Arbitral Tribunal Rules on Scope of Arbitral Consent under PRC-Singapore BIT

The arbitral tribunal (**Tribunal**) in *AsiaPhos Limited and Norwest Chemicals Pte Limited v People's Republic of China* (ICSID Case No. ADM/21/1) (***AsiaPhos v China***) recently issued its decision on the scope of consent to arbitrate under the bilateral investment treaty entered into between the Government of the People's Republic of China (**PRC**) and the Government of Singapore on 21 November 1985 (**BIT**).[1] The majority of the Tribunal (**Majority**) found that the scope of the arbitration clause was limited to disputes on the amount of compensation and did not cover the claimants' claims for indirect expropriation, and could not be expanded due to the "most favoured nation" (**MFN**) clause in the BIT. In a dissenting opinion (**Dissenting Opinion**), the dissenting arbitrator disagreed with those findings. Ultimately, by a majority, the claimants' claims were dismissed for lack of jurisdiction.

Our Comments

The decision in *AsiaPhos v China* is the latest instalment in a series of investment arbitration decisions concerning the scope of consent to arbitrate where the arbitration clause in the bilateral investment treaty contains words which arguably restrict a party's recourse to arbitration to matters of compensation for expropriation. In this case, the relevant clause was Article 13(3) of the BIT and the words in question were: "*a dispute involving the amount of compensation for expropriation, nationali[s]ation, or other measures having effect equivalent to nationali[s]ation or expropriation*".

On what some would consider a restrictive interpretation of such clauses, an investor can have recourse to arbitration under the treaty only where it is settled that an expropriation (or a measure having an equivalent effect) has occurred, and there is disagreement between the investors and expropriating State over the amount of compensation due. On the other hand, investors typically argue for a wider interpretation of such clauses – that an arbitral tribunal has jurisdiction to determine whether an expropriation (or a measure having an equivalent effect) has even occurred in the first place, before going on to deal with the question of compensation due.

In accordance with the treaty interpretation principles set out in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 (**Vienna Convention**), the Tribunal in *AsiaPhos v China* engaged extensively with the ordinary meaning of the words in Article 13(3) of the BIT as well as the context of the clause. It is therefore of interest that the Majority's decision in *AsiaPhos v. China* goes against the grain of jurisprudence which has tended to favour the so-called wider interpretation (especially where the arbitration clause contains a "fork-in-the-road" provision). A closer examination of the Tribunal's reasoning (including the Dissenting Opinion) reveals that subtle but important differences in approaching the interpretative exercise under Article 31 of the Vienna Convention may make all the difference between the narrower interpretation arrived at by the Majority and the wider interpretation reached in the Dissenting Opinion as well as in cases such as *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 (***Sanum (CA)***) (a decision of the Singapore Court of Appeal

[1] Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments dated 21 November 1985.

concerning the PRC-Laos bilateral investment treaty)[2] and *Tza Yap Shum v The Republic of Peru*, ICSID Case No. ARB/07/6 (***Tza***) (a decision of an International Centre for Settlement of Investment Disputes (ICSID) Tribunal concerning the Peru-PRC bilateral investment treaty). It is therefore critical for both States as well as investors to have an in-depth and nuanced understanding of these matters when crafting their legal strategy in respect of potential investment claims.

For now, the Majority's decision in *AsiaPhos v China* leaves the claimants with the option of challenging the decision before the national courts in the seat of the arbitration or (subject to issues of limitation) commencing claims for the alleged violations of the BIT before the PRC domestic courts.

This update examines the decision of the Tribunal in *AsiaPhos v China*.

Background

The claimants, AsiaPhos Limited (**AsiaPhos**) and Norwest Chemicals Pte Ltd (together, **Claimants**), were companies incorporated in Singapore. The respondent is the PRC (**Respondent**).

The Claimants, through their wholly owned Chinese subsidiary, held mining and exploration licences for two phosphate mines. They also owned two plants which produced yellow phosphorus using phosphate rocks extracted from the said two mines. AsiaPhos, through its equity interest in a Chinese company, held an exploration licence and exploration rights for one barite mine. These three mines and plants were located in Mianzhu City, Sichuan Province in the PRC, in and around the Jiudingshan Nature Reserve.

In 2016 and 2017, the Respondent set up a national panda park in and around the Jiudingshan Nature Reserve and developed and adopted a new policy that prohibited mining in the area. According to the Claimants, this new policy led to the shutdown, sealing and mandatory exit of the three mines and their associated mineral rights in 2017.

