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Australia's (Dis)Engagement with Investor-State Arbitration: A Sequel

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A seminar on 10 November 2023 during Australian Arbitration Week discussed "Australia's engagement in the Investor-State Dispute Settlement (ISDS) reform process". My presentation divided successive governments' approach into three significant eras over the last decade: anti-ISDS (2011-13), case-by-case ISDS (2014-2021), and uncertainty (since 2022). Some uncertainty has dissipated since the seminar. On 14 November 2022, Australia's Trade Minister Don Farrell declared that the new Labour Government *"will not include ISDS in any new trade agreements"*. He added that *"when opportunities arise, we will actively engage in processes to reform existing ISDS mechanisms to enhance transparency, consistency and ensure adequate scope to allow the Government to regulate in the public interest"*. The renewed anti-ISDS stance has already generated commentary from the Business Council of Australia, legal practitioners and others. Below I locate the Trade Minister's announcement in context and sketch some implications and motivations, drawing partly also on my 2021 book of selected essays on investor-state and commercial arbitration focused on Australia and Japan.

I. Anti-ISDS: 2011-13

Before this sequel, in 2011 the centre-left (Labor/Greens) Gillard Government declared that Australia would no longer agree to any form of ISDS in any future bilateral investment treaties (BIT) or Free Trade Agreement (FTA). That stance derived partly from the Productivity Commission's recommendation in its 2010 report into international trade policy, preferring unilateral liberalisation measures and sceptical about proliferating FTAs from a laissez-faire perspective. On ISDS provisions, the majority Commissioners asserted that (i) there was insufficient evidence that offering ISDS led to more FDI flows, (ii) Australian investors did not invoke investor-state arbitration, and (iii) ISDS could lead to "regulatory chill". Additionally, the Government's anti-ISDS policy was driven by the political left's opposition to investment and trade liberalisation generally. It was probably also influenced by Philip Morris Asia initiating the first-ever ISDS dispute against Australia, challenging Australia's tobacco packaging legislation under the BIT with Hong Kong. The anti-ISDS policy delayed conclusion of major FTAs with large exporters of capital to Australia, which pressed for such provisions.

II. Case by Case ISDS: 2014-2021

The centre-right Coalition government won the election in 2013 and reverted to the pre-2011 approach of agreeing to ISDS provisions on a case-by-case assessment. FTAs were soon concluded with China and Korea and included ISDS. The FTA concluded with Japan did omit ISDS, but probably because it did not offer Australia sufficient extra market access or other benefits. Japan's longer positive experience of investing in Australia also meant it could seek ISDS-backed protections through other treaties, which it eventually achieved through both countries ratifying the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Unlike the Greens, the Labor Opposition sided with the Government to pass the tariff-reduction legislation needed to ratify these ISDS-backed treaties, however, declaring the Labor Party's continued opposition to ISDS but assessing the FTAs as overall in the national interest.

The Coalition Government did omit ISDS in the PACER-Plus FTA given the Pacific Island micro-states' limited inbound investment prospects and capacity as host states to defend ISDS claims; and in the Regional Comprehensive Economic Partnership (RCEP) ASEAN+5 FTA, probably because almost all pairs of its 15 member states have at least one ISDS-backed treaty among themselves anyway. The Coalition Government also renegotiated a few early FTAs and BITs, replacing them with CPTPP-like provisions to clarify provisions or make them somewhat more pro-host-state considering emerging investment treaty case law. It further solicited public submissions to inform a review of older treaties. Australia ratified the Mauritius Convention in 2020 to retrofit transparency provisions on older treaties, but primarily only if other states also ratify the Convention – and so far few have done so.

Australia's renewed nuanced approach towards ISDS over 2014-21 may have been influenced by some evidence in Asia and more widely that ISDS provisions do have significant positive impacts on FDI flows. Also, ratifying investment treaties globally certainly impacted FDI, meaning that a minority of states increasingly holding out against all ISDS would have instead reduced ratifications and therefore FDI flows. Other empirical research, highlighted by Dr Sam Luttrell at the 10 November 2022 seminar, adds that ISDS-backed treaties reduce the cost of syndicated loan finance for cross-border investors.

Luttrell's presentation further reinforced how Australian investors, particularly in long-term resources projects, not only take into account ISDS protections but also started commencing outbound investor-state arbitrations under Australian treaties alleging host states have violated their substantive commitments. This is especially so since the successful *White Industries v India award* in 2010, which the Productivity Commission seems to have been unaware of. Concerns about "regulatory chill" also seem to have declined as Australia defeated Philip Morris Asia on jurisdiction in 2015, and as no further inbound ISDS arbitrations were commenced against Australia. Nonetheless, perhaps because ISDS remained a live issue in parliamentary hearings and successive Coalition Governments did not control the upper House. Australia does not seem to have been particularly vocal in multilateral ISDS reform discussions in UNCITRAL or ICSID, despiteing.

