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PREFACE

This year's edition of *The Investment Treaty Arbitration Review* boasts a number of new chapters. The result is greater coverage and a resource that is even more useful to practitioners.

As before, this new edition provides an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments in investment treaty arbitration.

Although many useful treatises on investment treaty arbitration have been written, the relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to those developments and the context behind them.

This eighth edition represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

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Honlet Legum Arbitration
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Chapter 44

CONSTRUCTION AND INFRASTRUCTURE

Lianjun Li, Matthew Townsend and Patrick Chong[1]

I INTRODUCTION

International construction disputes are on the rise. For instance, China's Belt and Road Initiative (BRI) has given rise to a surge in cross-border construction projects, with PRC enterprises active in identifying construction and infrastructure projects in countries across Asia, Africa and Latin America; however, these investments, often made in places of economic or political instability, frequently give rise to commercial disputes between investors and host states.

Given the size and complexity of those projects, the resulting disputes tend to involve substantial claims. The increased incidence of disputes has focused attention on the remedies available for investors under investment treaties. In those treaties, which are intended to promote cross-border investment, states provide guaranteed protections to investors, which are often enforceable by binding international arbitration in a neutral jurisdiction.

II WHEN IS ISDS AVAILABLE FOR CONSTRUCTION DISPUTES?

Investor-state dispute settlement (ISDS) is one of a number of mechanisms by which investors seek protection from the risk of state action that would adversely affect their investment. Other protection mechanisms include diplomatic protection, conciliation and negotiation.

An investor brings a claim in ISDS against the host state, seeking to enforce substantive protections set out in agreements entered into between the host state and the state of the investor concerned. The investment protections are typically set out in bilateral investment treaties (BITs), multilateral investment treaties (MITs), investment chapters in free trade agreements or in contracts directly signed with the state. Those treaties and contracts may further provide that investors may enforce the protections through arbitration in a neutral jurisdiction.

In the context of Chinese BRI investment, while investors have the benefit of China's investment protection regime, whereby China has entered into BITs with most BRI states, it may not provide full protection to the investors.

In particular, to invoke the protections set out in the relevant treaty or contract, a claimant investor must usually show that (1) it qualifies as an investor under the relevant investment treaty and (2) the investment qualifies as a protected investment under the investment treaty.

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III QUALIFYING INVESTORS IN THE CONSTRUCTION CONTEXT

The issue of whether a claimant investor is a qualifying investor usually depends on how 'investor' is defined in the relevant treaty. For example, in the PRC context, 'investor' is defined widely under Article 1(2) of the China–Laos BIT 1993 to include companies incorporated or constituted under the law of the investor's state.

In the construction context, companies incorporated in the host states and in the home states may set up joint ventures for the purpose of ensuring efficient deployment of services and resources. It has been held that only companies incorporated in the home states can enjoy the protections set out in the investment treaties.[2]

Issues relating to standing in investor-state arbitrations may also arise where the investor is itself a state-owned enterprise (SOE), as is the case in many BRI construction projects, where Chinese SOEs play a crucial role in making overseas infrastructure investments. In *Beijing Urban Construction Group v Yemen*,[3] the claimant, Beijing Urban Construction Group (BUCG), was a SOE incorporated under PRC law. It signed a construction contract with the respondent-state, Yemen, in respect of the construction of a new terminal for an airport in Yemen. Subsequently, BUCG sought to bring expropriation claims against Yemen pursuant to the China–Yemen BIT. The respondent-state argued that BUCG did not qualify as 'a national of another Contracting State' under Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) on the grounds that it was actually the Chinese government's agent. Having regard to the functions of the claimant in this particular context, the tribunal rejected Yemen's submissions and concluded that BUCG was acting in a commercial capacity and was not an agent of the Chinese government discharging governmental functions.

