

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**BEIJING URBAN CONSTRUCTION GROUP CO. LTD.**

Claimant

and

**REPUBLIC OF YEMEN**

Respondent

**ICSID Case No. ARB/14/30**

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**DECISION ON JURISDICTION**

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*Members of the Tribunal*

The Honourable Ian Binnie C.C., Q.C., President

Professor Zachary Douglas Q.C.

Mr. John M. Townsend

*Secretary of the Tribunal*

Ms. Geraldine R. Fischer

*Date of dispatch to the Parties: 31 May 2017*

## REPRESENTATION OF THE PARTIES

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**TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS**

|                                      |  |
|--------------------------------------|--|
| Arbitration Rules                    | ICSID Rules of Procedure for Arbitration Proceedings (10 April 2006)   |
| BIT/Treaty                           | Agreement on the Encouragement and Reciprocal Protection of Investments Between the Government of the People’s Republic of China and the Government of the Republic of Yemen, which entered into force on 10 April 2002 (CL-001 (Revised)) |
| C-[#]                                | Claimant’s Exhibit   |
| Cl. C-M                              | Claimant’s Counter-Memorial on Jurisdiction dated 4 January 2017   |
| Cl. Mem.                             | Claimant’s Memorial on the Merits dated 12 August 2016   |
| Cl. Rej.                             | Claimant’s Rejoinder on Jurisdiction dated 3 March 2017  |
| CL-[#]                               | Claimant’s Legal Authority   |
| Hearing                              | Hearing on Jurisdiction held on 15-16 March, 2017  |
| ICSID Convention                     | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965   |
| ICSID or the Centre                  | International Centre for Settlement of Investment Disputes   |
| PRC                                  | People’s Republic of China   |
| R-[#]                                | Respondent’s Exhibit   |
| Resp. Mem.                           | Respondent’s Memorial on Jurisdiction dated 14 October 2016  |
| Resp. Reply                          | Respondent’s Reply on Jurisdiction dated 3 February 2017   |
| RL-[#]                               | Respondent’s Legal Authority   |
| Tr. Day [#] [Speaker(s)] [page:line] | Transcript of the Hearing  |

|      |  |
|------|--|
| VCLT | Vienna Convention on the Law of Treaties |
|------|--|

## **I. INTRODUCTION AND PARTIES**

1. This jurisdictional ruling is made in the context of a dispute concerning construction by the Claimant of portions of an international terminal at Sana'a International Airport in Yemen.
2. The dispute was submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**”) pursuant to the Agreement on the Encouragement and Reciprocal Protection of Investments Between the Government of the People’s Republic of China and the Government of the Republic of Yemen, which entered into force on 10 April 2002 (the “**BIT**” or “**Treaty**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
3. The Claimant, Beijing Urban Construction Group Co. Ltd. (“**BUCG**” or “**Claimant**”), is a corporation incorporated under the laws of the People’s Republic of China (“**China**” or “**PRC**”). By contract dated 28 February 2006, BUCG undertook to construct the terminal facility at a contract price in excess of US\$100 million.
4. The Respondent is the Republic of Yemen (the “**Government**” or “**Respondent**”). The Government challenges the jurisdiction of the Tribunal to hear and dispose of the claim on the merits.
5. The Claimant and the Respondent are collectively referred to as the “Parties.” The Parties’ representatives and their addresses are listed above on page (i).

## **II. PROCEDURAL HISTORY**

### **A. REGISTRATION OF THE REQUEST**

6. On 5 November 2014, ICSID received an electronic copy of the request for arbitration dated 4 November 2014 from Beijing Urban Construction Group Co. Ltd. against the Republic of Yemen together with Exhibits C-001 through C-043 and Legal Authorities CL-001 through CL-003 (the “**Request**”). The Request was supplemented by the Claimant’s letter of 20 November 2014.

7. On 3 December 2014, the Acting Secretary-General of ICSID registered the Request, as supplemented, in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. The Parties were invited to proceed to constitute an arbitral tribunal as soon as possible.

## **B. CONSTITUTION OF THE TRIBUNAL**

8. The Parties agreed that the Tribunal should consist of three arbitrators, one arbitrator appointed by each Party, and the President of the Tribunal appointed by agreement of the Parties after exchanging lists of candidates.
9. On 4 February 2015, Mr. John M. Townsend, a U.S. national, accepted his appointment by the Claimant as arbitrator. On 10 March 2015, Professor Zachary Douglas Q.C., an Australian national, accepted his appointment by the Respondent as arbitrator.
10. On 10 July 2015, The Honourable Ian Binnie C.C., Q.C., a Canadian national, accepted his appointment by the Parties as President of the Tribunal. That same day, the Secretary-General of ICSID, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Geraldine Fischer, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

## **C. FIRST SESSION AND THE WRITTEN PHASE**

11. The first session convened in accordance with ICSID Arbitration Rule 13(1) was postponed at the Parties’ request. On 11 March 2016, the Tribunal held its first session in London, United Kingdom.
12. On 4 April 2016, the Tribunal issued **Procedural Order No. 1** reflecting the Parties’ agreement and the Tribunal’s directions on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, the procedural language would be English, and the place of proceeding would be London, United Kingdom.



13. On 8 November 2016, the Tribunal issued **Procedural Order No. 2** regarding the Respondent's representation by counsel in this arbitration proceeding.
14. On 12 August 2016, the Claimant filed its Memorial on the Merits ("**Claimant's Memorial**") together with Exhibits C-044 through C-076, Legal Authorities CL-004 through CL-040, and the following eight witness statements and one expert report:
  - Witness Statement of Mr. Zhang Jinxun dated 12 August 2016;
  - Witness Statement of Mr. Huang Kaibao dated July 2016;
  - Witness Statement of Mr. Ji Qiuming dated 12 August 2016;
  - Witness Statement of Mr. Ye Ruilin dated July 2016;
  - Witness Statement of Mr. Sun Yifei dated 3 August 2016;
  - Witness Statement of Mr. Guo Yongbin dated July 2016;
  - Witness Statement of Mr. Liang Zhaolong dated July 2016;
  - Witness Statement of Mr. Wang Zhiwen dated 12 August 2016; and
  - Expert Report of Mr. Robert Chandler of Ernst & Young dated 12 August 2016 with Appendices 001 through 062 and Exhibits EY-001 through EY-224.
15. On 14 October 2016, in accordance with Procedural Order No. 1, the Respondent filed its Memorial on Jurisdiction ("**Respondent's Memorial**") together with Exhibits R-001 through R-037 and Legal Authorities RL-001 through RL-030.
16. On 29 November 2016, the Tribunal issued **Procedural Order No. 3** modifying the procedural calendar as agreed by the Parties.
17. On 4 January 2017, the Claimant filed its Counter-Memorial on Jurisdiction ("**Claimant's Counter-Memorial**") together with Exhibits C-077 through C-093 and Legal Authorities CL-041 through CL-087.

18. On 3 February 2017, the Respondent filed its Reply on Jurisdiction (“**Respondent’s Reply**”) together with Exhibits R-038 through R-050 and Legal Authorities RL-031 through RL-069.
19. On 3 March 2017, the Claimant filed its Rejoinder on Jurisdiction (“**Claimant’s Rejoinder**”), together with Exhibits C-094 through C-096 and Legal Authorities CL-088 through CL-098.

**D. HEARING ON JURISDICTION**

20. On 8 March 2017, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.
21. On 10 March 2017, the Tribunal issued **Procedural Order No. 4** setting out arrangements for the Hearing on Jurisdiction, which was held at the International Dispute Resolution Centre in London, United Kingdom, from 15-16 March 2017 (the “**Hearing**”). In addition to the Members of the Tribunal and the Secretary of the Tribunal, the following persons were present at the Hearing:

*For the Claimant:*

|                        |                                    |
|------------------------|------------------------------------|
| Ms. Reza Mohtashami    | Freshfields Bruckhaus Deringer LLP |
| Mr. Sami Tannous       | Freshfields Bruckhaus Deringer LLP |
| Mr. Matei Purice       | Freshfields Bruckhaus Deringer LLP |
| Mr. Farouk El Housseny | Freshfields Bruckhaus Deringer LLP |
| Ms. Ruba Ghandour      | Freshfields Bruckhaus Deringer LLP |
| Mr. David Merritt      | Hill International                 |

*For the Respondent:*

|                              |                |
|------------------------------|----------------|
| Mr. Benjamin Knowles         | Clyde & Co LLP |
| Mr. Patrick Zheng            | Clyde & Co LLP |
| Mr. Ian Hopkinson            | Clyde & Co LLP |
| Ms. Milena Szuniewicz-Wenzel | Clyde & Co LLP |
| Ms. Saadia Bhatti            | Clyde & Co LLP |
| Ms. Enas Al-Shaibi           | Clyde & Co LLP |
| Ms. Catherine Wang           | Clyde & Co LLP |

### III. FACTUAL BACKGROUND

22. The Sana'a International Airport project ("Project") was a multi-phase and multi-national project to improve the facilities at the airport, funded by the Respondent and the Arab Investment Fund.<sup>1</sup> Phase One of the Project commenced on 14 March 2002. Phase Two, to which this dispute relates, commenced with the tender for selection of the construction contractor for a new International Terminal Building, which was won by BUCG.<sup>2</sup>
23. Accordingly, BUCG entered into a construction contract with the Yemen Civil Aviation and Meteorology Authority ("CAMA") on 28 February 2006 ("the Contract") for US\$114,657,262.<sup>3</sup>
24. An external consultant, the Netherlands Airport Consultants B.V. ("NACO"), based in The Hague, was engaged, *inter alia*, to assist CAMA with managing the administration of the Contract including disputes concerning the pace and quality of work and the timing of contractual payments, amongst other issues.
25. The Claimant alleges that in July 2009, the Respondent unlawfully deprived BUCG of its investment in Yemen by employing the Respondent's military forces and security apparatus to assault and detain BUCG's employees and forcibly deny BUCG access to the Project site and thus its ability to perform its contractual obligations. On 22 July 2009, the Claimant alleges, following weeks of state orchestrated harassment and intimidation, CAMA gave notice of its intention to terminate the Contract on the basis of BUCG's failure to return to the site to complete the works. The Claimant says it was prevented from performing the Contract by CAMA and the Respondent.

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<sup>1</sup> See Loan Agreement between the Republic of Yemen Government and the Arab Fund for Economic and Social Development dated 18 April 2001 (**R-011**).

<sup>2</sup> See "Three in race for Sana'a airport," *Middle East Business Intelligence* dated 30 September, 2015 (**C-081**): "The field has narrowed to three bidders for the contract to build a third terminal at Sana'a International Airport. They are Beijing Urban Construction Investment Development Company, which submitted a low bid of \$114 million when prices were opened in July, Saudi Binladin Group – which offered the second lowest price of \$134 million but ranked higher technically, and Turkey's Alarco, which also scored well during technical evaluation."

<sup>3</sup> Contract between CAMA and BUCG dated 28 February 2006 (**C-008/R-006**).