III. Anti-ISDS Again: Since Late-2022

After Labor won the general election in May 2022, the new Government had not yet publicly

declared its policy approach towards ISDS, until the Trade Minister's announcement on 14 November. The foreign ministry's website had still stated that Australia assesses ISDS on a case-by-case assessment. However, setting policy going into the election, the Labor Party's 2021 National Platform had reiterated that "Labor will not enter into agreements that include ISDS provisions" (p9 para 45), adding(p94, paras 33-34):

> "Labor in government will review ISDS provisions in existing trade and investment agreements and seek to work with Australia's trading partners to remove these provisions. While this process is underway, Labor will work with the international community to reform ISDS tribunals so they remove perceived conflicts of interest by temporary appointed judges, adhere to precedents and include appeal mechanisms.
>
> Labor will set up a full-time negotiating team within the Department of Foreign Affairs and Trade whose sole job will be to negotiate the removal of ISDS clauses …"

Until 14 November 2022, there had been no public announcement about any such initiatives.

IV. Short-term Implications

At the 10 November seminar, I pointed out that Australia's major ongoing FTA negotiations were with India and the European Union. India unilaterally terminated its BIT with Australia in 2017 as part of its broader policy of winding back protections for foreign investors due to claims against India under other older treaties. Although India's new Model BIT from 2016 retains ISDS, it provides a narrow window, and its substantive protections are heavily circumscribed. India has been able to conclude only a few new investment treaties from this negotiating position. Even maintaining the second era's case-by-case assessment policy, I considered that Australia and India could end up agreeing on a parallel investment treaty that only agrees to inter-state arbitration, especially if India offered significant preferential market access to Australian investors.

Omitting ISDS is now the only possibility under the new Labor Government stance, but India now may not offer as much market access or other benefits to Australia. A better compromise, given problems encountered by foreign investors in India as well as JNU Prof Jaivir Singh's empirical evidence that ISDS-backed treaties cumulatively have had positive impact on FDI inflows for India, could have been a CPTPP-like investment treaty with some further innovations. Those might include mandatory mediation before arbitration, as Australia agreed upon with Indonesia in 2019 but not with Hong Kong.

Australia is also still negotiating an FTA with the EU. Since 2015, the EU offers only a compromise "investment court" alternative to traditional ISDS. Singapore took this option, for example, but Japan did not – maintaining pre-existing BITs with EU member states with traditional ISDS and watching longer term multilateral reform discussions. Australia should probably take the investment court option, to secure an overall better FTA deal, as I have argued also for New Zealand (mimicking Australia's first anti-ISDS policy from late 2018). Arguably, this option is not "ISDS" so it would not conflict with Australia's renewed anti-ISDS position. If Australia adopts

this interpretation of its stance eschewing ISDS, to conclude a deal with the EU, this would also signal to other regional players and UNCITRAL delegates that there is scope to be flexible in investment treaty negotiations.

V. Further Motivations for Australia's New Policy?

One wild card for Australian policy-makers recently has been that a right-wing politician and mining magnate, Clive Palmer, escalated complaints in 2020 by formally seeking consultations with the federal Government and then notifying an ISDS dispute under multiple treaties with Australia through his Singaporean company (Zeph), after unsuccessful constitutional and other domestic law challenges. They allege expropriation and breach of fair and equitable treaty (denial of justice) related to Western Australian state legislation impacting on iron ore rights and related past domestic arbitration awards. Given his high public profile, and rights originally held by his Australian company being transferred to Zeph in Singapore, if and when an ISDS arbitration is commenced, this risks another Philip Morris Asia moment. On 20 October 2022, a notice of intent to commence arbitration was reportedly filed under the ASEAN-Australia-NZ FTA. An arbitration filing after three months (Art 22(2)) would certainly rekindle media and political interest in ISDS, which peaked in Australia over 2010-16.

In addition, concerns were recently reported about potential ISDS claims from foreign investors in Australian gas resources, under the Labor Government's plans to deal with the global energy crisis. Announcing now a renewed anti-ISDS policy may help pre-empt public criticisms in this respect as well. However, any such claims would be preserved under existing treaties, while substantive commitments made under Australia's treaties (especially FTAs) anyway give the host state considerable scope to introduce emergency measures.

VI. Wider Implications

Whether or not such potential claims may have influenced Australia's renewed anti-ISDS posture, that will make it even more difficult for RCEP to add ISDS protections, unless the Labor Government backtracks or loses the next elections in 2025. ISDS must be discussed again among member states within 2 years of RCEP coming into force, with a decision then on whether and how to add ISDS to be reached within another 3 years (Art 10.18).

In addition, the new Labor Government policy will probably have further ripple-on effects particularly across the Asia-Pacific region. It could also potentially impact on wider multilateral discussions about ISDS in UNCITRAL, and even on the "modernisation" of or withdrawal from the ISDS-backed Energy Charter Treaty (which Australia signed in 1994 but never ratified). This is so especially if the Australian government can articulate more specifically the arguments and evidence for adopting its renewed anti-ISDS position.

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