

BAYINDIR V. PAKISTAN AND THE DECLINE AND FALL OF INVESTMENT TREATY CLAIMS ON INTERNATIONAL CONSTRUCTION PROJECTS

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“Toto, I’ve a feeling we are not in Kansas anymore.”¹

Abstract

A recent international arbitration case involving a Turkish construction firm highlighted the dangers of making claims under international investment treaties; however this is not the only case. This article analyzes three similar international arbitrations involving construction contracts that implicate the International Center for the Settlement of Investment Disputes (ICSID). These contractors are entities who may have suffered, or who may be suffering, at the hands of a governmental entity under their international contracts and who are looking for a remedy under public international investment treaty law beyond their contractual dispute clauses (which may be less than satisfactory). The aspirations of these contractors for treaty redress may now have been curtailed as a result of these three cases. The cases also reveal a new trend in the applicability (or rather lack of applicability) of public international investor-state arbitration law to construction projects, particularly pure construction projects, as compared to construction concession agreements. The outcomes in these cases stand as a warning to all international contractors that they need to exercise extreme caution before they venture into making international public law investment treaty claims, because investment treaties will not provide protection from contractual matters, one of the prime defenses by the nation-

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¹ From the movie “The Wizard of Oz” (1939).

state to construction claims. By a showing that the contractor is on time, that changes are the owner's responsibility, that these changes impacted the critical path, and that there was no reasonable probability that the contractor could be considered in default, the contractor's is in a position to show that the actions of the state entity were not contractually motivated but were in fact treaty violations.

Özet

Yakın zamanda cereyan eden ve bir Türk inşaat şirketinin taraf olduğu tahkim davası, uluslararası tahkimin tehlikelerine dikkat çekmektedir, ancak bu dava tek değildir. Bu makale, birbirine benzeyen ve inşaat sözleşmesini konu edinen üç ICSID davasını analiz etmektedir. Sözleşmenin tarafları, uluslararası bir sözleşmenin tarafı olarak, bir devlet kurumundan dolayı zarara uğrayabilecek durumdadırlar veya zarara uğramaktadırlar ve kendi sözleşmelerindeki uyuşmazlık çözümü hükümlerinin ötesinde uluslararası kamu hukukunun yatırım anlaşmaları içerisinde hukuki çareler aramaktadırlar. Bu üç davanın sonucu olarak, anlaşmalara başvurulma yolu azalmaya başlamıştır. Davalar, ayrıca inşaat imtiyaz sözleşmeleri ile karşılaştırıldığında saf inşaat projeleri olarak görünen inşaat projelerine kamu uluslararası yatırımcısının hukukunun – devletin tahkim hukukunun uygulanabilirliği (ya da aslında uygulanamazlığı) konusunda yeni bir eğilim de açığa çıkarmıştır. Bu davaların sonucu tüm uluslararası alanda çalışan müteahhitlere bir uyarı niteliğindedir, şöyle ki; uluslararası kamu yatırım anlaşmalarına dayanmadan önce çok dikkatli davranmaları gerekir, çünkü yatırım anlaşmaları sözleşmeden kaynaklanan hususlar için koruma sağlayamamaktadır ve bu da ulus devletlerin inşaat uyuşmazlıklarındaki en temel savunmasıdır. Müteahhitlerin, iş konusunda sürelere uyduğunun, değişikliklerin malik'in sorumluluğunda olduğunun, bu değişikliklerin kritik etkilerinin olduğunun ve müteahhidin hatalı olduğu değerlendirmesine ulaşamayacağının ispatlanması, müteahhidin devlet kurumunun faaliyetlerinin sözleşme tarafından desteklenmeyip, anlaşma ihlali olduğunu göstermesi anlamına gelir.

Keywords: ICSID, international arbitration, investment treaties

Anahtar Kelimeler: ICSID, uluslararası tahkim, yatırım anlaşmaları

I. INTRODUCTION

This past summer, the Turkish construction contractor, Bayindir Insaat Turizm Ticaret ve Sanayi A.S ("Bayindir"), had its international treaty claim for \$496.6 million, arising out of Bayindir's termination on a road building

construction project against the Government of Pakistan, rejected completely by an international arbitration tribunal of the International Center for the Settlement of Investment Disputes ("ICSID").² The decision's impact on Bayindir has no doubt been significant (as also, for opposite reasons, on Pakistan). However, the effect of the Arbitration Award has also been felt well beyond Bayindir itself. The award impacted the consortia of Turkish banks that provided Pakistan with a guarantee of approximately \$96 million, covering the mobilization advance that Bayindir received from Pakistan. This money became payable to Pakistan as a result of the Award. The Award also impacted the Turkish Tasarruf Mevduat Sigorta Fonu (TMSF – Turkish Savings Deposits Insurance Fund),³ which by all accounts had been involved in supporting Bayindir financially.

In addition to these direct impacts of the Bayindir Award, and while not downplaying them, perhaps the most significant impact of the case is its *potential future impact on the ability of international construction contractors to get redress under international investment treaties*. These contractors, such as the Italian contractor Toto Costruzioni Generali S.P.A. ("Toto"), are entities who may have suffered, or who may be suffering, at the hands of a governmental entity under their international contracts and who are looking for a remedy under public international investment treaty law beyond their contractual dispute clauses (which may be less than satisfactory). The aspirations of these contractors for treaty redress may now have been curtailed.

This curtailment is not just as a result of the *Bayindir* decision, but of combined with two other decisions that also came out this past summer from ICSID Tribunals: *Toto Costruzioni Generali S.P.A. v. The Republic of Lebanon*,⁴ and *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*.⁵ In *Pantechniki*, as in *Bayindir*, the contractor's claim was denied completely, even though in that case, the Albanian government accepted that money was due the contractor, but simply did not have it. In *Toto*, which was a decision on jurisdiction, the ICSID Tribunal dismissed a number of the contractor's claims creating a scenario where the contractor is now faced with the cost and time issues of pursuing different claims in different forums. These cases, although all are independent cases, bring into sharp focus the issues

² *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, International Center for Settlement of Investment Disputes ("ICSID"), Case ARB/03/29 [hereinafter "Bayindir"], available at <http://ita.law.uvic.ca/documents/Bayindiraward.pdf> (last visited Apr 3, 2010).

³ Function similar to the U.S. Federal Deposit Insurance Corporation (FDIC).

⁴ ICSID Case ARB/07/12, Sep. 11, 2009, available at <http://icsid.worldbank.org/ICSID/FrontServlet> [hereinafter "Toto"].

