Investor-State Arbitration before the High Court of Singapore: Territoriality, Nationality and Arbitrability

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Abstract

This case note analyses the recent jurisdictional decision of the High Court of Singapore in *Laos v Sanum Investments*, concerning an alleged expropriation by the Laos government of an investment made by an entity incorporated in Macau. The Court's key finding was that the bilateral investment treaty between China and Laos was not intended to extend to Macau. This note questions the Court's focus on the territorial scope of the bilateral investment treaty, as opposed to the nationality of the investor, and appraises whether this case represents a departure from the 'pro-arbitration' reputation of Singaporean courts in international investment disputes.

Keywords

International Investment Law, Investor-State Arbitration, Territorial Application of Treaties, Nationality

The High Court of Singapore handed down its decision in *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* ('*Sanum Investments*') on 20 January 2015.¹ The dispute concerned a claim brought by a corporate investor domiciled in Macau against the government of Laos under the bilateral investment treaty between China and Laos (China-Laos BIT).² The decision, reversing the jurisdictional ruling of a tribunal constituted under the rules of the United Nations Commission on International

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¹ [2015] SGHC 15 (20 January 2015).

² Agreement Concerning the Encouragement and Reciprocal Protection of Investments between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic (China-Laos BIT) (adopted 31 January 1993, entered into force 1 June 1993) 1849 UNTS 109, art 1(2).

Trade Law (UNCITRAL), featured several findings which are significant for international commercial arbitration under bilateral investment treaties (BITs). The central conclusion was that the China-Laos BIT was not intended to protect Macanese investors—a point of potential relevance for BITs of China and other states with non-metropolitan territories. In dicta, the High Court also adopted a restrictive reading of the arbitration clause in the China-Laos BIT that represents a departure from the liberal interpretations preferred in other recent cases.

1 Facts and procedural history

The dispute arose out of investments made by an investor incorporated under the laws of Macau, a Special Administrative Region of China. The investor, Sanum Investments, claimed that the Lao government had improperly expropriated its investments in Laos' gaming and hospitality industry. In 2012, Sanum Investments referred the dispute to arbitration, citing expropriation protections and a dispute resolution clause in the China-Laos BIT. This agreement had been signed on 31 January 1993, nearly seven years prior to China regaining territorial sovereignty over Macau. At the time of signing, Portugal exercised administrative power over the Chinese territory under the terms of a joint declaration issued by China and Portugal in 1987 (China-Portugal Joint Declaration), which stipulated the future date of transfer of Macau back to Chinese administration.

On 13 December 2013, the UNCITRAL tribunal, seated in Singapore, delivered its ruling on jurisdiction, finding that the territorial scope of the China-Laos BIT was intended to include Macau, that the definition of an 'investor' in the China-Laos BIT encompassed entities incorporated in Macau, and that the arbitration clause covered Sanum Investments' expropriation complaint.³ The Lao government appealed the tribunal's jurisdictional decision to Singapore's High Court, pursuant to s 10(3) of Singapore's International Arbitration Act (IAA).⁴ The primary issue upon appeal was whether the protections enshrined in the China-Laos BIT applied to investors incorporated in Macau.

Separately, the parent company of Sanum Investments, incorporated in Netherlands Antilles, instituted arbitral proceedings against the Lao government under the BIT between Laos and the Netherlands.⁵

³ *Sanum Investments Limited v Government of the Lao People's Democratic Republic (Jurisdiction)* (Permanent Court of Arbitration, 13 December 2013) (*Sanum Investments (PCA)*).

⁴ *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) ('IAA').

⁵ *Lao Holdings NV v Lao People's Democratic Republic* (ICSID Case No ARB(AF)/12/6) (*Lao Holdings v Laos*).

2 The judgment

The High Court reached a preliminary conclusion that the interpretation of a treaty concluded between two foreign states was justiciable before a Singaporean court where that interpretation is an incidental but necessary step in giving effect to the right conferred by a Singapore domestic law—in this case, the right of review under section 10(3) of the IAA.⁶ It also dismissed Sanum Investment's submission that the standard of review for jurisdictional challenges under the IAA, recently articulated by the Singapore Court of Appeal,⁷ was lower for investor-state arbitrations than for private arbitration agreements. It found that *de novo* review is appropriate regardless of the type of investment.⁸ The Court then proceeded to consider three key questions.