This led to the Claimants commencing the arbitration on the basis that the Respondent violated various provisions of the BIT: (a) Article 6 through unlawful measures having effect equivalent to expropriation; (b) Article 3(2) through unfair and inequitable treatment; (c) Articles 4 and 3(2) for failure to afford full protection and security; and (d) Articles 15 and 4 for failure to observe its commitments regarding the Claimants' investments when the Respondent prohibited exploration and mining and shut down and sealed the mines.

The Claimants argued that Article 13(3) of the BIT gave the Tribunal jurisdiction to hear its expropriation claim (i.e., claim (a)), while the MFN clause in Article 4 of the BIT, given its purpose to ensure that guarantees offered to foreign investors from one State evolve to match those later offered to foreign investors from other States, also applied to provisions for settlement of investment disputes, thus giving the Tribunal jurisdiction over all of the Claimants' claims.

[2] WongPartnership LLP successfully acted for the investor, Sanum Investments Ltd, before the Singapore Court of Appeal: judgment available here.

The Tribunal's Decision

As the issues in dispute revolved around the interpretation of various provisions of the BIT, these are set out below for ease of reference:

Article 4. MOST FAVOURED NATION PROVISIONS

Subject to Articles 5, 6 and 11, neither Contracting Party shall in its territory subject investments admitted in accordance with the provisions of Article 2 or returns of nationals and companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of nationals and companies of any third State.

Article 6. EXPROPRIATION

1. Neither Contracting Party shall take any measure of expropriation, nationalization or other measures having effect equivalent to nationalization or expropriation against the investment of nationals or companies of the other Contracting Party unless the measures are taken for any purpose authorised by law, on a non-discriminatory basis, in accordance with its laws and against compensation which shall be effectively realisable and shall be made without unreasonable delay. Such compensation shall, subject to the laws of each Contracting Party, be the value immediately before the expropriation, nationalization or measure having effect equivalent to nationalization or expropriation. The compensation shall be freely convertible and transferable.

2. The legality of any measure of expropriation, nationalization or other measures having effect equivalent to nationalization or expropriation may at the request of the national or company affected, be reviewed by the competent court of the Contracting Party taking the measures in the manner prescribed by its laws.

…

Article 13. INVESTMENT DISPUTES

1. Any dispute between a national or company of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

2. If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment.

3. If a dispute involving the amount of compensation resulting from expropriation, nationalization, or other measures having effect equivalent to nationalization or expropriation mentioned in Article 6 cannot be settled within six months after resort to negotiation as specified in paragraph (1) of this Article by the national or company concerned, it may be submitted to an international arbitral tribunal established by both parties.

> The provisions of this paragraph shall not apply if the national or company concerned has resorted to the procedure specified in the paragraph (2) of this Article.
>
> …

Scope of the Respondent's Consent to Arbitration under Article 13(3) of the BIT

As mentioned, the Tribunal adopted an uncontroversial approach in interpreting Article 13(3) of the BIT, relying on Article 31[3] (and supplemented by Article 32[4]) of the Vienna Convention.

The Tribunal first assessed the ordinary meaning of the text of Article 13(3) of the BIT, starting with the term "*involving*". The Majority took the view that "*involving*" had a neutral, non-conclusive meaning in this case, and did not accept the Claimants' argument that "*involving*" has an inclusive meaning based on multiple dictionary definitions that define the term to mean "*including*", "*requiring*", or "*containing*" "*as a necessary part*", and that if the parties to the BIT intended to narrow the scope of arbitral consent, they could have used expressions like "*limited to*", "*over*" or "*concerning*". In doing so, the Majority endorsed the views expressed in *Sanum (CA)* and *China Heilongjiang Int'l Econ. & Technical Coop. Corp. and others v Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017 (***China Heilongjiang***) (a case concerning the PRC-Mongolia bilateral investment treaty) that the term "*involving*" could support both a broad and narrow interpretation. Instead, the Majority chose to focus on the expression "*the amount of compensation*". It reasoned that if it were to interpret "*involving*" as bearing an inclusive meaning, i.e., allowing for arbitration as long as the issue of compensation was one of the elements of the dispute, the words "*the amount of*" (which itself was a limiting insertion) would be superfluous.

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[3] Article 31 of Vienna Convention reads as follows:
"*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 the 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."

[4] Articles 32 of Vienna Convention reads as follows:
"*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."

The Dissenting Opinion, however, criticised this approach. The dissenting arbitrator reasoned that the Majority did not perform its own analysis of the ordinary meaning of the word "*involving*" and simply agreed with the *China Heilongjiang* decision. He also took the view that the Majority's focus on the phrase "*the amount of*" while refusing to establish the ordinary meaning of "*involving*" was an exercise in circular reasoning — if the term "*involving*" is inclusive in the first place, then the fact that the phrase "*a dispute involving the amount of compensation resulting from expropriation*" contained "*the amount of*" should not matter. He further noted that the Majority did not properly deal with other decisions which declined to read the word "*involving*" as "*limited to*" and instead interpreted it as "*including*" (see *Tza* and the arbitral tribunal's decision in *Sanum Investments Limited v Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013).

