STRIKE WHILE THE IRON IS HOT OR STRIKE OUT: WOULD PALMER'S SINGAPORE ENTITY SUCCEED IN AN ISDS CLAIM AGAINST AUSTRALIA?

By Donna Ross FCIArb FRI & Samira Lindsey

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Seeking to strike while the iron is hot, Palmer has shifted ownership of his Australian-owned company, Mineralogy Pty Ltd (**Mineralogy**), offshore. While previously incorporated under domestic law, Mineralogy is now owned by International Minerals Pty Ltd (**IM**), which is registered in Singapore. It is speculated that Palmer may seek arbitration under the Singapore-Australia Free Trade Agreement (**SAFTA**)[1] in order to take advantage of protections provided by its Investor-State Dispute Settlement (**ISDS**) mechanism. Under the SAFTA, foreign investors gain certain protections, including that they be treated no less favourably than domestic investors,[2] and that they receive fair and equitable treatment.[3]

Whether Palmer would succeed is highly debatable. his Singapore entity, IM, may not have standing to bring a claim under ISDS, if it cannot show that it actually controlled Mineralogy at the time of the investment and was not formed solely to change the company's nationality to benefit from the SAFTA.

In 2020, at the eleventh hour, the state of Western Australia (**WA**) enacted unilateral amendments to its State Agreement[4] with Mineralogy, which allowed Mineralogy to mine iron ore in the Pilbara region.

The awards follow a long history of disputes between Mineralogy and WA, arising out of the State Agreement. In 2014, an Australian arbitral tribunal determined that WA was liable to Mineralogy for refusing Palmer s mining proposal. This led to a second arbitration in 2019 where the tribunal upheld Mineralogy s entitlement to claim damages against WA.

WA's emergency amendments to the State Agreement render null and void both the 2014 and the 2019 awards,[5] such that WA has no liability to Mineralogy, Palmer's Australian entity.[6].

Primary Purpose of ISDS

The *raison d'être* of ISDS is two-fold. First, to promote inbound foreign investment and second, to protect outbound investors.

However, investments must be *bona fide* transactions, that is, they should contribute to the local infrastructure or economy.[7] ISDS encourages investors to make such investments by providing protection mechanisms preventing the host state from unilaterally and unreasonably interfering with foreign investment and by having the host state commit to immunise investors against opportunistic behaviour on the part of states.[8] This is what is known as fair and equitable treatment.

What we are seeing more of, however, is increased opportunistic behaviour on the part of investors. Sophisticated local investors may adopt complex corporate structures with the intention of exploiting the protections afforded to foreign investors under investment treaties.[9] This type of treaty shopping can render inadmissible an investor's claim in investor-state arbitration.

The question is whether or not Palmer's Singaporean entity, IM, is a genuine foreign investor, or merely a local investor cloaked in the corporate veil of a foreign company.

Standing and the Definition of Investor

To bring a claim, an investor must fall within the class of intended beneficiaries of the treaty's protections,[10] and meet the definition of investor. Investors, whether individuals or corporate entities, must be 'foreign', as only foreign investors have standing to bring a claim against the country in which the investment is located - in this case, Australia.

A local company may be controlled by a foreign holding company or managed by a foreign entity. Likewise, a foreign investor may establish a local subsidiary to manage a project whether based on its own decision or a local requirement. This type of corporate structuring in and of itself will not deprive an investor of treaty benefits.

When there is a doubt as to standing, particularly when a state invokes a denial of benefits clause,[11] an arbitral tribunal must determine the 'nationality' of the investor. For corporations, which comprise the majority of international investors, one might look to the place of incorporation, the headquarters or *siège social*, or the nationality of the majority shareholder, for example.[12]

However, the most important issue for the tribunal is determining who actually controls the investing company and whether that control is economic or managerial in nature. This analysis

may be driven by any definition of 'investment' in the treaty invoked. Determining actual control may require piercing the corporate veil, and a tribunal must decide how far up a corporate holding structure to look and what level of economic or corporate activity is required and who bears the burden of proof.[13] When an investor shifts ownership from the host state to a foreign country intending to gain treaty benefits, as Palmer has allegedly done, it engages in treaty shopping. This is an issue that plagues investor-state arbitrations today and generates criticism of the ISDS system. In Mineralogy's case, it is unlikely that Palmer would be able to establish standing or benefit from the SAFTA's protections.

Treaty Shopping: Timing Matters

There are two main types of treaty shopping: front-end and back-end. Prior to making an investment, there may be a number reasons for a company to incorporate in one state rather than another. These may be economic or political. Provided the host state is aware of the structure at the time of the investment or a change thereafter is made for legitimate reason, it cannot refuse treaty benefits to the investor. This front-end structuring is generally acceptable and is often termed an indirect investment.