26. BUCG states that, but for the Respondent's denial of access to the site, it would have completed the Contract and earned a profit.
27. The Respondent replies that BUCG failed in multiple respects to perform the Contract satisfactorily – as set out in the “Employer’s Claim and Evaluation of the Contractor’s Claim” dated February 2013,<sup>4</sup> and, *e.g.* the Engineer’s (NACO’s) “Report on Default of Contractor: July 07 – December 08” – including unauthorized removal of materials from the construction site, importation of equipment without customs authority, lengthy absence from the site of key BUCG personnel and continuing problems with subcontractors.<sup>5</sup>

#### **IV. THE JURISDICTIONAL OBJECTIONS AND REQUESTS FOR RELIEF**

28. The Respondent contends that the Arbitral Tribunal lacks jurisdiction both *ratione personae* and *ratione materiae* in the present case.<sup>6</sup>

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<sup>4</sup> CAMA Report, “Employers Claim and Evaluation of the Contractor’s Claim” dated February 2013 (**R-001**).

<sup>5</sup> NACO Report, “Engineer’s Report on Default Contractor: July 07 – December 08” dated December 2008 (**R-049**).

<sup>6</sup> In its Memorial **on Preliminary Objections**, the Respondent requests the following relief:

“For the foregoing reasons, the Respondent respectfully requests that the Tribunal issue an award:

- (a) dismissing the Claimant's claims in their entirety and with prejudice on the grounds of lack of jurisdiction; and/or
- (b) declaring that the Tribunal lacks *rationae personae* and / or *rationae materiae* jurisdiction in the present case; and / or
- (c) ordering the Claimant to pay:
  - (i) the costs incurred by the Respondent in presenting its jurisdictional defence, including the cost of the Tribunal, ICSID and the legal and other costs incurred by the Respondent; and
  - (ii) interest on any costs awarded to the Respondent in an amount to be determined by the Tribunal; and / or
- (d) awarding such further and other relief as the Tribunal may consider appropriate” (Resp. Mem., ¶ 182).

In its Counter-Memorial, the Claimant seeks the following relief:

“[...] BUCG respectfully requests from the Tribunal the following relief in the form of a Decision on objections to jurisdiction:

- DISMISS all of the Respondent’s preliminary objections;  
DECLARE that the dispute falls within the jurisdiction of ICSID and within the competence of the Tribunal; and  
ORDER the Respondent to pay the costs of the proceeding related to the Respondent’s preliminary objections, including the Tribunal’s fees and expenses, and the cost of BUCG’s legal representation” (C1.C-M, ¶ 148).

**A. FIRST OBJECTION *RATIONE PERSONAE* - IS THE CLAIMANT A “NATIONAL OF ANOTHER CONTRACTING STATE”?**

**(1) The Parties’ Positions**

***a. The Respondent’s Position***

29. According to the Respondent, the Tribunal lacks jurisdiction over this dispute because BUCG does not qualify as “a national of another Contracting State” under the ICSID Convention Article 25(1). Employing the *Broches* test, the Respondent asserts that BUCG, a State-owned entity, is both an agent of the Chinese Government and discharges governmental functions even in its ostensible commercial undertakings. Accordingly, BUCG does not qualify as a “national of another Contracting State.” Consequently, the Respondent submits that BUCG’s claims should be barred, as the Tribunal lacks jurisdiction under ICSID Convention Article 25(1) over State-to-State disputes.<sup>7</sup> Moreover, BUCG did not seek to have its rights protected or registered as an investment under the law of Yemen at the time it entered into the Contract. Yemen contends that registration was a condition precedent to the investment protection potentially available under the China-Yemen BIT. Absence of such registration, according to Yemen, is fatal to the Tribunal’s jurisdiction.

***b. The Claimant’s Position***

30. The Claimant counters that it is a “national of another Contracting State” under the ICSID Convention, and it has standing to bring its claims against Yemen. The Claimant states that State-owned entities may bring claims under the ICSID Convention when operating as ordinary commercial entities. Applying the *Broches* test, the Claimant submits that in respect of this project it did not act as an agent of the PRC Government nor discharge any governmental functions in making its investment in Yemen. BUCG asserts it was acting in a commercial capacity and did not act under the direction or control of the PRC

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<sup>7</sup> Resp. Mem., ¶¶ 33-57; Resp. Reply, ¶¶ 6-45.

Government in relation to the Sana'a Airport contract. Accordingly, BUCG is a "national of another Contracting State" for the purposes of ICSID Convention Article 25(1).<sup>8</sup>

(2) **The Tribunal's Analysis**

31. It is common ground that Article 25(1) of the ICSID Convention is not a State-to-State dispute resolution mechanism and is not open to State-owned companies as claimants when acting as agents of the State or when engaged in activities where they exercise governmental functions. It is common ground that in such circumstances State-owned enterprises are barred from bringing a claim under Article 25(1).<sup>9</sup> In this respect, the Respondent cites Article 5 of the International Law Commission's *Draft Articles on State Responsibility*:

The conduct of a person or entity which is not an organ of the State under article 4 **but which is empowered by the law of that State to exercise elements of the government authority** shall be considered an act of the State under international law, provided the person or entity **is acting in that capacity in the particular instance**.<sup>10</sup>

The Claimant contends that the emphasis should be on the words "in the particular instance."

32. The Tribunal accepts that BUCG is a publicly funded and wholly state-owned entity established by the Chinese Government. It described itself in the bidder qualification documents as "one of the top 500 state-owned enterprises" in China.<sup>11</sup>

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<sup>8</sup> Cl. C-M, ¶¶ 20-42; Cl. Rej., ¶¶ 9-40.

<sup>9</sup> Article 25(1) provides in pertinent part: "[T]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, **between a Contracting State** (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) **and a national of another Contracting State**, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally" (emphasis added).

<sup>10</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 5 (emphasis added) (CL-014).

<sup>11</sup> BUCG, *Qualification for New Terminal Building (TB) at Sana'a International Airport*, 2 (R-013).

33. Both Parties accept as applicable the functional test formulated in 1972 by Aron Broches, the first Secretary-General of ICSID and one of the principal drafters of the ICSID Convention, which he framed as follows:

[I]n today's world the classical distinction between private and public investment, based on the source of the capital, is no longer meaningful, if not outdated. There are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities. It would seem, therefore, that for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' **unless it is acting as an agent for the government or is discharging an essentially governmental function.**<sup>12</sup> (Emphasis added)

The Tribunal notes the disjunctive “or” in the concluding sentence.

34. The *Broches* factors are the mirror image of the attribution rules in Articles 5 and 8 of the ILC's *Articles on State Responsibility*. The *Broches* test lays down markers for the non-attribution of State status.
35. The *Broches* test was adopted and applied in *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* (“*CSOB*”) as follows:

[I]t cannot be denied that for much of its existence, CSOB acted on behalf of the State in facilitating or executing the international banking transactions and foreign commercial operations the State wished to support and that the State's control of CSOB required it to do the State's bidding in that regard. **But in determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on the nature of these activities and not their purpose.** While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental policies or purposes of the State, **the activities themselves were essentially commercial rather than governmental in nature.**<sup>13</sup>

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<sup>12</sup> C. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair, *The ICSID Convention: A Commentary* (2<sup>nd</sup> edition, 2009), 161 (RL-003) (emphasis added).

<sup>13</sup> *Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999 (CL-053), ¶ 20 (emphasis added). See also *Emilio Agustín Maffezini v. Kingdom of*

In the result, having regard to the particular facts of the case, CSOB was permitted access to ICSID. The Respondent argues that the *CSOB* tribunal misapplied the *Broches* test,<sup>14</sup> but in the view of the present Tribunal the important point about the *CSOB* case is the focus on a context-specific analysis of the commercial function of the investment, a focus with which the present Tribunal agrees.

36. The Tribunal will examine in turn how each branch of the *Broches* criteria applies to the circumstances of this case.

(i) *Was BUCG Acting on the Project as an Agent for the Chinese Government?*

37. The Respondent relies on a variety of Chinese Government publications and directives to demonstrate that in general BUCG is expected to advance China's national interest. For example, BUCG was subject to the overall direction of a Board that was the "representative of the state interests and the operation decision making organ, which should be responsible for the value maintenance and increment of the state-owned assets within the scope of authorisation."<sup>15</sup> Similarly, a PRC document entitled *Reply to authorise BUCG to operate and manage the State-owned Assets* dated 23 May 1995 emphasises that BUCG shall "accept the supervision and inspection of Beijing State-owned Assets Supervision and Administration Bureau and Beijing Finance Bureau."<sup>16</sup>

38. The Respondent relies on evidence that the Communist Party committees in State-owned enterprises such as BUCG are required to focus not only on supervising human resources,

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*Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000 (CL-011, "*Maffezini*"), ¶ 80 and *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (CL-067), ¶ 212.

<sup>14</sup> Resp. Reply, ¶ 13: "Two criticisms in particular have been levelled at the [*CSOB*] Tribunal. The first is that the Tribunal concluded that CSOB was an investor under the ICSID Convention despite finding that it had acted as a state agent – the first prong of the *Broches* Test. Second, the Tribunal failed to take into account the real purpose of CSOB's activities in determining whether CSOB was performing governmental functions, focusing instead only on the nature of its activities." See M. Feldman, *State-Owned Enterprises as Claims in International Investment Arbitration*, ICSID Review, Vol. 31, No. 1 (2016) (RL-004) at 628-630.

<sup>15</sup> Resp. Mem. ¶ 47, citing *Reply to authorise Beijing Urban Construction Group General Company to operate and manage the State-owned Assets belonging [to] the relevant Group Entities* dated 27 March 1995 (R-020). The Respondent also relies upon R-013, indicating BUCG's "Business Scope" as "[a]uthorized to undertake the operation and management of government assets" and BUCG's Business License dated 10 September 2014 specifying that BUCG is "[a]uthorized to carry out operations and administration of state-owned assets" (C-007).

<sup>16</sup> R-020.



finance and materials but are as well responsible for “monitoring the implementation of the scientific concepts of development and national policies, to promote enterprises to play a leading role in carrying out political and social responsibility.”<sup>17</sup> In this respect, the Respondent cites the statement in *Maffezini v. Spain*, that:

the test that has been developed [to establish whether a particular entity in a state body] looks to various factors, such as ownership, control, the nature, **purposes and objectives** of the entity whose actions are under scrutiny, and to the character of the actions taken.<sup>18</sup>

39. These corporate controls and mechanisms are not surprising in the context of PRC State-owned corporations. However, as noted above, the issue is not the corporate framework of the State-owned enterprise, but whether it *functions* as an agent of the State in the fact-specific context.<sup>19</sup> The evidence in this case does not establish that, in building an airport terminal in Yemen, BUCG was acting as an agent of the Chinese State in any relevant sense of the word “agent.”
40. On the contrary, the evidentiary record discloses that BUCG participated in the airport project as a general contractor following an open tender in competition with other contractors. Its bid was selected on its commercial merits. Its contract was terminated, Yemen contends, not for any reason associated with the PRC’s decisions or policies but because of BUCG’s failure to perform its *commercial* services on the airport site to a *commercially* acceptable standard. Indeed, as will be seen, the Respondent elsewhere takes the position that the present dispute is not a treaty case at all but an ordinary garden variety commercial dispute which should be resolved under the Dispute Settlement Provisions of Article 67 of the Construction Contract.<sup>20</sup>

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<sup>17</sup> Resp. Reply, ¶ 44 (emphasis in original).

