Introduction

This round-up is intended to summarise several important decisions concerning investment arbitrations that were handed down in March 2017 on aspects including: (a) the consequences for parties of inadvertent disclosure of confidential information by their counsel; (b) early dismissal of claims under Rule 41(5) of the ICSID Arbitration Rules; and (c) the significance of contractually-agreed limitations on compensation for expropriation.

(1) *Vladislav Kim and Ors v Republic of Uzbekistan* (ICSID Case No.ARB/13/6) (Decision on Jurisdiction, 8 March 2017) (Tribunal: Professor David D. Caron, President; L. Yves Fortier QC; Toby Landau QC)

In *Kim v Uzbekistan*, Kazakh investors brought claims against Uzbekistan under the Kazakhstan-Uzbekistan BIT (1997). The investment comprised an indirect majority shareholding in two Uzbek cement companies. The claims arose out of a series of regulatory and judicial measures taken by different branches of the Uzbek government, allegedly leading to the unlawful nationalisation of the two cement companies.

Uzbekistan filed jurisdictional objections: (1) that the claimants were not Kazakh nationals (as they had to be in order to bring their claims within the Kazakhstan-Uzbekistan BIT); (2) that the requirements for an "investor" who had made an "investment" were not satisfied in the case of the claimants; (3) that the claimants' investment was "illegal"; and (4) that the claimants procured their investment through corruption (with the consequence that the claim arising from that investment was not admissible).

Another issue that arose for the Tribunal's consideration was whether the Respondent's Counsel (White & Case LLP) had failed to adopt adequate procedures to ensure the integrity of confidential information that was entrusted to it by expert witnesses who had provided their testimony pursuant to an agreement that their expert evidence would be for "attorney's eyes only". This arrangement had been adopted in response to concerns regarding reprisals against the experts by the Uzbekistan Government. However, on three occasions, White & Case LLP inadvertently leaked confidential information to

the Uzbekistan Government. On the third occasion, when a high-ranking Uzbek government official was copied on an email containing confidential information about the anonymous experts, this led to the experts withdrawing on the grounds of safety.

On 8 March 2017, the Tribunal dismissed all of Uzbekistan's jurisdictional objections.

On the matter of costs, in the light of the failures by White & Case LLP to ensure the adequate protection of confidential information that had the effect of consistently derailing the Tribunal's gathering and hearing of expert evidence, Uzbekistan was ordered to bear its own share of the direct expenses relating to the anonymous experts, and compensate the claimants for certain expenses relating to the anonymous experts.

Also on the matter of costs, one of the claimants (Mr. Kim) was criticised for "surreptitiously [taking] photographs during his witness testimony, later posting at least one of these photos on social media accompanied by offensive language and the statement "White & Case must die"." Whilst Mr. Kim apologised to the Tribunal for this behaviour, it was described in the Award as "unacceptable conduct" that would be "a factor in the Tribunal's final allocation of costs in this proceeding".

(2) *Ansung Housing Co Ltd v People's Republic of China* (ICSID Case No.ARB/14/25) (Award, 9 March 2017) (Tribunal: Professor Lucy Reed, President; Dr. Michael C. Pryles and Professor Albert Jan van den Berg)

In *Ansung v China*, a South Korean investor brought claims against China under the China-Korea BIT (2007). The underlying investment comprised capital expenditure of over US$15 million for the development of a golf and country club and condominiums in China.

China argued that the arbitration proceedings were commenced more than 3 years after the claimant had first acquired knowledge that it had incurred loss or damage. The consequence of this was that the claim was time-barred under Article 9(7) of the China-Korea BIT and, therefore, "manifestly without merit" for the purposes of ICSID Arbitration Rule 41(5) (which provides for early dismissal of claims).

On 9 March 2017, an ICSID Tribunal issued an Award upholding China's objections and dismissing the claim. China was awarded its share of the direct costs of the arbitration proceedings plus 75% of its legal fees and expenses.

This case was the second international investment arbitration brought against China, the first in which a Tribunal was constituted and the first in which a final award was delivered.

