ICSID TRIBUNAL ACCEPTS JURISDICTION IN EXPROPRIATION CLAIM AGAINST YEMEN

Beijing Urban Construction Group Co Ltd v Republic of Yemen (ICSID Case No. ARB/14/30)

Introduction

In an award handed down on 31 May 2017, the ICSID Tribunal in *Beijing Urban Construction Group Co Ltd v Republic of Yemen* (ICSID Case No. ARB/14/30) held that it had jurisdiction on the basis that a clause in the China-Yemen Bilateral Investment Treaty ("the BIT") granting jurisdiction over "any dispute relating to the amount of compensation for expropriation" covered both quantum and liability issues arising out of alleged expropriation.

Background

Beijing Urban Construction Group ("the Claimant"), a publicly funded and wholly state-owned entity established by the Chinese Government, won a tender process for the selection of a construction contractor for a new international terminal at Sana'a International Airport in Yemen and, accordingly, in 2006 entered into a construction contract (worth in excess of US$110 million) with the appropriate Yemeni authorities. Subsequently, the Claimant commenced ICSID arbitration proceedings alleging that the Republic of Yemen ("the Respondent") had unlawfully deprived it of its investment by employing military forces and security personnel to assault and detain the Claimant's employees and to forcibly deny access to the project site, thereby rendering the Claimant incapable of performing its contractual obligations.

The Respondent raised several jurisdictional objections, including:

(1) that the Claimant, being a state-owned entity, was not a "national of another Contracting State" as required by Article 25(1) of the ICSID Convention. Further, the Claimant had failed to register its investment under domestic Yemeni law;

(2) that the Respondent had consented to ICSID arbitration only in respect of disputes limited to the quantum of compensation, not liability;

(3) that the BIT's Most-Favoured-Nation ("MFN") clause could not be used to circumvent the limits of its dispute resolution clause;

(4) that there was not a qualifying "investment" for the purposes of the ICSID Convention;

(5) that the claim was a 'contractual claim' rather than a 'treaty claim'.

Decision

The Tribunal (Ian Binnie QC, President; Zachary Douglas QC, and Mr. John M. Townsend) accepted jurisdiction over the dispute and dismissed almost all of the Respondent's jurisdictional objections.

(1) As regards whether the Claimant was "a national of another Contracting State", the Tribunal held that, notwithstanding the fact that the Claimant was state-owned, the evidence demonstrated that the Claimant was, in carrying out this work, acting as a commercial contractor and was neither an agent of the Chinese Government nor fulfilling governmental functions. Further, there was no express registration requirement in the BIT, and such a requirement could not be inferred.

(2) As regards whether the Respondent's consent was limited to quantum issues, the Tribunal held that a proviso to Article 10(2) of the BIT (which provided, in relation to ICSID arbitration, for the Contracting Parties "irrevocable consent to the submission of any dispute relating to the amount of compensation for expropriation") had to be interpreted in line with the object and purpose of Article 10 in the context of the BIT as a whole. Such an approach favoured a broad interpretation of the proviso of Article 10(2) to cover issues of liability – as a necessary condition precedent to any assessment of compensation for expropriation.

(3) As regards whether the BIT's MFN clause could be used to circumvent the limits of Article 10, the Tribunal agreed with the Respondent that the wording of the MFN clause tied it to activities that took place "in the territory" associated geographically with the investment. Thus it could not be used to expand the scope of international arbitration (which itself is not an activity inherently linked to the respondent's territory) beyond Article 10.

(4) As regards whether there was a qualifying "investment", the Respondent argued that the Claimant was purely a paid contractor that had to provide a performance guarantee – and this did not qualify as an "investment". However, the Tribunal held that there was "no difficulty" in concluding that there was an "investment" both under the ICSID Convention and the BIT in circumstances where the Claimant had made a contribution (in a contract for works extending over a substantial time period and, therefore, involving an element of risk) to the Respondent's economic development that clearly exposed it to risks posed by the sovereign power.

(5) As regards whether the Claimant's claim was a 'contractual claim' or a 'treaty claim', the Tribunal noted that the allegation of military intervention against the Claimant's workers made the instant matter different from an ordinary commercial contract dispute. The Tribunal noted that the Claimant was not asserting breach of contract claims in the ICSID proceedings. The Tribunal held that it had jurisdiction to hear the claims insofar as they arose under the BIT. If, in the merits phase, the Claimant was unable to establish a claim under the BIT, the proceedings would be dismissed.

Concluding Remarks

The Tribunal's approach to the dispute resolution clause in this case demonstrates a willingness to interpret such clauses, where there is potential ambiguity, in line with the object, context and purpose of the dispute resolution clause and the treaty as a whole.

A significant aspect of this case, however, is that, whilst the Respondent failed on most of its jurisdictional objections, it was (importantly) successful in part – because the Tribunal did not allow the use of the MFN clause to import a broader dispute resolution clause from the Yemen-UK BIT, which would have potentially allowed the Tribunal to take jurisdiction over non-expropriation BIT claims.