⁵ ICSID Case ARB/07/21, Jul. 30, 2009, available at <http://icsid.worldbank.org/ICSID/FrontServlet> hereinafter "Pantechniki"].

facing international contractors in deciding whether to proceed to enforce rights under international investment treaties. The cases also reveal a new trend in the applicability (or rather lack of applicability) of public international investor-state arbitration law to construction projects, particularly pure construction projects, as compared to construction concession agreements. The cases highlight the difficulties faced by contractors in demonstrating that their cases are investment treaty cases, not simply contract actions.

This article reviews the three cases of *Bayindir*, *Pantechniki* and *Toto*, both individually on their own facts and for their collective message. It also explains the effects the outcomes in these cases will likely have on international construction contractors' abilities to now pursue investment treaty claims successfully. The article then reflects on possible alternative mechanisms that such international contractors may wish to consider to ensure they have mechanisms that give them fair opportunity to protect their rights in entering into such agreements.

II. ICSID AND INVESTOR-STATE DISPUTE RESOLUTION: A BRIEF OVERVIEW

In order to understand the decisions in, and the relevance of, *Bayindir*, *Pantechniki* and *Toto*, it is necessary to briefly set forth the investor-state treaty context and arbitral framework within which they were decided. This is a framework in which construction projects have in recent years become a significant part of the world of investor-state treaty disputes. This fact is not especially surprising. Foreign direct inward investment into developing countries often focuses on the infrastructure needs of those nations. Also, particularly where projects are being funded by international entities, international contractor investors are involved. Moreover, construction projects have traditionally been subject to a high number of disputes.⁶ Furthermore, contractors performing work in and for national governments in developing nations often find themselves subject to unfriendly contract terms regarding disputes. State entities either do not agree to international arbitration clauses or, even if they do, the contractor is not confident that any arbitration award will be enforced by the courts of that nation, even if the nation is a signatory to the New York Convention. An additional overlay on all of this now is also the global economic credit squeeze. This economic tightening is causing contractors to be increasingly competitive in tendering and, in an increasingly unfriendly market

⁶ See, e.g., Helmut Köntges, *International Dispute Adjudication - Contractors' Experiences*, 23 INTL. CONST. L. R. 306 (2006). Of the 22 large and medium international projects of his company, the German international contractor Hochtief, from a six-year period that he surveyed, 15 of those projects had disputes that required an outside party to assist with resolution. *Id.* at 307-10. This is a dispute rate of 68% of the projects.

for construction projects, making contractors more likely to accept a greater risk profile. It is against all of these market currents and tensions that contractual and investor-state treaty rights and the decisions in *Bayindir*, *Pantechniki* and *Toto* are important for international construction contractors.

A. The ICSID Convention and the ICSID Arbitral Institution

ICSID is an international arbitration institution that is part of, but at the same time, autonomous from, the World Bank.⁷ It is based in Washington, D.C. Its main purpose is to function as the arbitral institution for the resolution of public international law investment disputes that arise under investment treaties between states and investors (“investor-state disputes”).⁸ ICSID was established by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (commonly known as the Washington or ICSID Convention). Today over 150 nation states have executed the ICSID Convention. ICSID’s arbitration case load has grown considerably in the last 10 years, fueled in large measure by the increase in global trade between nations and the rise of investor protection trade treaties, whether bilateral (Bilateral Investment Treaties “BIT”) or multilateral (Multilateral Investment Treaties “MIT”).⁹

In this regard, as a point of reference, the United Nations Conference on Trade Development (“UNCTAD”) reports that, as of June 1, 2009, Turkey has entered into 79 BITs with other nations.¹⁰ Turkey is also a signatory to the Energy Charter Treaty, a MIT, concerning energy investments.¹¹ Disputes under the Energy Charter Treaty may also be referred to ICSID.¹² Indeed, the one of the most well-known ICSID Turkish investment arbitration cases, *Libananco Holdings Co. Limited (Cyprus) v. Republic of Turkey*, is an energy treaty-related case, concerning a \$10 Billion claim based on allegations of expropriation of electricity generation and distribution concessions.¹³ That case is still on-going.

⁷ See ICSID, *About ICSID*, at <http://icsid.worldbank.org> (last visited Apr. 3, 2010).

⁸ As with all major international arbitral institutions, ICSID has its own arbitration rules. These are either the ICSID Convention rules of arbitration or the ICSID Additional Facility Rules. See ICSID, at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>.

⁹ An example of a MIT would be the North American Free Trade Agreement (“NAFTA”) between Canada, the United States and Mexico.

¹⁰ See UNCTAD, at http://www.unctad.org/sections/dite_pceb/docs/bits_turkey.pdf (last visited Apr. 3, 2010).

¹¹ Available at <http://www.encharter.org>. (last visited Apr. 3, 2010).

¹² See e.g., *Plama Consortium Ltd (Cyprus) v. Bulgaria*, ICSID Case ARB/03/24, Aug. 27, 2008.

¹³ ICSID Case No. ARB/06/8, Apr. 19, 2006.

B. International Investment Treaty Rights and Arbitration

International investment treaties, whether BITs or MITs, have become increasingly sophisticated and varied. However, while there may, for example, be significant differences between some of the 79 BITs Turkey has signed, there are effectively three prime rights and protections that BITs and MITs give investors that can be discussed generally. These are:

- BITs typically provide the investor with a right to 'fair and equitable treatment.' This is a right that the host state will not engage in behavior that discriminates against the investor and in favor of either investors from other states or domestic host nation-based investors.
- BITs also often provide investors with 'most favored nation' status. This means that the investment will be treated no less favorably than the manner in which investors from other nations are treated in the host, pursuant to their BITs. This right has been used to apply rights given in other BITs to a BIT at issue in a dispute, on the basis that the investor in the dispute is entitled, via the most favored nation clause, to the same rights as others.
- BITs provide investors with protection from expropriation by the state without fair compensation. This expropriation can be direct or indirect regulatory taking.

These rights granted in BITs and MITs are distinct and separate from contractual rights. They are public international law rights provided by treaty law. This is an important point, as noted later, in relation to the claims of construction contractors under investment treaties and the interrelationship between the rights they have in their contracts and those in BITs.

