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ARTICLE

FOREIGN INVESTORS' INCREASING AWARENESS OF INVESTOR-STATE ARBITRATION – VIEW FROM AUSTRALIA

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Decolonisation and globalisation over the last century have led to the development of investment treaties in a bid to promote and protect investments. Many of these treaties provide for arbitration as a means of investor-state dispute settlement. However, Australian investors have been claimants in less than two percent of known global investor-state arbitrations, many of which arise out of international, multi-million and multi-billion dollar mining projects and Australia has been on the receiving end of only two formal claims. This article comprehensively reviews the cases that have involved Australian investors as claimants and Australia as a respondent.

1 Introduction

Although investor-State dispute settlement (ISDS) regimes are frequently used in Europe and the Americas, until recently, Australia has seen little activity. This is evident when the statistics are considered. Argentina has had the most claims brought against it (62) followed by Spain (52) and Venezuela (51).[1] The United States is the most frequent claimant in investor-State disputes (178) followed by the Netherlands (110) and the United Kingdom (83).[2] At the time of writing, there are more than 1,000 known treaty-based ISDS cases ongoing worldwide.[3] Due to the significant degree of confidentiality maintained for many arbitration disputes, it is quite possible that there are more cases currently afoot. It is hoped that the introduction of the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration,[4] which provide for more transparency in investor-State arbitrations, may improve the breadth of publicly available information in this respect.

In contrast, an Australian investor has been claimant in approximately 16 known investor-State arbitrations and Australia has been on the receiving end of only two formal claims. Despite the number of investor-State arbitrations with Australian involvement being comparatively low, these disputes have represented a perceptible increase in Australia of claims made under ISDS provisions in the last decade. For much of the past three decades, Australia has evinced a long standing, bipartisan willingness to incorporate these regimes into its bilateral and multilateral investment treaties and free trade agreements. It is only in more recent times that the number of claims from Australian investors against foreign States and foreign investors against Australia has increased significantly, which has seemingly affected the government's approach to ISDS provisions.

In this article, we begin by comprehensively reviewing the cases that have involved Australian investors as claimants. Our review identifies that the two early claims made by Australian investors in the 1990s and early 2000s were discontinued apparently due to the claimants' failure to progress the matters. After this rather lacklustre start, there are 13 cases on record in which Australian claimants have brought or threatened to bring claims against various States in relation to disputes spanning a variety of industries for breaches of investment treaties, including by expropriation, failure to provide effective means of asserting claims and enforcing rights and failure to provide fair and equitable treatment.

Our article first considers the outcomes of five cases brought by Australian claimants which have proceeded through to an award. Of these five cases:

(a) two cases failed to overcome a jurisdictional defence made by the respondent State;

(b) two cases resulted in the Australian claimant succeeding and being awarded significant sums; and

(c) one case proceeded through the emergency arbitration process under the Stockholm Chamber of Commerce Arbitration Rules to obtain expedited interim relief.[5]

We then consider a number of pending and threatened claims that Australian investors are either pursuing or considering pursuing through the investor-State arbitration process. It is shown that, provided an investor claimant is not defeated by a jurisdictional challenge, Australian investors have proven successful in investor-State arbitrations. These successful arbitrations may well encourage the Australian investors pursuing pending and threatened arbitrations.

Finally, we examine cases where foreign investors have brought or threatened to bring claims against Australia. As became evident in the cases involving Australian investor claimants who faced jurisdictional challenges, the analysis of cases where Australia is the respondent State reflects that a jurisdictional defence is a mighty sword.

The cases indicate that, over the last decade, inbound and outbound investors have become more aware of the availability of action against foreign States under international investment treaties. It is expected that investor-State disputes will increase in coming years as foreign investors become more encouraged to pursue actions against States after seeing the significant awards that are being made in favour of claimants who are not faced with, or who have overcome, jurisdictional hurdles.

2 Political Background

Australia's changing use of ISDS provisions has largely been shaped by the Australian government's response to inbound foreign investment arbitrations. This was particularly evident after the 2011 initiation of the Phillip Morris proceedings in relation to Australia's plain packaging tobacco legislation, brought under ISDS provisions in the 1993 Australia-Hong Kong Free Trade Agreement, which signified the beginning of a significant shift in the Australian approach to ISDS regimes. Additionally, at this time, a number of mining companies indicated an intention to potentially launch a claim against Australia in relation to the then-Government's "Super Profits Mining Tax".[6] Although the threatened claim did not ultimately progress, these experiences were sufficient for the Gillard Labor Government to announce that Australia would no longer accept ISDS provisions in investment treaties. However, following the election of the Abbott Coalition government in 2013, the official stance was revised to assess the incorporation of ISDS provisions on a "case by case basis", which remains the current approach.

Overall, however, it seems that Australia is likely to maintain an ostensibly receptive attitude toward ISDS provisions in order to continue to create a more resilient, competitive and diversified economy, significantly aided by increased inbound and outbound flows of foreign investment. This objective was an explicitly outlined objective in the 2017 Foreign Policy White paper released by the Department of Foreign Affairs and Trade.[7] This position is reflected in the three most recent free trade agreement that Australia has entered into:

(a) In March 2019, Australia signed the Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA) which contains an ISDS mechanism.[8] The IA-CEPA complements and expands on several provisions of the ASEAN-Australia-New Zealand Free Trade Agreement[9] and entered into force on 5 July 2020.

