agreement and an FTA with the Gulf Cooperation Council.

6 Is the state party to the ICSID Convention?

Australia signed the ICSID Convention on 24 March 1975. The ICSID Convention entered into force on 1 June 1991.

7 Does the state have an investment treaty programme?

Although Australia entered into 15 BITs between 1990 and 1998, Australia does not have a strict 'investment treaty programme'. Successive Australian governments have indicated that Australia will focus on FTAs in the future, rather than pursuing further BITs.

Regulation of inbound foreign investment

8 Does the state have a foreign investment promotion programme?

Australia has a number of foreign investment promotion programmes at different levels of government. At the Federal level, the programme is coordinated by the Australia Trade Commission (Austrade). Austrade works in close partnership with other Australian government departments and agencies, state and territory governments and regional councils to promote inbound foreign investment.

Austrade provides a number of guides and useful information to assist foreign investors and promote the various incentives made available by the government to attract inbound foreign investment, such as tax incentives for enterprises engaging in research and development in Australia. AusIndustry has merged with a new federal agency called Business (www.business.gov.au), which offers a range of business services and information, including details of various grants, and tax and duty concessions for foreign investors. In addition to Austrade, each Australian state and territory has its own foreign investment promotion programmes. The relevant agencies for each state and territory are:

- Australian Capital Territory – the Innovation, Trade and Investment Branch (www.business.act.gov.au);
- Queensland – Trade and Investment Queensland (www.tiq.qld.gov.au);
- New South Wales – Trade and Investment Department (www.trade.nsw.gov.au);
- Victoria – Invest Victoria (www.invest.vic.gov.au);
- South Australia – Department of State Development (www.statedevelopment.sa.gov.au/what-we-do/invest-in-south-australia);
- Western Australia – Department of State Development (www.dsd.wa.gov.au/7621.aspx);
- Tasmania – Department of State Growth (www.stategrowth.tas.gov.au/home); and
- Northern Territory – InvestNT (www.investnt.com.au).

9 Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

Inbound foreign investment in Australia is managed by the FATA and by associated relevant regulations including the Foreign Acquisitions and Takeovers Regulations 1989 (Cth), the Foreign Takeovers (Notices) Regulations 1975 (Cth) and the Foreign Investment Policy. These regulations and policies are regulated by the Australian Foreign Investment Review Board (FIRB), which advises and assists the Treasurer in making decisions on foreign investment proposals. Additionally industry-specific legislation and policy can impose special requirements on foreign investors, such as in the banking sector.

A foreign investment in Australia must be notified to the FIRB if the investor is a foreign government investor, regardless of the value of the investment. In addition to a foreign body politic, a foreign government investor includes an entity that is 15 per cent controlled by one foreign government, 40 per cent controlled by multiple foreign governments, or otherwise controlled by a foreign government. An investment in Australia by a 'foreign person' must be notified to the FIRB if the foreign investor will take a substantial interest in a corporation or business that is valued above A$248 million. Further, an investor must also obtain approval to acquire a substantial interest in an offshore company with Australian gross assets valued above A$248 million. The threshold for investors from New Zealand and the United States is A$1,078 million.

For the purposes of the FATA, a 'foreign person' includes a:

- foreign natural person;
- foreign corporation;
- corporation which is controlled by foreign persons; or
- foreign trustee of a trust estate who holds a substantial interest.

Under the FATA control means 15 per cent for an individual or 40 per cent for an aggregate interest. This control extends to both majority and minority interests.

Some investments must be notified to FIRB regardless of the value of the investment or nationality of the investor. For example:

- investments in vacant non-residential land;
- investments in residential real estate (some exemptions apply); and
- investments in shares or units in Australian urban land corporations or trust estates (some exemptions apply).

Special thresholds exist for foreign investments in certain sectors. For example:

- investments of 5 per cent or more in the media sector;
- investments in the banking sector must comply with the Banking Act 1959, the Financial Sector (Shareholdings) Act 1998 and the Australian government banking policy;
- investments in Australian airlines must comply with the Airports Act 1996; and
- investments in the shipping industry are regulated by the Shipping Registration Act 1981.

States and territories may impose separate requirements for foreign investors and investments within their jurisdiction. For example, under the Foreign Ownership of Land Register Act 1988 (QLD) foreign investors purchasing land in Queensland must register the investment with the Queensland Foreign Land Registry. Queensland is the only state or territory that maintains such a register. This notification requirement requires a one-page foreign ownership information form to be completed and filed at the same time that a transfer of land is registered. Penalties are imposed for non-compliance and conviction may result in the land being forfeited to the state. The Australian government has proposed introducing a national foreign land register.

10 Identify the state agency that regulates and promotes inbound foreign investment.

As identified in question 9, the FIRB is the primary Australian government authority that regulates inbound foreign investments. Specific sectors also have departments which monitor and regulate foreign investment.

The promotion of inbound foreign investment has been discussed in question 8.

