

McNAIR CHAMBERS – QUARTERLY UPDATE – SUMMER 2017

Welcome to the latest McNair Chambers quarterly round-up, in which we provide a summary of some key judicial and arbitral decisions handed down in recent months, along with recent developments of interest. For a more detailed consideration of the cases listed below, please see the Publications section of the McNair Chambers website.

Public International Law

- *Jadhav Case (India v Pakistan)*. On 8 May 2017, India instituted proceedings against Pakistan before the International Court of Justice alleging violations of the Vienna Convention on Consular Relations 1963 in respect of an Indian national, Commander Jadhav, who, having confessed to charges including espionage and terrorism, was convicted and sentenced to death by decision of a military court in Pakistan. India's relief sought included immediate suspension of Commander Jadhav's death sentence and (if Pakistan was not able to annul the underlying decision) a declaration that the decision was illegal and directions to release Commander Jadhav forthwith. India simultaneously requested Provisional Measures including an order that Pakistan take all measures necessary to ensure that Commander Jadhav was not executed. India contended that the matter was so urgent as to require Provisional Measures to be granted without a hearing. Instead, the Court held a hearing on 15 May 2017. On 18 May 2017, in the absence of an undertaking from Pakistan that Commander Jadhav would not be executed before the matter had been dealt with by the Court, the Court issued a Provisional Measures order requiring Pakistan to take all measures at its disposal to prevent the execution of Commander Jadhav, pending final judgment of the Court. The parties have now been ordered to file their initial pleadings by 13 September 2017 (for India) and 13 December 2017 (for Pakistan).
- [*KSA-led sanctions against Qatar*](#). On 5 June 2017, Saudi Arabia, the UAE, Bahrain and Egypt (amongst others) severed diplomatic relations with Qatar and subsequently closed their territorial waters to Qatar-flagged vessels and their airspaces to Qatari aircraft/airlines travelling to and from Qatar. Furthermore, orders were given that Qatari nationals residing in these States

were to be expelled and Saudi Arabia took steps to close its land border with Qatar. Although the purported justification for this action was alleged “funding and support for terrorism” by Qatar, no compelling or credible evidence was provided in this regard. These measures provoked substantial diplomatic reaction around the world, and disrupted supply chains not only of consumer goods destined for Qatar, but also shipments of hydrocarbons from Qatar via international shipping channels.

- On 29 June 2017, the General Assembly of the United Nations requested an advisory opinion from the International Court of Justice on the legal consequences arising out of the separation of the Chagos Archipelago from Mauritius in 1965, including the consequences of the continued administration by the United Kingdom of the Chagos Archipelago, and with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals.

Investment Treaty Arbitration

- [*Vladislav Kim and Ors v Republic of Uzbekistan*](#) (ICSID Case No.ARB/13/6) – In a Decision on Jurisdiction handed down on 8 March 2017, an ICSID Tribunal rejected several challenges to its jurisdiction. Furthermore, it held that the behaviour of one of the claimants, surreptitiously taking photographs during witness testimony and posting these photos on social media accompanied by offensive language, would be a factor in the Tribunal’s final allocation of costs.
- [*Ansung Housing Co Ltd v People’s Republic of China*](#) (ICSID Case No.ARB/14/25) (Award, 9 March 2017) – In an award handed down on 9 March 2017, an ICSID Tribunal held that a claim against China under the China-Korea BIT was time-barred, and thus "manifestly without merit" for the purposes of ICSID Arbitration Rule 41(5).
- [*Venezuela Holdings et al v Bolivarian Republic of Venezuela \(case formerly known as Mobil Corporation et al v Bolivarian Republic of Venezuela\)*](#) (ICSID Case No.ARB/07/27) – In a Decision on Annulment handed down on 9 March 2017, an ICSID Annulment Committee partially upheld Venezuela’s request for the annulment of a portion of the Award dealing with compensation for expropriation on the basis that the Tribunal had wrongly disregarded a contractual limitation governing compensation for expropriation.

