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Aggravating Australia's Arbitration Ambivalence: Zeph's ISDS Claims

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On 4 August 2023, in an investor-State dispute settlement ("ISDS) arbitration commenced against Australia on 29 March 2023 under the Association of Southeast Asian Nations ("ASEAN") Australia New Zealand Agreement for a Free Trade Area ("AANZFTA"), Singapore-incorporated Zeph filed an application for interim measures including an unusual request.

Zeph sought an order that Australia's "officers and representatives refrain from making public comments or remarks about this arbitration, the Tribunal, or the ISDS system in general". In Procedural Order No 2 dated 17 November 2023, the tribunal succinctly rejected this request, given that claimant Zeph's submission focused exclusively on "Josh Wilson, [Member of Parliament for the governing] Labor Party, and Chair of the Australian Parliament's Joint Standing Committee on Treaties ["JSCOT"]", who had made several:

> "public statements highly critical of the ISDS system, including by reference to the *Phillip* [sic] *Morris v. Australia* case. According to the Claimant, Mr. Wilson's remarks constitute an attack by the Respondent, which must stop because it undermines the integrity of the proceedings and interferes with the orderly conduct of the arbitration" (para 62).

The tribunal first observed that Zeph had not shown that Mr Wilson had been specifically empowered, like a minister or diplomat, to represent Australia on international policy matters. Secondly, the tribunal reasoned that his remarks were:

> "an expression of Australia's constitutional democracy. Strong discourse by members of the legislative branch is a usual component of political life in democracies. In any event, the Tribunal cannot see how Mr. Wilson's remarks infringe upon the integrity of the proceedings or the orderly conduct of the arbitration" (para 64).

Will episodes like this aggravate or assuage concerns about ISDS that have resurfaced in Australia recently, with ripple-on effects particularly in Asia? The tribunal's ruling seemingly suggests otherwise, by holding that Australia's parliamentarians are free to engage in robust debate over

ISDS policy. Opponents of ISDS proceedings (as in this draft Open Letter) might therefore take heart. Yet they are more likely to be aggravated by the very fact of this case being commenced, and this interim measure being sought at all. This is even more likely because its underlying international investment agreement ("IIA") was recently debated in Parliament regarding Australia's ratification of a Second Protocol. However, such developments do open up the possibility of Australia advancing an "investment court" alternative to ISDS when reviewing older IIAs and negotiating new ones.

Australia's ISDS Policy and Parliamentary Debates

The background to the unusual request for interim measures is the ambivalence about ISDS in Australia, particularly from the centre-left Labor Government (see here). It had reinstated in late 2022 a policy over 2011-13 of not agreeing to ISDS in new IIAs. Indeed, it added that it would review Australia's past IIAs. Nonetheless, the current Labor Government still signed the Second Protocol to AANZFTA, even though that IIA (originally signed in 2009) retains ISDS. This was justified by the Protocol providing for a Work Program to review the ISDS provisions starting within 18 months of its entry into force.

However, before the AANZFTA Second Protocol could be ratified, there needed to be parliamentary review through the JSCOT. That Committee always comprises a majority of Government parliamentarians so almost always recommends ratification, and that occurred in May 2024. The JSCOT proceedings allow for public scrutiny and discussion of treaties. This is important indeed, but enhanced transparency risks aggravating issues, especially when complex. In submissions and then evidence given in hearings, an Australian union group and NGO repeated longstanding objections to ISDS and recommended against ratification, whereas I favoured the compromise reached.

For the Work Program on ISDS, I further suggested Australia could propose a hybrid alternative to the European Union ("EU") style investment court or key features thereof (standing panel of arbitrators pre-selected by states, appellate review, etc.). Although not picked up in the JSCOT Report of May 2024, I subsequently pursued this idea with letters to the Trade Ministers of Australia and New Zealand. The latter also has a new government, perhaps rethinking New Zealand's own approach to ISDS.

The key issues raised around ISDS in the JSCOT hearings were longstanding ones. Does offering ISDS promote more cross-border foreign direct investment? There is some but not strong evidence. Do Australian outbound investors use ISDS options? They now bring formal claims, but mostly as resource companies – politically not flavour of the decade in Australia. Does ISDS create excessive "regulatory chill"? This is hard to measure, and some extra scrutiny of government measures may anyway be advisable particularly in a democracy.

On the last point of regulatory chill, however, the union and NGO highlighted before the JSCOT the claim brought by Zeph under AANZFTA – and at least two other Zeph claims. Interestingly, the JSCOT Report did not specifically mention Zeph, perhaps to dial down dissension among Committee members and the wider public. But it noted (at para 2.75) that submitters had identified pending ISDS claims including "arrangements between Australia and ASEAN nations", with Australia's lawyers furthermore being instructed to "vigorously defend those matters".

The Three Zeph Claims

The first Zeph claim impugns Western Australian state legislation in 2020 preventing access to judicial and administrative review while annulling an arbitration agreement and resultant awards from a former judge of the High Court of Australia ("HCA"), issued in favour of Zeph's affiliate Mineralogy. It had earlier failed in a constitutional challenge before the HCA contesting this legislation involving an iron ore project (see Zeph's request for consultations on 14 October 2020 under a bilateral FTA here).

