

China – Australia FTA text reveals innovative ISDS safeguard for government regulation

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The China-Australia FTA (ChAFTA) contains some interesting approaches to investor-State dispute settlement (ISDS) including an innovative new ISDS safeguard.

The ISDS provisions include a filter mechanism to allow the Government Parties to block an ISDS claim against a non-discriminatory measure for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order. If both Australia and China agree that a measure is of this nature, a claim challenging the measure would be barred from proceeding, and this agreement would be binding on any tribunal.

This mechanism could be seen as a response to concerns about claims being brought against public welfare regulation such as Australia's tobacco plain packaging measures.

As with any novel provision, the filter mechanism raises a number of questions about how it would be interpreted and applied and how it interacts with the other obligations and safeguards in the agreement.

In an unusual outcome, as the scope of ChAFTA is relatively limited, the ISDS provisions will only apply at this stage to the National Treatment obligation.

See our initial analysis of the scope of the ChAFTA Investment Chapter [here](#) and our article on the relationship of ChAFTA with the existing bilateral investment treaty [here](#).

The full text of ChAFTA and further information is available on DFAT's website.



Richard Braddock
Partner

+61 2 6198 3392
www.lexbridgelawyers.com