2.1 The admissibility of evidence not available to the UNCITRAL tribunal

The Lao government adduced as evidence a pair of letters, written in January 2014, exchanged between the Lao Ministry of Foreign Affairs and the Chinese Embassy in Vientiane. The letters, reproduced in full in the judgment, ostensibly express confirmation from Chinese and Lao officials that the China-Laos BIT does not extend to Macau. These letters had not been filed during the arbitral hearing. The investor objected to their admission in the High Court proceedings, alleging contravention of a test established in the English case of *Ladd v Marshall* and subsequently adopted by Singaporean courts concerning the admissibility of fresh evidence in a case in which a judgment has already been delivered.⁹ The Court dismissed this submission, finding that the pair of letters satisfied the test laid out in *Ladd v Marshall* for evidence that is admissible despite not having been tendered in earlier proceedings: the party seeking to admit the evidence demonstrated why evidence was not adduced at the arbitral hearing; the evidence would probably have an important influence on the case; and the evidence was sufficiently credible.¹⁰ While the Court asserted that its findings would be supported even in the absence of these letters, it also characterised the letters as a 'key plank' of evidence.¹¹

2.2 Territorial application of the China-Lao BIT to Macau

The High Court accepted that customary rules of treaty interpretation entail a presumption that treaties apply to the entirety of a state party's territory.¹² Under article

⁶ *Sanum Investments* (n 1) paras 21–31.

⁷ *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372, 428 (*Astro*).

⁸ *Sanum Investments* (n 1) paras 31–36.

⁹ *Ladd v Marshall* [1954] EWCA Civ 1, [1954] 1 WLR 1489.

¹⁰ *Sanum Investments* (n 1) paras 43–56.

¹¹ *ibid* paras 38, 111.

¹² *ibid* paras 59–61.

29 of the Vienna Convention on the Law of Treaties (VCLT), this presumption can be rebutted by the establishment of a contrary intention of the parties.¹³ Under the Vienna Convention on Succession of States in Respect of Treaties, the presumption is displaced if it appears from the treaty or is otherwise established that such a territorial application would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.¹⁴ Taking these provisions into account, the Court considered an array of evidence to assess whether the parties had intended to exclude Macau from the China-Laos BIT's operation.

The High Court found that the pair of letters between China and Laos evidenced a 'subsequent agreement' between the parties that their BIT did not extend to Macau,¹⁵ qualifying as an acceptable source of interpretive guidance under the VCLT.¹⁶ The Court found that evidence concerning the intended territorial application of China's BITs with other states was of little use in interpreting the China-Laos BIT.¹⁷ For example, it rejected the investor's submission that the absence of an express exclusion of Macau from the China-Laos BIT, as exists in the BIT between China and Russia, implied Macau's inclusion.¹⁸

The Court based its finding on two other pieces of evidence. First, it accepted expert evidence that the China-Portugal Joint Declaration foresaw that China's existing treaty obligations would, upon its resumption of sovereignty over Macau, extend to that territory only following a formal implementation process for each treaty, which had not yet occurred in relation to the China-Laos BIT.¹⁹ Secondly, it considered that a policy document published by the World Trade Organization in 2001 which stated that Macau had no BITs other than one with Portugal. The Court found that this report was inconclusive but 'suggest[ed] to a limited extent' that the China-Laos BIT did not apply to Macau.²⁰

2.3 The scope of the arbitration clause

Finally, in dicta, the High Court addressed whether the investor's claim fell within the scope of the investor-state arbitration clause in the China-Laos BIT. The relevant clause, article 8(3), read in part: 'If a dispute involving the amount of compensation

¹³ Vienna Convention on the Law of Treaties (adopted opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 29 (VCLT).

¹⁴ Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3, art 15.

