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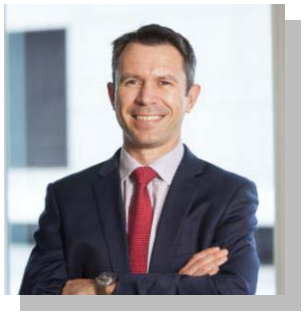

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Australia Signs the Mauritius Convention: How Investor-State Arbitration Might Look With More Transparency

The Mauritius Convention and investor-state arbitration

On 18 July 2017, Australia signed the Mauritius Convention, officially known as the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (**Mauritius Convention**). The Mauritius Convention aims to increase transparency in investor-state arbitration by extending the application of the UNCITRAL Rules on Transparency (**Transparency Rules**).

Investor-state arbitration is a dispute resolution method available to foreign investors from countries (states) which are state-party to a treaty or agreement with the state in which the foreign investment is made and that treaty or agreement contains an investor-state dispute settlement (**ISDS**) regime which includes arbitration.

The treaty or agreement is typically a bilateral investment treaty (**BIT**), multilateral investment treaty (**MIT**) or free trade agreement (**FTA**), although not all FTAs contain ISDS provisions. The discussion below includes BITs, MITs and FTAs when it refers to treaties.

A BIT is a binding agreement between two states, by which each state assumes obligations in relation to investments made by parties based in the other state. MITs are similar agreements between a number of states. A state in which an investment is made may be obliged, for example, to promote favourable investment conditions, to treat investors fairly and equitably, and not to undertake expropriation or nationalisation. The certainty and security provided by BITs and MITs is intended to foster investment between the signatories to the treaty.

Australia is a party to 21 BITs with countries throughout the world. Australia also has free trade agreements (**FTAs**) with other significant trading partners, many of which include ISDS provisions, as is the case in the FTAs with China, Korea, and Singapore.

The Mauritius Convention and the Transparency Rules

While allowing for the protection of confidential information, the Transparency Rules provide for the publication of information relating to the arbitration and key documents including the statement of claim and defence, tables of evidence, written submissions, and transcripts of hearings. The Transparency Rules also mandate public hearings and allow opportunities for interested third parties to make submissions in the arbitration.

Currently, the Transparency Rules have limited application. They only apply to investor-state arbitrations initiated under the UNCITRAL Arbitration Rules where the arbitration is initiated under a treaty concluded on or after 1 April 2014 (unless the parties to the treaty or arbitration agree otherwise). The Transparency Rules can apply to arbitrations initiated under the UNCITRAL Rules and based on treaties concluded before April 2014, but only if:

(a) the parties to the *arbitration* (e.g. an investor and a state) agree to apply the Transparency Rules; or
(b) the parties to the *treaty* (e.g. two states) concluded before April 2014 agree after 1 April 2014 that the Transparency Rules apply.

The Mauritius Convention would expand the applicability of the Transparency Rules to any investor-state arbitration based on a treaty concluded before 1 April 2014 where:

(a) the state respondent is a Party to the Convention; and

(b) the investor claimant is either from a state which is Party to the Convention, or the investor claimant consents to the application of the Transparency Rules.

The Mauritius Convention also removes the limitation currently in the Transparency Rules whereby the Transparency Rules only apply to arbitrations conducted under the UNCITRAL Rules.

21 countries across Europe, North America, the Middle East and Africa have signed the Mauritius Convention, but so far it has only been ratified by Mauritius, Canada, and Switzerland. Australia is the first in the Asia-Pacific region to sign up and hopes that its move will encourage other Asian countries to do the same. Merely signing the treaty though does not make it binding in Australia. Australia is not legally bound by the Mauritius Convention's provisions until it ratifies it by depositing an instrument of ratification with the United Nations. This will not be done until the government's Joint Standing Committee on Treaties has had an opportunity to consider Australia's ratification.

Australia's move towards greater transparency in investor-state arbitration is further supported by the recent *Civil Law and Justice Legislation Amendment Bill 2017* (Cth) (**Bill**), which is currently before the Senate. The Bill aims to amend the *International Arbitration Act 1974* (Cth) (**IAA**) to suspend the operation of its confidentiality provisions in certain circumstances to better facilitate the Transparency Rules where they apply in investor-state arbitrations conducted in Australia.[1]

Once Australia ratifies the Mauritius Convention, investor-state arbitrations between Australia and consenting investors or investors from states party to the Convention will become subject to the Transparency Rules regardless of when the treaty underpinning the arbitration was concluded, or the applicable arbitration rules. Similarly, Australian investors engaging in arbitration against foreign states party to the Convention should be wary that the Transparency Rules may apply. As more countries sign up to the Mauritius Convention, transparency will automatically apply to more investor-state arbitrations.

