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The International Comparative Legal Guide to:

Investor-State Arbitration 2019

1st Edition

A practical cross-border insight into investor-state arbitration.

Published by Global Legal Group, in association with CDR, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George
Print Group
November 2018

ISBN 978-1-912509-41-6
ISSN 2631-6307

Strategic Partners

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1 Treaties: Current Status and Future Developments

1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

Australia has entered into 10 free trade agreements with individual countries (Chile, China, Japan, Korea, Malaysia, New Zealand, Singapore, Thailand and the USA) or groups of countries (the AANZFTA between Australia, Brunei, Burma, Cambodia, Indonesia, Laos, Malaysia, New Zealand, the Philippines, Singapore, Thailand and Vietnam).

Australia is also party to 20 bilateral investment treaties (**BITs**) that are in force with Argentina, China, Czech Republic, Egypt, Hong Kong, Hungary, Indonesia, Laos, Lithuania, Mexico, Pakistan, Papua New Guinea, Peru, the Philippines, Poland, Romania, Sri Lanka, Turkey, Uruguay and Vietnam.

The provisions of a terminated BIT with India remain applicable to pre-termination investments.

1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

Australia has signed, but not yet ratified, the Pacific Agreement on Closer Economic Relations Plus (**PACER Plus**), Peru-Australia Free Trade Agreement, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**, also known as TPP-11). Generally, there is a delay between signature and ratification because a process of inquiry must be undertaken by the Joint Standing Committee on Treaties (**JSCOT**).

The PACER Plus was signed in Tonga on 14 June 2017 by Australia, New Zealand and eight Pacific Island countries. The most recent report issued by the JSCOT recommended the PACER Plus be ratified.

The Peru-Australia FTA was signed by representatives from Australia and Peru on 12 February 2018. It has been tabled in Parliament and was discussed in a public hearing of the JSCOT on 7 May 2018 where a key concern was the potential overlap between PAFTA and the CPTPP. The JSCOT has not yet reported back to Parliament.

The CPTPP was signed in Santiago on 8 March 2018. It is likely to be ratified later in the year.

1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

There is an Australian model Investment Promotion and Protection Agreement (**IPPA**) text. It provides a clear set of obligations relating to the promotion and protection of investments and takes full account of each party's laws and investment policies. The model IPPA text can be seen, for example, in the Australia-Mexico IPPA, the Australia-Egypt IPPA, the Australia-Uruguay IPPA and the Australia-Lithuania IPPA.

1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

We are not aware of diplomatic notes with other States being published.

1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

We are not aware of official commentaries concerning the intended meaning of treaty clauses being published.

2 Legal Frameworks

2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Australia is party to both the New York Convention and the Washington Convention. Australia signed the Mauritius Convention on Transparency on 18 July 2017. Ratification will be considered by the Australian Parliament through the JSCOT.

2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

The foreign investment legislative framework in Australia is comprised of the *Foreign Acquisitions and Takeovers Act 1975* (**FATA**), the *Foreign Acquisitions Takeovers Fees Impositions*

Act 2015 and their regulations. This legislative framework is supplemented by Australia's Foreign Investment Policy (**Policy**) and guidance notes. The substantive provisions of FATA and the Policy address the formal admission of foreign investment (discussed in question 2.3 below).

Like the rest of the market in Australia, foreign investors are regulated by the Australian Securities and Investments Commission (**ASIC**). ASIC is an independent Commonwealth Government body responsible for (among other things) registering and ensuring companies, schemes and various individuals and entities meet their obligations under the *Corporations Act 2001*. Additionally, all dealings must be conducted in accordance with the Corporations Act with regard to insider trading, market manipulation, disclosure of shareholdings, takeovers and acquisitions and capital raisings.

FATA (and its associated regulations) does not contain dispute resolution provisions.

2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Under FATA, foreign investment must receive approval from the Commonwealth Government's Treasurer in certain circumstances which involve a "foreign person" as defined by s 4 of FATA.

A foreign person includes:

- a natural person who is not ordinarily a resident in Australia;
- a corporation in which one foreign person (or two or more foreign persons together) holds a controlling interest; or
- the trustee of a trust estate in which one foreign person or corporation (or two or more foreign persons or corporations together) holds a substantial interest.

Whether a proposed foreign investment requires approval will depend upon the type of investor, the type of investment, the industry sector and also the value of the proposed investment. For example, there is greater scrutiny on investments by "foreign government investors" (as compared to foreign individuals or entities). Typical types of transactions requiring approval include real estate, agricultural or business investment.