<sup>18</sup> Resp. Reply ¶ 16, citing **CL-011**, *Maffezini*, ¶ 76 (emphasis added by the Respondent).

<sup>19</sup> See Articles of Association of Beijing Urban Construction Group Co., Ltd. dated 24 August 2005 (**C-080**), Arts. 6 and 7. In particular, Article 7 reads: “The Company is entitled to all corporate property rights formed by the investor and lawful civil rights as well as civil liabilities; the Company independently operates, assumes sole responsibility for profits and losses, performs independent accounting, pays taxes in accordance with the regulations, and assumes liability for debts of the Company with all its assets.”

<sup>20</sup> See Sec. IV.E.

41. In the Tribunal’s view, the evidence establishes that BUCG was performing its work on the airport site under a construction contract as a commercial contractor and not as an agent of the Chinese Government.

(ii) *Was BUCG in its Work on the Airport Terminal Discharging an Essentially Governmental Function?*

42. The Respondent’s second ground for denying jurisdiction *ratione personae* fails for essentially the same reasons as its “agency” argument. The Respondent’s positioning of BUCG in the broad context of the PRC State-controlled economy is convincing but largely irrelevant. As noted above, the appropriate focus is on the *functions* of BUCG “in the particular instance”, namely the Sana’a International Terminal project. There is no evidence that in *that* capacity BUCG was discharging a PRC governmental function rather than a commercial function.<sup>21</sup>

43. For example, in support of its “government functions” argument, the Respondent refers to a statement from the PRC Foreign Economic and Trading Department that the foreign business undertaken by BUCG “shall be administered, coordinated and regulated by [the Foreign Economic and Trading] Department.”<sup>22</sup> Accordingly, the Respondent contends, “the Chinese State is the **ultimate** decision maker for key management, operational and strategic decisions.”<sup>23</sup> In the Tribunal’s view, the assertion that “the Chinese State is the **ultimate** decision maker” for BUCG is too remote from the facts of the Sana’a International Airport project to be relevant. BUCG was clearly not exercising a Chinese governmental function on the airport site in Yemen. The alleged military aggression was not by Yemen against the People’s Republic of China (or the consequences might have been more severe) but in relation to BUCG as an airport contractor that, CAMA alleges, fell down on the job.

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<sup>21</sup> See **CL-073**, ¶ 243: “The concept of ‘agency’ should be read not in structural terms but functionally. This means that whether the ‘agency’ is a corporation, whether and to what extent it is government-owned and whether it has separate legal personality are of secondary importance. What matters is that it performs public functions on behalf of the Contracting State or one of its constituent subdivisions.”

<sup>22</sup> PRC Foreign Economic and Trading Department, *Reply on Approving Beijing Urban Construction Group General Company to Undertake Foreign Economic and Technological Cooperation Business*, W.J.M.Z.S.H.Z. [1994] No. 1859 dated 17 December 1994 (**R-016**).

<sup>23</sup> Resp. Mem., ¶ 44 (emphasis added).

44. Accordingly, the Tribunal concludes that on the evidence, BUCG was not fulfilling Chinese governmental functions within the sovereign territory of the Republic of Yemen.

(iii) *Was BUCG Required to Register its Investment in Yemen?*

45. As to BUCG's alleged failure to register its investment under domestic Yemeni law, there is no express provision of the China-Yemen BIT that imposes a requirement to obtain registration for an investment to be protected by the BIT. Some investment treaties do have such a requirement and that requirement has been characterised as a condition precedent for treaty protection.<sup>24</sup> But no such requirement can be inferred in the absence of an express provision.

46. The registration requirement under the Yemen Investment Law is the gateway to the privileges and protections set out in that law. But it does not serve as the gateway to the privileges and protections maintained by the China-Yemen BIT. The Tribunal thus agrees with the ICSID Tribunal in *Desert Line v. Yemen*:

The Arbitral Tribunal does not accept that a particular certificate from the Yemen General Investment Authority was necessary to bring the Claimant's investment under the Ambit of the BIT.

[...]

The [Yemeni Investment Law] does not purport to regulate all investments in Yemen, but only those whose promoters wish to benefit by license from its specific advantages, which are not coterminous with those in the BIT.<sup>25</sup>

47. The Respondent's objections *ratione personae* are therefore dismissed.

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<sup>24</sup> See *Philippe Gruslin v. Malaysia*, ICSID Case No ARB/99/3, Award, 27 November 2000 (CL-054).

<sup>25</sup> *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 (CL-029), ¶¶ 116, 121.

**B. SECOND OBJECTION *RATIONE MATERIAE* - YEMEN CONTENDS THAT IT CONSENTED TO ICSID ARBITRATION ONLY IN RESPECT OF DISPUTES LIMITED TO THE QUANTUM OF COMPENSATION**

**(1) The Parties' Positions**

**a. *The Respondent's Position***

48. The Respondent contends that the Tribunal lacks jurisdiction *ratione materiae* over this claim as the conditions to Yemen's consent under the China-Yemen BIT and the ICSID Convention have not been satisfied.

49. Article 25(1) of the ICSID Convention provides:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, **which the parties to the dispute consent in writing to submit to the Centre.** When the parties have given their consent, no party may withdraw its consent unilaterally.<sup>26</sup>

50. At the heart of the Respondent's objection in this respect is Article 10 of the BIT, which sets out a scheme providing options "at the choice of the investor" for the resolution of investment disputes as follows:

1. **Any dispute** between one Contracting Party and an investor of the other Contracting Party **relating to an investment** shall, as far as possible, be settled amicably through deliberations and negotiations between the parties to the dispute.

2. **If the dispute** cannot be resolved by the parties through direct arrangements for amicable negotiations within six months from the date on which a request for settlement is submitted in writing, such dispute may be submitted **at the choice of the investor** to:

(a) **a competent court of the Contracting Party** in the territory of which the investment has been made; or

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<sup>26</sup> ICSID Convention, Art. 25(1) (emphasis added).

- (b) the **International Centre for the Settlement of Disputes (ICSID)** which was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States opened for signature at Washington DC on March 18, 1965, for arbitration.

For this purpose, either Contracting Party shall give its irrevocable consent to the submission of any dispute **relating to the amount of compensation for expropriation** for resolution under such arbitration procedure. **Other disputes** submitted under such procedure **shall be mutually agreed upon** between both Contracting parties.

3. No Contracting Party, being a party to a dispute, may raise any objection at any stage of the arbitration proceedings or during the course of the enforcement of an arbitral award on the ground that the investor, being the other party to the dispute, can receive compensation that covers all or part of its losses in accordance with an insurance policy.
4. The arbitral tribunal shall render its awards in accordance with the **domestic laws** (including rules relating to the conflict of laws) of the Contracting Party which is a party to the dispute and which accepts an investment, the provisions of **this Agreement**, the provisions of any **special agreements** entered into for the purpose of such investment and principles of **international law**.
5. The arbitral awards shall be final and binding upon both Contracting Parties. Each Contracting Party undertakes to enforce such awards in accordance with its domestic laws.<sup>27</sup>

51. The Respondent submits that the reference to “the amount of compensation for expropriation” in Paragraph 2 are clear words of limitation that apply to the whole of Article 10. The Contracting Parties gave consent, the Respondent argues, to submit an expropriation dispute to an ICSID tribunal pursuant to Article 10.2 only as to the calculations of “the amount of compensation.” According to the Respondent, this conclusion follows from the rules of interpretation laid down in the Vienna Convention on the Law of Treaties (“**VCLT**”) and is supported by the wording and context of Article 10 and the object and purpose of the BIT, as well as the historical and political circumstances surrounding the conclusion of the Treaty. The Respondent notes that a contrary conclusion

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<sup>27</sup> CL-001 (Revised), BIT, Art. 10 (emphasis added).

was reached by the ICSID tribunal in *Tza Yap Shum v. Peru*,<sup>28</sup> but contends that *Tza Yap Shum* was wrongly decided and should not be followed.

52. The Respondent argues, therefore, that the Tribunal lacks jurisdiction because the requirement of **consent** in Article 25(1) of the ICSID Convention (“consent in writing”) to arbitration of the claims made by the Claimant is not satisfied by Article 10 of the China-Yemen BIT.<sup>29</sup>

**b. The Claimant’s Position**

53. The Claimant, relying on a revised unofficial English text of the China-Yemen BIT,<sup>30</sup> submits that the “narrow interpretation” given by the Respondent to Article 10 is misconceived. The Tribunal has jurisdiction over BUCG’s expropriation claim because Article 10.2 extends to liability as well as the calculation of compensation. The existence and unlawfulness of an expropriatory act is a necessary condition precedent to, and inseparable from, any assessment of the amount of compensation payable. This “broad” interpretation of Article 10.2 is, according to the Claimant, consistent with the ordinary meaning of Article 10.2 interpreted in light of the object and purpose of the China-Yemen BIT. As in its view the meaning of Article 10.2 of the China-Yemen BIT is clear, the Claimant says there is no need to resort to supplementary means of interpretation under VCLT Article 32.<sup>31</sup> In any event, the application of Article 32 would lead to the same result.

**(2) The Tribunal’s Analysis**

54. Article 31(1) of the VCLT instructs the Tribunal to look to the text, context and both the object and purpose of the Treaty to ascertain its correct meaning, in conjunction with the other elements set out in subsections (2), (3) and (4) of Article 31. Reference is permitted

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<sup>28</sup> *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009 (CL-033, “*Tza Yap Shum*”).

<sup>29</sup> Resp. Mem., ¶¶ 58-101. Resp. Reply, ¶¶ 46-109.

<sup>30</sup> CL-001 (Revised), BIT.

<sup>31</sup> Cl. C-M, ¶¶ 88-130; Cl. Rej., ¶¶ 41-88.

to be made to “supplementary means” under Article 32 only where the meaning derived under Article 31 is otherwise ambiguous, obscure, manifestly unreasonable or absurd.<sup>32</sup> As will be seen, the Tribunal does not consider it necessary in this case to resort to the “supplementary means” referenced in Article 32.

*a. “Lawful” Versus “Unlawful” Expropriations*

55. Much of the argument about Article 10 turns on its relationship with Article 4 of the BIT which provides that “nationalization, expropriation, or any other measures having a similar effect” will not violate the BIT provided that four stated conditions are satisfied; namely, that the expropriation is: (i) in the public interest of the contracting state; (ii) done by means of a “legal procedure”; (iii) without discrimination; and (iv) “against compensation”. A forcible taking by the state that fails any **one** of the four conditions will constitute a violation of the treaty.<sup>33</sup>

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<sup>32</sup> VCLT (**RL-001**), Arts. 31 and 32 provide as follows:

“Article 31. General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.”