In the second Zeph claim (commenced some two months later, on 29 May 2023), the Notice of Arbitration impugns the Queensland state government's decision against Zeph's affiliate Waratah Coal, "to grant an environmental offset to a direct competitor of the Claimant over land in which the Claimant's subsidiary had certain coal exploration permits" (cited in Decision on Challenge, at para 2). A third Zeph claim focuses on a Queensland Land Court judgment recommending against a coal project application by Waratah Coal. In this dispute, Zeph alleges bias of Court's President Kingham (see Notice of Intention to Commence Arbitration dated 20 October 2023).

All claims are brought under the UNCITRAL rather than the ICSID Arbitration Rules. The agreed repository for tribunal documentation in the first and second claims is the Permanent Court of Arbitration ("PCA") in The Hague.

These three claims are particularly controversial, and aggravating for debates over ISDS, for several reasons in addition to Australia's policy shift outlined above. The claims are high-value and involve resource projects in Australia, which are nowadays often politically controversial. Most controversially, Singapore-incorporated Zeph is controlled by an Australian mining magnate and right-wing former parliamentarian, Clive Palmer. As such, the Zeph claims rekindle public concerns about potential over-reach of ISDS generated by the first-ever treaty-based claim against Australia, brought in 2011 by Philip Morris Asia ("PMA") under an early IIA (now replaced) with Hong Kong, claiming that Australia's tobacco packaging legislation indirectly expropriated trademarks. In 2015, the tribunal declined jurisdiction: the claim was an abuse of rights under customary international law, as the trademark rights were transferred to the Hong Kong subsidiary when the dispute with Australia was reasonably foreseeable. But it attracted much adverse media and political commentary, especially as a (partly concurrent) challenge had been rejected by the High Court of Australia as the federal Constitution only protects against direct expropriation.

A similar jurisdictional objection can be expected in the claims brought under the first Zeph claim, as the claimant appears to be incorporated in 2019. An extra defence is available under its Article 11 AANZFTA, allowing Australia to deny benefits if Zeph lacks "substantial business activities" in Singapore. Interestingly, the chair of the tribunal in the first Zeph claim is Professor Gabrielle Kaufmann-Kohler, who was the arbitrator nominated by PMA over a decade earlier. Australia again nominated Professor Don McRae. As such, the tribunal will probably be open to applying the test of "reasonable foreseeability" for the abuse of rights defence, although some scholars (see on this Chapter 17 here) have recently questioned that test and its application in the PMA case.

The first Procedural Order scheduled hearings for 16-20 September 2024. The tribunal had earlier set Geneva as the seat, not London as argued by Australia. The PCA recently announced it would provide the venue and livestreaming for this hearing on jurisdictional objections.

Under Procedural Order No 3 on transparency, which again arose out of considerable disputation among the parties, hearings will be open to the public and so will the transcript (after redaction of confidential information). The tribunal also ruled that parties can later release their main submissions. Such openness should provide some comfort to those who have long objected to ISDS due to the procedures and outcomes ostensibly being determined by "secret tribunals", despite mounting contrary evidence. However, as with the JSCOT procedure in Parliament, enhanced transparency risks instead aggravating concerns in Australia around ISDS.

Procedural Order No 3 also allows cross-referencing to the second Zeph claim, which adopts a similar transparency regime. However, its tribunal membership only overlaps partially. Australia again nominated Professor McRae. The chair is Dr Laurent Lévy, curiously a partner in the same law firm as Professor Kaufmann-Kohler, and the seat again is Geneva. But the claimant nominated Dr Charles Poncet, not William Kirtley as in the first Zeph claim tribunal. The appointing authority (PCA Secretary-General) has rejected Australia's challenge of Dr Poncet based on old Italian court proceedings. It will be interesting to see if this tribunal applies similar tests and factual determinations to jurisdictional objections, expected in hearings scheduled for September 2025. Presumably the arguments will be very similar, but one or both parties may apply more resources to their second shot.

Such inefficiencies bolster my earlier arguments (elaborated here) for an EU-style investment court model to be introduced as a longer-term compromise into AANZFTA, as well as other existing and new IIAs. Under such a model, the same adjudicators could be assigned to hear the expected similar jurisdictional objections, and the appellate review mechanism could promote extra consistency in decisions. This would help avoid delays and costs increasingly evident in international arbitration, undermining its legitimacy.

Conclusions

Overall, the Zeph claims against Australia, as well as parliamentary inquiries into ratification of IIAs like AANZFTA's Second Protocol, are therefore likely to aggravate rather than assuage concerns in Australia over ISDS rekindled by the Labor Government's new policy. This is despite tribunal rulings like those mentioned at the beginning, and considerable transparency in these multiple forums. Governments and stakeholders therefore need to work harder to promote productive debate and seek workable ways forward. An EU-style investment court or key features can be a useful discussion point for Australia and its counterparties to IIAs.

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