11 Identify the state agency that must be served with process in a dispute with a foreign investor.

In Australia there is no single agency that manages foreign investor disputes. Accordingly, a process for a dispute would be served on the relevant Australian government department or agency. Importantly investors have no right of administrative or judicial review of foreign investment decisions made under the FATA or associated policy. (The Administrative Decisions (Judicial Review) Act 1977 (Cth) specifically exempts decisions made under the FAT Act from judicial review.) However, FIRB does allow for resubmission by investment proposals.

Investment treaty practice

12 Does the state have a model BIT?

Australia does not presently have a model BIT. A recent Australian Senate inquiry report suggested that the Australian government develop a model BIT.

On 5 March 2014, an Australian senator introduced a bill that would prevent the Australian government from entering into agreements with foreign governments that include investor-state dispute settlement provisions. A Senate committee was formed to evaluate the bill. The Senate committee recommended that the bill not be passed and suggested that the risks associated with investor-state dispute settlement could be more effectively managed through careful treaty drafting and the development of a well-balanced Model Investment Treaty. At the time of publication there was no confirmation from the Australian government that such a treaty will be drafted.

13 Does the state have a central repository of treaty preparatory materials?

Australia does not have a central repository. Copies of treaties are available online via the Australian Treaties Database (ATD), an online database managed by the Department of Foreign Affairs and Trade (www.info.dfat.gov.au/treaties).

14 What is the typical scope of coverage of investment treaties?

Australian BITs and FTA investment chapters cover a broad range of investments including movable and immovable property, shares, stocks, bonds, returns which are reinvested, intellectual and industrial property rights and business concessions.

Most treaties define 'investor' as a either a natural person or a company having the nationality of the home state. The 'nationality' of a company is often determined through the place of incorporation. Nonetheless, in certain cases consideration of the main seat of business or a bond of economic substance may also be considered.

15 What substantive protections are typically available?

Each of the FTAs and BITs entered by Australia contain protections for fair and equitable treatment, expropriation and protection and security.

Most-favoured-nation protection is included in all of Australia's BITs and FTAs, excluding ASEAN–Australia–New Zealand FTA and the Singapore–Australia FTA. Umbrella clauses are contained in Australia's BITs with China, Hong Kong, Papua New Guinea and Poland. The Korea–Australia FTA is the only FTA that contains an umbrella clause, although that FTA is not yet in force.

16 What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

No publicly available investment treaty award has been rendered against Australia. A dispute between Philip Morris Asia Limited and Australia is being arbitrated under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2010. Singapore is the seat of the arbitration.

17 Does the state have an established practice of requiring confidentiality in investment arbitration?

Australia has only been party to one investor-state arbitration, which is ongoing. In the *Philip Morris* dispute (see question 18), the confidentiality regime provides that all hearings, meetings and conferences be recorded and that all transcripts be kept in confidence. The confidentiality regime also imposes restrictions on the disclosure of confidential materials and confidential information including pleadings, memorials and submissions filed by the parties. In determining the confidentiality regime Australia argued for a high degree of transparency on the basis that each party should be able to make public its own written submissions and accompanying exhibits, redacted as appropriate. The claimant argued that the proceeding as a whole should be presumptively confidential and consented only to the tribunal's awards, decisions, orders and directions being published subject to the redaction of commercially sensitive information. Additionally, the claimant agreed that parties were permitted to make neutral public statements concerning the nature of issues in dispute in the arbitration and its procedural status.

The tribunal ultimately ordered that its awards, decisions and orders be published on the website of the registry for the arbitration, the Permanent Court of Arbitration in The Hague, and made no orders restraining parties from making statements about the arbitration or from publishing its own materials. The tribunal materials are accessible from the Commonwealth Attorney-General's Department (www.ag.gov.au/tobaccoplainpackaging), and the Permanent Court of Arbitration (www.pca-cpa.org/showpage.asp?pag_id=1494).

Investment arbitration history

18 How many known investment treaty arbitrations has the state been involved in?

At the date of publication, Australia has only been subject to one investor-state dispute claim. On 1 December 2011, the Tobacco Plain Packaging Act 2011 became law in Australia. The Act formed part of a range of tobacco control measures to reduce the rate of smoking in Australia. Philip Morris Asia has challenged the Act under the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments (Hong Kong BIT).

Philip Morris Asia has argued that Australia's tobacco plain packaging measure constitutes an expropriation of its Australian investments in breach of article 6 of the Hong Kong BIT. Philip Morris Asia has further argued that Australia's tobacco plain packaging measures are in breach of Australia's commitment under article 2(2) of the Hong Kong BIT to accord fair and equitable treatment to Philip Morris Asia's investments. Philip Morris Asia further asserts that tobacco plain packaging constitutes an unreasonable and discriminatory measure and that Philip Morris Asia's investments have been deprived of full protection and security in breach of Article 2(2) of the Hong Kong BIT. Australia has rejected each of the claims brought by Philip Morris Asia.