<sup>33</sup> **CL-001 (Revised)**, BIT, Art. 4 provides:

56. In the course of the Hearing, the Respondent insisted on a distinction between lawful expropriations and unlawful expropriations, and submitted that “unlawful” expropriations of investments would receive no protection from the BIT.<sup>34</sup>
57. In this case, the Claimant alleges that it was forced off the worksite in July 2009 by the Yemini military forces at the airport. There is no doubt that Article 4 requires the Tribunal to consider the domestic law of Yemen as part of its consideration of whether the alleged expropriation is compliant with the Treaty. However, the Tribunal was not referred to any domestic Yemen law authorizing military intervention under the circumstances. Nor was any compensation offered to BUCG. On the contrary, the Respondent’s position is that there was no investment and no taking and that no compensation was or is payable.
58. If BUCG establishes the factual elements of its claim, the question will simply be whether the alleged expropriation, if it occurred, complied with the Treaty. The expropriation analysis in this case turns on whether there was a “taking” of “an investment” and if so, whether the taking was done in compliance with Article 4. If the Respondent is correct that Article 10 deals only with “lawful” expropriations, the consequence would be that the more egregious a State’s misconduct, the less protection would be available to a foreign investor

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“Article 4 Expropriation and Compensation

1. Any measures of nationalization, expropriation, or any other measures having a similar effect or of a similar nature (hereinafter referred to as ‘expropriation’) against the investments of investors of the other Contracting Party which might be taken by a Contracting Party shall satisfy all the following conditions:
  - (a) for the public interests;
  - (b) by legal procedure;
  - (c) without discrimination;
  - (d) against compensation.
2. The compensation mentioned in item (d) of Paragraph 1 of this Article shall be equivalent to the **market value** of the investments expropriated immediately before the time when the expropriation takes place or is known to the public.
3. The determination and payment of compensation shall be made promptly without undue delay. Compensation shall be paid to investors by means of a convertible currency, and be freely transferable” (emphasis added).

<sup>34</sup> The argument was advanced by Mr. Patrick Zheng (who appeared as one of the Respondent’s Counsel). Mr. Zheng advised the Tribunal that the same Chinese character translated as “expropriation” in Article 10 is used in Article 4 dealing with “expropriation and compensation”. Having established a linguistic link between Articles 4 and 10, the Respondent contends that Article 10 is limited to disputes that purport to be “lawful expropriation” under Article 4 but to which an investor objects to non-fulfillment of the Article 4 conditions. *See* Tr. Day 1, Mr. Patrick Zheng, 112 *et seq.*



under the BIT; a conclusion that is hardly compatible with the “object and purpose” of the BIT itself, which seeks to encourage the flow of foreign investment.

***b. The “Narrow” Versus the “Broad” Interpretation of the Text of Article 10***

59. Both Parties characterized their opposing interpretations of Article 10 as the Respondent’s “narrow” interpretation versus the Claimant’s “broad” interpretation of the words “any dispute relating to the amount of compensation for expropriation.”
60. The Respondent takes the view that the expression “the amount of compensation for expropriation” refers to *quantum simpliciter*. For this purpose, *quantum* is wholly divorced from liability. As the Respondent observes, “on the one hand the existence, and lawfulness of expropriation and on the other hand, the amount of compensation for expropriation are different and separate legal disputes subject to different legal tests.”<sup>35</sup>
61. The consequence of the “narrow” interpretation is that, if liability is not conceded by the State, or if an investor wishes to complain about anything other than the State’s monetary assessment of its alleged loss, ICSID has no jurisdiction.
62. In these circumstances, counsel for the Respondent indicated to the Tribunal in the course of argument that the Claimant would have the following options:

In terms of the options for dealing with the issue of liability, it is always open to the claimant in any event to sue the government, if it chooses, in its host state....

The other option they would have in terms of our argument, which is that liability has to be determined separately and naturally prior, is that it would be open to them to run a contractual arbitration and, in the event that contractual arbitration established some sort of liability, which liability fitted within the treaty, then they would be able to bring that finding from the first arbitration in order to try to get jurisdiction here.

So if they can say that - - if a Tribunal determined, if a contractual Tribunal determined, as it might do - - it might not, it might do - - that there had been expropriation, for example, then they could bring that to this

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<sup>35</sup> Resp. Reply. ¶ 66.

Tribunal, but the natural way in which they would do it would be to go to court in Yemen.<sup>36</sup>

63. The Claimant rejects the “narrow” interpretation and contends that the Contracting Party intended to give investors a real “choice” between recourse to a Yemeni court or to an ICSID tribunal, as explicitly promised by the language of Article 10. In the Claimant’s view, the words “relating to the amount of compensation” are sufficient to grant an ICSID tribunal jurisdiction over liability as well as the calculation of compensation. Liability “relates” to *quantum* because without liability there can be no *quantum*. The two issues are logically integrated and inseparable.

(i) *The Text of Article 10*

64. It should be emphasized at this point that the only authentic texts of the China-Yemen BIT are in Chinese and Arabic. While the Claimant provided the Tribunal with two successive English translations (CL-001 and CL-001 Revised),<sup>37</sup> the translation was “unofficial” and elements of it are disputed. Indeed, the Respondent states that the English text of the Treaty is “not relevant at all,” but that is the only text accessible to this Tribunal.<sup>38</sup> In discussing the terms of the Treaty in English translation, the Tribunal will use the text of CL-001 Revised unless otherwise indicated.

65. There is, of course, some irony in having English speaking lawyers making detailed and nuanced arguments dissecting an English text when the text itself has no official status whatsoever. The dissection focused on the words “relating to” the amount of compensation for expropriation. Learned argument was presented as to whether the words “relating to” constituted an overly broad interpretation of the Chinese character 有关 (“**You Guan**”). In the view of the Claimant, the Chinese character has a broad meaning equivalent to “involving” or “concerning” or “relating to”. The definition of “You Guan” in the Oxford Chinese Dictionary is very broad:

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<sup>36</sup> Tr., Day 1, Mr. Benjamin Knowles, 87-88.

<sup>37</sup> See discussion in Tr., Day 1, Mr. Benjamin Knowles, 82-83.

<sup>38</sup> Resp. Reply, ¶ 52

[H]ave something to do with: [for example] The disease might have something to do with smoking.<sup>39</sup>

As “the amount of compensation” bears a necessary relationship to liability, or at least has “something to do with it”, the Claimant says the words “relating to” are necessarily broad enough to support the jurisdiction of an ICSID Tribunal over questions of liability.

66. The Respondent, on the other hand, says that if such a broad meaning had been intended, the parties would have used the Chinese character 涉及 (“**She Ji**”) in place of “You Guan”. In response, the Claimant referred to a number of BITs entered into with the PRC, including the PRC’s BITs with Denmark, Argentina, the United Kingdom, Hungary, Bulgaria, Guyana, Kuwait, the United Arab Emirates, Malaga and Lithuania, in which the Chinese character “You Guan” was variously interpreted in an *official* English version (*i.e.* not just an unofficial translation) as “involving” or “concerning” or “relating to”.
67. The Claimant further points out that the Arabic equivalent to “You Guan” is translated in an authoritative Arabic-English dictionary as “to pertain to, belong to, relate to, be related to, concerned, be connected with”, all of which would favour the broad construction contended for by the Claimant.<sup>40</sup>
68. In the Tribunal’s view, it is not realistic to regard as dispositive the textual arguments relating to an unofficial English translation of Chinese or Arabic characters where, as here, the Respondent does not dispute the Arabic translation, and the Chinese characters of “You Guan” and “She Ji”, contrary to the Respondent’s position, appear to be used more or less interchangeably in treaty texts entered into by the PRC to which the Tribunal was referred.
69. The real question is whether even accepting as correct the “broad” interpretation of the words “relating to the amount of compensation”, the text of Article 10.2 is broad enough to support ICSID jurisdiction in respect of liability as well as *quantum*, a question which requires the Tribunal to examine the structure and context of Article 10 in which the disputed words appear.

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<sup>39</sup> *Oxford Chinese Dictionary* (C-089), 911

<sup>40</sup> M. Baalbaki and R. Baalbaki, *Al-Mawrid Al-Waseet Concise Dictionary: Arabic-English*, 325 (C-093).

70. The opening text of Paragraphs 1 and 2 of Article 10 is very broad. The opening language is repeated here for ease of reference:

1. **Any** dispute between one Contracting Party and an investor of the other Contracting Party relating to an investment shall, as far as possible, be settled amicably through deliberations and negotiations between the parties to the dispute.
2. If **the** dispute cannot be resolved by the parties through direct arrangements for amicable negotiations within six months from the date on which a request for settlement is submitted in writing, such dispute may be submitted at the choice of the investor to:
  - (a) a **competent court of the Contracting Party** in the territory of which the investment has been made; or
  - (b) **the International Centre for the Settlement of Investment Disputes (ICSID)** which was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States opened for signature at Washington DC on March 18, 1965, for arbitration.<sup>41</sup>

71. Notwithstanding the Respondent's submissions to the contrary,<sup>42</sup> the word "or" at the conclusion of paragraph 2(a) of Article 10 clearly indicates a fork in the road. Confronted with an unresolved "legal dispute", Article 10.2 purports to grant an investor the choice between taking its dispute to a competent court of the Contracting Party, in this case Yemen, or to ICSID arbitration, but not both.

72. In the English text, the words "any disputes" are followed in paragraph 2 by reference to "*the* dispute" followed by the fork in the road. According to orthodox principles of treaty interpretation, both of the investor's options must be given meaning and substance. The principle of *effet utile* or "effective interpretation" requires that international agreements be interpreted "so as to give them their fullest weight and effect consistent with the normal

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<sup>41</sup> **CL-001 (Revised)**, BIT, Art. 10.1, 10.2 (emphasis added).

<sup>42</sup> See Resp. Reply, ¶ 68

sense of the words and with other parts of the text and in such a way that a reason and meaning can be attributed to every part of the text.”<sup>43</sup> An interpretation that nullifies either of the choices granted to the investor is to be avoided.

73. The broad scope of the terms in Article 10 was confirmed by Mr. Patrick Zheng, a Chinese-speaking counsel for the Respondent, who advised the Tribunal that in the Chinese text the identical character is used for “all disputes” and “the dispute”. In his view, this Chinese character would more precisely be rendered in English simply as “legal dispute”.<sup>44</sup> In the view of the Tribunal, the term “legal dispute”, taken in isolation, is a term broad enough to include both liability and *quantum*.

(ii) *The Proviso*

74. The fork in the road (“or”) is followed by the contentious language at the conclusion of paragraph 2 which is central to the jurisdictional objection, namely:

For this purpose, either Contracting Party shall give its irrevocable **consent to the submission of any dispute relating to the amount of compensation for expropriation** for resolution under such arbitration procedure. **Other disputes** submitted under such procedure **shall be mutually agreed upon** between both Contracting parties.<sup>45</sup>

For convenience this concluding language will be called the “proviso” in this ruling.

75. Taken in isolation, the words that the Contracting Parties “irrevocably” consent to the submission “**of any dispute relating to the amount of compensation**” is open to several interpretations. It could be argued to broaden the investor’s protection by making the Contracting Parties’ consent to an ICSID arbitration, at least in relation to *quantum*, beyond

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<sup>43</sup> See, for example, the report of the Claimant’s argument in respect of the China-Laos BIT before the Singapore Court of Appeal in *Sanum v. Laos*: “Sanum contends that if the submission of the Lao Government is correct and if an investor must first go to a competent national court to determine *whether* an impermissible expropriation has occurred (on the basis of the Narrow Interpretation of Art 8(3)), it would very likely find itself precluded from then submitting any dispute, on the amount of compensation it claims is due to it, to arbitration since the national court would already have determined the issue of compensation. This would render Art 8(3) wholly ineffective since, practically speaking, investors would never be able to bring a dispute to investor-state arbitration under the PRC-Laos BIT” (*Sanum Investments Limited v. Government of the Lao People’s Democratic Republic*, [2016] SGCA 57, Judgment, 29 September 2016 (CL-086, “*Sanum*”), ¶ 128).