- [*Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan*](#) (ICSID Case No. ARB/12/1) – In a Decision handed down on 20 March 2017, an ICSID Tribunal held that the refusal by the Government of Balochistan to approve the application by the claimants’ local operating subsidiary for a mining lease in respect of the Reko Diq mine (one of the world’s largest known copper and gold deposits) violated the Australia-Pakistan BIT. This case now proceeds to the quantum phase.
- [*Beijing Urban Construction Group Co Ltd v Republic of Yemen*](#) (ICSID Case No. ARB/14/30) – In a Decision on Jurisdiction handed down on 31 May 2017, an ICSID Tribunal held that it had jurisdiction over the underlying dispute. The phrase “any dispute related to the amount of compensation for expropriation” in the BIT was held to be wide enough to cover issues of liability as well as quantum.
- [*Orascom TMT Investments Sàrl v People’s Democratic Republic of Algeria*](#) (ICSID Case No. ARB/12/35) – In a Decision handed down on 31 May 2017, an ICSID Tribunal held that a claim brought by a former parent in a complex corporate group was inadmissible as the claim remained, upon the sale of its subsidiary, the legal right of that subsidiary, which had directly suffered the loss and which had settled with the Algerian government. The claim was held to be an abuse of rights.

Public International Law before the English Courts

- [*The Law Debenture Trust Corp plc v Ukraine*](#) [2017] EWHC 655 (Comm) – On 29 March 2017, the English Commercial Court granted summary judgment against Ukraine for non-payment of \$3 billion borrowed from Russia under Eurobonds, which Ukraine argued were entered into under pressure from the Russian government. The court held that, as a result of the doctrine of foreign act of state, it was unable to adjudicate a transaction entered into between states and could not interpret international agreements not incorporated into English law. The court also held that it was unable to rule on questions of the public international law doctrine of countermeasures.

Fraud and Corruption

- [*Serious Fraud Office v Eurasian Natural Resources Corporation*](#) [2017] EWHC 1017 (QB) – On 8 May 2017, the English High Court handed down a decision in which it ruled that certain documents generated by accountants

and solicitors during internal investigations into claims of corruption related to mines acquired in Africa and Kazakhstan were not subject to legal professional privilege, as they were not generated in anticipation of litigation, nor were they of the character of legal advice.

- [*Stati & Ors v The Republic of Kazakhstan*](#) [2017] EWHC 1348 (Comm) – On 6 June 2017, the English High Court ordered a full trial of a public policy challenge to a New York Convention award on the basis of alleged fraud relating to the valuation of an underlying asset. Earlier decisions in the US and Swedish courts had not conclusively determined the fraud issue and on the evidence there was a sufficient *prima facie* case of fraud so as to warrant a full trial of the issue.

Arbitration and Litigation in the English courts

- [*Microsoft Mobile Oy \(Ltd\) v Sony Europe Limited and others*](#) [2017] EWHC 374 (Ch) – On 28 February 2017, the English High Court held that an arbitration clause was broad enough to encompass tortious claims that were closely related to the contractual claims. Proceedings were stayed under Section 9 of the Arbitration Act 1996 and an order for service out of the jurisdiction was set aside for lack of a “good arguable case”.
- [*IPCO \(Nigeria\) Ltd v Nigerian National Petroleum Corporation*](#) [2017] UKSC 16 – By a decision handed down on 1 March 2017, the UK Supreme Court held that the Court of Appeal had erred in requiring security from the appellant as it pursued an appeal against an arbitral award on the grounds of public policy and fraud.
- [*Aldcroft v International Cotton Association Limited*](#) [2017] EWHC 642 (Comm) – On 30 March 2017, the English High Court held that a rule in the Arbitrators’ Code of Conduct of the International Cotton Association that restricted the number of appointments an arbitrator could undertake was not void and unenforceable as an unreasonable restraint of trade. The rule was a legitimate means of pursuing the objectives of avoiding delays and avoiding the perception of bias.
- [*Associated British Ports v Tata Steel UK Limited*](#) [2017] EWHC 694 (Ch) – On 3 April 2017, the English High Court held that an arbitration clause was broad enough and certain enough to cover a request for changes in fees due to a “major physical or financial change in circumstances”. Proceedings were stayed under Section 9 of the Arbitration Act 1996.