(b) Also in March 2019, Australia and Hong Kong signed the Australia-Hong Kong Free Trade Agreement and associated side letters (A-HKFTA) and the Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China (Investment Agreement).[10] The A-HKFTA entered into force on 17 January 2020. Accordingly, the 1993 Agreement between Australia and Hong Kong for the Promotion and Protection of Investments which is discussed in relation to the Phillip Morris case below, has been terminated.

(c) Finally, the Peru-Australia Free Trade Agreement (PAFTA) which entered into force on 11 February 2020 also contains an ISDS mechanism.[11]

Similar to the IA-CEPA,[12] the ISDS mechanism in the A-HKFTA excludes certain claims in the following terms:[13]

> No claim may be brought … in respect of the following measures of Australia: measures comprising or related to the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and Office of the Gene Technology Regulator….

The A-HKFTA also provides that:[14]

> No claim may be brought … in respect of a Party's control measures of tobacco products (including products made or derived from tobacco), cigarettes, imitation smoking products, and other smoking products such as Electronic Nicotine Delivery Systems and Electronic Non Nicotine Delivery Systems including electronic cigarettes….

The inclusion of these provisions is undoubtedly a consequence of the Australian Government's experience in the Philip Morris arbitration mentioned above and discussed further below.

These treaties indicate a willingness by Australia to enter into ISDS obligations within multilateral forums, accepting the exposure to foreign investor claims in order to facilitate significant increases in inbound and outbound investment opportunities. In any case, maintaining a case-by-case approach will necessitate an inevitable trade-off, and Australia must brace itself for the reality of potential exposure to foreign investor claims under ISDS provisions. This is particularly pertinent in the current political climate, in which contemporary global challenges in areas including health, climate change and environment, compel governments to respond with appropriate regulatory and legislative responses with potential adverse impacts on foreign investment.

In light of these various considerations, we consider how Australian investors have fared bringing investment treaty claims to date, in addition to considering the way in which Australia has responded to any investment treaty claims brought against it by foreign investors. While there are a number of cases that have failed due to a lack of jurisdiction, there is a potential for substantial rewards if investors can overcome jurisdictional hurdles.

3 Cases Brought by Australian Investors against States

3.1 Discontinued

Misima Mines Pty Ltd v Independent State of Papua New Guinea

Russell Resources International Limited v Democratic Republic of Congo

Australian claimants encountered a spluttering start to investor-State arbitration with the first claim on public record being brought by Misima Mines Pty Ltd against the Independent State of Papua New Guinea in 1996, only to be discontinued at the request of a party in 2001.[15] The second claim from an Australian investor was by Russell Resources International Limited against the Democratic Republic of Congo in 2004. This dispute was also discontinued for lack of payment of the required advances pursuant to the Centre for Settlement of Investment Disputes (ICSID) Administrative and Financial Regulation.[16]

3.2 Jurisdictional Issues

Churchill Mining and Planet Mining v Republic of Indonesia

In 2012, English entity Churchill Mining Plc (Churchill) and Australian entity Planet Mining Pty Ltd (Planet) commenced an investor-State arbitration against Indonesia in relation to the unilateral revocation by the Indonesian government of mining licenses in which Churchill and Planet had interests,[17] together with some Indonesian partners. In its defence, Indonesia argued that the mining licenses were not valid because they were forged by Churchill and Planet and their Indonesian partners.[18]

In an award delivered in December 2016, the ICSID Tribunal found that serious fraud tainted the East Kutai Coal Project with the record containing 34 forged documents including 10 mining licences.[19] The Tribunal found that the seriousness of the fraud was compounded by Churchill and

Planet's lack of diligence evidenced by their lack of supervision of the licencing process.[20] The Tribunal concluded that all of the claims before it were inadmissible, noting that the general principles of good faith and the prohibition of abuse of process entail that the claims cannot benefit from investment protection under the bilateral investment treaty between the United Kingdom and Indonesia or the bilateral investment treaty between Australia and Indonesia.[21]

The claimants were ordered to pay 75% of Indonesia's costs in the amount of approximately US$8.6 million and 100% of the direct costs of the proceedings (e.g. tribunal members' fees, court reporting and hearing facilities) in the amount of US$1.6 million.[22]

In March 2017, Churchill and Planet filed an annulment application and a request for a stay of the enforcement of the award with ICSID.[23] In April 2017, the enforcement of the award was provisionally stayed.[24] In June 2017, the ad hoc committee which was constituted pursuant to the Convention of the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), made a decision on the stay of the enforcement proceedings, allowing the stay to continue pending a decision of the annulment application subject to the direct pledge by Churchill and Planet of the Port Land property located in the East Kalimantan Province, Indonesia, as security worth US$1.757 million.[25]

The annulment application was heard in Singapore in July 2018.[26] In March 2019, the committee delivered its decisions dismissing the annulment application and terminating the stay on enforcement.[27] Churchill is now in administration.[28]

In terms of ongoing investment relations between Australia and Indonesia, the recent signing of the IA-CEPA, mentioned in 2 above, Political Background, is significant. This treaty includes a robust ISDS regime with an explicit exclusion for any investments adversely affected as a result of laws "designed and implemented to protect public health".[29] In this respect, it is apparent that Australian engagement with ISDS provisions have clearly been shaped by the Phillip Morris proceedings which are discussed further below.

Lighthouse Corporation v Timor-Leste

The next investor-State arbitration to be commenced by an Australian investor was that by Lighthouse Corporation Pty Ltd and a Seychelles company, Lighthouse Corporation Ltd, IBC (together, the Lighthouse Entities), against the Democratic Republic of Timor-Leste in 2015.[30] In this instance, the reference to arbitration lay in the contractual arrangements between the parties rather than in an investment treaty.