<sup>44</sup> Tr. Day 2, Mr. Patrick Zheng, 308:6-18.

<sup>45</sup> CL-001 (Revised), BIT, Art. 10.2 (emphasis added).

recall. In other words, *arguendo*, the proviso could be read in its English translation not to *limit* the “choice of the investor” to choose either a Yemeni court or ICSID arbitration but to *enhance* protection by assuring investors that whatever be the fate of the remaining provisions of the Treaty, the consent to jurisdiction over “the amount of compensation” is irrevocable.

76. The Respondent contends that the proviso should be read as a limitation on the opening language of paragraphs 1 and 2. On this reading, the fork in the road leading to ICSID arbitration is limited to the calculation of compensation for an admitted liability. On the other hand, the Claimant relies on the ICSID tribunal’s ruling concerning a similarly worded BIT in *Tza Yap Shum*<sup>46</sup> for the opposite conclusion, as follows:

The Tribunal first refers to the specific wording used by Article 8(3). The BIT uses the word “involving” which, according to the Oxford Dictionary means “to enfold, envelope, entangle, include.” A *bona fide* interpretation of these words indicate that the only requirement established in the BIT is that the dispute must “include” the determination of the amount of a compensation, and not that the dispute must be restricted thereto. Obviously, other wording was available, such as “limited to” or “exclusively”, but the wording used in this provision reads “involving.”<sup>47</sup>

77. The Tribunal concludes, as did a five judge panel of the Singapore Court of Appeal with respect to another similarly worded BIT in *Sanum v. Laos*, that the “ordinary meaning” and scope of the words “amount of compensation” is not conclusive either in favour of the “broad” interpretation or the “narrow” interpretation.<sup>48</sup> The task of interpretation therefore moves to context, object and purpose.

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<sup>47</sup> CL-033, *Tza Yap Shum*, ¶ 151.

<sup>47</sup> CL-033, *Tza Yap Shum*, ¶ 151.

<sup>48</sup> The Singapore Court of Appeal in *Sanum* held (i) that the text of the China-Laos BIT, which contained language similar to the China-Yemen BIT, did not itself resolve the problem of interpretation, but (ii) nevertheless an *official* English version that used the word “involving” did not require the narrow interpretation: “With great respect to the parties, we think the word ‘involve’ is certainly capable of supporting either of the Broad or Narrow Interpretations and to cavil over the possible dictionary definitions of the word ‘involve’ will not help us interpret Art 8(3) of the PRC-Laos BIT. Rather, the words in Art 8(3) can only be accurately, and more meaningfully, understood by considering the context of the provision and it is to this which we now turn” (CL-086, *Sanum*, ¶ 126).

c. ***The Context of Article 10***

78. When the proviso is read in the context of Article 10 as a whole, and Article 10 is read in the context of the China-Yemen BIT as a whole, the real issues are brought into sharper focus. The Respondent's "narrow" interpretation leads to an internal contradiction, whereas the Claimant's "broad" interpretation does not. The "broad" interpretation advances the object and purpose of the BIT. The Respondent's "narrow" interpretation does not.
79. The effect of the "narrow" interpretation, according to the Respondent, is that a claimant who seeks compensation for an alleged expropriation does not have a choice (despite the express text in Article 10.2) but *must* go to the "competent court of the Contracting Party" *unless* the Respondent concedes liability. If the Respondent does not concede liability, the investor's only recourse is to the courts of Yemen.<sup>49</sup>
80. Yemen's interpretation therefore creates an internal contradiction whereby the Respondent controls access to the ICSID tribunal even though Article 10 itself states that the choice between the competent court of Yemen and the ICSID tribunal shall be "at the choice of the investor."
81. On the Respondent's interpretation, Yemen can unilaterally deny a claimant access to an ICSID tribunal simply by refusing to admit some aspect of liability. If Yemen puts in doubt the alleged expropriation, the claim must go to the courts of Yemen for determination.<sup>50</sup> However, by reason of Article 4, the Yemeni court would not be able to determine the

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<sup>49</sup> It will be noted that Article 10 paragraph 4 provides for the sources of law to be applied by the Arbitral Tribunal but is silent on the sources law to be applied by the "competent court of the Contracting Party."

<sup>50</sup> The Respondent states that in light of the hostilities in Yemen, it has been unable to collect accurate information about how a Yemeni court of competent jurisdiction would approach the issue of expropriation. As a result, and without objection on the part of the Claimant, the Respondent developed its argument in this respect by reference to the applicable laws of China and in particular a codification of *Chinese Administrative Law* adopted by the 7<sup>th</sup> National People's Congress on 4 April 1989 with effect from October 1, 1990 in respect of which Mr. Patrick Zheng, one of the counsel appearing for the Respondent, made helpful submissions.

Article 70 of the Chinese law states that "this law shall be applicable to foreign nationals, stateless persons and foreign organizations..." as well as Chinese nationals. However, Article 72 provides that "if an international treaty concluded by the [PRC] contains provisions different from those found in [Chinese administrative] law, the provisions of the international treaty shall apply" (*see* Tr. Day 2, Mr. Benjamin Knowles, 297:5 *et seq.*).

question of expropriation without addressing each of the four conditions listed in Article 4, including whether effective and appropriate compensation has been paid. The Respondent agrees that such is the mandate of the Yemeni court. It submits that:

Pursuant to Article 4.4 of the China-Yemen BIT, expropriation is permitted if it is “against compensation”, which not only includes potential issues as to the amount of compensation, but also the means of such compensation and/or whether any compensation has been paid at all. In contrast, Article 10.2 specifically limits the Tribunal’s scope of jurisdiction to “the amount of compensation.”<sup>51</sup>

However, having regard to the fork in the road, and the issue of *quantum* having then been decided by the courts of Yemen, the investor would be precluded from an ICSID arbitration to re-litigate the amount of compensation.

82. As pointed out by the *Renta 4* tribunal, such a process fuels “a central concern of investors who are averse to allowing the host State to act as judge and party in measuring the monetary extent of its own liability.”<sup>52</sup>
83. In this situation, the ICSID tribunal in *Tza Yap Shum* interpreted the fork in the road provision on the China-Peru BIT to necessitate an interpretation of the equivalent provision to Article 10 to grant to the ICSID tribunal full jurisdiction over the issue of liability as well as *quantum*:

The Tribunal concludes that to give meaning to all the elements of the article, it must be interpreted that the words “**involving the amount of compensation** for expropriation” includes not only the mere determination of the amount but also any other issues normally inherent to an expropriation, including whether the property was actually expropriated in accordance with the BIT provisions and requirements, as well as the determination of the amount of compensation due, if any. **In the opinion of the Tribunal, a contrary conclusion would invalidate the provision related to ICSID arbitration** since according to the final sentence of Article 8(3), turning to the courts of the State accepting the investment would preclude definitely the possibility of choosing arbitration under the ICSID Convention. Consequently, **since the Claimant has filed a *prime facie* claim** of expropriation, the Tribunal,

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<sup>51</sup> Resp. Reply, ¶ 77.

<sup>52</sup> *Renta 4 S.V.S.A. et al v. Russian Federation*, SCC Case No. V 024/2007, Award on Preliminary Objections, 20 March 2009 (CL-032, “*Renta 4*”), ¶ 33.



pursuant to Articles 25 and 41 of the ICSID Convention and Rule 41 of the Arbitration Rules, considers that it is **competent to decide on the merits** of the expropriation claim filed by Claimant.<sup>53</sup>

84. The result of the Respondent’s argument would be that the “choice” granted to an investor by paragraph 2 would be reversed by the proviso into a “choice” granted to the Respondent. The Tribunal agrees with the *Tza Yap Shum* tribunal that the interpretation urged by the Respondent “would lead to an untenable conclusion, namely, that the investor would never actually have access to arbitration” unless the Respondent agreed.<sup>54</sup>
85. Further, the concluding words of the proviso require the agreement of both parties to an *ad hoc* arbitration for “other disputes.” Yet under the Respondent’s argument, the State must not only give its *ad hoc* agreement to arbitrate “other disputes” but, in effect, “all disputes.”
86. The Singapore Court of Appeal in *Sanum v. Laos*, in its analysis of the China-Laos BIT,<sup>55</sup> concluded that the “fork in the road” provision would, if Article 10.2 were “narrowly” interpreted, effectively deprive the investor of both choice and protection:

...it is entirely open to the host State to avoid arbitration over the amount of compensation for indirect expropriation simply by not submitting the dispute on liability to its municipal courts. [...] In such cases, the investor would then be compelled to bring a claim to a national court for a ruling that the host State had committed an expropriatory act but in so doing, it may be barred from bringing a dispute on compensation to arbitration. It should also be added that even in the rare cases of direct expropriation, host States would be in a position effectively to avoid arbitration by simply denying that they had engaged in expropriatory acts. [...] This would once

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<sup>53</sup> **CL-033**, *Tza Yap Shum*, ¶ 188 (emphasis added). The decision was upheld in *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, 12 February 2015 (**CL-082**).

<sup>54</sup> **CL-033**, *Tza Yap Shum*, ¶ 154.

<sup>55</sup> See **CL-086**, *Sanum*, ¶ 123. Article 8 of the China-Laos BIT reads:

“Article 8

1. [...]
2. If the dispute cannot be settled through negotiation within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting State accepting the investment.
3. If a dispute **involving the amount of compensation for expropriation** cannot be settled through negotiation within six months as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article” (emphasis added).

again compel the investor to resort to the national courts, thereby barring a claim in arbitration.<sup>56</sup>

87. Accordingly, the consideration of the disputed text in the context of the whole structure of Article 10 of the BIT leads this Tribunal to conclude that the Contracting Parties intended to confer a real choice, not an illusory choice, on investors from their respective countries, and that the words “relating to the amount of compensation for expropriation” must, in context, be read to include disputes relating to whether or not an expropriation has occurred.

*d. Object and Purpose of the Treaty*

88. Article 31 of the VCLT requires that the terms of the China-Yemen BIT, including the dispute resolution provisions, be interpreted with due regard to its object and purpose. In this respect, the Respondent relies on the argument of Professor Yansheng Zhu that “to create favourable conditions for investment by investors” does not necessarily mean that the scope of ICSID’s jurisdiction should be artificially expanded to encompass all aspects of expropriation disputes (rather than simply questions of *quantum*).<sup>57</sup>

89. The object and purpose of the China-Yemen BIT is set out in its Preamble as follows:

[...]