IV CONSTRUCTION PROJECTS AS QUALIFYING INVESTMENTS

The claim against the host state must also fall within the scope of investment as defined in the investment treaty. Taking Chinese BITs as an example, investment is typically widely defined to cover every kind of asset, followed by a non-exhaustive list of examples of investments.[4]

In the context of the International Centre for Settlement of Investment Disputes (ICSID), the claimant-investor may also need to show that a relevant investment arises under Article 25 of the ICSID Convention. The arbitral tribunal in *Salini v. Morocco*, which concerned a dispute relating to the construction of a highway in Morocco, laid down the following four key elements that must be satisfied for an investment to fall within ICSID's jurisdiction: substantial contribution of money or assets, assumption of commercial risk, sufficient duration of the investment project and contribution to the economy of the host state.[5]

2 *Tulip Real Estate and Development Netherlands BV v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014.

3 *Beijing Urban Construction Group Co Ltd v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017.

4 See, e.g., China–Laos BIT, 1993 Article 1(1); China–Myanmar BIT 2001, Article 1(1); China–Malta BIT 2009, Article 1(1).

5 *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, Paragraphs 52.

The *Salini* test has been subsequently referred to and applied in different arbitral awards; however, some cases have criticised the status of the test and declined to follow it. In any event, it is generally the case that a lower threshold is applied even if the tribunal decides not to follow the *Salini* test and that a construction-related project would satisfy the test.

Just as the use of local subsidiaries can sometimes give rise to challenges that there is no qualifying investor, so too can they lead to defences on the basis of there being no qualifying investment. In *Zhongshan v. Nigeria*, the tribunal rejected the state's objections that Zhongshan, which had contracted in the relevant investment through a wholly owned Nigerian subsidiary, was not a true investor as it had not invested its own money.[6]

V ACTS ATTRIBUTABLE TO THE STATE

If the employer in a disputed construction contract, or the entity whose acts otherwise give rise to the claim, is a state-owned company, disputes may arise regarding whether it is considered a state organ. In this regard, it is relevant that Article 8 of the International Law Commission's Responsibility of States for Internationally Wrongful Acts (ARSIWA) sets out the 'effective control' test by which the conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is acting under the instruction of, or under the direction or control of, that state in carrying out the conduct.

In *Jan de Nul v. Egypt*,[7] the tribunal considered these points in the context of a disputed agreement between the claimant and the Suez Canal Authority (SCA) to dredge the Suez Canal. The tribunal further set out a two-limbed test for determining when a state enjoyed effective control: does the state have general control over the person or entity; and does the state have specific control over the act in question?[8] In this case, the tribunal found that the 'very specific' acts of the SCA could not be attributed to the state of Egypt.[9]

As for the role of local or regional state entities in alleged breaches of investor protection, Articles 4, 5 and 9 of ARSIWA put in place a regime that extends state responsibility to state organs. In the BRI context, *Zhongshan v. Nigeria* concerned the action of the government of Ogun state, a province in south-west Nigeria. Nonetheless, the tribunal found that Zhongshan was entitled to compensation directly from the federal government of Nigeria because the local state government's actions, which constituted an unlawful expropriation of Zhongshan's investment, were attributable to the host state.[10]

6 *Zhongshan Fucheng Industrial Investment Co Ltd v. Federal Republic of Nigeria*, ad hoc, UNCITRAL Rules, Final Award, 26 March 2021 (*Zhongshan*), Paragraph 79.

7 *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008.

8 ibid., Paragraph 173.

9 ibid.

10 *Zhongshan*, Paragraph 72.

VI SUBSTANTIVE PROTECTIONS

Commonly available protections include the following:

a Protection against unlawful expropriation: typically, expropriation itself is permitted, provided that it is accompanied by prompt, adequate and effective compensation, serves a public purpose and is not discriminatory. Expropriation may be direct, indirect or creeping.

b Fair and equitable treatment: generally speaking, this standard requires states to provide predictable investment environments that are consistent with reasonable investor expectations.

c National treatment: this standard provides that foreign investors should be treated no worse than local investors.

d Most-favoured nation treatment: this standard requires the state party to one investment treaty to provide qualifying investors with treatment no less favourable than the treatment afforded to investors under other investment treaties to which the state is a party.

e Non-discriminatory measures: this standard provides that foreign investors should not be discriminated against.