The dispute was in relation to agreements entered into in October and November 2010 between the Lighthouse Entities and Timor-Leste for the sale and shipment of high speed fuel and the supply of diesel generators.[31] There were three agreements with various references to "Lighthouse Energy Standard Terms and Conditions Applying to the Sale of Goods" and "Standard Terms & Conditions of Supply".[32] The Lighthouse Entities claimed that a revised version of its general terms and conditions dated late November 2010 incorporated a reference to arbitration in accordance with the ICSID Convention.[33]

In May 2016, Timor-Leste raised three jurisdictional objections and requested the matter be bifurcated into a first phase addressing the jurisdictional objections followed by a second phase addressing any other objections and the merits.[34] In July 2016, the Tribunal granted the request for bifurcation.[35] The hearing on jurisdiction was held in February 2017.[36]

The three jurisdictional objections Timor-Leste raised were:[37]

1. there had been no consent by Timor-Leste to ICSID arbitration (which is required by Article 25(1) of the ICSID Convention);
2. there has been no investment for the purposes of the ICSID Convention (also a requirement of Article 25(1) of the ICSID Convention); and
3. the Lighthouse Entities are not a foreign investor and do not hold a special investment agreement for the purposes of the Timor-Leste Foreign Investment Law (Law No 05/2005) (FIL).

The tribunal discussed that, for there to be consent to ICSID jurisdiction through incorporation by reference, it must be demonstrated that the parties intended to incorporate ICSID Arbitration into

their arrangements.[38] The tribunal found that the Lighthouse Entities had failed to demonstrate that the parties had agreed to refer their disputes to ICSID arbitration as the document containing the ICSID dispute settlement clause was ambiguous in its intent and it was also not sufficiently established that Timor-Leste knew that the document existed or that it was given the document or that it was even discussed.[39]

The tribunal also considered it "telling" that the Lighthouse Entities did not consider there was consent to ICSID arbitration because, a year after entering into the relevant agreements, the Lighthouse Entities sent Timor-Leste a document entitled "Consent to Arbitration under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States" and requested Timor-Leste execute this document.[40]

The tribunal then considered whether there was consent to ICSID arbitration through the FIL. Timor-Leste's argument was that the Lighthouse Entities were not a "foreign investor" and they did not hold a "special investment agreement".[41] Under the FIL, a foreign investor must hold a foreign investor's certificate, which the Lighthouse Entities did not hold.[42] The tribunal did not accept the Lighthouse Entities' argument that because they met the "material requirements" of a foreign investor, it did not matter that they did not hold a foreign investor's certificate.[43]

The tribunal was also not able to find that the agreement constituted a "special investment agreement" as it did not meet the requirement of a Council of Ministers resolution approving the agreement.[44]

On the basis of the above two determinations that the tribunal lacked jurisdiction, the tribunal did not consider it necessary to determine the third objection regarding whether there was an investment for the purposes of the ICSID Convention.[45]

The Lighthouse Entities were ordered to pay all of the direct costs of the proceeding amounting to approximately US$550,000[46] and US$1.3 million of Timor-Leste's costs which reflected the range of costs the Lighthouse Entities incurred as opposed to the "very high amount" of Timor-Leste's actual costs of approximately US$3.1 million.[47] The Lighthouse Entities have since commenced proceedings in the Supreme Court of Victoria. In 2019, the Lighthouse Entities were successful in defeating jurisdictional challenges by Timor-Leste in the Supreme Court and again in the Court of Appeal based on *forum non conveniens* (clearly inappropriate forum) arguments. The Lighthouse Entities should now be able to proceed to have the substance of their dispute heard in the Victorian Supreme Court.

3.3 Substantive Awards

Australian investor disputes that reached a hearing on merits proved to be a lucrative win for the claimants. The ISDS provisions have allowed both White Industries Australia Limited and Tethyan Copper Company Limited to successfully obtain substantial rewards for a breaches of the respective bilateral investment treaties between Australia and the relevant foreign States.

White Industries Australia Limited v The Republic of India

It was not until 2010 that an Australian investor successfully brought a claim against a foreign State using the bilateral investment treaty between Australia and India (Australia-India BIT).[48] In this matter, White Industries Australia Limited (White Industries) had entered into a contract with Coal India (a government instrumentality) in 1989 for the supply of equipment to and the development of a mine at Piparwar, in the Indian State of Jharkhand, in return for payment in the amount of approximately A$206 million. Disputes arising from the project relating to White Industries' performance and to Coal Industries' having recourse to White Industries' security culminated in an ICC Arbitration Award being rendered in favour of White Industries in the amount of approximately A$4.08 million in May 2002.[49]

Coal India appealed to the High Court at Calcutta in September 2002 and, at the same time, White Industries applied to the High Court at New Delhi to have the award enforced.[50] An embattled White Industries spent from 2002 to 2009 in proceedings in the Indian Courts.[51] In December 2009, White Industries wrote to India asserting that, by the action of its courts and by the actions of Coal India, India had breached provisions of the Australia-India BIT.[52]

White Industries filed a Notice of Arbitration in July 2010 and a tribunal was established by the end of 2010.[53] Nearly a year later, in November 2011, the investor-State arbitral tribunal rendered an award in favour of White Industries finding that India had breached its obligations to provide "effective means of asserting claims and enforcing rights" with respect to White Industries.[54] White Industries was awarded A$4.085 million in addition to interest and compensation for the fees and expenses of the Arbitrators and White's costs in the ICC arbitration.[55]

Not only was this the first Australian investor claim against a State to proceed to determination, but it was also the first judgment on investment ruling of a bilateral investment treaty for India. Following this arbitral determination, Australian investors appeared to elicit an increasing awareness and willingness to maximise their legal rights under international investment treaties.