In deciding whether to approve a proposed foreign investment, the Treasurer is advised by the Foreign Investment Review Board (**FIRB**). FATA itself does not prescribe criteria for approving foreign investment proposals. Rather, FATA empowers the Treasurer to veto foreign investment proposals which are contrary to the national interest (FATA, s 67). The Policy is instructive of what is relevant to the national interest. The Treasurer and FIRB start from the general presumption that foreign investment is beneficial (Policy, p 8). Matters that are relevant to the national interest include, for example, competition, impact on the economy, the investor's character and national security.

FATA also requires compulsory notification of certain business activities which are considered to be significant (or notifiable) actions. One of the tests used is a monetary screening threshold test (indexed annually). The threshold is met when either:

- the amount paid for an interest; or
- the value of the entity or the asset,

exceeds the threshold amount (depending on the type of transaction).

Other business activities are considered voluntary notice activities (i.e. the foreign person can choose to notify but does not have to). The benefit of giving voluntary notice is that if the Treasurer issues a notice of "no objection", the Treasurer can no longer make orders in relation to the proposal.

Certain persons and proposals are exempt from the notification requirements, however, as strict penalties apply for breaches of FATA, foreign investors in doubt should seek legal advice.

3 Recent Significant Changes and Discussions

3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

In *SZOQQ v Minister for Immigration and Citizenship* [2012] FCAFC 40, the Full Federal Court considered, among other issues, the connection between Australia's domestic law and the *Convention Relating to the Status of Refugees*. *SZOQQ* demonstrates that the Australian courts' approach to treaty interpretation is, subject to contrary legislation, consistent with the approach in international law reflected by arts 31 and 32 of the *Vienna Convention on the Law of Treaties* (**VCLT**). The VCLT provides that a treaty shall be interpreted in good faith and according to the ordinary meaning of its words in their context and in the light of the treaty's object and purpose. Recourse to explanatory materials (i.e., *travaux preparatoires*) is permitted (*Great China Metal Industries Co Ltd* (1998) 196 CLR 161 at 186).

In *Minister for Home Affairs v Zentai* [2012] 246 CLR 213, the High Court of Australia considered Hungary's request for the extradition of the respondent to face questioning for an alleged war crime in 1944. The issue before the High Court was the interpretation of the *Australia-Hungary Extradition Treaty* (**Treaty**), which had been incorporated into domestic law. Having ascertained the Treaty's object and purpose, the majority of the Court found in favour of a strict textual interpretation. The Chief Justice remarked that the VCLT rules of interpretation were "generally consistent" with Australian common law principles on treaty interpretation (paragraph [19]). Ultimately, as the crime with which the respondent was charged did not exist at the time of the alleged offence, the Court denied the request for extradition.

The Full Federal Court case of *Tech Mahindra Limited v Commissioner of Taxation* [2015] FCA 1082 provides a comprehensive analysis on the interpretation of treaties in Australia. The case concerned the *Indian Double Taxation Agreement* (**Agreement**). The Court noted that India was not a party to the VCLT. However, as the VCLT is reflective of customary international law, the Court held that the rules of interpretation codified by arts 31 and 32 of the VCLT applied to the construction of the Agreement (paragraph [53]). Further, the Court emphasised that where parliament had adopted the exact text of a treaty into domestic legislation, it can be assumed Parliament intended to fulfil its international obligations. Accordingly, it is appropriate to interpret such legislation in accordance with the VCLT (paragraph [51]).

3.2 Has your country indicated its policy with regard to investor-state arbitration?

The current Australian Commonwealth Government's policy is to consider investor-State dispute settlement (**ISDS**) provisions on a case-by-case basis, and there is ministerial support for ISDS provisions. ISDS provisions were agreed to in the Korea-Australia FTA (2014), the China-Australia FTA (2015), as well as the recent CPTPP.

It is worth noting, in the case of any change in government, that the Labour Party and the Greens are opposed to ISDS provisions.

3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

None of Australia's current treaties contain anti-corruption provisions (although the CPTPP, which has not yet entered into force, contains provisions which permit a State taking measures necessary to eliminate bribery and corruption in international trade).

Australia's more recent FTAs:

- recognise a State's right to adopt measures necessary to protect the environment or conserve natural resources (e.g., with Japan and China);
- expressly exclude procedures for the resolution of disputes provided for in other investment agreements from the ambit of the MFN clause (e.g., with Malaysia, Japan and China); and
- protect assets owned or controlled "directly or indirectly" by an investor of a party (e.g., with China, Japan, Korea and Malaysia).

3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

No, however, India unilaterally terminated its BIT with Australia on 23 March 2017.