Investment treaty rights arise where there is some action or inaction by the host state, or a state agency, (not by a private entity) that impinges upon the rights of the investor in the treaty. This is because investment treaties relate to actions or inactions of sovereigns that effect foreign investors. In this regard, they cover acts not only of the central government itself, but local governments (such as that of a state or province), and state agencies, including state-owned companies. Indeed, under an investment treaty, the actions of state entities can be imputed to the nation-state itself — investors claim against a country at ICSID not against a state instrument. For example, in *Bayindir*, the Tribunal found that Pakistan's National Highway Administration could act as a sovereign for the purpose of the application of the Turkey/Pakistan BIT.¹⁴ The Tribunal

¹⁴ "NHA's conduct is attributable to Pakistan under Article 8 of the ILC Articles." . . . "Each act allegedly in breach of the Treaty was a direct consequence of the decision of the NHA to

applied Article 8 of the International Law Commission's ("ILC") Articles to reach this conclusion. Article 8 provides that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." The ILC Articles are "widely regarded as expressing current customary international law."¹⁵ The arbitration case, however, was against Pakistan not against its highway administration.

Both BITs and MITs contain arbitration provisions for the resolution of investment disputes between investors and the host nation. The dispute clauses in the treaties often provide for a period in which the parties should seek to resolve their disputes before arbitration. The arbitration provision then typically sets forth a choice (for the investor to make) of either ICSID arbitration or another arbitral institution's arbitration, such as UNCITRAL. The policy behind putting arbitration clauses into BITs and MITs is so an investor, who asserts treaty violations by a nation state, is not required to proceed before the courts of the same nation-state that it accuses of violating its investment treaty rights in order to seek redress.

C. Construction Projects as Investor-State Disputes

i. Construction Projects as "Investments"

BITs and MITs define 'investor' and 'investment.' The latter is usually very broad. For example, the Turkey/Pakistan BIT at issue in the *Bayindir* case defined investment as including "every kind of asset in particular, but not exclusively...(b)...claims to money or having other rights to legitimate performance having financial value related to an investment, (c) moveable and immoveable property, as well as other rights *in rem* such as mortgages, liens, pledges and any other similar rights..."¹⁶ Under such definitions, construction projects constitute 'investments' and the contractors 'investors.'

The issue of whether a construction project is an investment was also addressed in the affirmative in *Pantechniki*. Under that BIT (the Greece/Albania BIT), construction contracts for a road and bridge project were investments because they involved "the supply of services and materials; the contribution of equipment and *construction management*; the mobilization of human and

terminate the Contract, which decision received express clearance from the Pakistani Government." *Bayindir*, para. 125.

¹⁵ *Bayindir*, para. 113, fn 19.

¹⁶ Article 2 of Agreement between the Republic of Turkey and the Islamic Republic of Pakistan Concerning the Reciprocal Promotion of Investments, March 16, 1995. The BIT entered into force on September 3, 1997.

capital resources for the purposes of performing the Contracts; and the entitlement to compensation deriving from the above.” (emphasis added).¹⁷ The Tribunal found greater difficulty determining whether the construction contracts qualified as an investment under Article 25(1) of ICSID Convention, which, the Tribunal suggested, offered a more restrictive conception of investment than many BIT treaties. The Tribunal expressed its own formulation of what constitutes an investment for the purpose of satisfying Article 25(1), holding that an investment is, objectively, “the commitment of resources to the economy of the host state by the claimant entail in the assumption of risk in expectation of a commercial return.”¹⁸ Ultimately, the Tribunal held that under any reasonable definition of the word ‘investment,’ Pantechniki’s commitment of capital and labor to Albania for a profit constituted an investment and jurisdiction was proper. Accordingly, construction projects typically qualify as ‘investments’ under international treaty law jurisprudence.

ii. The Trend of Contractors to Protect Their BIT Rights

In recent years it has been common to see international construction contractors seek to take advantage of BIT rights. Contractors have created and framed their corporate structures for projects so that they can get BIT rights, for example, by establishing entities to perform the projects in jurisdictions where there is a BIT with the host nation. In this regard, for example, the disputes regarding the Dabhol power plant in India were subject to the BIT between India and Mauritius, the contractors having created a vehicle based in Mauritius to perform the project.¹⁹

iii. A Large Number of ICSID Disputes Are Construction Ones

A review of the ICSID website, searching simply the word ‘construction,’ reveals that a significant proportion of the investor-state cases at ICSID involve construction projects. These are of various kinds including a hotel, fertilizer factory, low-income housing units, airport terminal, highways, dams, office buildings and a mosque. While some of these projects are concession agreements, e.g., projects where the investor constructs the infrastructure and then operates it for a profit over a certain time period, a significant number, such as the cases we now turn to, are pure construction projects that involve simply building infrastructure facilities.

¹⁷ *Pantechniki*, paras 34 and 35.

¹⁸ *Id.*, paras 36 and 49.

¹⁹ While it is likely that such was done for tax reasons, more than BIT protection reasons. Nevertheless, the BIT did provide a way around the delays of the Indian courts. See Simpson Thatcher, *International Arbitration: A Key Protection for Foreign Investments*, News 34-36 (Oct 10, 2006) at http://www.simpsonthatcher.com/content/News/News622_1.pdf.

III. REVIEW OF BAYINDIR, PANTECHNIKI AND TOTO

A. Bayindir

The Bayindir award was issued by a three-member ICSID panel on August 27, 2009, more than seven years after the submission of a Request for Arbitration to the ICSID by the Claimant Bayindir. The Award was against Bayindir. Based on the decision, while construction companies may qualify in ICSID as investors for jurisdictional purposes, it will be very difficult, if not impossible, for them to succeed in pursuing pure construction claims (such as acceleration/compression, change orders, etc.) in an investment arbitration setting unless there is a specific showing that the BIT or the MIT at issue was violated by the host state through expropriation or some other act that goes beyond the conventional breach of a commercial construction contract. Also, it will be increasingly difficult for contractors to seek to shoehorn what are 'contractual' claims into 'treaty' claims by assertions of conspiracies and the like. If a contractor is to prevail on a treaty claim, and override a nation-state's defense of "it is a contract claim," the contractor is going to need very clear and convincing evidence that a sovereign act in violation of the treaty occurred; getting that information will be extraordinarily difficult in most situations.

i. The Construction Project

The facts of the *Bayindir* case are that Bayindir, a Turkish company engaged in (among other areas of business) construction, entered into a contract in 1993 to build the Islamabad-Peshawar Motorway (the "M1 Motorway") for the National Highway Administration ("NHA"), a public corporation controlled by the government of Pakistan.²⁰

Prior to the start of work, the contract was revised twice, once in March of 1997 and then in July 1997. The contract incorporated the FIDIC General Conditions of Contract and elected Pakistani law as the law of the contract. The dispute resolution clause in the contract called for arbitration under Pakistan's Arbitration Act of 1940. Also, under the contract, the NHA was to be represented by "the Engineer," who would have the authority to make discretionary decisions regarding the work to be performed.²¹

Initially, the contract called for a July 2000 date for the completion of the M1 Motorway. Between the June 1998 start date and the project completion

²⁰ *Bayindir*, para. 9.