That said, the Majority's analysis did not stop there. The Majority went on to consider the scope of arbitral consent under Article 13(3) of the BIT in light of two particular aspects of the BIT, *viz*, the substantive clause in relation to expropriation in Article 6 of the BIT, as well as the fork-in-the-road clause in the second sentence of Article 13(3) of the BIT (**Fork-in-the-Road Clause**).

The Majority's view was that Article 6(2) of the BIT confirmed that the parties to the BIT had segregated proceedings in mind: first, proceedings on the question of legality of an expropriatory measure and, second, subsequent proceedings regarding the amount of compensation resulting from the measure in dispute. Article 13(3), when read in conjunction with Article 6(2) of the BIT, referred only to the latter, i.e., proceedings regarding the amount of compensation. Further, the Majority did not accept the Claimants' argument that the use of the term "*may*" in both Articles 6(2) and 13(3) of the BIT (as opposed to the mandatory "*shall*") meant that an investor could opt for international arbitration instead of a domestic court when it came to reviewing the occurrence and/or legality of an expropriatory measure. Instead, the use of the term "*may*" simply meant that an investor could choose not to submit such a dispute to *any* forum.

According to the Dissenting Opinion, the Majority's interpretation failed to give an investor a real choice; the only interpretation that gives Article 6(2) *effet utile* is to give investors a choice between submitting a dispute about the legality of expropriation to domestic courts or submitting it to another forum, i.e., international arbitration under Article 13(3).

Turning to the Fork-in-the-Road Clause, the Claimants contended that, if the Respondent's interpretation of Article 13(3) was accepted, any previous recourse to the PRC domestic courts for a decision on the legality of expropriation would trigger the Fork-in-the-Road Clause and thereby preclude access to international arbitration for any subsequent dispute on the amount of compensation. This would leave the arbitration clause without any *effet utile*.

The Majority did not accept this contention. As a starting point, the Tribunal considered the location of the Fork-in-the-Road Clause within Article 13(3), which first sentence provided for an exception to the general rule in Article 13(2) specifically for "*disputes involving the amount of compensation*". The Fork-in-the-Road Clause which came after that therefore applied only in a case referred to in the first sentence of Article 13(3). Following from this, the Tribunal was of the view that (under PRC law) an investor could reserve the question of the amount of compensation and defer it to separate proceedings before the PRC domestic courts. So long as the investor restricted the dispute before the domestic court to the existence of a measure of expropriation and did not request the domestic court to decide the question of the amount of compensation, this would not trigger the Fork-in-the-Road Clause. The Majority even went on to suggest

that, in a hypothetical scenario where the investor was paid a certain amount of compensation by the State and the domestic court was requested by the investor to rule that the payment of insufficient compensation rendered the expropriation unlawful, such a finding would not trigger the Fork-in-the-Road Clause. The domestic court would be requested to determine the adequacy of the compensation paid as part of its determination of the legality of the expropriation; however, this was distinct from a determination of the *precise quantum* of the compensation to be paid for unlawful expropriation if the domestic court were to find that the compensation paid was in fact inadequate (which could still be made by an arbitral tribunal under Article 13(3) of the BIT).

The Dissenting Opinion challenged the Majority's reasoning in that regard. As Article 6(2) of the BIT referred to "*the legality of a measure of expropriation*", the adjudication of such disputes necessarily required a determination whether compensation that met the requirements of Article 6 had been paid. The dissenting arbitrator therefore was of the view that the separation of the fact of expropriation and the question of the amount of compensation by the Majority was incorrect and untenable. He further observed that the hypothetical scenario suggested by the Majority was an attempt to "*thread the needle*" and an unsatisfactory interpretation which raised more questions than it answered.

Notably, the Dissenting Opinion found support in a number of cases with similar fork-in-the-road clauses, including *Sanum (CA)* and *Tza*. In particular, the Singapore Court of Appeal in *Sanum (CA)* reasoned that: "*[f]irst, if the only issue in the case is one of quantum, it is not clear what issue the State would have referred to the national court. And if the State has referred the issue of quantum to the national court, it is unclear how a subsequent reference to arbitration of the same issue would be resolved*"; further, "*host States would be in a position effectively to avoid arbitration by simply denying that they had engaged in expropriatory acts*", as this would "*compel the investor to resort to the national courts, thereby barring a claim in arbitration*" and "*lead to an untenable conclusion – namely that the investor could never actually have access to arbitration*".