4 Case Trends

4.1 What investor-state cases, if any, has your country been involved in?

As of September 2018, Australia has only been a party to one reported investor-State case. However, the status of a second case is unknown.

In 2012, Philip Morris commenced UNCITRAL arbitral proceedings against Australia under the Hong Kong-Australia Bilateral Investment Treaty. The dispute arose out of Australia's implementation of tobacco plain-packaging laws. Philip Morris alleged, among other things, that Australia had not afforded Philip Morris fair and equitable treatment and that Australia had indirectly expropriated its assets. Ultimately, the Tribunal dismissed Philip Morris' claims for jurisdictional reasons.

In November 2016, an American power generation company, APR Energy, commenced UNCITRAL arbitral proceedings against Australia under the Australia-United States FTA (AUSFTA). Broadly, the dispute relates to the seizure of the claimant investor's power turbines by one of Australia's major private banks. Australia responded to the Notice of Dispute stating that APR Energy cannot bring a dispute under AUSFTA because, *inter alia*, the treaty does not provide for investor-State arbitration. The status of the matter is unknown.

4.2 What attitude has your country taken towards enforcement of awards made against it?

There have been no awards made against Australia.

4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

Australia has not had cause to bring any annulment proceedings.

4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

There has been no relevant satellite litigation.

4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

There is a lack of case law on which to make any relevant observations.

5 Funding

5.1 Does your country allow for the funding of investor-state claims?

Yes. Third-party litigation funding was legalised by the High Court of Australia in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] 229 CLR 386. A majority of the High Court held that litigation funding was not contrary to public policy or an abuse of process. Australia permits third-party funding of other dispute resolution proceedings, including arbitral proceedings.

5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

In Australia, there is no case law directly relating to the funding of investor-State claims. This fact is unsurprising given Australia has been party to only one investor-State dispute (the Philip Morris plain-packaging laws dispute mentioned above).

5.3 Is there much litigation/arbitration funding within your jurisdiction?

It has been reported that third-party litigation funders operating in Australia capture approximately 15% of Australia's $21 billion litigation market (Jason Geisker and Jenny Tallis, *The Third Party Litigation Funding Law Review* (The Law Reviews, 1st edition, 2018). A significant proportion of litigation funding relates to insolvency disputes and class actions for tort claims, investor claims, product liability claims and environmental claims.

By contrast, it is understood that few arbitral matters in Australia are funded.

6 The Relationship Between International Tribunals and Domestic Courts

6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

In other countries, claims have been initiated against host States for allegedly targeting officers and directors of foreign investors through unlawful criminal proceedings. In these instances, claimants have relied on standard treaty provisions such as "National Treatment" and "Minimum Standard of Treatment" which exist in many of Australia's Free Trade Agreements. For example, in the Singapore-Australia FTA, the minimum standard of treatment includes an express "*obligation not to deny justice in criminal, civil or administrative* *adjudicatory proceedings*". Therefore, although the provisions have not been tested in the context of Australian treaties in this way, it is conceivable that similar provisions could be invoked to call into question a criminal investigation or domestic judgment.

6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

In contrast with the Model Law, arbitrations under the Washington Convention are "self-contained", that is, all procedural issues are to be resolved by ICSID and the arbitral tribunal themselves. For example:

- the Chairman of ICSID's Administrative Council is responsible for appointing arbitrators where the parties cannot agree (Washington Convention, art 38; Rules of Procedure, art 4);
- the tribunal can make provisional measures if necessary (Washington Convention, art 47, Rules of Procedure, art 39); and
- ICSID, the tribunal, and *ad hoc* committees can (upon a party's application) interpret, revise, stay or annul awards (Washington Convention, arts 50–52, Rules of Procedure, arts 50–55).

The self-contained nature of ICSID arbitrations is consistent with the IAA, which is silent on the Australian courts' role (or lack thereof) concerning procedural issues. Accordingly, the Australian courts' role in relation to ICSID arbitrations is limited to recognising and enforcing awards (Washington Convention, art 54; IAA, s 35).

6.3 What legislation governs the enforcement of arbitration proceedings?

The IAA governs the recognition and enforcement of arbitral awards. It gives the Washington Convention the force of law in Australia (s 32). Part IV of the IAA provides for the recognition and enforcement of ICSID awards. Arbitral awards made under the UNCITRAL Model Law are enforced under Part II of the IAA.

6.4 To what extent are there laws providing for arbitrator immunity?

Section 28 of the IAA provides arbitrators with immunity for anything done or omitted to be done in good faith in his or her capacity as arbitrator.