The authors note that India unilaterally terminated the Australia-India BIT on 23 March 2017, although it remains in force for investments made prior to termination for 15 years from the date of termination. India is in the process of renegotiating its trade agreements with various States after having adopted a new model bilateral investment treaty. Notably, this new model treaty has re-instated ISDS provisions, albeit in a far more circumscribed form.

India is the world's largest democracy, maintains a rapidly expanding developing economy, and is emerging as a major geopolitical actor in international relations. This has been a significant factor which has contributed to Australia's recent re-focus to the Indo-Pacific and underscores the government's ongoing negotiations to bring to fruition the Australia-India Comprehensive Economic Agreement.[56]

In 2018, the Department of Foreign Affairs and Trade published a report by Peter Varghese whose commission was to outline an approach for increasing economic engagement with India through to 2035.[57] Within this report, it is highlighted that Australia must navigate India's somewhat contradictory objectives in wanting to increase inward foreign investment while curtailing investor protections.[58] As Varghese notes, effective negotiation of trade and investment treaties such as the Comprehensive Economic Cooperation Agreement will be critical to securing important investment protections and making future ISDS provisions viable from the perspective of Australian investors.[59]

Tethyan Copper Company Limited v Islamic Republic of Pakistan

The next investor-State dispute commenced by an Australian party was that by Tethyan Copper Company Limited (Tethyan Copper) against Pakistan in January 2012 in relation to the denial of a mining lease. Relying on the bilateral investment treaty between Australia and Pakistan (Australia-Pakistan BIT),[60] Tethyan Copper successfully argued that Pakistan had violated several provisions of the Australia-Pakistan BIT. The first arbitral decision, made in March 2017 with reasons published in November 2017, determined jurisdiction and liability, finding that the tribunal had jurisdiction to hear the claims and that the denial of a mining lease by Pakistan was in breach of the Australia-Pakistan BIT.[61]

A separate hearing on quantum was held in May 2018 and the tribunal's award on quantum was published on 12 July 2019.[62] Pakistan was ordered to pay Tethyan Copper US$4.087 million in compensation for its breaches of its obligations under the bilateral investment treaty, plus interest.[63] Pakistan was also ordered to pay Tethyan Copper's share of the costs of the arbitration, being US$2.5 million and Tethyan Copper's legal fees in the amount of almost US$60 million.[64]

However, obtaining this substantial award has not been the conclusion to this matter. Since the award was published, Tethyan Copper has filed a petition to enforce the arbitral award in the United States District Court for the District of Columbia and has commenced proceedings in the Federal Court of Australia to enforce the US$4 million award against Pakistan. At the same time, Pakistan has sought to annul the award at ICSID with the Secretary-General notifying the parties of a provisional stay of enforcement of the award. An ad hoc committee has been constituted to hear the annulment application. Due to the provisional stay, the Federal Court of Australia proceedings are being held in abeyance, with the last two case management conference for this matter adjourned.

The Federal Court of Australia was recently faced with a similar situation in the matter of *Infrastructure Services Luxembourg SARL v Kingdom of Spain*[65] where it had made case

management directions in enforcement proceedings prior to the Kingdom of Spain's application to ICSID for annulment and consequential provisional stay. Once the Secretary-General of ICSID granted the provisional stay, the Federal Court of Australia stayed the enforcement proceedings. Then, when the provisional stay was lifted, the Federal Court proceeded with the enforcement proceedings. In February 2020, the Federal Court handed down its judgment in which it granted the application to enforce the award against Spain.[66] Spain has appealed this decision.

This recent Federal Court decision against Spain indicates that the Court may proceed in the same manner when considering Tethyan Copper's application to enforce the arbitral award against Pakistan. That is, the Federal Court will not proceed with the matter unless or until the ICSID provisional stay is lifted.

3.4 Emergency Arbitration

There has been one matter referred to emergency arbitration involving an Australian investor. This case is a clear demonstration of the usefulness of emergency arbitration when seeking urgent interim relief.

Munshi v Mongolia

In 2018, Mr Mohammed Munshi, a dual British-Australian citizen, commenced emergency proceedings against the State of Mongolia in relation to Gobi Coal and Energy Ltd (Gobi Coal), a company in which Munshi is an 11% shareholder and was the Chair until 2017.[67] The emergency proceedings related to a claim Munshi intends to bring against Mongolia pursuant to the Energy Charter Treaty (ECT),[68] asserting that Mongolia has seriously damaged the share value of Gobi Coal.[69] Whilst the substantive ECT claim is in its infancy, it comes with a formidable background, most of which is set out in an Emergency Arbitration Award dated 5 February 2018.

