

# Kluwer Arbitration Blog

## Zeph Investments v Australia: The Latest in Investor-State Climate Change-Related Claims

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The recently reported investment treaty claim by Singapore-based mining company Zeph Investments (“Zeph”) against Australia appears to be the latest in investor-State dispute claims arising out of climate change-related measures introduced by States.

The claim was first disclosed on 10 July 2023 by the Attorney General’s Department of Australia in response to a question on notice before the Senate Standing Committee on Legal and Constitutional Affairs earlier in the year. While minimal details have been shared, the claim appears likely to arise from the high-profile decision by the Queensland Land Court (the “Court”) in November 2022. The Court recommended that the Queensland authorities should refuse to grant a mining lease and environmental authority to Zeph’s wholly-owned subsidiary, Waratah Coal, for its proposed Galilee Coal Mine in Queensland, Australia. Among other things, the Court based its recommendation on the evidence of climate change and human rights impacts deriving from the project, taking account of the Scope 3 emissions associated with the burning of the coal produced by the mine. The Queensland Department of Environment and Science subsequently followed that recommendation and refused the grant.

According to the Attorney General’s Department, Zeph filed a Notice of Arbitration under Chapter 11 of the ASEAN-Australia-New Zealand Free Trade Agreement (“AANZFTA”) on 29 May 2023, claiming damages of AUD 41.3 billion (approximately GBP 21.9 billion). This is the second claim by Zeph against Australia under the AANZFTA, with the first being reportedly filed earlier this year in connection with the Balmoral South iron ore project, seeking AUD 300 billion (approximately GBP 159 billion) in compensation.

### Some Context: A Growing Body of Climate Change-Related Investment Treaty Cases

This latest Zeph claim appears to be part of a growing body of investment treaty case law concerning State measures associated with climate change and decarbonisation.

Historically, the majority of such cases have arisen from changes to existing regulatory frameworks which form part of wider State decarbonisation policies. For example, many of the cases against Spain, Italy, the Czech Republic and Romania arose from regulatory incentive regimes which were introduced to facilitate the development of the solar power sector in pursuit of

decarbonisation objectives, and which were then amended or withdrawn to the alleged detriment of investors. These cases include *Charanne v Spain*, *Masdar v Spain*, *Isolux v Spain*, *CEF Energia v Italy*, *Greentech Energy v Italy*, *Voltaic Network v Czech Republic*, *Jürgen Wirtgen v Czech Republic*, and *LSG v Romania*, among many others. There have also been similar cases brought against Germany concerning the incentive regime for offshore wind power generation, such as *Strabag v Germany* and *Mainstream Renewable Power v Germany*. In other words, these claims arose from changes made to an existing regulatory framework where that framework had been put in place as part of climate change or decarbonisation-related measures.

More recently, however, two other broad categories of claims with a climate change or decarbonisation nexus have also arisen from State measures.

The first category concerns the introduction of new energy transition policies in pursuit of climate change or decarbonisation-related policy objectives. Most notably, this includes State decisions to phase out the use of certain energy sources, such as the claims by *Uniper* and *RWE* against The Netherlands and by *Westmoreland* against Canada, all regarding State decisions to phase out coal-fired power generation. In each of these cases, the claims did not challenge the introduction of the phase out policies per se – rather, they challenged the way the compensation schemes associated with the phase outs were implemented.

The second category of claims, however, has involved much more direct engagement with the basis for State policies on climate change. This category concerns State decisions in respect of specific projects, including the denial or withdrawal of project approvals and licences for climate change-related reasons. This has included the *TransCanada v USA* claims in respect of the Keystone XL pipeline, *Rockhopper v Italy* in which the investor successfully argued that the denial of a licence to exploit an offshore oil field amounted to unlawful expropriation, and *Lone Pine v Canada*, concerning the revocation of an exploration licence in respect of a shale gas concession.

The latest Zeph claim against Australia seems likely to arise from a State measure falling into this second category. However, it remains to be seen how the claim will be framed and the extent to which it seeks to challenge the underlying policy decision itself or instead to allege that its implementation was illegitimate in some way.

### **The Future: More Clarity on State Obligations on Climate Change under International Law?**

This claim arises against the background of a number of attempts to clarify the scope of State obligations under international law in respect of climate change and the implications of those obligations for investors. This includes the [request earlier this year to the International Court of Justice to produce an advisory opinion on the obligations of States in respect of climate change](#), the [request for an advisory opinion from the International Tribunal for the Law of the Sea on the obligations of States under the United Nations Convention on the Law of the Sea to, among other obligations, prevent, reduce and control pollution of the marine environment in connection with the effects of climate change](#), and the [request for an advisory opinion from the Inter-American Court of Human Rights to clarify the scope of State obligations to respond to the climate emergency within the framework of international human rights law](#). Tribunals considering the sorts of investment treaty claims described above may in future seek to draw on these developments and any opinions issued in assessing the State actions which investors seek to challenge.

The consideration of State measures related to climate change under international law, and in particular in the context of investment treaty protections, is likely to become more complex and in-depth as tribunals are increasingly faced with competing international and domestic obligations around investor protection and climate change action. As the conversation around what exactly international law requires of States becomes more sophisticated, including through being informed by the advisory opinions referenced above, investment treaty tribunals may be faced with difficult questions about if and how to engage with claims under investment treaties which intersect with States' climate change policies.


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This entry was posted on Thursday, August 24th, 2023 at 8:59 am and is filed under [Australia](#), [Climate change](#), [Investment](#), [Investment Arbitration](#)

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