Official material relating to the dispute are accessible from the Commonwealth Attorney-General's Department (www.ag.gov.au/tobaccoplainpackaging), and the Permanent Court of Arbitration (www.pca-cpa.org/showpage.asp?pag_id=1494).

19 Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

There has only been one investor-state dispute in Australia. Please refer to question 18.

20 Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

There has only been one investor-state dispute in Australia.

21 Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

There has only been one investor-state dispute in Australia. Under section 2 of the Legal Services Directions 2005 (Cth), Appendix A, the Australian Government Solicitor, the Attorney-General's Department and the Department of Foreign Affairs and Trade are authorised to perform public international law services on behalf of the government. The Solicitor-General and external barristers may be retained to represent the Australian government, and this has occurred in the *Philip Morris* arbitration.

Enforcement of awards against the state

22 Is the state party to any international agreements regarding enforcement, such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Australia is party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention). The International Arbitration Act 1974 (Cth) gives effect to Australia's obligations under the New York Convention as well as the UNCITRAL Model Law and ICSID Convention. An application for enforcement of an investment treaty award may be made in a supreme court of any state or territory or in the Federal Court of Australia.

23 Does the state usually comply voluntarily with investment treaty awards rendered against it?

No publicly available awards have been rendered against Australia under its investment treaties. The *Philip Morris* dispute (see question 18) was still being determined at the time of publication.

24 If not, does the state appeal to its domestic courts against unfavourable awards?

Not applicable at the time of publication.

25 Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

The International Arbitration Act 1974 (Cth) (IAA), gives effect to Australia's obligations under the New York Convention as well as the UNCITRAL Model Law and ICSID Convention. The IAA provides that a foreign arbitral award made in pursuance of an arbitration agreement in a country other than Australia awarded under the New York Convention is binding and may be enforced in a court of a state or territory or through the Federal Court of Australia as if the award were a judgment or order of that court (section 8 of the IAA refers).

The recognition and enforcement of a foreign award may be refused on the following grounds (section 8 of the IAA refers):

- that the party to the arbitration was (under the law applicable to it) under some incapacity at the time when the agreement was made;
- that the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;
- a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to defend against the arbitration proceedings;
- that the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;

Update and trends

The inclusion of investment treaty arbitration provisions in Australia's FTAs and BITs has become highly politicised in recent years. In April 2011, the then Australian government made an unequivocal statement denouncing investor-state dispute resolution in Australia's future bilateral and multilateral agreements. In April 2011, the then Australian government stated: 'In the past, Australian governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessment about whether they want to commit to investing in those countries.'

Following the November 2013 federal election, there was a change of government and a change in attitude towards investment treaty arbitration. In 2014 the current Australian government has stated: 'The government will consider investor-state dispute settlement provisions in FTAs on a case-by-case basis. The Australian government is opposed to signing up to international agreements that would restrict Australia's capacity to govern in the public interest – including in areas such as public health, the environment or any other area of the economy.' Since the 2013 election, the Australian government has signed two bilateral agreements, with Japan and Korea respectively. The FTA between Australia and Korea provides for investor-state dispute settlement, while the EPA between Australia and Japan does not

The current *Philip Morris* dispute concerning Australia's plain cigarette packaging laws is an extremely high profile arbitration. It is Australia's first investor-state proceeding. The intellectual property and public health issues that are raised by the arbitration are also being pursued by a number of World Trade Organization members in the WTO's Dispute Settlement Body. These matters are being very closely watched by many interested stakeholders. The resolution of the dispute will deliver new law and precedent for future cases, and will undoubtedly have important impacts on Australia's ongoing policy attitude towards investor-state dispute resolution.

- that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- that the award has not yet become binding on parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

Additionally, recognition or enforcement may be refused if the subject matter is not capable of settlement by arbitration under the laws in force in the state or territory in which the court is sitting. Further, recognition or enforcement may be refused if it is contrary to public policy (section 8(7)-(7A) of the IAA refers). Under the IAA, 'contrary to public policy' means:

- the making of the award was induced or affected by fraud or corruption; or
- a breach of the rules of natural justice occurred in connection with the making of the award.

Provisions regarding ICSID awards can also be found in the IAA. An ICSID award is binding and not subject to any appeal or any other remedy otherwise than in accordance with the ICSID Convention. Under article 55 of the ICSID Convention, enforcement of ICSID awards cannot be challenged on the grounds of sovereign immunity. Further, under article 52(1) of the ICSID Convention, Australia may apply to have an ICSID award annulled on the following grounds:

- that the tribunal was not properly constituted;
- that the tribunal has manifestly exceeded its powers;
- that there was corruption on the part of a member of the tribunal;
- that there has been a serious departure from a fundamental rule of procedure; or
- that the award has failed to state the reasons on which it is based.

An ICSID award may be enforced in the supreme court of a state or territory or the Federal Court of Australia with the leave of the court (section 35 of the IAA refers).

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