Gobi Coal was established by Munshi in 2004 to explore coal mining activities in Mongolia.[70] In around 2012 and 2013, Gobi Coal made loans to Mongolian national Jargalsaikhan Baz in the amount of approximately US$$10 million.[71] Although Baz made payments initially, he subsequently defaulted.[72] Gobi Coal successfully pursued an award for US$11.5 million plus costs, continuing interest and damages in relation to the loans to Baz in a Hong Kong International Arbitration Centre arbitration.[73]

In 2015, at the invitation of Baz's brother, Chuluunbaatar Baz (who had interests in Gobi Coal), to dinner with him in Mongolia to discuss some business matters, Munshi travelled to Mongolia where he was arrested on arrival and taken to a detention centre.[74] He was released after interrogation by police but told he was not to leave Mongolia until he paid Chuluunbaatar Baz some millions of dollars or transferred the assets of Gobi Coal to Chuluunbaatar Baz.[75] It was not until July 2017 that Munshi was tried and convicted of "defrauding as the source of one's income for life" – a crime that only entered into force in July 2017 – and sentenced to 11 years' imprisonment.[76]

The prison in which Munshi is detained has strict visitation rules including the allowance of one "short" visit every 90 days and one lengthy visit every 120 days.[77] The rules also govern Munshi's other communications to the receipt of one parcel and one phone call (no more than five minutes) every 60 days.[78] The tribunal stated that these rules make it impossible for Munshi to consult with his lawyers in respect of the ECT claim against Mongolia.[79]

In January 2018, Munshi submitted an "Application for the Appointment of an Emergency Arbitrator and Issuance of a Decision on Interim Measures" under the Stockholm Chamber of Commerce rules.[80] Munshi sought the Emergency Arbitrator to issue a decision ordering Mongolia to release him and allow him to leave Mongolia until the substantive ECT claim is determined.[81] In the alternative, Munshi sought an order for Mongolia to release him and he remain in Mongolia or that he at least be able to travel to Singapore for medical treatment.[82]

The Emergency Arbitrator determined the request for emergency relief applying the four traditional requirements for the granting of interim relief, namely, irreparable harm, necessity, urgency and proportionality.[83]

Irreparable harm: The Emergency Arbitrator accepted that significant human hardship and serious risk to health is capable of constituting irreparable harm for as long as the conditions in which Munshi was being detained continued.[84]

Necessity: The Emergency Arbitrator was not convinced that it was necessary for Munshi to leave the jurisdiction of Mongolia or to be released from detention in order to be able to pursue his ECT claim against Mongolia.[85] However, the Emergency Arbitrator held that access to local and international counsel was a necessary interim measure in order for Munshi to advance his ECT claim.[86]

Urgency: The Emergency Arbitrator determined that Munshi's right to access local and international counsel was urgent.[87]

Proportionality: The Emergency Arbitrator did not accept that it would be proportionate to order Mongolia to release a person who had been tried and convicted of a crime in Mongolia and declined to interfere with the powers of a sovereign State by ordering such a release.[88]

Accordingly, the Emergency Arbitrator did not grant Munshi any of the interim measures he was seeking but instead awarded him interim measures allowing him access to local and international counsel to commence and progress his ECT claim.[89]

There was no further publicly available information in relation to the substantive ECT claim at the time of writing.

3.5 Pending and Threatened Cases

There are eight other Australian outbound investors that have launched claims in reliance on ISDS provisions in investment treaties. The claim Kingsgate has brought against Thailand has proceeded to a merits hearing. As has been demonstrated in the White Industries and Tethyan Copper cases above, if Kingsgate is successful, this could result in a significant award being made in its favour. On the other hand, the claim by Emerge and Tantalum against Egypt has recently been bifurcated to have a jurisdictional challenge heard as a preliminary matter. Egypt could defeat the whole claim if its challenge is successful. The remaining three claims considered in this section are still in their infancy. It remains to be seen if they will proceed to the point where a substantive award is made, or if they will face insurmountable jurisdictional hurdles, or if they may simply be discontinued for lack of progress or some other reason.

Kingsgate v Thailand

In November 2017, following extensive but unsuccessful negotiations with the Kingdom of Thailand, Kingsgate Consolidated Limited (Kingsgate) issued a notice of arbitration to Thailand under the Australia-Thailand Free Trade Agreement[90] in relation to the alleged unlawful expropriation of the Chatree Gold Mine by the Thai government in 2016 and other alleged unlawful measures against Kingsgate investments in Thailand.[91] The Chatree Gold Mine is operated by Thai company, Akara Resources Public Co Limited (Akara) which is 100% owned by Kingsgate.[92] The State acts that Kingsgate allege form the basis of the claim include:[93]

1. Thailand's decision to renew Akara's metallurgical processing licence only until the end of 2016, rather than for a period of three or five years (as it had previously been renewed);
2. Thailand's order to Akara to close Chatree Mine; and
3. the order of the Prime Minister of Thailand suspending all gold mining operations and other gold mining activities in Thailand.

Although Kingsgate is yet to quantify its claims, it has indicated it will claim damages for unlawful expropriate in an amount equal to the fair market value of its investments immediately prior to their expropriation or their impending expropriation becoming public knowledge.[94]

Interestingly, Kingsgate expressed a desire for all hearings in the arbitration to be public and for all orders, decisions and awards of the tribunal to be published.[95] However, the Thai Government was successful in seeking a confidentiality order which requires the proceedings to be kept confidential except where disclosure is required to fulfil a legal duty.[96] Accordingly, most information on these proceedings is only available through information Kingsgate is required to disclose pursuant to its listing on the Australian Stock Exchange.

The Kingsgate December 2019 quarterly report advises that the merits hearing, originally set for November 2019, was rescheduled to February 2020 given the escalating violence in Hong Kong.[97] The author understands that the hearing was held in Singapore on the rescheduled dates.

