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Text of Korea-Australia FTA released – ISDS provisions revealed

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The text of the Korea-Australia Free Trade Agreement (**KAFTA**) was released yesterday, following the conclusion of negotiations on 5 December 2013.

Importantly for cross-border investors, KAFTA includes investor-state dispute settlement (**ISDS**) provisions, which offer protections against political risks such as expropriation of investment assets or profits and discrimination as between cross-border and national investors.

As we have discussed in previous articles regarding KAFTA¹, the inclusion of ISDS provisions in free trade agreements has proven to be a controversial issue, and one in respect of which the former Labor and current Coalition Governments have adopted different positions. The former Labor Government refused to include ISDS provisions in trade agreements, stating that it would not support provisions that conferred greater legal rights on foreign businesses than those available to domestic businesses, or constrained the ability of the Government to make laws on public interest matters. In contrast, the Coalition Government has said that it will approach the inclusion of ISDS provisions on a case-by-case basis, and that the rights of governments to take decisions in the public interest can be protected provided that trade agreements include appropriate safeguards.

The issue that has been the subject of the greatest interest surrounding the text of the ISDS provisions in KAFTA is how those 'safeguards' will be drafted.

The text of KAFTA reveals that, as the Coalition Government foreshadowed, KAFTA does contain a number of safeguards designed to circumscribe the potential scope of the ISDS provisions and give the government greater discretion to take regulatory action in relation to 'legitimate public welfare objectives'. The safeguards include:

- an express provision that, except in rare circumstances, non-discriminatory regulatory actions by a Government that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations. The text of KAFTA also seeks to clarify that this list is non-exhaustive, and that regulatory actions to protect public health include regulation, supply and reimbursement with respect to pharmaceuticals, diagnostics, vaccines, medical devices, health-related aids and appliances and blood and blood products,
- reservations which allow the States to maintain or introduce non-conforming measures which will not be subject to some or all of the investment obligations in KAFTA relating to, for example, national treatment, most favoured nation treatment and market access,
- reservations which allow States to adopt or enforce measures necessary:
 - to protect human, animal or plant life or health,
 - to ensure compliance with laws and regulations that are not inconsistent with KAFTA,
 - for the protection of national treasures of artistic, historic or archaeological value, or
 - for the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption,
- a limitation on the scope of the most favoured nation clause to exclude investor-state dispute resolution procedures,
- the exclusion of investments which are subject to review under Australia's foreign

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investment policy, and

- procedural mechanisms that allow for expedited dispute resolution processes to determine whether, as a matter of law, a claim submitted is not a claim in respect of which an award may be made.

The full text of KAFTA is available for download at the 'Official documents' link on the [DFAT KAFTA website](#).

It is important with such agreements to carefully consider the text to determine the precise scope of the provisions. A more detailed article will follow analysing the nature of scope of the ISDS provisions in the KAFTA as compared with other FTAs and bilateral investment treaties entered into by Australia.

This article was written by, Leon Chung, Partner, Jamie Stollery, Senior Associate and Kate Lindeman, Solicitor, Sydney.

Endnotes

1. See, our earlier articles of [12 February 2014](#), [6 December 2013](#) and [1 November 2013](#).

More information

For more information please contact, [Leon Chung](#) or [Don Robertson](#).

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