(3) *Venezuela Holdings et al v Bolivarian Republic of Venezuela (case formerly known as Mobil Corporation et al v Bolivarian Republic of Venezuela)* (ICSID Case No.ARB/07/27) (Decision on Annulment, 9 March 2017) (Annulment Committee: Sir Franklin Berman QC (president); Tan Sri Cecil Abraham; Professor Dr. Rolf Knieper)

In *Venezuela Holdings et al v Venezuela*, claims were brought against Venezuela under the Netherlands-Venezuela BIT (1991). The investment comprised interests in two extra-heavy crude oil projects located in the Venezuela region of the Orinoco Oil Belt, under profit sharing agreements concluded with the Government of Venezuela. The claims arose out of Venezuela's nationalisation of the two oil projects (after having increased their applicable royalty rate and income tax) and subsequent disagreements between the parties concerning the amount of compensation owed to the investors.

On 9 October 2014, the Tribunal (H.E. Judge Gilbert Guillaume, President; Professor Gabrielle Kaufmann-Kohler; Dr. Ahmed Sadek El-Kosheri) handed down an Award finding Venezuela liable to pay damages of US$1.6 billion to the claimants.

On 9 March 2017, an ICSID annulment committee handed down a decision; (i) rejecting Venezuela's request for the annulment of the Award on account of the Tribunal's assumption of jurisdiction; but (ii) partially upholding Venezuela's request for the annulment of the portion of the Award dealing with compensation for expropriation by Venezuela (with the consequence that the amount of damages payable was reduced by US$1.4 billion).

The decision to annul parts of the Award dealing with compensation flowed from, inter alia, the annulment committee's finding that the Tribunal had wrongly disregarded a contractual limitation agreed between the parties governing compensation for expropriation.

(4) *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan* (ICSID Case No.ARB/12/1) (Decision, 20 March 2017) (Tribunal: Dr. Klaus Sachs, President; Stanimir A. Alexandrov; Lord Hoffmann)

In *Tethyan Copper Company v Pakistan*, an Australian investor brought claims against Pakistan under the Australia-Pakistan BIT (1998). The investment comprised rights under a Joint Venture Agreement concluded with the Province

of Balochistan for the development of a copper-gold mine – the Reko Diq project (one of the world's largest known copper and gold deposits).

The claims arose out of a decision taken in 2011 by the Government of Balochistan to refuse the application by claimants' local operating subsidiary for a mining lease in respect of the Reko Diq site.

On 20 March 2017, the Tribunal issued a decision by which it rejected Pakistan's application to dismiss the claims and held that Pakistan was liable to pay damages for violations of the Australia-Pakistan BIT.

Following this decision, the Tribunal proceeded to hear the parties' submissions on quantum of damages. It is reported that a ruling on quantum is expected to be given in 2018. The amount claimed is reported to be more than US$1 billion.

ICSID Caseload Statistics (Issue 2017-1)

Also, ICSID have published ICSID Caseload Statistics (Issue 2017-1) covering cases registered or administered by ICSID as of 31 December 2016. Key statics include the following:

(a) As of 31 December 2016, ICSID had registered 597 cases under the ICSID Convention and Additional Facility Rules;

(b) 59.8% of ICSID cases are based on BITs for jurisdiction;

(c) 24% of cases concern South American State Parties, 25% concern Eastern European/Central Asian State Parties, 15% concern Sub-Saharan African State Parties and 10% concern Middle Eastern & North African State Parties;

(d) 25% of cases concern the Oil, Gas & Mining sector whilst 17% concern the Electrical Power & Energy sector;

(e) 64% of cases result in an award, whilst 36% of proceedings are discontinued or settled;

(f) Of the cases deciding by an ICSID Tribunal, 75% of cases lead to an award on the merits. 25% of awards decline ICSID jurisdiction;

(g) 68% of arbitrators in ICSID cases are from North America and Western Europe;

(h) The top 3 nationalities for ICSID arbitrator appointments are French (202), US (199) and British (176) (as at 31 December 2016)