Emerge Gaming and Tantalum International v Egypt

Two Australian companies, Emerge Gaming Ltd (formerly Arrowhead Resources Limited) (Emerge) and Tantalum International Ltd (Tantalum) commenced an ICSID arbitration against the Arab Republic of Egypt in June 2018 in relation to the alleged expropriation (amongst other claims) of Tantalum's interest in the Abu Dabbab Tantalum-Tin-Feldspar project (Project) in southern Egypt in 2015.[98] The claims by Emerge and Tantalum are being funded by third party funder, Calunius Capital Litigation Risk Funds.[99]

According to a web page dedicated to providing information on the arbitration, set up by Tantalum, it considers that Egypt has implemented illegal measures to gain full control of Tantalum Egypt's exploitation licences and the Project.[100] Accordingly, Tantalum considers that Egypt has unlawfully expropriated its investments in the Project, impaired its management, operation and enjoyment of those investments and treated Tantalum and its investments in a manner that is not fair and equitable.[101]

In November 2018, a three member tribunal was constituted.[102] On 31 July 2019, Egypt filed an objection to jurisdiction and requested the objection be addressed as a preliminary hearing.[103] On 2 December 2019, the matter was bifurcated to have the objections to jurisdiction addressed as a preliminary question, with the proceeding on the merits suspended until determination of the preliminary question. As we have observed above, if a claimant is unable to overcome a challenge to the tribunal's jurisdiction, its whole claim fails.

Western African Aquaculture, Kurt Lennart Hansson and Martje Bolt Hansson v Gambia

Swedish national, Kurt Lennart Hansson, and his Australian wife, Martje Bolt Hansson, are the owners of a tiger-prawn business, Western African Aquaculture Ltd, which was compulsorily acquired by The Gambia "so that the acquired investments will perform better, in the interest of the entire country".[104] In March 2018, they filed a request for arbitration with ICSID, claiming US$35 million for the expropriation of their business by the government for former president, Yahya Jammeh.[105] In March and April 2020, the arbitrators appointed by the Claimants and Respondent, respectively, accepted their appointments. The typical next step would be for the Chair of the tribunal to be appointed and the hearing of the matter begin in earnest.

Prairie Mining v Poland

A recent dispute involving an Australian claimant is a claim threatened against Poland by Australian mining company, Prairie Mining Limited (Prairie) for Poland's alleged breach of the ECT, the UK-Poland Bilateral Investment Treaty[106] and the Australia-Poland Bilateral Investment Treaty.[107] [108] The claim is based on Poland allegedly unfairly obstructing the development of two coal-mining projects by delay and denial of an extension of time for a mining concession in relation to the Debiensko mine, and its failure to grant environmental approval so that Prairie could apply for a mining licence in relation to its Jan Karski mine.[109]

In around February 2019, Prairie formally notified Poland of its dispute and requested prompt negotiations with the Polish government to resolve the dispute amicably.[110] Poland's economic committee, including the Prime Minister and other government officials, was scheduled to meet in May 2019 to discuss the dispute.[111] Prairie has reserved its right to submit the dispute to international arbitration should negotiations fail.[112]

Range Resources Ltd v Georgia

In June 2019, Range Resources Ltd (Range Resources) reported that it has submitted a notice of arbitration against the government of Georgia seeking damages in the amount of US$21.9 million plus interest for what it alleges is a "flagrant breach" of the terms of a production-sharing contract (PSC) Range Resources has over Block VIA, a license block pertaining to the use of oil and gas resources.[113] The alleged breach has arisen from the government's announcement of an open international tender on Block VIA, the same block over which Range Resources asserts it has a

valid PSC.[114] Range Resources has since announced that it has withdrawn its notice of arbitration on a without prejudice basis.[115]

EnviroGold (Las Lagunas) Limited v Dominican Republic

EnviroGold (Las Lagunas) Limited (EnviroGold) is an Australian company which is a subsidiary of Sydney-based PanTerra Gold (PanTerra). On 2 April 2020, ICSID registered the request for the institution of arbitration proceedings by EnviroGold against the Dominican Republic.[116] EnviroGold will be seeking approximately US$18 million plus costs.[117]

The claim arises from a 2004 contract which EnviroGold entered into with the Dominican Republic after EnviroGold won a tender granting it the right to extract gold and silver from the waste material of a mine near the Las Lagunas project based approximately 100 kilometres north-west of Santo Domingo. PanTerra submitted a formal claim against the Dominican Government for costs in relation to the failure to provide a suitable site for constructing a dam for storage of waste material which it alleges was an obligation on the Dominican Government.[118] EnviroGold also raised tax matters in the filing whereby it intends to claim for the legal costs to fight tax assessments repeatedly submitted by the Dominican Government and may include a dispute over the profit-sharing agreement between the parties.[119]

EnviroGold and the Dominican Republic appointed arbitrators in April 2020 and July 2020 respectively.[120] What should follow is the appointment of the Chair of the Tribunal. then the proceedings will be able to get underway.