6.5 Are there any limits to the parties' autonomy to select arbitrators?

A party should not appoint an arbitrator which is a national of the contracting State party to the dispute or the contracting State whose national is a party to the dispute unless the sole arbitrator or each individual member of the tribunal is appointed by party agreement (Washington Convention, art 39).

Further, if a party appoints an arbitrator from outside the Panel of Arbitrators, the arbitrator must be "*of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment*" (Washington Convention, arts 14(1) and 40(2)).

These articles above have the force of law in Australia under section 32 of the IAA.

Parties should also be aware of any contractually imposed limits.

6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes, the default procedure in the Washington Convention has the force of law in Australia.

If the parties fail to agree on the number of arbitrators, the default number is three (Washington Convention, art 37(2)(b)).

If the parties fail to agree upon a procedure for the appointment of arbitrators in a three-member tribunal, each party shall appoint one arbitrator and the two arbitrators appointed shall appoint the third, who shall be the president of the Tribunal (Washington Convention, art 37(2)(b)).

6.7 Can a domestic court intervene in the selection of arbitrators?

Generally, a domestic court will only intervene where the parties are unable to agree the arbitrator or the method of appointment fails. However, arbitrations conducted under the Washington Convention are effectively insulated from the interference of domestic courts. The Washington Convention provides a mechanism for tribunal constitution where the parties are unable to agree on the number of arbitrators or the method of appointment (see art 37(2)(b)) or where the tribunal has not been constituted within time (see art 38). Similarly, the Washington Convention provides a mechanism in respect of the proposed disqualification of an arbitrator.

7 Recognition and Enforcement

7.1 What are the legal requirements of an award for enforcement purposes?

Article 48 of the Washington Convention requires the award to be in writing, and signed by the arbitrators. The award shall also state the reasons upon which it is based.

7.2 On what bases may a party resist recognition and enforcement of an award?

An ICSID award is binding and not subject to any appeal or any other remedy otherwise than in accordance with the Washington Convention.

Under art 54 of the Washington Convention, a State must enforce an ICSID award as if it were the final judgment of a court in that State. The Federal Court of Australia and the Supreme Courts of the States and Territories are designated for the purposes of art 54. A party cannot resist, and a court cannot deny, enforcement on grounds of public policy.

The grounds for resisting enforcement of an award under the New York Convention do not apply to an ICSID award (IAA, s 34).

There are limited grounds on which a party may request annulment of an award in art 52 of the Washington Convention.

7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

Sovereign immunity from jurisdiction and execution is provided for under the *Foreign States Immunities Act 1985* (Cth). It provides for limited State immunity. A foreign State is generally immune from the jurisdiction of Australian courts unless it has submitted to the jurisdiction (s 10) or the proceedings concern the State's commercial activities (s 11). In *Lahoud v The Democratic Republic of Congo* [2017] FCA 982 (which concerned the enforcement of an ICSID award), the Federal Court of Australia held that the Democratic Republic of Congo was not immune because it had submitted to the jurisdiction of the ICSID tribunal.

The property of a foreign State will generally not be subject to any order of the Australian courts for the enforcement of an arbitration award unless the foreign State has waived immunity (s 31) or the property is commercial (s 32).

The case of *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] ALR 228 considered these provisions. A private fund, Firebird, held bonds issued through the Nauru Finance Corporation (**NFC**) and guaranteed by the Republic of Nauru. NFC defaulted and Nauru refused to guarantee the debt owing. Firebird obtained judgment against Nauru in a Tokyo District Court. Firebird then sought to register that judgment in Australia, and to freeze Nauru's Australian bank accounts. The High Court of Australia held that Nauru was immune to any freezing order over its Australian bank accounts because Nauru used those accounts for non-commercial purposes. Although registered, the judgment against Nauru was practically toothless.

7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

The *Foreign States Immunities Act* expressly provides that separate entities (which are defined to include a body corporate that is an agency or instrumentality of the foreign State) are covered by the immunity from jurisdiction provided under s 9 and execution of an arbitration award against State property under s 30 (see ss 22 and 35, respectively).

The Full Court of the Federal Court of Australia considered the definition of separate entity in *PT Garuda Indonesia v ACCC* [2011] FCAFC 52. It was held that an instrumentality is a body created by the State for the purpose of performing a function for the State.

Therefore, a separate entity will be covered by sovereign immunity unless one of the exceptions under the Act (discussed in question 7.3 above) applies.

Acknowledgment

The authors would like to thank their colleague Dominic Fawcett for his assistance in the writing of this chapter.

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