

Sanum v. Laos (Part I): The Singapore Court of Appeal Affirms Tribunal's Jurisdiction under the PRC-Laos BIT

Kluwer Arbitration Blog

November 10, 2016

Gary B. Born and Jonathan W. Lim, Dharshini Prasad (Wilmer Cutler Pickering Hale and Dorr LLP)

Please refer to his post as: Gary B. Born and Jonathan W. Lim, Dharshini Prasad, 'Sanum v. Laos (Part I): The Singapore Court of Appeal Affirms Tribunal's Jurisdiction under the PRC-Laos BIT', Kluwer Arbitration Blog, November 10 2016,

<http://arbitrationblog.kluwerarbitration.com/2016/11/10/sanum-v-laos-the-singapore-court-of-appeal-affirms-tribunals-jurisdiction-under-the-prc-laos-bit/>

On 29 September 2016, the Singapore Court of Appeal (“SGCA” or the “Court”) released its much-anticipated judgment in *Sanum Investments Ltd. v Government of the Lao People’s Democratic Republic* (“Sanum v Laos”). In a carefully reasoned decision, Singapore’s apex court reversed a decision of the Singapore High Court, which had previously held that an UNCITRAL tribunal seated in Singapore had no jurisdiction to hear certain claims by a Macanese investor under the 1993 Bilateral Investment Treaty between the People’s Republic of China (the “PRC”) and the Lao People’s Democratic Republic (“Laos”) (the “PRC-Laos BIT”). The SGCA held that the tribunal did have jurisdiction on two grounds: first, the PRC-Laos BIT applied to the Macau Special Administrative Region (“Macau”), so the Macanese investor was an “investor” under Article 1(2)(b) of the BIT; and second, the investor’s claims fell within the dispute resolution clause at Article 8(3) of the BIT and therefore the tribunal had subject matter jurisdiction to hear the investor’s claims.

This comprehensive judgment by the SGCA provides clarity on how Singapore courts will approach the review of investment arbitration awards, and reflects Singapore’s growing prominence as a global dispute resolution hub for both commercial and investment disputes. The Court’s willingness to engage and tackle complex questions of customary international law and treaty interpretation is evident throughout the judgment – where relevant, the Court applied commentary by international jurists and decisions by investment tribunals.

Part I of this two-part blog post summarizes the dispute and the Court’s holding. **Part II** provides some comments on the judgment and its significance, including its impact on future Singapore court proceedings involving investment arbitration awards and future disputes involving PRC treaties.

Background to the Appeal

Sanum Investments Limited (“Sanum”) is a company incorporated in Macau that, in 2007, invested in the gaming and hospitality industry in Laos. As a result of allegedly unfair and discriminatory taxes imposed by the Lao government, Sanum commenced arbitration proceedings under the PRC-Laos BIT against Laos on 14 August 2012. An arbitral tribunal was subsequently constituted under the UNCITRAL Arbitration Rules.

Laos raised preliminary objections to the arbitral tribunal’s jurisdiction on two grounds: first, that

Sanum does not qualify as an “investor” under Article 1(2)(b) of the PRC-Laos BIT because the territorial scope of the treaty does not extend to Macau under the “one country, two systems” policy; and second, that Sanum’s claims relate to the propriety of state taxation measures and falls outside the scope of Article 8(3) of the PRC-Laos BIT, which only permits arbitration of “a dispute involving the amount of compensation for expropriation.”

On 13 December 2013, the arbitral tribunal rendered a preliminary award upholding its jurisdiction (“Award”), finding both that the PRC-Laos BIT applied to Macau and the subject matter of the claim fell within the scope of Article 8(3) of the treaty. The Lao government then commenced challenge proceedings before the High Court in Singapore, the seat of the arbitration, under section 10(3)(a) of the Singapore International Arbitration Act (the “IAA”).

On 20 January 2015, the High Court granted the Lao government’s application and vacated the Award. It held that the PRC-Laos BIT did not extend to Macau, on the basis of *inter alia* two *Notes Verbales* from the Lao Ministry of Foreign Affairs and the PRC Embassy in Vientiane respectively that purported to confirm that the PRC-Laos BIT did not apply to Macau (the “2014 NVs”), which were admitted into evidence despite post-dating the Award. The High Court also relied for its conclusion on a 1987 PRC-Portugal Joint Declaration on the question of Macau, the experience of the PRC and the United Kingdom with respect to Hong Kong, and a reference to “no other bilateral investment treaties or bilateral tax treaties” in a 2001 World Trade Organisation Trade Policy Report. The High Court further held that, in any event, the subject matter of the dispute fell outside the scope of Article 8(3), which it found should be given a restrictive rather than expansive interpretation.

Decision of the SGCA

On appeal, the SGCA reversed the High Court’s decision on both of the foregoing grounds. The Court’s reasoning on each ground, along with its analysis on a number of preliminary evidential and substantive issues, is summarized below.

Preliminary Issues

The SGCA considered two preliminary questions that had been raised before the High Court (although the first was not pursued by Sanum on appeal), namely: whether the interpretation and application of the PRC-Laos BIT are justiciable matters before the Singapore courts, and whether the Court should adopt a more deferential standard of jurisdictional review in the case of an investor-state arbitration concerning the application of principles of public international law. The Court held that the interpretation and application of the PRC-Laos BIT were justiciable; in fact, they were matters the Singapore courts were obliged to consider as the curial courts at the seat. The Court also found that a *de novo* standard of review applied to jurisdictional rulings, consistent with Singapore case law, and that no special deference was warranted in the investor-state arbitration context.