Ntaka Nickel Holding Company v Tanzania

Perth based Indiana Resources Limited has issued a letter of notice to Tanzania in relation to the revocation of retention licences for its project in the country through its majority shareholding in UK incorporated Ntaka Nickel Holdings Limited (Ntaka).[121] The Tanzanian Government passed the *Mining (Mineral Rights) Regulations* in 2018 which reportedly abolished retention licences for a number of companies and transferred the rights to the government.[122] The Government subsequently announced a public tender for the joint development of the areas previously covered by the retention licenses.[123] Ntaka issued the notice once the public tender was announced to kick start the six-month cooling off period under the UK-Tanzania bilateral investment treaty. Ntaka plans to file its claim if a settlement is not reached with Tanzania within the six-month period, which is in or around July 2020.[124]

Ntaka Nickel Holding Company proposes the quantum of its claim may include the value of historic investments in Tanzania, the value of the project at the time tenure was expropriated and damages suffered as a result of Tanzania's acts and omissions.[125]

Cassius Mining v Ghana

Cassius Mining Limited (Cassius) has announced that it served a notice of intention to proceed to arbitration on the Ghanaian Government in April 2020.[126] Cassius alleges that Ghana has breached its obligation to accord fair and equitable treatment to Cassius by failing to provide protection to Cassius in relation to its Gbane gold deposit in Ghana, against neighbouring mine, Shaanxi Mining, which Cassius alleges was illegally trespassing on and removing assets from its licence, and about which Cassius alleges Ghana had knowledge.[127] Cassius also alleges that Ghana is unilaterally re-demarcating boundaries in favour of Shaanxi Mining which effectively transferred a portion of Cassius's asset to Shaanxi.[128] Cassius asserts that Ghana effectively expropriated Cassius's assets by refusing to issue routine permits without valid reasons.[129] Finally, Cassius claims that Ghana failed to act on allegations of the corrupt behaviour of senior members of the Ghanaian Government which resulted in decisions negatively affecting Cassius.[130]

Cassius intends to claim more than US$275 million for its losses.[131] No formal notice of arbitration has been registered with ICSID at the time of writing.

4 Australia as Respondent

Only one case against Australia has proceeded to the point of a jurisdictional award which determined that the tribunal did not have jurisdiction to hear the claim brought against Australia by a foreign claimant. The other cases have also stalled due to issues with jurisdiction. These cases

confirm our observation that a jurisdictional defence raised by a respondent State can be a mighty weapon in a State's defence arsenal.

Philip Morris v Australia

The first case brought by a foreign investor against the Commonwealth of Australia was that brought by Philip Morris Asia Limited (PMA) in November 2011 relying on the Australia-Hong Kong bilateral investment treaty (Hong-Kong Australia BIT) in relation to a claim in respect of Australia's introduction of legislation which mandates the plain packaging of tobacco products.[132]

In April 2010, the Australian government announced its intention to introduce tobacco plain packaging legislation (TPP Legislation).[133] Prior to this announcement, Philip Morris International (PMI) and its group companies, participated in the consultation process conducted by the Australian government and expressed its opposition to the TPP Legislation.[134] After the government's announcement to proceed with the TPP Legislation, PMI undertook a restructure which saw PMA, based in Hong Kong, become the sole shareholder of Philip Morris' Australian trading entities.[135]

In 2014, the Tribunal held a hearing on bifurcation and determined to bifurcate the proceedings and hear jurisdictional issues in the first phase.[136] The hearing on jurisdiction was held in February 2015.[137] In December 2015, the Tribunal issued its award on jurisdiction making a scathing finding that the restructure of Philip Morris was for the principal, if not the sole, purpose of gaining protection under the Hong Kong-Australia BIT.[138] The Tribunal held that the claims were inadmissible and it was precluded from exercising jurisdiction over the dispute.[139]

In March 2017, the Tribunal published its final award regarding costs, ordering PMA to pay a redacted percentage of Australia's costs.[140] The exact amount PMA was ordered to pay was also redacted in the costs award.[141] Freedom of information requests made in relation to the costs of the proceedings initially revealed that the government's total bill was in the vicinity of A$40 million.[142] However, that was in relation to the ISDS case plus other related proceedings. It has since been revealed that the government's legal costs in relation to the ISDS case alone were approximately $23 million, of which PMA was ordered to pay half.[143] Further, PMA was ordered to pay half of the government's share of the costs of the arbitral tribunal, which were approximately $500,000. Accordingly, the cost of the case to Australian tax payers, assuming PMA has complied with the costs award, was approximately $12 million.

It is easy to conclude that this decision served as the impetus for some of the drafting in international investment treaties which Australia has concluded since 2017, discussed in the political background section above.

APR Energy & Ors v Australia

In April 2017, APR Energy PLC (APR) commenced investor-State arbitration proceedings against the Commonwealth of Australia arising from its loss of four wind turbines, which were valued at approximately US$260 million and which were on lease to Forge Group Power Pty Ltd, due to APR's failure to properly register its interest in the wind turbines pursuant to the *Personal Property Securities Act 2009* (Cth) (PPSA).[144]

APR seeks to rely on the most favoured nation (MFN) clause in the Australia-United States Free Trade Agreement (AUSFTA)[145] to bring its claim by invoking the "more favourable" investor-State dispute resolution provisions in the Hong-Kong Australia BIT because there is no investor-State dispute settlement mechanism providing for arbitration in the AUSFTA.[146]

Whether an investor can invoke the MFN clause to allow the importation of a more favourable procedural provision is not settled law in investor-State arbitration. The tribunal in *Emilio Agustín Maffezini v The Kingdom of Spain*[147] allowed the importation of a MFN clause to remove the local litigation requirement in the bilateral investment treaty between Spain and Argentina. This decision has not been followed by subsequent tribunals which have restricted the interpretation of MFN clauses to exclude the importation of procedural provisions from other investment treaties. Since arbitral tribunals are not bound by precedent, these different interpretations may stand in juxtaposition.