²¹ See *Bayindir*, paras 18, 19 and 241. In FIDIC contract forms, as well as others from around the globe, the engineer is formally an 'independent' agent, albeit one that is paid by the Owner, who is often required to act essentially as a 'referee' in effect between the parties on issues such as changes, time extensions and the like. See, e.g., Jeremy Glover, *et al*, UNDERSTANDING THE NEW FIDIC RED BOOK, A CLAUSE-BY-CLAUSE COMMENTARY 56-61 (Thomson 2006).

date, however, a number of problems arose, delaying the progress of the work. While Bayindir claimed the delays were caused by NHA's failure to timely hand over control and possession of the work site, Pakistan contended that the delays were caused by Bayindir's unsatisfactory performance and construction management.

Even though Bayindir and NHA initially agreed to mutually extend the completion date to December 2002, in December 2000 the Engineer notified Bayindir that Bayindir was not making satisfactory progress and demanded that it submit a plan outlining in detail the actions Bayindir planned to take to achieve timely completion. Bayindir asserted that it was entitled to time extensions due to NHA-caused delays and demanded a 'high-level' meeting between the parties.

This meeting resulted in a limited time extension for Bayindir, but Bayindir continued to maintain that it should have been granted additional time extensions for the completion of the work. The parties failed to resolve the issue of the amount of additional time Bayindir should have been entitled to for the remainder of Bayindir's performance.

In addition to the aforementioned disagreement over schedule and time extensions, NHA demanded that Bayindir permanently hand over equipment it had been utilizing on the project to Pakistan, which Bayindir refused to do. Further, NHA claimed that Bayindir had failed to pay its subcontractors with the monies it had received from NHA in a timely fashion, falling behind in such payments.

Based on the schedule delays, the dispute regarding the handing over of equipment and alleged failure to pay subcontractors, NHA issued a formal notice that it would impose liquidated damages against Bayindir on two priority sections of the work. Three days later, NHA terminated Bayindir and evacuated Bayindir from the site. NHA then awarded the rest of the work to another contractor, a local entity from Pakistan.

ii. The Claim

Following its April 2001 termination, Bayindir proceeded to simultaneously demand arbitration against NHA under the Pakistan Arbitration Act as required by the contract as well as initiating litigation of its perceived wrongful termination in Pakistani courts. These proceedings, however, were all dismissed, stayed, or effectively enjoined by the procedural order of the ICSID Tribunal.

On April 15, 2002, Bayindir filed its demand for arbitration with ICSID seeking payment of the following amounts: recovery of outstanding interim

payments for \$62,514,558; compensation for fixed and movable assets expropriated for \$43,050,619; lost profits in the amount of \$167,154,634; damage to reputation for \$150,000,000; claims related anticipated completion of the work for \$19,071,449; mobilization and demobilization costs in the amount of \$7,444,854 and additional financial claims related to work completed by Bayindir for \$27,000,000. In total, Bayindir's claim was for \$496.6 million, excluding interest.²²

In addition to the issue as to whether ICSID had jurisdiction in this case – which will be addressed below – at issue before the tribunal were substantive issues of whether or not Bayindir's claims were caused by Pakistan's violations of the BIT. Bayindir argued that NHA could no longer afford to pay Bayindir as required under the contract and therefore sought to terminate Bayindir, using the language of the contract as subterfuge for the termination. Pakistan argued that Bayindir was terminated because of its poor performance on the project and that Pakistan acted fairly and in good faith throughout the performance period.²³

iii. Decision on Jurisdiction

At the outset of the proceedings, Pakistan challenged ICSID's jurisdiction, requesting that the tribunal dismiss the matter. Pakistan advanced the following arguments in support of its position.

- (a) Bayindir had not made an investment within the meaning of Article 1(2) of the BIT or Article 25 of the ICSID Convention.
- (b) The basis of Bayindir's claims was an alleged breach of the contract. The contract was governed by the law of Pakistan and, pursuant to the law of Pakistan, the employer (NHA) was a separate legal person, distinct from Pakistan. The ICSID Tribunal had no jurisdiction with respect to alleged breaches of the contract as such breaches were not attributable to Pakistan.
- (c) The contract claims were inadmissible in the light of the agreement of the employer and the contractor to refer their disputes to arbitration, and the proceedings should be stayed pending resolution of the contractual dispute by arbitration.
- (d) To the extent that Bayindir's claims were based on an alleged breach of the BIT, i.e., to the extent that they were treaty claims,

²² *Bayindir*, para. 100.

²³ Pakistan alternatively contended that even if it were liable to Bayindir, damages be offset due to the substantial mobilization payment made to Bayindir at the start of the project which had not been exhausted by Bayindir. *Bayindir*, paras 101-105.

they were entirely artificial and advanced solely for purposes of expediency.

(e) Since Bayindir's treaty claims were dependent upon the claims for breach of the contract that had to be settled in another forum, the ICSID Tribunal could not exercise jurisdiction over the treaty claims, at least until that other forum has reached a conclusion with regard to the alleged breach of the contract.

(f) Insofar as Bayindir's treaty claims were distinct from the alleged breach of the contract, these allegations had no colorable basis and were insufficient for the Tribunal to assert jurisdiction.²⁴

In response, Bayindir asserted the following:

(a) Bayindir had made an "investment" under both the BIT and the ICSID Convention;

(b) Bayindir had *prima facie* claims against Pakistan for breaches of the BIT, namely for breaches of the treaty provisions on national and most favored nation treatment, fair and equitable treatment and expropriation without compensation.

(c) The Treaty Claims were distinct and autonomous claims which Bayindir could assert against the NHA (and or Pakistan) independently from those claims which arose out of the contract.

(d) Finally, as an independent argument, the ICSID Tribunal also had jurisdiction over the contract claims.²⁵

On November 14, 2005, the ICSID Tribunal issued its decision on jurisdiction in favor of Bayindir. That decision stated that ICSID had jurisdiction over claims asserted by Bayindir against Pakistan for alleged breaches of the BIT between Turkey and Pakistan, which included allegations on the part of Bayindir regarding (1) breach of the Fair and Equitable Treatment obligation under the BIT; (2) breach of the Most Favored Nation provision; and (3) expropriation without compensation.

iv. The ICSID Ruling

At the outset of its decision on the merits, the Tribunal noted that its decision would be governed by the text and *ratione temporis* of the Turkey Pakistan BIT, as well as applicable rules of international law. The Tribunal also noted that previous ICSID decisions were not binding, but should be given "due regard,"

²⁴ Bayindir, Decision on Jurisdiction, Nov. 14, 2005, paras. 65-71.