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<sup>56</sup> **CL-086**, *Sanum*, ¶ 133. The Singapore Court of Appeal dealt persuasively with this weakness in the Respondent’s approach: “In our judgment, the Lao Government’s interpretation of Art 8(3) of the PRC-Laos BIT is not tenable. The words of the provision do not seem to us to be capable of accommodating the segregation of an expropriation claim in the way it was suggested such that the question of liability may be determined by the national courts leaving the issue of the quantum of compensation to be heard by an arbitral tribunal. In our judgment, the words ‘[t]he provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in paragraph 2’ means that if *any dispute* is brought to the national court, the claimant will no longer be entitled to refer any aspect of *that dispute* to arbitration. Hence once an expropriation claim is referred to the national court, no aspect of that claim can then be brought to arbitration. It should be noted that this does not mean that any and every dispute relating to expropriation may be referred to arbitration. As provided in Art 8(3), this only avails if the dispute does involve a question as to the amount of compensation,” **CL-086**, *Sanum*, ¶ 130 (emphasis in original).

<sup>57</sup> Resp. Reply, ¶ 86 (citing Y. Zhu, *Determination of the Consent to the ICSID Jurisdiction in BITs – A Review on the Errors Made by the Tribunal Concerning the Determination of the Consent in the Mr. Tza Yap Shum Case*, Journal of International Economic Law, Vol. 17, No. 3, 2010 (**RL-047**), 118-120).

Intending to create **favourable conditions for investment** by investors of one Contracting Party within the territory of the other Contracting Party;

Recognizing that the reciprocal encouragement, promotion and protection of investment will **stimulate business communication** of investors and will increase prosperity in both countries;

Desiring to **intensify the economic cooperation** between both countries on the basis of equality and mutual benefits;

Have agreed as follows [...] <sup>58</sup>

90. The Tribunal agrees with the Respondent that a “balanced” approach to such general language is required.<sup>59</sup> As stated in the *RosInvest* award, care must be taken not to use general aspirational treaty preambles to re-write a narrow jurisdictional clause in favour of an investor:

As derived from the fact that the **protection and promotion of foreign investment is not the sole aim of investment treaties**, particular emphasis is further placed on the need for a **balanced interpretation rather than an interpretation in favour of the investor** [...] Especially against the background that preambles usually contain broadly worded object and purpose clauses to protect and promote foreign investments even in case of investment treaties which do not contain any right to international arbitration, the interpretative exercise should not be diverted from the **actual wording of Article 8(1) or lead to a re-write of a narrow jurisdictional clause** [...].<sup>60</sup>

91. While acknowledging the need for a “balanced approach,” the overall purpose of the BIT is nevertheless to stimulate the flow of foreign investment. As the *Renta 4* tribunal pointed out, to “favour the protection of covered investments” is not equivalent to a presumption that the investor is always right.<sup>61</sup>
92. Accordingly, while keeping the *RosInvest* caution in mind, the fact remains that in this case, the Respondent’s “narrow” interpretation would undermine achievement of the BIT’s

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<sup>58</sup> CL-001 (Revised), BIT, Preamble (emphasis added).

<sup>59</sup> Resp. Reply, ¶ 89.

<sup>60</sup> *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V 079/2005, Award on Jurisdiction, 5 October 2007 (CL-065, “*RosInvest*”), ¶ 83 (emphasis added).

<sup>61</sup> CL-032, *Renta 4*, ¶ 57.

object and purpose. The lack of investor protection would discourage investment. The BIT would be seen as a trap for unwary investors instead of an incentive for them to invest in “the other Contracting Party.”

*e. Relevance of the History of PRC Investment Treaties to the Interpretation of Article 10*

93. The Respondent points out that tribunals frequently find it helpful to examine the historical background of a country’s practice in the making of BITs; for example, in the cases where the Russian Federation prevailed on a “narrow” interpretation of the dispute resolution provisions in some of its BITs.
94. Similarly, in the present case the Respondent relies on the writings of Professor An Chen<sup>62</sup> and Professor Yansheng Zhu<sup>63</sup> to demonstrate that the PRC’s intention when concluding BITs was and has always been to limit the scope of ICSID’s jurisdiction in investment disputes to *quantum* only. At the time the China-Yemen BIT was concluded, according to these scholars, the PRC was a closed socialist economy, with a strong interest in protecting its political sovereignty. It was not until the China-Barbados BIT (the first of the “later generation” BITs) that the PRC started moving towards an open-market economy, with a significantly increased need for inward foreign investment. Accordingly, to this analysis, largely directed against the decision in *Tza Yap Shum*, the narrow scope of jurisdiction provided for by Article 10.2 reflects the PRC’s political circumstances at the time.<sup>64</sup>
95. The Parties did not submit the prior practice of Yemen in regard to investment treaties into evidence.
96. The issue here is the admissibility of such secondary authority (even if it were otherwise considered to be relevant) when the Tribunal has already found that the interpretation of

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<sup>62</sup> A. Chen, *Queries to the Recent ICSID Decision on Jurisdiction upon the case of Tza Yap Shum v Republic of Peru: Should China-Peru BIT 1993 Be Applied to Hong Kong SAR under the ‘One Country Two Systems’ Policy?*, Journal of World Investment & Trade, Vol. 10, No. 6 (RL-008), 829-861 .

<sup>63</sup> Y. Zhu, *Determination of the Consent to the ICSID Jurisdiction in BITs – A Review on the Errors Made by the Tribunal Concerning the Determination of the Consent in the Mr. Tza Yap Shum Case*, Journal of International Economic Law, Vol. 17, No. 3, 2010 (RL-047), 106-121 .

<sup>64</sup> Resp. Reply, ¶¶ 80-81.

Article 10 can and should be interpreted under VCLT Article 31, which accordingly precludes resort to a broader range of external materials under Article 32.

97. In the Tribunal's view, the history of the PRC's position in various BITs over the years is not relevant to the disposition in this case of the jurisdictional objections.

(i) *The Russian Federation Cases*

98. The Respondent relies on several tribunal awards that reached varying conclusions with respect to investment treaties entered into by Russia, and in particular:

- *Vladimir Berschader and Moise Berschader v. the Russian Federation (SCC Case No. 080/2004), Award, 21 April 2006, CL-059* ("Berschader");
- *RosInvestCo UK Ltd. V. the Russian Federation, SCC Case No. Arb. V 079/2005, Award on Jurisdiction, 5 October 2007, CL-065* ("RosInvest"); and
- *Renta 4 SVSA et al v. the Russian Federation, SCC Case No. V 024/2007, Award on Preliminary Objections, 20 March 2009, CL-032* ("Renta 4").

99. Applying similarly-worded treaties, the *Berschader* tribunal found that it had no jurisdiction; the *RosInvest* tribunal determined that it had jurisdiction by using the MFN clause to import the dispute resolution provisions of another Russian treaty; and the *Renta 4* tribunal rejected that approach in favour of reading of the dispute resolution provision of the treaty before it to confer jurisdiction.

100. In *Berschader* (award rendered in 2006), a Belgian construction contractor sought arbitration of a claim against the Russian Federation under an investment treaty concluded among Belgium, Luxembourg and Russia. The equivalent dispute resolution clause provided as follows:

ARTICLE 10

1. Any dispute between one Contracting Party and an investor of the other Contracting Party **concerning the amount or mode of**

**compensation** to be paid under Article 5 of the present Treaty shall be the subject of a written notice, accompanied by a detailed memorandum, to be submitted by the investor to the Contracting Party involved in the dispute....<sup>65</sup>

101. The primary issue in *Berschader* was whether “foreign shareholders in a foreign incorporated company [could] rely upon the terms of a BIT without having made any direct investment on their own part.”<sup>66</sup> However, issues regarding the proper interpretation of the words “the amount of compensation” were briefly noted, as described below.
102. In *RosInvest* (award rendered in 2007), a British investor in the Russian oil company Yukos complained that its investment was rendered “nearly valueless” by sham “arbitrary incremental tax assessments” imposed by the Russian Federation. It sought arbitration under the UK-Russia BIT. The dispute resolution clause in *RosInvest* provided as follows:

#### ARTICLE 8

##### Disputes between an Investor and the Host Contracting Party

- (1) This Article shall apply to **any** legal disputes between an investor of one Contracting Party and the other Contracting Party **in relation to an investment of the former either concerning the amount or payment of compensation** under Articles 4 or 5 of this Agreement, or concerning any other matter **consequential** upon an act of expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement.
- (2) Any **such** disputes which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.<sup>67</sup>

103. In the view of the present Tribunal, the decisions in *Berschader* and *RosInvest* are quite distinguishable. Firstly, there is no opening promise of a procedure to deal with “any dispute” but is limited from the outset in *Berschader* to “any dispute ... concerning the amount or mode of compensation” and in *RosInvest* to disputes “in relation to an

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<sup>65</sup> CL-059/RL-019, *Berschader*, ¶ 47 (emphasis added).

<sup>66</sup> CL-059/RL-019, *Berschader*, ¶ 135.

<sup>67</sup> CL-065, *RosInvest*, ¶ 23 (emphasis added).

investment .... concerning the amount or payment of compensation.” Secondly, there was no choice of forum between the domestic courts or arbitration. The only forum was “international arbitration”. Consequently, the “fork in the road” problem, which is central to the present case, could not arise. Thirdly, there was no *effet utile* issue, because in the absence of a fork in the road there was no possibility of one branch of the fork being rendered ineffectual. Fourthly, as the Respondent in *RosInvest* was able to point out, the use of the word “consequential” in its clause necessarily required “unambiguously ... a predicate act of expropriation.”<sup>68</sup> Fifth, the *Berschader* tribunal relied in part on the Russian Federation’s general practice in concluding BITs, a form of external evidence that in our view is neither necessary nor appropriate in the present case.

104. The Claimant, on the other hand, relies on the later case of *Renta 4 v. Russia* (award rendered in 2009), in which the dispute resolution clause provided:

Article 10

Disputes between one Party and investors of the other Party

1. Any dispute between one Party and an investor of the other Party **relating to the amount or method of payment of the compensation due under Article 6** of this Agreement, shall be communicated in writing [...]. [The parties shall] as far as possible, endeavour to settle the dispute amicably.
2. If the dispute cannot be settled thus within six months of the date of the written notification referred to in paragraph 1 of this article, it may be referred to by [sic] **either** of the following, **the choice being left to the investor**:
  - **An arbitral tribunal** in accordance with the Regulations of the Institute of Arbitration of the Chamber of Commerce in Stockholm;
  - **The ad hoc arbitral** tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).<sup>69</sup>

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<sup>68</sup> CL-065, *RosInvest*, ¶¶ 57, 80.

<sup>69</sup> CL-032, *Renta 4*, ¶ 5 (emphasis added).