In the Australian government's responses to APR's notice of dispute, Australia denies that APR has jurisdiction to bring a dispute under the AUSFTA or any other international agreement.[148]

NuCoal v Australia

NuCoal Resources Ltd (NuCoal) is an Australian company with approximately 30% of its shareholders being American investors.[149] In 2015, it flagged a claim against the Australian government over the cancellation of its mining licences following findings of misconduct and corruption relating to the granting of those licences.[150] The licences were cancelled without compensation by the introduction of legislation by the State of New South Wales.[151]

As the foreign investors are from the United States, they face the same difficulties as APR does, given the AUSFTA does not include an investor-State dispute settlement mechanism which allows American investors to commence an investor-State arbitration directly against the Australian government. At the time of writing, no formal investor-State arbitration claim was on public record.

Mineralogy v Australia

The most recent company to flag a claim against Australia is Australian politician Clive Palmer's Mineralogy International Limited (MIL), which was registered in New Zealand in December 2018.

Chinese company, CITIC Pacific Ltd (CITIC), through a lease with Mr Palmer's private company, Mineralogy Pty Ltd (Mineralogy), in relation to the Sino Iron Ore mine in the Pilbara Region in Western Australia, has the right to mine magnetite iron ore from the deposit. A dispute has arisen between CITIC and Mineralogy in relation to royalties payable and the refusal of Mineralogy to allow CITIC to expand its tailings operations.[152] Western Australian Premier, Mark McGowan became involved when, during Parliament question time, he suggested the government may intervene.[153] It was reported in May 2019 that Mr McGowan is considering amending the State Agreement with Mineralogy to remove the requirement for the consent of Mineralogy in order for CITIC to be able to expand its operations.[154]

The registration of MIL constituted a restructure so that New Zealand entity MIL now owns Mineralogy. It is apparently Mr Palmer's intention to bring a claim under the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)[155] through MIL in the sum of approximately A$45 billion against Australia if the Western Australian Premier introduces legislation that negatively affects his investment.[156]

However, any claim by MIL faces two hurdles. Firstly, the ANZCERTA treaty does not bind the parties (Australia and New Zealand) to an international dispute mechanism, nor allow a New Zealand investor to bring a claim directly against the Australian government. ANZCERTA does not refer the States to international arbitration, but, rather, allows the government of New Zealand (only should it choose to do so) to seek settlement consultation and negotiation with the government of Australia if Australia is at risk of breaching the ANZCERTA protocols.[157] There is no requirement, or indeed any mechanism, for a binding, third-party dispute resolution process unless it is subsequently agreed between the governments of Australia and New Zealand in the circumstances.

Secondly, as was made clear in the Philip Morris case discussed above, a corporate restructure made at the time a dispute was foreseeable (as is the case for MIL), has been found to constitute an abuse of process and will not give a tribunal jurisdiction to hear a claim brought by a party in such circumstances.

5 Conclusion

Considering the cases above, it is clear that Australian experiences with investor-State claims have been mixed to date. From an investor perspective, Australian companies have been successful in achieving awards against India and Pakistan in the White Industries and Tethyan Copper cases respectively. In addition, the Munshi case demonstrates the ability of the regimes to achieve beneficial results for Australian investors other than in respect of purely compensatory outcomes. Particularly where there may be concerns in regard to the preservation of fundamental rights or the pursuance of politically motivated legal proceedings, the ISDS regime has been effective in allowing Mr Munshi to gain proper access to international counsel for the purposes of his

Mongolian trial. The Arbitral panel in this case was not inclined to go further in ordering his release from prison. In this respect, it can be argued that the ISDS provisions provide an avenue of potential redress for Australian investors whilst not overstepping sovereign power.

Considering the cases from a foreign perspective, ISDS provisions have not provided Australian investors with a disproportionate advantage over the States within which they have invested. The Churchill Mining and Lighthouse Entities cases, against Indonesia and Timor Leste respectively, have been unsuccessful on the grounds of fraud and a lack of jurisdiction. Eight other claims remain ongoing, albeit at different stages and under a shroud of confidentiality. Overall, however, it appears that Australian investors are increasingly open to utilising ISDS provisions to protect overseas investments. From a political perspective, the creation of greater transparency in ISDS arbitration may be critical in helping to dispel some of the apprehensions held by some in regard to a perceived disproportionate advantage held by investors over States.

In respect of claims made by foreign investors, Australia is yet to be unsuccessful in a dispute. In the APR Energy and NuCoal disputes, Australia continues to strongly assert a lack of jurisdiction based upon the non-inclusion of ISDS provisions in the AUSFTA. It also successfully defended the claim made by Phillip Morris. It is important to note however, that the disparity between the amount spent by the Australian government in mounting its defence and the quantum of the costs order against Phillip Morris has drawn recent widespread criticism. This has galvanised anti-ISDS sentiment within some sections of the Australian political community. Despite being a legitimate concern, it appears that the government's approach is likely to remain receptive to ISDS regimes, continuing to undertake assessments on a case by case basis.

Raising a jurisdictional defence to a claim brought by a foreign investor appears to be a strong defence available to States that will cancel all claims against the State that the foreign investor may have. However, if a foreign investor is able to overcome a jurisdictional challenge, there is the possibility of gaining a substantial arbitral award. As more disputes are awarded in favour of Australian outbound investors, it is likely that this dispute mechanism will become more popular with other Australian outbound investors, encouraged by the possibility of protection and significant reward.

It is clear that claims made against Australia have influenced the exclusions it has incorporated into subsequent investment agreements. Like all trade and investment agreements, a nation must be prepared to compromise on certain elements to achieve a greater objective. In light of Australia's vigorous pursuit of a diversified and more competitive economic future, it seems likely that it will continue to accept some exposure to claims from foreign investors in order to achieve its broader aims of increased flows of foreign direct investment, greater economic self reliance, and overall national prosperity.

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