Hypothetical impact of the Transparency Rules on the Philip Morris arbitration

The recent case of *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia* [2] illustrates how important transparency could be in investor-state arbitration. In this case, the parties were asked to reach agreement on the applicable standard of confidentiality that should apply to the proceedings. No agreement was reached, with Philip Morris primarily campaigning for privacy. The tobacco giant wanted the procedure as a whole to be conducted confidentially – with hearings held in camera, documents not in the public domain to remain confidential, and awards, decisions, orders and directions of the tribunal to be redacted to protect confidential business information. After receiving submissions from both parties as to what the standard of confidentiality should be, the tribunal made Procedural Order No. 5 which provided that:

(a) awards, decisions and orders of the tribunal were to be published with appropriate redactions;

(b) hearings, meetings, conferences and transcripts were to be private and confidential; and

(c) the parties were free to publish their submissions subject to appropriate redactions.

It appears that the only additional documents to the awards and orders of the tribunal that are public are Philip Morris's notice of claim and notice of arbitration and the Commonwealth's response to the notice of arbitration. No submissions appear to have been made public by either party.

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[1] For more on the proposed amendments to the IAA, see Erika Williams, 'Internationalising the International Arbitration Act' on McCullough Robertson, *The Bench Press* (21 August 2017) <http://mcrbenchpress.blogspot.com.au/2017/08/updated-internationalising.html>.

[2] (PCA Case No. 2012-12) Award on Jurisdiction and Admissibility, 17 December 2015.

The investor-state arbitration initiated by Philip Morris involved a direct challenge to a public welfare measure initiated by the Australian government, being plain packaging legislation covering tobacco products. Had the Transparency Rules applied to that arbitration, hearings would have been public and interested third parties could have made submissions. The transcripts and submissions would also have been made public. Concerned members of the public could have intervened in respect of how any right of Philip Morris to protect its investment in Australia against such a measure should be balanced against Australia's right to regulate on public health issues.

Hypothetical impact of the Transparency Rules on APR's challenge to the effects of the PPSA

Florida-based company APR Energy has foreshadowed a challenge to the operation of the *Personal Property Securities Act 2009* (Cth) (**PPSA**) in a reported arbitration claim against the federal government. APR lost two wind turbines, which were leased to the Australian company Forge Group Power Pty Ltd (**Forge**), after the PPSA caused all interest in the wind turbines to vest in Forge upon it going into administration.

Right now, the Transparency Rules would not apply to this investor-State arbitration because the free trade agreement between Australia and the United Stated was signed almost a decade before the 1 April 2014 date in the Transparency Rules and it is unknown if the arbitration would be conducted under the UNCITRAL Arbitration Rules. However, if this investor-State arbitration went ahead at a time when the Mauritius Convention was in force, the Transparency Rules could, in certain circumstances, become applicable.

If APR's challenge does go ahead (and it faces some jurisdictional hurdles in this respect[3]) and an award in relation to the operation of the vesting provision in the PPSA, which caused APR to lose its turbines is published, the application of the Transparency Rules here would allow others concerned with the tribunal's decision full visibility. Those interested would then have an understanding of how a tribunal may determine another matter involving a foreign investment in Australia similarly affected by the vesting provision of the PPSA.

The availability of clear information about arbitral decisions is a key benefit of increased transparency in investor-state arbitration for foreign investors. Ultimately, transparency in investor-state arbitration increases certainty about the investment landscape in a particular state and can lower the investment risk. The operation of the vesting provision in the PPSA is one example of a matter which could be contested in investor-state arbitration with the decision affecting the status of countless investments. Under the Transparency Rules, most documents relating to the dispute would be published including the decision, allowing other investors to assess where they stand.

Conclusion

Transparency in investor-state arbitration would foster increased public participation in arbitral proceedings, and clearer publicly available information about these types of arbitral proceedings. This would in turn increase public awareness of state contraventions of treaties or the impact that challenges to state regulatory action may have on issues of public interest.

With increased transparency, investors too can gain confidence in the impartiality and consistency of arbitral decisions, assess the risk environment in the state in which they are considering investing, and remain informed about the extent of their investment rights under a treaty.

Australia has not yet ratified the Mauritius Convention and the proposed changes to the IAA have not yet been implemented. However, Australia becoming a signatory to the convention and tabling the Bill are strong indications that Australia is moving towards embracing transparency in investor-state arbitration.

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[3] See Erika Williams, 'Turbines Tussle May Test Free Trade Agreement' (2017) 37(5) The Proctor 20.