Whether the PRC-Laos BIT Applies to Macau

The first jurisdictional issue turned on the application of the “moving treaty frontier” rule (“MTF Rule”), which is a rule of customary international law that presumptively provides that a state’s treaties will automatically extend to any new territory that becomes part of the state. The MTF Rule also provides that, when a territory undergoes a change in sovereignty, it passes automatically out of the treaty regime of the predecessor sovereign into the treaty regime of the successor sovereign.

This rule is codified in Article 29 of the Vienna Convention on the Law of Treaties (“VCLT”) and Article 15 of the Vienna Convention on the Succession of Treaties (“VCST”). The MTF Rule is a presumption and may be displaced in accordance with certain exceptions codified in Article 15 of the VCST and

Article 29 of the VCLT. The SGCA's analysis focused on the only potentially applicable exception given the facts—whether “a different intention appears from the treaty or is otherwise established” that the BIT does not apply in respect of the entire territory of the PRC.

The SGCA held that a different intention did not appear from the treaty. It was not evident from the text, the objects and the purposes of the PRC-Laos BIT, or the circumstances of its conclusion, that the parties intended that the treaty not apply to Macau; the treaty was silent on the issue, which suggested that the MTF Rule presumptively applied.

The SGCA also found that none of the evidence adduced by the Lao government was sufficient to prove that it was “otherwise established” that the PRC-Laos BIT did not apply to Macau. The Court adopted the balance of probabilities as the relevant standard of proof. It also adopted the “critical date doctrine” under international law, which provides that evidence generated after the dispute has arisen, i.e. after the critical date, cannot be used by disputing party to improve its position in the dispute. The Court then considered each piece of evidence, looking first at the evidence before the critical date – including the 1987 PRC-Portugal Joint Declaration, a number of official statements in relation to Hong Kong, and a 1999 Note from the PRC to the UN Secretary General – concluding that the pre-critical date evidence did not displace the presumption under the MTF Rule:

With respect to the 2014 NVs, which were adduced only after the Award, the Court found that they would be given weight to the extent they demonstrated continuity and consistency with pre-critical date evidence. The Court held the 2014 NVs should not be accorded any weight, because it found that the 2014 NVs were not merely confirmatory in nature but instead contradicted the pre-critical date position. The Court held that it would, in any event, have given the 2014 NVs no material weight because their stated justification was based on the internal laws of the PRC and Macau, and these were irrelevant considerations under international law given Article 27 of the VCLT, which provides that states may not invoke provisions of their internal laws to justify their failure to adhere to treaty obligations, and the principle that the internal domestic laws of a state will not generally affect a state's rights and obligations under international law.

The SGCA also rejected Laos' arguments that the 2014 NVs constituted subsequent agreement or subsequent practice under Articles 31(3)(a) or (b) of the VCLT, and held that giving effect to the 2014 NVs would amount to a retroactive amendment of the BIT, because there was no evidence of any such agreement prior to the 2014 NVs. The Court also noted that nothing in the 2014 NVs referred to any pre-existing agreement, or suggested that there was a common understanding to that effect before the critical date. The Court distinguished *ADF Group Inc v United States* (ICSID Case No ARB(AF)/00/1, Award, 9 January 2003), in which a NAFTA tribunal gave effect to an interpretive statement by the Contracting States issued after the notice of arbitration, on the basis that NAFTA Article 1105 expressly permits Contracting States to issue binding interpretative statements, unlike the PRC-Laos BIT.

Scope of Article 8(3) of the PRC-Laos BIT

Laos' second jurisdictional objection was that Sanum's claims fell outside the scope of the dispute resolution clause in Article 8(3) of the PRC-Laos BIT, because that clause permits arbitration where the *only* issue in dispute is the amount of compensation payable upon on expropriation. Sanum argued for a broader reading, namely that Article 8(3) permits arbitration as long as the claims *include* a dispute over the amount of compensation. Disagreeing with the High Court, the SGCA accepted the broad interpretation of Article 8(3).

In accordance with Article 31 of the VCLT, the SGCA considered the interpretation of Article 8(3) in light of its ordinary meaning, context, object and purpose. Finding that the ordinary meaning was

equivocal and capable of supporting both interpretations, the Court then considered the context, object and purpose of Article 8(3) of the PRC-Laos BIT.

With respect to context, the SGCA found that issues of quantum and liability for expropriation were incapable of segregation, such that it would not be possible to have only the question of quantum submitted to an arbitral tribunal. The Court also considered the fork-in-the-road provision in Article 8(3), finding that it meant that if “any dispute” is brought to the national courts, the investor cannot bring any aspect of that same dispute to arbitration. The Court also considered it material that, under the narrow interpretation, it would be open to the host state to avoid arbitration by not submitting the liability dispute to its courts, which would render investor protection under Article 8(3) illusory and run counter to the principle of effective interpretation under international law. The Court therefore agreed with the ICSID tribunal in *Tza Yap Shum v Peru* (ICSID Case No ARB/0706, Decision on Jurisdiction and Competence, 19 June 2009) that taking a narrow interpretation would lead to “an untenable conclusion – namely that the investor would never actually have access to arbitration.”

The Court then distinguished a number of investment arbitration awards relied upon by the Lao government, where arbitral tribunals had arrived at narrow interpretations of dispute resolution clauses that also referred to “the amount of compensation.” The Court paid particular attention to the differences in language and architecture of the various BITs under consideration, as well as the interpretative context, placing particular emphasis on whether the BITs expressly demarcated the determination of the legitimacy of the expropriation from the amount of compensation, and whether there was a fork-in-the-road provision.

The Court therefore found that the specific context surrounding Article 8(3) of the BIT supported a broad interpretation. The Court also held that the primary object and purpose of the BIT was the promotion of investment and protection of investors, albeit subject to “the principles of mutual respect for sovereignty,” and that these were consistent with a broad interpretation of Article 8(3).