²⁵ *Id.* para. 61-64.

with the Tribunal “follow[ing] solutions established in a series of consistent cases, comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case.”²⁶ Then, as a preliminary matter, the Tribunal determined that the actions of the NHA were attributable to Pakistan. Agreeing with Pakistan that the NHA is a “distinct legal personality” under the laws of Pakistan and therefore not a state organ under Article 4 of the ILC Articles, and that the NHA was not an “instrumentality acting in the exercise of governmental powers” under Article 5 of the ILC, the Tribunal nevertheless held that the NHA acted under the “direction or control of” Pakistan, and thus attribution was appropriate pursuant to Article 8 of the ILC.

a. Bayindir Did Not Prove a Violation of Fair and Equitable Treatment

Regarding the alleged treaty breaches, the Tribunal noted that Bayindir had the burden of proving such breaches leaving “no room for reasonable doubt.”²⁷ In a lengthy discussion of Bayindir’s Fair and Equitable Treatment claim, the Tribunal concluded that Pakistan did not breach the duty to provide Fair and Equitable Treatment (“FET”) to Bayindir. First, the Tribunal held that although the Turkey / Pakistan BIT did not expressly include an FET provision, such obligation was imported into the BIT through the Treaty’s Most Favored Nation Clause relying on a contemporaneous FET clause (from a BIT between Pakistan and Switzerland which predated the contract with Bayindir). The Tribunal then rejected Bayindir’s arguments that the Pakistani government took an aggressive stance against Bayindir and terminated and expelled Bayindir in bad faith.

The Tribunal noted that the standard of proof for a conspiracy involving a bad faith component was a demanding standard and concluded that Bayindir did not meet the burden. Notes of the secretary of communications concerning terminating the MI-Project after a default did not support a conspiracy as the course of action was not reflected in a final decision or instruction imposed on the Engineer. Likewise, the Tribunal also rejected Bayindir’s assertion that Pakistan’s General Musharraf made the decision to terminate the contract, finding no evidence of such a decision by Musharraf. Moreover, the Tribunal found no evidence that the Engineer was part of any conspiracy – relying in part on the Engineer favoring Bayindir in five of ten decisions made between November 2000 and July 2001. In sum, the Tribunal held that a conspiracy

²⁶ Bayindir, Award on Merits, para. 145.

²⁷ *Id.*, para 142.

finding “can in no circumstances derive solely from a divergence of views on the interpretation of certain provisions of the Contract.”²⁸

The Tribunal further found, contrary to Bayindir’s allegations, that the fact that the NHA amended the contract was neither an attempt to shift the Project away from Bayindir, or an indication of adverse political shift constituting a breach of FET. Instead, it provided a revised structure for Bayindir to complete the project. Accordingly the Tribunal found no causal link between Pakistan’s financial difficulties and its decision to expel Bayindir, and so the Tribunal concluded that Bayindir was not expelled to save resources and allow completion of the project by less costly local contractors. Regarding the NHA’s consideration of local contractors, the Tribunal dismissed this as indicating nothing more than Pakistan’s need to find an alternative contractor to complete the work following a proper termination of Bayindir.

Bayindir’s claim that an abrupt change in Pakistan’s government caused it to suffer inequitable treatment was also rejected. The Tribunal held that Bayindir did not prove that the changes in the Pakistani investment environment were outside of Bayindir’s “reasonable expectations.”²⁹ The Tribunal concluded that, “Claimant could not reasonably have ignored the volatility of the political conditions prevailing in Pakistan at the time it agreed to the revival of the Contract.”³⁰ This was especially true in this case, where Plaintiff had suffered from similar volatility in Pakistan in the years immediately prior to its reviving of the contract.

In all, the Tribunal held that Bayindir had not produced sufficient evidence to show that the NHA did not terminate and expel Bayindir for any reason other than a good faith belief that Bayindir did not adequately perform under the Contract. The Tribunal concluded that these were contract issues and not treaty violations.

b. There was No Violation of the Most Favored Nation Clause

The Tribunal also decided that Bayindir had not been deprived of Most Favored Nation Treatment on the basis that the NHA hired a local contractor to complete the work.

To prove an MFN violation has occurred, the Tribunal noted, the claimant must show that it was in a “similar situation” with local investors and received disparate negative treatment compared to the local investors.³¹ The Tribunal

²⁸ *Id.* para. 256.

²⁹ *Id.*, paras. 190-199.

³⁰ *Id.*, para. 193.

³¹ *Id.* para. 389.

noted that whether a claimant is in a similar situation as local investors is a fact-specific inquiry. If the requirement of a similar situation is met, the Tribunal concluded that an MFN violation would be found if, under an objective standard, i.e., without regard to any intent to discriminate, the Tribunal identifies a discriminatory showing toward a foreign investor.

In this case, the Tribunal determined it did not need to reach whether discrimination occurred because it found Bayindir had not shown that it was in a similar situation with the local replacement contractor. For example, the Tribunal found that there was no foreign currency component to the replacement contract, and Bayindir and the local replacement contractor had different expertise and experience levels, which commanded different pay rates. As such, “the two contractual relationships are too different...to be deemed in “similar situations.”³² Accordingly, the national treatment standard could not be met by Bayindir.

c. Pakistan Did Not Commit Expropriation

Finally, the Tribunal denied Bayindir’s expropriation claim. The Tribunal concluded that where a contract is validly and in good faith terminated, it will not suffice to prove that the Government wrongfully took money or property belonging to the investor. The Tribunal stated: “[t]o establish an expropriation as a result of the NHA’s exercise of its own contract rights, Bayindir must start by proving that its contractual rights were not limited by the NHA’s contractual rights or that the NHA took an action that, although allegedly based on the Contract’s terms, was in fact clearly in breach of such terms.”³³ Having decided earlier in its decision that the NHA acted in good faith in terminating the contract, it followed that no expropriation claim could be sustained.

Accordingly, in sum the Tribunal awarded zero to Bayindir and held that the guarantees provided to Pakistan by a Turkish banking consortia relating to the advance payments—up front payments to assist in the financing of the project—amounting to \$96 Million must be repaid to Pakistan.³⁴ This issue had been stayed pending the outcome of the ICSID arbitration.