What is not acceptable is for investors to circumvent the nationality requirement by moving ownership of a local company offshore after the fact so as to gain ISDS protections. This back-end treaty shopping generally occurs when a local investor discovers a potential act by the host state that may affect the investment and against which the local company has no recourse. When the transfer of ownership follows such a discovery and takes place subsequent to the investment, a tribunal may determine that the alleged investor has no standing. Such cases of urgent ownership transfer will raise a red flag with respect to the admissibility of a claim under a treaty's ISDS provisions.

The passing of the WA legislation in the Palmer case is an example of this type of act,[14] and would not be the first case of treaty shopping by a party whereby legislation is passed that has an adverse effect on said party.[15] Hence, if the investor – or potentially IM in this case – is only a shell company whose sole purpose is to find recourse other than through the national court system (where it may have already exhausted its remedies), then invoking ISDS would constitute an 'abuse of right'.[16]

If IM were to argue that it has been denied 'fair and equitable treatment' as an investor,[17] or if the corporate veil is pierced in order to prove that the Singapore company has not had any real control over Mineralogy, the Australian government may succeed with a denial of benefits claim against such a purported investor, if the latter lacks any substantial business activity in Australia.

At the end of the day, while companies are entitled to change their management and shareholder base as well as their nationality, there is a line between corporate restructuring and back-end treaty shopping. The latter is an abuse of right in investor-state arbitration and undermines international investment as a whole. In order to combat this, tribunals have demonstrated a readiness to declare claims resulting from back-end treaty shopping inadmissible, despite the existence of protective provisions in the relevant treaty.

And while ISDS prevents host states from infringing on the rights of investors and offers the protections necessary to attract foreign investment, investors should not be allowed to profit from loopholes in treaties or abuse international investment arbitration.

Donna Ross the principal and founder of Donna Ross Dispute Resolution. She is a graded arbitrator and Fellow and faculty member of the Chartered Institute of Arbitrators, Fellow of Resolution Institute and Board Member of Arbitral Women. Donna is an international ADR and ODR practitioner an IMI, NMAS and New York accredited mediator, and LIV Accredited Specialist in Mediation Law. She also teaches mediation, negotiation and arbitration.

Samira Lindsey is a student and research assistant at Monash University's Faculty of Law. Samira has worked with Donna Ross in 2020 providing research and editorial assistance in international commercial arbitration. She is currently completing her final law studies and is researching Australia's arbitration landscape.

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ENDNOTES

[1] Free Trade Agreement, Singapore-Australia, opened for signature 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003) <https://www.dfat.gov.au/sites/default/files/safta-chapter-8-171201.pdf> ('*SAFTA*').

[2] Ibid arts 4-5.

[3] Ibid art 6.

[4] State Agreements are contracts between the State and a company seeking to develop a major project, ratified by legislation. They are particularly prevalent in WA.

[5] *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) s 10.

[6] Western Australia, *Parliamentary Debates*, Legislative Council, 13 August 2020, 4875b-4904a (Senator the Hon. Sue Ellery) <https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/3C52889FCEFE865F482585D0000E555E/$FILE/C40%20S1%2020200813%20p4875b-4904a.pdf>.

[7] *Phoenix Action Ltd v Czech Republic*, ICSID Case No. ARB/06/5 <https://www.italaw.com/cases/850> [107], [138]-[139], [143].

[8] Stephan W Schill, 'Part I Chapter 2: Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement', in Michael Waibel et al (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010) 33.

[9] Investment treaties are used as a generic term for Bilateral Investment Treaties (BITs), Fair Trade Agreements (FTAs) and other multilateral or regional trade agreements that incorporate ISDS provisions.

[10] Rachel Thorn and Jennifer Doucleff, 'Part I Chapter 1: Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of "Investor"', in Michael Waibel et al (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010) 5.

[11] See, e.g., SAFTA art 18.

[12] See n 12.

[13] ibid. See also *Philip Morris Asia Ltd v Commonwealth of Australia* (UNCITRAL, PCA Case No. 2012-12) <http://www.italaw.com/cases/851> [190]-[192], [202], [204] ('*PM Asia v Australia*').

[14] Another example is *PM Asia v Australia* regarding the *Agreement with Hong Kong concerning the Promotion and Protection of Investments*, signed 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993).

[15] See, e.g., *PM Asia v Australia* 175 [566], 176 [569].

[16] See, e.g., *PM Asia v Australia*; *Saluka Investments BV v Czech Republic*, UNCITRAL (17 March 2006) [240] <https://www.italaw.com/cases/961>.

[17] Pursuant to SAFTA arts 4, 6.