105. It will be noticed at once that the opening language is directed to “any dispute ... relating to the amount or method of payment by the compensation due under Article 6 ...”. There is no opening acceptance of “*any* dispute” as in the China-Yemen BIT.
106. Secondly, there is a “fork in the road,” but both forks lead to international arbitration, and neither undermines the other.
107. The *Renta 4* tribunal dismissed the *Berschader* tribunal’s analysis as superficial because in a few brief conclusory paragraphs, the *Berschader* tribunal assumed in favour of the Russian Federation the very point in issue.<sup>70</sup> The *Renta 4* tribunal observed that, under the Russian Federation’s view, “the predicate of obtaining *any* amount of compensation according to *any* method would be hostage to the host State’s self-determination as to whether it is due at all.”<sup>71</sup>
108. Ultimately, the *Renta 4* tribunal’s decision is consistent with the importance attached by the present Tribunal to the object and purpose of the BIT, which the *Renta 4* tribunal expressed as follows:

Yet some considerations of purpose have a solid foundation. It must be accepted that investment is not promoted by purely formal or illusory standards of protection. It must more specifically be accepted that a fundamental advantage perceived by investors in many if not most BITs is that of the internationalisation of the host state’s commitments. It follows that it is impermissible to read Article 10 of the BIT as vanishingly narrow internationalisation of either Russian’s or Spain’s commitment. [...] [I]f there is no obligation to make compensation the arbitration clause would never operate. **The dispute would not be internationalised if the respondent State could simply declare whether there is an obligation to compensate.** Either signatory State could thus by its fiat (including that of its courts given the State’s responsibility for their acts under international law) ensure that there would never be an arbitration under Article 10. This would be an illusion which the Tribunal cannot accept as consonant with Article 31 of the Vienna Convention if ever that Article is to be given full weight.<sup>72</sup>

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<sup>70</sup> CL-032, *Renta 4*, ¶¶ 24-26, 53.

<sup>71</sup> CL-032, *Renta 4*, ¶ 58 (emphasis in original).

<sup>72</sup> CL-032, *Renta 4*, ¶ 56 (emphasis added).



The Tribunal agrees with this aspect of the *Renta 4* decision.

109. In the Tribunal’s view, having regard to its discussion of the elements of Article 31 of the VCLT relied upon by the Parties, and which in the opinion of the Tribunal are relevant to the present case, the Respondent’s objections *rationae materiae* must be dismissed.

**C. THIRD OBJECTION - MFN CLAUSE CANNOT CIRCUMVENT LIMITED DISPUTE CLAUSE**

**(1) The Parties’ Positions**

**a. The Respondent’s Position**

110. The Respondent submits that Article 3.1 of the China-Yemen BIT in respect of Most Favoured Nation Treatment (the “**MFN Clause**”) cannot circumvent the BIT’s express limited jurisdiction to incorporate the broader dispute resolution clause in the Yemen-UK BIT. The Respondent asserts that the MFN Clause at issue was drafted to limit the scope of the MFN Clause only to substantive rights, and any contrary interpretation would render the limiting language in the dispute resolution clause in China-Yemen BIT Article 10.2 purposeless.<sup>73</sup>

**b. The Claimant’s Position**

111. The Claimant contends that the Tribunal has jurisdiction to hear BUCG’s claims as a result of the MFN Clause, which must be interpreted like any other BIT clause in accordance with the VCLT principles. The Claimant disputes the alleged “limiting language” in Article 10.2, and therefore denies the Respondent’s suggested impact of Article 10.2 on the interpretation of the MFN Clause. The Claimant asserts that the second paragraph of the MFN Clause is not restricted to substance rather than procedure. The Claimant cites a number of recent investment tribunal decisions that have found the equivalent terms in a MFN provision to extend to the terms of the access to international arbitration.<sup>74</sup>

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<sup>73</sup> Resp. Mem., ¶¶ 102-120. Resp. Reply, ¶¶ 110-129.

<sup>74</sup> See *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (CL-057, “*Siemens*”), ¶ 103; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No ARB/07/17, Award, 21 June

Consequently, the Claimant argues that the MFN Clause may be used to take advantage of more favourable dispute resolution mechanisms in other BITs, in particular Article 7 of the Yemen-UK Treaty.<sup>75</sup>

(2) **The Tribunal's Analysis**

112. The MFN Clause (Article 3.1) provides as follows:

Article 3 Investment Treatment

1. Each Contracting Party shall ensure that fair and equitable treatment is given to the investments of the other Contracting Party **in its territory**, and such treatment shall, in accordance with its laws and regulations, be **no less favourable** than the treatment accorded to investments of **the most favoured nation**, if the latter is more favourable.

Each Contracting Party shall, in accordance with its laws and regulations, ensure that **the treatment accorded to investors** of the other Contracting Party **in its territory** with respect to the activities relating to their investments shall be no less favorable than the treatment accorded to its domestic investors or no less favourable than the treatment accorded to investors of **the most favoured nation**, with the more favourable treatment to apply.<sup>76</sup>

113. The Tribunal agrees with the Respondent's general proposition that the use of an MFN provision to extend the scope of the Respondent's consent to the dispute resolution clause is controversial. As observed by the tribunal in *Plama v. Bulgaria*:

[D]ispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context.<sup>77</sup>

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2011 (CL-095, "*Impregilo*"), ¶¶ 99-100; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013 (CL-039, "*Garanti Koza*"), ¶ 96.

<sup>75</sup> Cl. C-M, ¶¶ 131-147; Cl. Rej., ¶¶ 89-105.

<sup>76</sup> CL-001 (Revised), Art. 3.1 (emphasis added).

<sup>77</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 (RL-015), ¶ 207.

114. However, other tribunals, applying the words of the particular treaty before them, have concluded that an MFN clause may be used to import the dispute resolution provisions of one treaty into another.<sup>78</sup> This Tribunal sees no need to address in the abstract whether MFN provisions may in principle be applicable to dispute resolution provisions, but will turn instead to whether the text of this Treaty lends itself to such an application.
115. In doing so, the Tribunal approaches the interpretation of the MFN terms of Article 3 by starting with the ordinary meaning of its terms as directed by Article 31 of the VCLT.
116. The argument is, at least in part, that while the word “treatment” in Article 3.1 may be broad enough to encompass procedural “measures”,<sup>79</sup> the accompanying reference in Article 3.1 to “treatment accorded to investors.... **in its territory**” plainly invokes territorial limits that are directed to substantive provisions in relation to local treatment of the investment, and are not apt to describe international arbitration.
117. Full meaning must be given to the words “in the territory”. The Respondent points to the observation of the *Berschader* tribunal that “use of the expressions ‘treatment’ and ‘in its territory’” suggests that the contracting parties intended the MFN clause to address “the material rights accorded to investors within the territory of the Contracting States”<sup>80</sup> and not international arbitration which “is not an activity inherently linked to the territory of the respondent State. Just the contrary is true.”<sup>81</sup>
118. The context of the words “in the territory” differs between the first paragraph of Article 3.1, dealing with Fair and Equitable Treatment (“**FET**”) and in the second paragraph of Article 3.1, dealing with Most Favoured Nation (“**MFN**”).

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<sup>78</sup> See, e.g. **CL-065**, *RosInvest* at ¶¶ 128-133. See general discussion of decisions each way in **CL-039**, *Garanti Koza*, ¶¶ 40-41.

<sup>79</sup> See **CL-057**, *Siemens*, ¶ 103: “The Tribunal concurs that the formulation is narrower but, as concluded above, it considers that the term ‘treatment’ and the phrase ‘activities related to the investments’ are sufficiently wide to include settlement of disputes;” and **CL-095**, *Impregilo*, ¶ 99: “The Arbitral Tribunal is of the opinion that the term ‘treatment’ is in itself wide enough to be applicable also to procedural matters such as dispute settlement.”

<sup>80</sup> **CL-059/RL-019**, *Berschader*, ¶ 185.

<sup>81</sup> *ICS Inspection and Control Services Limited v. Argentine Republic*, PCA Case No. 2019-9, Award on Jurisdiction, 10 February 2012 (**RL-061**), ¶ 306.

119. In relation to FET, the words “in the territory” modify “the investments” – which plainly must be in the territory to attract BIT protection in the first place. In the context of FET, accordingly Article 3.1 does not limit itself to matters of substance and can apply to the dispute resolution mechanisms of other BITs to which Yemen is a party.
120. In respect of the MFN Clause, however, the wording is different. The words “in the territory” are contained within the provision concerning “treatment accorded to investors of the other Contracting party in its territory with respect to activities relating to their investments...”. These words, in the Tribunal’s view, tie the MFN to activities that take place “in the territory” associated geographically with the investment. This limitation is not consistent with the Parties giving their consent to the use of the MFN to expand the scope of international arbitration beyond the provisions of Article 10. As pointed out in *IRC v. Argentina*, *supra* paragraph 117, international arbitration is not itself an activity “inherently linked to the territory of the [R]espondent.”
121. The Tribunal therefore concludes that Article 3.1, properly interpreted, does not enlarge the dispute resolution provision of Article 10 of the China-Yemen BIT.

**D. FOURTH OBJECTION - LACK OF QUALIFIED INVESTMENT**

**(1) The Parties’ Positions**

***a. The Respondent’s Position***

122. The Respondent contends that the Claimant has failed to prove that its claim arises out of a qualified investment as, in the Respondent’s view, the Claimant’s submissions on when and what was invested, and by whom, are vague and somewhat contradictory. The Respondent asserts that the Claimant was purely a paid construction contractor that had to provide a performance guarantee – which the *Joy Mining* tribunal found was not an “investment” – and that consequently BUCG never did make a qualified investment in Yemen. Respondent further submits that there is no evidence that any alleged investment was made “in accordance with the laws and regulations of” Yemen, which required registration to gain protection under the BIT, nor was a qualified investment made “in the

territory” of Yemen. Consequently, the Tribunal has no jurisdiction under Article 25(1) of the ICSID Convention and BIT Article 1.1.<sup>82</sup>

**b. The Claimant’s Position**

123. The Claimant contends its claims arise out of a qualifying investment in Yemen. Contrary to the Respondent’s allegations, the Claimant submits that its investment consists of rights acquired under the Contract (together with all plan, equipment and materials imported by BUCG in connection with its works, as well as the bank guarantees), which fall under the “investment” definition under BIT Article 1.1. Moreover, the Contract would also qualify as an investment under the ICSID Convention as interpreted and applied in the *Salini* test. The Claimant further argues that the availability of investment registration under Yemeni law is irrelevant to BUCG’s claims as there is no *obligation* under Yemeni law to register an investment and no illegality attaches to failure to do so. BUCG’s investment was made in the territory of Yemen because the Contract was required to be, and was in fact, performed there.<sup>83</sup>

**(2) The Tribunal’s Analysis**

124. In order for the Tribunal to accept jurisdiction over the Claimant’s claim, the burden of proof is on the Claimant to satisfy the Tribunal that it is an “investor” and that it made an “investment”:

(i) within the meaning given to those terms in the BIT, which defines the framework of the consent given by the Respondent; **and also**

(ii) within the meaning given to those terms in the ICSID Convention.

125. The *Joy Mining* tribunal emphasised the pre-eminence of the ICSID Convention over the terms of the BIT in jurisdictional terms:

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<sup>82</sup> Resp. Mem., ¶¶ 122-168. Resp. Reply, ¶¶ 130-158.

<sup>83</sup> Cl. C-M, ¶¶ 47-81; Cl. Rej., ¶¶ 106-118.

The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention.<sup>84</sup>

This passage was explicitly endorsed by other ICSID tribunals.