³² *Id.*, para. 411.

³³ *Id.*, para. 460.

³⁴ On construction contracts, parties giving guarantees require indemnification from the contractor should the guarantee be subject to a payment demand. As such, the banking consortia would have had contractual rights under their financing agreement with Bayindir to recover this money from Bayindir upon a call against the Guarantees.

v. The Rule in *Bayindir*

While an important decision on several fronts, perhaps the most important lesson derived from the *Bayindir* decision is that contractors must know what their treaty rights are and must be able to divorce those treaty rights from their pure construction contract claims. As confirmed in the discussion of the other cases below, ICSID Tribunals have neither the authority nor the propensity to award money to contractors whose sole claims are really contractual issues related to the work. In this regard, it is to be anticipated that met with such claims, nation-states will always raise the “it’s a contract claim, not a treaty claim” defense. In *Bayindir*, Bayindir seems to have done nothing to refute this defense. Pakistan produced evidence that Bayindir was behind schedule and that this justified a contractual termination. This evidence framed the dispute in contractual terms, not treaty terms. If Bayindir had produced evidence showing, via a scheduling analysis or other method, that this was not the case, such may have assisted it in meeting its burden that other factors —sovereign decisions — were the real reason for the termination. This would have supported a treaty claim.

A corollary to the above rule is that contractors, such as Bayindir, will not be able to create an international arbitration forum capable of awarding them pure construction contract claims by attempting to characterize and disguise those claims as a violation of treaty rights. If a contractor was delayed, for example, due to the inability of the host state to turn over the work area, that constitutes a construction claim, not a violation of the contractor’s rights under the BIT or the MIT. And, while ICSID will hear the contractor’s allegations of treaty violations, unless there is a bona fide violation such as expropriation, damages related to pure construction claims, will not be awarded by the ICSID tribunal. Accordingly, in such circumstances, the better course for the contractor may well be ensure it is protected in its contractual claim mechanism so that it may assert its claims as construction claims in a contractual arbitration or other agreed forum under the disputes clause in the contract.

B. PANTECHNIKI

The Pantechniki case was decided slightly before *Bayindir*, the award being issued on July 30, 2009. The Award was against Pantechniki, and indicates that a good contract claim might make a bad investment treaty claim and that serious thought needs to be given before a party relinquishes its rights to contract arbitration or even to litigation once it commences it.

i. The Construction Project

The *Pantechniki* case involved a road and bridge project in Albania, which Pantechniki, a Greek contractor, won in an international tender. Pantechniki entered into two contracts which were on FIDIC-equivalent forms. The contracts contained an arbitration clause regarding disputes. The contracts also contained a provision that placed risk of loss due to civil disturbances on Albania's General Road Directorate. In 1997 there was severe civil unrest in Albania. As noted by the Tribunal, "[d]isorder was everywhere" and there was significant looting and destruction of Pantechniki's equipment. Work was interrupted at site by several days of rioting and Pantechniki had to abandon site.³⁵

ii. The Claim

As a result, in May 1997, Pantechniki claimed \$4,893,623.93 in compensation. The Resident Engineer evaluated Claimant's damages at \$3,123,199. A Special Commission created by the Albanian General Road Directorate further evaluated Claimant's loss at \$1,821,796.³⁶ The Albanian Ministry of Public Works informed the Albanian Minister of Finance of the evaluation, so that this sum could be paid to Pantechniki, which accepted it, but the Finance Ministry did not have funds to do so. The Minister of Finance stated it was not its obligation to make payment and that payment could only be made from a special fund of the Ministers' Council. Rather than invoking arbitration under the contract, Claimant sued in Albanian Court, allegedly after having been informed that payment would be made if there was an enforceable court judgment requiring the government to pay. The Albanian Court, however, dismissed the case on the basis that the risk of loss provision in the contract created liability without fault. Claimant decided not to pursue the claim to the Albanian Supreme Court and filed for ICSID arbitration.

iii. The ICSID Ruling

The ICSID Tribunal ruled against the Claimant. It did so, even though the Tribunal noted:

The Claimant suffered losses which it appeared contractually entitled to recover. The Government negotiated a reduced amount. It then refused to pay on grounds that are difficult to understand. Subsequently, Albanian courts denied the very validity of the underlying contract on equally obscure grounds.

³⁵ *Pantechniki*, paras 1 and 13.

³⁶ *Id.*, para. 15.

The claim does not fail for lack of inherent validity. It rather falters because the Treaty is unavailable to the Claimant in the circumstances.³⁷

The Tribunal ruled:

(a) Pantechniki did not show that Albania failed to protect Pantechniki's investment. Pantechniki was fully aware of the lack of police presence in Albania when it entered into the Contract. Albania's inability to protect Pantechniki's investment, as a result of Albania's lack of resources and infrastructure which was known to Pantechniki at the time of contracting, was not sufficient to support a finding that Albania had breached its obligation to protect Pantechniki's investment under the BIT. The Tribunal noted that there was an important difference between a sovereign's refusal to protect an investment, and its mere inability to do so.

(b) The Tribunal further decided that it could not decide the question of Fair and Equitable Treatment as put forth by Pantechniki because that allegation, *i.e.*, that Albania had not compensated it for its losses, had already been submitted by Pantechniki to the Albanian Courts.

(c) The Tribunal also found that Pantechniki's claim that Albania did not honor its alleged offer to settle the dispute was, in essence, a contract issue that was outside of the jurisdiction of the Tribunal.

(d) Finally, the Tribunal rejected Pantechniki's claim that it was denied justice by Albania when the Albanian Courts allegedly misapplied Albanian law and held Albania not liable for Pantechniki's losses. The Tribunal declined to consider the matter seriously because it found that no denial of justice claim was viable until the claimant is actually failed by the justice system. Because Pantechniki abandoned its contractual claims and filed for ICSID arbitration prior to receiving a decision from the Albanian Supreme Court, the Tribunal could not know if the Albanian Supreme Court would have corrected the lower court's rulings in favor of Pantechniki. "One cannot fault Albania before having taken the matter to the top."³⁸

iv. The Strategic Error of Abandoning Arbitration and Litigation

From the language quoted above, it is clear that in the *Pantechniki* case, the contractor had a clear entitlement to redress, which the State had admitted.

³⁷ *Id.*, para. 104.

³⁸ *Id.*, para. 97.