Not all cases considering fork-in-the-road clauses, however, speak with one voice, and the arbitral tribunal in *China Heilongjiang* reached the opposite conclusion that "*arbitration will be available where the dispute is indeed limited to the amount of compensation for a proclaimed expropriation, the occurrence of which is not contested*" and "*[w]hile it may be the case that formally proclaimed expropriations are a less common event than measures having an effect equivalent to nationalisation or expropriation … the Tribunal cannot see that an arbitration provision that would nevertheless encompass an entire category of disputes can fairly be said to be lacking effet utile*".

The Majority took pains to explain that it had carefully considered the decisions cited by the parties (including *Sanum (CA)* and *Tza*) but noted that those decisions considered either the scope of fork-in-the-road clauses or provisions comparable to Article 6(2) of the BIT, but did not contain both such clauses at the same time. In particular, the treaties in *Sanum (CA)* and *Tza* lacked a provision comparable to Article 6(2) of the BIT. Moreover, the reasoning in those decisions was circular because they relied on fork-in-the-road clauses which scope was "*necessarily identical to that of the arbitral clause (regardless of what that scope may be), in order to determine the scope of the arbitral clause itself*".

The Majority's decision to accord less weight to the Fork-in-the-Road Clause appears to be a consequence of its having arrived at an interpretation of Article 13(3) based on the ordinary meaning of the words in the provision, the structure of the arbitration clause in Article 13, as well as the context in Article 6 first, *before* that interpretation was tested against the Fork-in-the-Road Clause. In contrast, fork-in-the-road

clauses and the *effet utile* of those clauses seemed to take on more significance for the Singapore Court of Appeal in *Sanum (CA)* and the arbitral tribunal in *Tza*, because their examination of fork-in-the-road clauses was part of the overall interpretative exercise of the arbitration clauses in question.

That the Majority considered whether an investor could reserve the question of the amount of compensation before the PRC courts applying PRC law in dealing with the Fork-in-the-Road Clause also warrants further evaluation. One could query whether the issue of expropriation under the BIT should be determined by international law instead of domestic law. Besides, having recourse to the domestic law of the host State in determining this issue may mean that the effect of fork-in-the-road clauses in treaties could change based on the identity of the host State, which in turn could affect the scope of arbitral consent.

As for recourse to the object and purpose of the BIT as well as the circumstances of the conclusion of the BIT (such as the political system and state of PRC law) pursuant to Article 32 of the Vienna Convention, neither the Majority nor the Dissenting Opinion saw this as necessary as they were able to arrive at interpretations of Article 13(3) of the BIT – albeit contrary ones – based on the principles of interpretation in Article 31 of the Vienna Convention.

Expansion of Respondent's consent to arbitration through the MFN clause

After examining the decisions by investment arbitration tribunals in *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, *European American Investment Bank AG (Austria) v The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012 and *Vladimir Berschader and Moïse Berschader v The Russian Federation, SCC Case No. 080/2004*, Award, 21 April 2006, the Majority agreed with the reasoning in those decisions that, as a starting point, the expansion of an arbitration clause by virtue of an MFN clause requires the clear and unambiguous intention of both parties for the MFN clause to have such an effect.

The Majority then held that the BIT did not provide for such an expansion of the arbitration clause by virtue of the MFN clause in Article 4 of the BIT. Pursuant to its ordinary meaning, the wording of Article 4 cannot be considered an unambiguous expansion of the arbitration clause. The Majority rejected the Claimants' reliance on the term "*treatment*" as evidencing the intention of the parties to the BIT to apply the MFN clause to the scope of the arbitration clause. This is especially since the parties to the BIT had negotiated and agreed on Article 13(3) which was an arbitration clause with a carefully negotiated scope.

The Dissenting Opinion agreed with the Majority that Article 13(3) (as an arbitration clause with a carefully negotiated scope) provided the relevant context for interpreting the MFN clause, but criticised the Majority for not analysing the ordinary meaning of the MFN clause, and in particular, the term "*treatment*".

Concluding Observations

AsiaPhos v China currently stands as one of those decisions where the scope of arbitral consent in a bilateral investment treaty is limited to disputes concerning only the amount of compensation where the arbitration clause contains a fork-in-the-road provision. The arbitration clause in the BIT features in around 41 "first-generation" bilateral investment treaties involving the PRC.[5] This new addition to existing jurisprudence may therefore have potentially significant implications for foreign investments in these countries. Given the possible uncertainty surrounding the scope of arbitral consent in such treaties, it would also be prudent for investors to carefully consider the viability of pursuing claims before the domestic courts or arbitration, and the implications arising therefrom.

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[5] See Li Yuwen & Cheng Bian, China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options, Netherlands International Law Review 67, 503-551 (2020), Appendix 2: ISDS provisions in first generation Chinese BITs.

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