



Rethinking Australian Investment Treaty Policy

By: Simon Lester - October 16, 2013

The recent Australian elections were decided mostly by domestic policy issues, but their outcome will have an impact beyond the border, as the new government may rethink Australia's somewhat unique view on the international investment regime. Whereas most of the world supports a core set of investment rules, Australia has long been a skeptic. The Liberal-National coalition, however, has indicated that it is more amenable to these rules. If they decide to revise current policy, Australia will have an opportunity to refine its thinking on rules that were developed decades ago and are ripe for modernization.

The international investment regime came to the average Australian's attention several years ago when tobacco company Phillip Morris used an obscure Hong Kong-Australia investment treaty to challenge Australia's plain packaging cigarette laws before an international tribunal. This challenge helped cement Australian doubts about these treaties.

In its 2004 free trade agreement with the US, Australia had objected to the inclusion of investor-state rules (rules that allow for investors to sue governments directly), and these rules were ultimately excluded from the treaty. This was a major departure from US policy, one that has not since been repeated. Australia's ability to dictate the terms to the US indicates the strength of Australian convictions on the issue. A few years later, Australia made a policy of excluding investor-state rules from trade agreements permanent, based on findings of an independent agency called the Productivity Commission. In response to these findings, Australia announced that it would no longer pursue investor-state provisions in its international agreements.

Thus, as a matter of formal government policy, Australia was already wary of these rules. The plain packaging case simply brought more attention to the issue and affirmed for many Australians the correctness of this view.

Now Australia might abandon its position, at least as a hard and fast rule. As noted, the Liberals have previously expressed a desire to change course on this issue. For example, rather than categorically exclude investor-state rules, Australia might now consider using them on a case-by-case basis.

The obvious places to carry out a new policy would be in the Trans Pacific Partnership (TPP) trade negotiations and in bilateral talks with China and Korea. In these talks, Australia has previously asked to be excluded from the investment provisions that the other TPP parties are negotiating and has resisted

their inclusion in the China and Korea talks. This stance may now be up for reconsideration (although the Australian Senate may resist efforts in this regard).

Opponents of such rules will be seriously disappointed by such a shift; supporters, on the other hand, will cheer. The real potential here, though, goes beyond keeping score of which government is on which side of the issue. (Australia's position was particularly notable because Australia is a rich capitalist democracy, in contrast to most objectors to the investment regime, who are left-wing, authoritarian governments.) Rather, what is needed is a nuanced discussion of these rules. So far, the debate has simply been "pro" or "con." Business groups and international lawyers are strongly for such rules, whereas public health advocates are strongly against. However, we need to move past this misleading, binary debate and ask, instead, what should international investment rules say? These rules have not changed much since their origins in the early 1960s. They may be in need of revision.

Some of the existing international investment rules are very useful. For example, a ban on domestic laws and regulation that discriminate based on the nationality of investors is at the core of international economic relations. Aside from national security or other legitimate reasons, we should not discriminate against others. The world is more peaceful and prosperous when we commit to equal treatment. Even rules that address compensation for expropriating private companies may be able to work, although this can be a challenging area.

The real problem comes from vague and broad legal obligations such as "indirect expropriation" and "fair and equitable treatment." Such principles are common in domestic law, but there is no international consensus on what they mean. Elevating them to international legal status opens up limitless opportunities for litigation and thus makes for a great deal of uncertainty (as well as raising fears of intrusion into domestic policy-making). This can actually undermine support for more established norms such as non-discrimination and direct expropriation.

Perhaps most important is the issue of whether to allow direct lawsuits by foreign investors against governments. Generally speaking, international law only allows state-to-state disputes, which helps filter out frivolous complaints and acts as a check on the system. Investor-to-state disputes open up the floodgates on litigation.

Australia's change in government is an opportunity to revisit these issues. In thinking about a possible policy shift, Australia should not blindly adopt the conventional wisdom that all of the existing investment rules are necessary. Instead, it should think about what rules makes sense and try to develop a vision for the international investment regime that can really work for the future. Much of the controversy surrounding investor-state rules arises due to specific features of the current framework: investors can bring suits directly against governments, based on provisions that are so broad as to call almost any government action into question. These rules do not seem necessary for the purpose of allowing foreign investment to flow freely. A better approach might be to focus on more established and bounded rules such as non-discrimination, through which governments could agree not to keep out investment by non-citizens without a good reason (such as national security). Such an approach would

be beneficial in terms of economics and would not lead to the political difficulties that have been created by the current rules. If we can get international investment rules right, we will be able to liberalize investment without interfering with national autonomy and causing needless controversy.