The rights available to contractors and other investors under investment treaties are a function of the drafting of those treaties.

In the PRC BRI context, the extent of available remedies depends on which generation those treaties are. The first and second generations of Chinese BITs (i.e., those signed in the 1980s and the early 1990s) limit the scope of arbitration to disputes relating to the amount of compensation for expropriation.[11] This, in turn, significantly limits the treaty protection available to Chinese investors under most of China's treaties. Nevertheless, certain tribunals have held that in addition to the amount of compensation, it is also necessary to deal with issues such as whether there was a breach of the relevant investment treaty in the first place;[12] however, jurisprudence in this area is not necessarily consistent.

VII UMBRELLA, STABILISATION AND FORK-IN-THE-ROAD CLAUSES

Other considerations for parties to anticipated ISDS claims may include umbrella, stabilisation and fork-in-the-road clauses.

Umbrella clauses are clauses in an investment treaty whereby the host state agrees to perform all of its obligations owed to the investors, including contractual obligations.[13] Umbrella clauses can therefore have the effect of elevating a breach of contract claim to an investment treaty claim. The application of umbrella clauses, including in the context of construction contracts, is not without controversy, nor have international tribunals necessarily treated them with consistency.

Stabilisation clauses may be found in a contract between investors and host states, providing that the state agrees not to take certain unilateral actions that would adversely

11 See, e.g., China–Laos BIT 1993, Article 8(3); China–Peru BIT 1994, Article 8(3).

12 See, e.g., *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009.

13 See, e.g., Philippines–Switzerland BIT 1997, Article X(2), as discussed in *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No. ARB/02/06, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004.

affect the investor.[14] These actions might include effecting changes to legislation or making those changes without indemnifying the investor. Although these do not comprise direct treaty obligations, they can be significant in the investor protection context as investors may argue that the state has breached an umbrella clause (if any) or its actions are contrary to the standard of fair and equitable treatment.

Fork-in-the-road clauses require that the investor make a choice between pursuing its claims against the state either through the arbitration mechanisms provided in the relevant BIT or in local courts or other venues provided for in the relevant contractual mechanisms.[15]

VIII REMEDIES AND ENFORCEMENT

Construction matters typically involve large-scale, long-term projects. It is not unusual to see high-value awards in those cases, often representing the net present value of an investment that was likely to produce returns for several years to come. Some tribunals have also granted non-compensatory or moral damages in cases where the state's actions are found to be particularly egregious.[16] Where it is not expressly prohibited by the relevant investment treaty or investment contract, tribunals may also award non-pecuniary relief, including orders requiring states to take or refrain from taking certain actions.[17]

It is provided in many investment protection instruments that investment disputes may be settled through ICSID, which is one of the organisations that make up the World Bank Group. Other non-ICSID arbitration awards are routinely enforceable across borders by virtue of the widespread adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

IX CONCLUSION

For parties to construction and infrastructure projects, ISDS can offer important protections. The ability to bring arbitration proceedings against states that breach the protections is vital. This is particularly the case where a claim against the state or state organ would be frustrated under domestic law.

However, as PRC contractors will be aware, a state investment protection regime is only as good as its investment treaty framework. Parties to anticipated ISDS proceedings should, therefore, pay close attention to the text of the treaties themselves, and parties structuring investments in the construction and infrastructure sectors should likewise ensure that they do so while taking advantage of the best treaty protections available.

14 See, e.g., *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

15 See, e.g., Italy–Lebanon BIT 1997, Article 7(2), as discussed in *Toto Costruzioni Generali SpA v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009.

16 See, e.g., *Zhongshan v Nigeria*.

17 See, e.g., *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013.