However, the contractor still lost at ICSID. This situation is an indictment, not only of a state being unwilling to honor its contractual obligations, but more so of the contractor's legal strategic failure to exercise its international commercial arbitration under the contract to enforce its contractual rights, instead of proceeding at ICSID. If Pantechniki had commenced an international commercial arbitration under its contract, given the evidence under the contract matrix of sums being due, Pantechniki would more than likely have received an award in its favor, perhaps of more than the reduced claim of \$1,821,796 it sought in ICSID arbitration.³⁹ And, it could have enforced such an award under the New York Convention to which Albania has acceded.

The case also highlights the point that if you do abandon the contractual arbitral mechanism for the courts of a State you need to be prepared to take that litigation to the highest court to have a chance to assert a treaty violation arising from a court decision. On this point, the Tribunal stated, "I am not sure that I truly understand why the Claimant did not stay the course before the Albanian Courts. But it is inevitable that its failure to take the final step in the straight line to the Supreme Court is fatal to its claim of denial of justice."⁴⁰ The *Toto* decision, below, reaffirms this point.

v. The Rule in Pantechniki

Pantechniki highlights the extreme care needed before a contractor should abandon its contract disputes mechanism or even litigation once started, for ICSID arbitration, showing that such can result in a bad outcome even on very good facts. *Pantechniki* stands also for another proposition of which international contractors need to be aware. This is that whenever a contractor is doing business in a country where it knows the state lacks public order resources, the contractor cannot complain if general disorder occurs which the state cannot control, if that disorder also impacts the construction project. This effectively means that for the purposes of investment treaty law a *force majeure* clause in a contract is nullified in such circumstances. Thus, if a contractor has a *force majeure* argument arising from general civil disruption, it may be better off relying on its contractual rights.

³⁹ Instructive in this regard is ICC Award No 8677 which related to a Middle East contractor's claim against an Asian state. While mobilizing, the contractor's country was invaded by a foreign state and the contractor lost a significant amount of equipment. The Tribunal held: "If a party cannot enforce a contract entitlement over which there is no, or no real, dispute through the arbitral process, there will be cases...in which there is no available remedy." International Chamber of Commerce, *Extracts from ICC Arbitral Awards in International Construction Disputes*, 19 ICC BULLETIN 71, 73 (2009). The Tribunal held for the claimant contractor. *Id.*

⁴⁰ *Id.*, para. 102.

C. Toto

The Toto case was decided on September 11, 2009. It was a jurisdictional decision concerning whether or not ICSID had jurisdiction to hear Toto's claims arising from a road project. The Tribunal ruled that a number of Toto's claims were contract claims and thus not subject to ICSID jurisdiction, although some others were and that these latter would go forward and be decided on their merits at ICSID.

i. The Construction Project and the Claims

Toto, an Italian construction company, executed a contract in 1997 with the Lebanese Republic-Conseil Executif des Grands Projets ("CEGP") for the construction of the "Hadath Highway-Syrian Border Saoufar-Mdeirej Section" portion of the Arab Highway linking, *inter alia*, Beirut and Damascus. Contract completion was originally intended for October 24, 1999 with a following 12-month maintenance period until October 24, 2000. Actual completion occurred in December 2003, with the maintenance period ending in December 2004. Toto made various claims between 1997 and 2003 relating to the contract. In August 2001, Toto submitted two claims to the Lebanese Administrative Court; the first concerned unforeseen soil while the second dealt with design changes. After attempting negotiations from June 30, 2004 onwards without success, in March 2007 Toto filed for arbitration under ICSID Convention Article 36 and Article 7 of the November 7, 1997 Italy-Lebanese bilateral investment treaty.⁴¹ Toto's breach of the treaty claim alleged Lebanon had: changed the regulatory framework; delayed or failed to carry out the necessary expropriations; failed to deliver construction sites; failed to protect Toto's legal possessions; and, given erroneous design information and instructions. Toto also asserted that the Lebanese court's failure to decide the two cases it had brought constituted a denial of justice.⁴²

ii. Lebanon's Challenges to ICSID Jurisdiction

Lebanon challenged the jurisdiction of ICSID to decide the disputes. Lebanon argued that the building of the Arab Highway was not an "investment" for the purposes of the Lebanon-Italy BIT; the Tribunal rejected this argument. There is a difference between 'investment' as defined in the BIT and 'investment' as defined under the ICSID Convention. The Tribunal noted that "money used to create an economic value," as well as "technical processes and know-how," and the presence of moveable property in the foreign country, were sufficient to create an "investment" and therefore jurisdiction under the BIT.

⁴¹ *Toto*, paras 23-24.

⁴² *Id.*, para. 25.

However, to constitute an “investment” for jurisdiction under the ICSID Convention, the subject matter of the dispute must satisfy four criteria: (1) an extended duration of time, (2) contribution by the investor to the work, (3) contribution by the investor to the economic development of the host state, and (4) risk.⁴³

The Tribunal concluded that Toto had made the requisite investment to trigger ICSID jurisdiction. The Tribunal rejected Lebanon’s argument that the contract involved no risk to Toto, where Toto was guaranteed payment for the work. The Tribunal held that “a construction contract in which the execution of the work extends over a substantial period of time involves by definition an element of risk.” The Tribunal stressed that the risk was a profitability risk, not the general risk that the contractor might be victimized by some default or breach of the contract. And, the Tribunal went on to stress that the concept of ‘investment’ was not exclusively defined by the *Salini* test, but was rather a fluid notion whose definition is greatly qualified by the circumstances of a given case: “there is no basis for a ‘rote or overly strict’ application of the test in every case.”⁴⁴

Lebanon argued that it had not breached any treaty obligation because Lebanon’s breaches – assuming such breaches occurred – were merely breaches of contract and not investment treaty violations. In response, Toto asserted that by delaying necessary expropriations, offering misleading information, making design changes, and changing the regulatory framework of the project, Lebanon violated its obligation to protect Toto’s investment under the BIT. Toto also argued that the interruption of claim negotiations and the subsequent delays in the Lebanese Courts constituted a denial of justice and violated the Fair and Equitable Treatment Article of the BIT.

The Tribunal held that the expropriation delays fell within Lebanon’s obligation as the holder of the *puissance publique*, and as such this was a claim existing within the Tribunal’s jurisdiction. However, Toto’s claims for costs due to misleading information and design errors and changes were excluded from jurisdiction, because the Tribunal considered those to “relate to the standard duties in a construction contract.”⁴⁵ The Tribunal similarly held that Toto was not protected from regulatory changes, provided the changes were not

⁴³ These are the four factors identified in *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, 42 ILM 609, Jul. 23, 2001) (Decision on Jurisdiction). Note that in *Pantechniki*, the Tribunal did not adopt the *Salini* test in full, preferring the *Douglas* test. See *Pantechniki*, para 36.

