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International Arbitration ADVISORY ■

DECEMBER 22, 2023

Recourse Under International Law for Companies Impacted by the Red Sea Attacks and Other Recent Events in Yemen

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In recent weeks, Houthi militants originating from Yemen have launched numerous attacks against commercial vessels transiting the Red Sea and the Bab el-Mandeb Strait. The escalating violence has stymied maritime traffic through the Suez Canal, forced shipping companies to reroute ships via the Cape of Good Hope, and further destabilized a critical corridor for global trade. In response, several countries have joined a U.S.-led multinational security initiative, dubbed Operation Prosperity Guardian.

Beyond an as-yet-uncertain military or diplomatic resolution and potential remedies arising out of applicable contracts, including insurance agreements, companies affected by these attacks could turn to protections provided by international law.

One option involves the Energy Charter Treaty (ECT). Although some European countries have recently sought to withdraw from the ECT, it is still in force and Yemen is a party to it. This is relevant because, although the bulk of the protections in the ECT relate to the promotion of the "making of investments" in a host territory, the ECT requires fair, prompt, and adequate compensation for losses resulting from armed conflict that more broadly affect investments in the territory of the host state (in this case, Yemen) owned by investors from other signatory nations.

In addition, there are over 20 bilateral and multilateral investment treaties to which Yemen is a contracting state that offer protections to foreign companies. Although the definition of "investment" differs from treaty to treaty, Yemen's treaties, by and large, grant foreign investors the right to initiate an arbitration directly against a host state to enforce certain protections embedded in the treaties, including Yemen's obligation to protect the physical integrity of a covered investment against interference by the use of force, known as the "full protection and security standard."

Foreign investors covered by a Yemeni investment treaty could argue that Yemen has breached its treaty obligations by denying their investments full protection and security and therefore must compensate the investors for their losses. Indeed, the first modern arbitration conducted under a bilateral investment treaty, *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka* (decided in 1990), is illustrative. In *AAPL*, a shrimp farm in Sri Lanka was destroyed during Sri Lankan security forces' operations against a militant separatist group. The tribunal concluded that Sri Lanka had breached the full protection and security standard by failing to carry out adequate diligence—for instance, by failing to take appropriate precautionary measures that could have prevented the destruction. Other authorities have clarified that states have a duty to employ due diligence in affording protection and security, even if it is a non-state actor (such as the Houthi forces here) that actually causes the damage.

Likewise, in the *Corfu Channel* case, a dispute between the United Kingdom and Albania decided by the International Court of Justice in 1949, British warships sailing through a channel within Albanian territory were damaged by the explosion of mines that had been laid by Yugoslavia. Although Albania did not lay the mines, the court held that Albanian authorities knew about

the minefield and had breached the obligation to warn ships approaching the danger zone. An analogous claim could be made in the present circumstances, where Yemen arguably has an obligation to use best efforts to prevent activities in its territory that it knows or ought to know could harm foreign investments.

Yemen also has a foreign investment law, Law No. 15 of 2010, that affords certain protections to any foreign investor involved with an investment project in Yemen. That law requires fair compensation for the expropriation of foreign investment projects.

At the same time, the international significance of the ongoing attacks may prompt certain states to espouse claims by their citizens and commence a dispute against Yemen under the United Nations Convention on the Law of the Sea (UNCLOS). While the issue of state responsibility under UNCLOS for acts of piracy and similar violence is subject to debate, the *Corfu Channel* case highlights circumstances when a state can be held responsible for actions it did not directly undertake.

With this in mind, pursuant to Article 26 of UNCLOS, Yemen undertook not to levy any charges "upon foreign ships by reason only of their passage through the territorial sea." The attacks by the Houthis might, in effect, constitute an unlawful de facto tariff, in contravention of Article 26.

Yemen is also still a party to certain friendship, commerce, and navigation (FCN) treaties that were arguably breached as a result of its failure to prevent the Houthis from attacking certain ships in the Red Sea. For example, the U.S.-Yemen FCN treaty requires Yemen to treat American ships no worse than it treats other foreign ships. Although the United States is not a party to UNCLOS, it would be able to claim that Yemen's de facto collection of duties on ships passing the Bab el-Mandeb Strait also breached the U.S. FCN.

Alston & Bird's International Arbitration Group regularly advises foreign investors in assessing and pursuing potential avenues for redress against sovereigns. In addition, we frequently assist companies affected by cross-border disputes in protecting their rights under applicable contracts, including insurance coverage.

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