126. This is a so-called “double-keyhole” test – the Claimant must meet the requirements of both the Convention and the BIT in order for the Tribunal to have jurisdiction over its claim.
127. However, the approach taken by the tribunal in *Joy Mining* has not been universally accepted. Some tribunals posit that as the ICSID Convention did not attempt to define “investment,” this task is left to the parties to delineate in their instruments of consent, including treaties. The *ad hoc* annulment committee in *Malaysia Historical Salvors* expounded the wisdom of looking primarily to the text of the relevant BIT:

It is those bilateral and multilateral treaties which today are the engine of ICSID’s effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term “investment” as found in Article 25(1) of the Convention, risks crippling the institution.<sup>85</sup>

128. A middle ground between these two approaches has developed. While many tribunals have felt that “It would go too far,” in the words of the tribunal in *SGS v. Paraguay*, “to suggest that *any* definition of investment agreed by states in a BIT [...] must constitute an ‘investment’ for purposes of Article 25(1),”<sup>86</sup> many tribunals have adopted the approach of defining the relevant question as whether the definition of “investment” in the BIT exceeds what is permissible under the ICSID Convention.

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<sup>84</sup> *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (RL-026, “*Joy Mining*”), ¶¶ 49-50.

<sup>85</sup> *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009 (CL-070), ¶ 73.

<sup>86</sup> *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010 (CL-094), ¶ 93 (emphasis in original).

a. ***Investment for Purposes of the ICSID Convention***

129. Article 25 of the ICSID Convention makes the facilities of ICSID available only to resolve disputes arising out of a protected investment. As instructed by Article 31 of the VCLT, Article 25 is to be interpreted according to the “ordinary meaning” of the terms “in their context and in the light of its object and purpose.” Article 25(1) provides:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

130. The drafters of the ICSID convention left the term “investment” undefined. One widely (but not universally) applied analysis of the term “investment” is derived from *Salini v. Morocco*, which identified a series of elements that constitute an investment:

The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction [...] In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.<sup>87</sup>

131. The so-called “*Salini* test” therefore contemplates:

(a) a contribution;<sup>88</sup>

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<sup>87</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (RL-020, “*Salini*”), ¶ 52

<sup>88</sup> RL-020, *Salini*, ¶ 53: “The contributions made by the Italian companies are set out and assessed in their written submissions. It is not disputed that they used their know-how, that they provided the necessary equipment and qualified personnel for the accomplishment of the works, that they set up the production tool on the building site, that they obtained loans enabling them to finance the purchases necessary to carry out the works and to pay the salaries of the workforce, and finally that they agreed to the issuing of bank guarantees, in the form of a provisional guarantee fixed at 1.5% of the total sum of the tender, then, at the end of the tender process, in the form of a definite guarantee fixed at 3% of the value of the contract in dispute. The Italian companies, therefore, made contributions in money, in kind,

- (b) a certain duration of the economic operation;<sup>89</sup>
- (c) the existence of a risk of sovereign intervention assumed by the investor; and
- (d) a contribution to the host State's economic development.

132. The contribution, when the *Salini* test is applied, need not only be financial; some tribunals have held that it can mean a transfer of know-how or of equipment<sup>90</sup> derived from the dedication of resources which themselves have an economic value.

***b. Investments Within the Scope of the BIT***

133. The preamble to the BIT makes it clear that its very object and purpose is to:

... create favourable conditions for investment by investors of one Contracting Party within the territory of the other Contracting Party.

134. In the same vein, Article 2 emphasizes the territorial aspect of a protected investment:

1. Each Contracting Party shall encourage investors of the other Contracting Party to make investments in **its territory** and accept such investments in accordance with its laws and regulations.

[...]

2. Investments of investors of either Contracting Party shall be accorded fair and equitable treatment and shall enjoy full and complete protection and security **in the territory of the other Contracting Party** subject to any measures which are necessary for maintaining public order. [...] <sup>91</sup>

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and in industry.” See also *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (CL-030).

<sup>89</sup> **RL-020**, *Salini*, ¶ 54: “Although the total duration for the performance of the contract, in accordance with the CCAP, was fixed at 32 months, this was extended to 36 months. The transaction, therefore, complies with the minimal length of time upheld by the doctrine, which is from 2 to 5 years.”

<sup>90</sup> See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 (CL-020, “*Bayindir*”), ¶ 131.

<sup>91</sup> **CL-001 (Revised)**, BIT, Art. 2 (emphasis added).



135. The BIT contains a detailed definition of what constitutes an investment, under which the commitment of resources under a contract to be performed in the other Contracting State explicitly qualifies as an investment.

#### Article 1 Definitions

In this Agreement,

1. The term “investment” means, every kind of asset and capital invested directly or indirectly by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter, including in particular but not limited to:

(a) movable and immovable property as well as any other property rights such as mortgages, pledges, real securities, usufructs and similar rights;

[...]

(c) creditor’s rights and **claims to any performance having an economic value**; [...] <sup>92</sup>

136. In the opinion of the Tribunal, the definition of “investment” in the Treaty does not exceed what is permissible under the ICSID Convention. BUCG’s contribution to the Sana’a International Terminal project resulted in it now asserting “claims to any performance having an economic value” within the meaning of Article 1 of the Treaty. In the view of the Tribunal, that is sufficient to bring the Claimant’s claim within the jurisdiction of the Tribunal under both the Treaty and the ICSID Convention. Moreover, to the extent to which it may be necessary or useful to apply the *Salini* test, that contribution clearly exposed BUCG, a foreign investor, to risks posed by the sovereign power and otherwise as described in *Salini* itself:

With regard to the risks incurred by the Italian companies, these flow from the nature of the contract at issue. The Claimants, in their reply memorial on jurisdiction, gave an exhaustive list of the risks taken in the performance of the said contract. Notably, among others, the risk associated with the prerogatives of the Owner permitting him to

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<sup>92</sup> CL-001 (Revised), BIT, Art. 1 (emphasis added).

prematurely put an end to the contract, to impose variations within certain limits without changing the manner of fixing prices; the risk consisting of the potential increase in the cost of labour in case of modification of Moroccan law; any accident or damage caused to property during the performance of the works; those risks relating to problems of co-ordination possibly arising from the simultaneous performance of other projects; any unforeseeable incident that could not be considered as *force majeure* and which, therefore, would not give rise to a right to compensation; and finally those risks related to the absence of any compensation in case of increase or decrease in volume of the work load not exceeding 20% of the total contract price.

It does not matter in this respect that these risks were freely taken. It also does not matter that the remuneration of the Contractor was not linked to the exploitation of the completed work. **A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor.**<sup>93</sup>

137. In a similar vein, turning to other elements of the *Salini* test:

- It was pointed out in *Toto v. Lebanon (Jurisdiction)* that a construction contract in which the execution of the works extends over a substantial period of time involves by definition an element of risk.<sup>94</sup>
- It is obvious that construction of an international air terminal worth in excess of a hundred million dollars contributes to the host State's economic development.

138. In summary, the Tribunal has no difficulty in concluding that BUCG did make an investment in Yemen that qualified for protection under both Article 25(1) of the ICSID Convention and Article 1(1) of the China-Yemen BIT.

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<sup>93</sup> **RL-020**, *Salini*, ¶¶ 55-56 (emphasis added).

<sup>94</sup> *Toto Construzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 (**CL-072**), ¶ 78

**E. FIFTH OBJECTION - BUCG’S CLAIM IS A CONTRACTUAL CLAIM, NOT A TREATY CLAIM**

**(1) The Parties’ Positions**

**a. *The Respondent’s Position***

139. The Respondent asserts that a review of the facts demonstrates that the Claimant’s claim is a purely contractual commercial claim, which is subject to resolution pursuant to the Contract’s dispute resolution mechanism. Consequently, the Respondent submits that the Tribunal lacks jurisdiction to decide this dispute.<sup>95</sup>

**b. *The Claimant’s Position***

140. The Claimant submits that its claims arise under the China-Yemen BIT, and are not merely contractual in nature. The Claimant asserts that it is common ground that the Tribunal should apply a *prima facie* test to the facts presented by the Claimant in its Memorial when considering the Respondent’s jurisdictional objections. The Claimant further contends that a review of those facts demonstrates that its claims are capable of constituting BIT breaches and the Tribunal therefore has jurisdiction to deal with them.<sup>96</sup>

**(2) The Tribunal’s Analysis**

141. A factual distinction of great importance between the BUCG claim and an ordinary commercial contract dispute is the alleged intervention of the Respondent’s military forces to exclude BUCG workers from the construction site and, allegedly, to render the Contract incapable of performance.

142. The Treaty to be applied in this case does not contain a so-called “umbrella clause,” so the question before the Tribunal is simply whether the Claimant is asserting breaches of the Treaty. The Claimant is not asserting claims for breaches of contract in this proceeding;

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<sup>95</sup> Resp. Mem., ¶¶ 169-181. Resp. Reply, ¶¶ 159-161.

<sup>96</sup> Cl. C-M, ¶¶ 82-85; Cl. Rej., ¶¶ 123-125.

were it to do so, this Tribunal would have no jurisdiction to hear such claims and would decline to entertain them given the limited consent to arbitration in Article 10 of the BIT to “any dispute **relating to the amount of compensation for expropriation.**”<sup>97</sup>

143. For that reason, the Tribunal has no jurisdiction to resolve the claims and counterclaims alleged by the Parties in the document filed by the Respondent entitled “Employer’s Claim and Evaluation of the Contract’s Claims,” which involves claims for compensation well in excess of the current Treaty claims.<sup>98</sup> Nor is the Tribunal being asked to do so.
144. In this proceeding, the Claimant is limited to the relief to which it may or may not be entitled under the Treaty. The tribunal in *Bayindir* observed that “treaty claims are juridically distinct from claims for breach of contract, even where they arise out of the same facts,” and “when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty.”<sup>99</sup>
145. This Tribunal has jurisdiction to hear the Claimant’s claims to the extent that they arise under the Treaty. If the Claimant is unable to establish a claim under the Treaty in the course of the merits phase of this arbitration, the proceedings will be dismissed.

## V. DECISION

146. The Respondent’s jurisdictional objection to enlargement of the dispute resolution provision by reference to the MFN clause is allowed. Consequently, the Tribunal has jurisdiction in this arbitration to hear only those claims related to the Claimant’s allegations of expropriation.
147. The Respondent’s jurisdictional objections are otherwise dismissed. With respect to the Respondent’s jurisdictional objections raised, the Tribunal concludes (a) that the Claimant is a national of another Contracting State within the meaning of the ICSID Convention, (b) that it has jurisdiction *ratione materiae* to hear the Claimant’s claims insofar as they allege and seek compensation for the alleged expropriation of the Claimant’s investment in breach

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<sup>97</sup> CL-001 (Revised), BIT, Art. 10(2) (emphasis added).


<sup>98</sup> CAMA Report, “Employers Claim and Evaluation of the Contractor’s Claim” dated February 2013 (R-001).

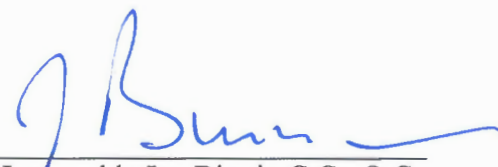
<sup>99</sup> CL-020, *Bayindir*, ¶¶ 148, 167

of the Treaty, and (c) that the Claimant has a claim arising out of an investment that qualifies for protection under the Treaty and the ICSID Convention.

148. Any award of costs is reserved to the merits phase of these proceedings after hearing submissions from the Parties.

  
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Professor Zachary Douglas Q.C.  
Arbitrator

  
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Mr. John M. Townsend  
Arbitrator

  
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The Honourable Ian Binnie C.C., Q.C.  
President of the Tribunal