⁴⁴ *Id.*, para.82, quoting *Biwater Gauff (Tanzania) Ltd. v. Utd. Republic of Tanzania*, ICSID Case 05/22, Jul. 24, 2008.

⁴⁵ *Id.*, para. 121.

“discriminatory, unreasonable, or otherwise in violation of the treaty.”⁴⁶ The Tribunal held there was no basis for Toto’s claim that Lebanon violated the Fair and Equitable Treatment obligation by disrupting negotiations; such negotiations are not guaranteed to be conducted expeditiously or successfully. Similarly, the Tribunal held that the perceived slow pace of the Lebanese Courts did not constitute a denial of justice because Toto did not make a *prima facie* showing that the delays were wrongful, and did not show that Toto took advantage of local remedies to quicken the pace of the proceedings. The Tribunal also found that Toto did not show that the Lebanese Courts exhibited a lack of transparency sufficient to state a claim under the BIT for denial of justice.

No jurisdiction existed for Toto’s claims of \$15 Million representing the additional costs incurred by Toto to perform the project. The Tribunal noted that indirect expropriation involves “government measures needed to ‘effectively neutralize’ the enjoyment of property.” There must be a “radical deprivation.” Toto failed to offer *prima facie* evidence for its assertion that it incurred increased costs of 37% of the project’s initial value and that Lebanon’s failure to pay such was rejected as not being a treaty claim, but a contract claim. The Tribunal noted that expropriation does not occur simply because debts are not paid or obligations breached.

iii. The Rule in Toto

As with *Bayindir*, the principal rule in *Toto* is to illustrate the difficulties for international contractors in divorcing contract claims from treaty rights. The decision in *Toto* splits Toto’s claims – some being subject to treaty jurisdiction while some other, significant ones, being held to be contract rights. As such, *Toto* now must fight on at least two fronts. This is neither desirable nor efficient from a contractor’s standpoint and it is suspected that *Toto* will now settle its dispute.

IV. CONCLUSION

The outcomes in the *Bayindir*, *Pantechniki* and *Toto* cases stand as a warning to all international contractors that they need to exercise extreme caution before they venture into making international public law investment treaty claims. Not only is prosecuting such claims costly and time-consuming, but if the claim is denied or eviscerated at ICSID, the contractor may suffer from claims against it by guarantors and the like. The contractor may then be placed in a position where it must regroup and incur the same substantive costs again in a commercial arbitration, which it could have done in the first place.

⁴⁶ *Id.*, para.130.

The key point and rule to take from *Bayindir*, *Pantechniki* and *Toto* then is, while it is important, particularly in today's economy, to secure BIT and MIT protections where available, such BIT and MITs will not provide protection from contractual matters. Proving that sovereign acts are extra-contractual treaty violations in the context of construction projects is extremely difficult. This is not simply from a 'discovery' perspective of getting access to internal governmental documents that may be needed, but that even where some such documents seem to assist, they, as in *Bayindir*, may be merely pieces of a different — a contractual — jigsaw, not a treaty one.

Accordingly, if investor-treaty redress is likely to be difficult to achieve, an international contractor doing business today with a state entity must redouble its efforts in considering the risk it is taking under the contract. It must seek to ensure that it has an adequate dispute forum for resolving disputes. *Bayindir* clearly seems to have considered that fighting in Pakistan in arbitration under Pakistani law was not to its advantage. It may well have, however, been wrong, depending on the arbitrators it might have got. Similarly, in *Pantechniki* and *Toto*, both contractors chose to forego their dispute clauses at their own peril and *Pantechniki* even abandoned the courts. These actions, in not seeing cases through to finality in national courts, were punished by the tribunals.⁴⁷

Accordingly, a contractor must focus on the dispute resolution provision of its contract with a keen eye. This is not simply an arbitration clause, as opposed to a 'courts of the nation' clause. However, consideration might possibly be given to a tiered dispute resolution clause that provides for mediation or some other form of alternative dispute resolution, such as expert determination or even a dispute review board, prior to final resolution by a court or arbitration. There are potentially significant advantages to both contracting parties in having such a contracting framework. And, if a reasonable and proper dispute resolution clause cannot be had, this may have to be reflected in the price and negotiated on that basis.

As shown from the *Bayindir* case, a contractor must also focus attentively on the terms of any bond or guarantee. An on-demand bond — payable simply upon call by a government entity and regardless of any fault — may simply not be tenable or appropriate. Such a bond can place a contractor completely at the mercy of arbitrary conduct, and if the guarantee is of a significant sum, possibly risks its entire existence. A negotiation may be needed that the guarantee is provided subject to it being called if a default on the part of the contractor is

⁴⁷ This is consistent with a general rule in administrative law that one must exhaust administrative remedies before resorting to courts. See, e.g. *Fitzgerald v. Barnstable School Committee*, 129 S.Ct. 788 (2009).

established first. Or, even if an on-demand bond is unavoidable, it may be possible to negotiate a bond whose amount decreases upon repayment of installments against an advance or progression of the work. Closely connected with such guarantees and bonds is insurance, and especially political risk or *force majeure* insurance. If *Pantehniki* had taken out political risk insurance from MIGA or some other international entity, it would have been in an entirely different risk situation. Likewise, guarantors may wish to spread their risk in the market.

Where a treaty claim and arbitration is being considered, the results in *Bayindir* and *Toto* clearly indicate that careful consideration needs to be given to whether any of the matters for which a claim might be brought are likely to be considered contractual claims. In this regard, the effect of whether the claimant wishes to possibly be a disputant in two forums can be a significant matter, especially in litigation costs and time.

Furthermore, as noted in *Bayindir* and as can certainly be expected in *Toto*, one of the prime defenses by the nation-state to construction claims, particularly termination ones, is that the claim is a contract matter. Construction law and investment treaty law are very different. If it is likely that an investment claim will be subject to this defense, however, it may make good sense for the claimant to bring onto its legal team international construction law specialists who are adept at claims and the evidence that supports them to show, as *Bayindir* did not, that there is no legitimate basis upon which there could have been a contractual termination. By a showing that the contractor is on time, that changes are the owner's responsibility, that these changes impacted the critical path, and that there was no reasonable probability that the contractor could be considered in default, it likely strengthens the contractor's position that the actions of the state entity were not contractually motivated but were treaty violations.

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