¹⁵ *Sanum Investments* (n 1) para 70.

¹⁶ VCLT (n 13) art 31(3)(a).

¹⁷ *Sanum Investments* (n 1) para 86.

¹⁸ *ibid* para 80.

¹⁹ *ibid* para 92.

²⁰ *ibid* para 109.

for expropriation cannot be settled through negotiation (...) it may be submitted [to arbitration] at the request of either party.⁷

The High Court constructed the phrase ‘dispute involving the amount of compensation’ narrowly so as to cover only disputes over the quantum of compensation and not other aspects of an expropriation. It noted that article 8(3) was more restrictively worded than a similar phrase in article 8(1) (which referred simply to ‘[a]ny dispute’ between an investor and a state being settled by negotiation), which suggested the state parties had intentionally narrowed the scope for investor-state arbitration. The Court criticised the reasoning of an ICSID Tribunal in *Tza Yap Shum*,²¹ a case which also concerned a BIT to which China was a party and which had concluded that such an exclusionary interpretation would conflict with a BIT’s purpose of promoting investment. The High Court noted that a narrow interpretation did not rule out arbitration altogether, but rather struck an appropriate balance between the rights of investors and the sovereign choices of states to limit the disputes which could be submitted to arbitration, reflected in the language of their agreement. It further speculated that two communist states were likely to have intended to limit the range of disputes exposed to arbitration.²²

3 Analysis

3.1 Territorial application of the China-Laos BIT

The High Court’s exclusive focus on the territorial application of the China-Laos BIT, as opposed to the nationality of the Macanese investor, is somewhat puzzling. After critiquing this approach, this note appraises the High Court’s reasoning in relation to the China-Laos BIT’s territorial application.

(i) The BIT’s territorial application and the investor’s nationality

BITs typically cover only investments ‘in the territory’ of one of the contracting parties. The China-Laos BIT is no exception.²³ In *Sanum Investments*, however, there was no dispute that the company’s investments were located in Lao territory. Therefore, whether the Macanese company enjoyed the BIT’s protection should have turned on the company’s nationality. Under the China-Laos BIT, a company will possess the nationality of a contracting state if it is ‘established in accordance with the laws and regulations’ of that state.²⁴ Curiously, this is not the inquiry on which *Sanum Investments* was based.

²¹ *Tza Yap Shum v Republic of Peru (Decision on Jurisdiction and Competence)* (ICSID Case No ARB/07/06) (*Tza Yap Shum*), certified English translation available in (2010) 1 Transnational Dispute Management <<http://www.transnational-dispute-management.com/article.asp?key=1576>> accessed 20 April 2015.

²² *Sanum Investments* (n 1) para 125.

²³ China-Laos BIT (n 2) art 1(1).

²⁴ *ibid* art 1(2)(b).

Instead, the applicability of the China-Laos BIT was assessed with reference to the treaty's territorial application.

It is accepted in academic writing that a treaty's coverage of persons (natural and legal) protected as investors may differ from its coverage of the territory in which investments are protected.²⁵ This position was supported in another case concerning an investor residing in Hong Kong. In *Tza Yap Shum*, the ICSID arbitral tribunal explicitly found that the question of whether the BIT between Peru and China applied to the investor rested not on whether Hong Kong formed part of China's territory for the purposes of the treaty, but whether the individual in question held Chinese nationality.²⁶ In a similar vein, in *Feldman v Mexico*, an ICSID tribunal held that an investor's geographical location performs only 'a subsidiary function' in determining its nationality.²⁷ In a parallel proceeding to *Sanum Investments*, between Sanum Investment's Dutch parent company and the Lao government,²⁸ the ICSID tribunal considered only the nationality of the investor, devoting no attention to the relevant BIT's territorial application (despite the fact that the investor was incorporated in Aruba in the Netherlands Antilles, not in Dutch metropolitan territory—akin to Sanum Investment's incorporation in Macau).

In *Sanum Investments*, the High Court described Sanum Investments as 'a company incorporated in Macau'.²⁹ It did not address whether this meant that the company qualified as a Chinese investor. The arbitral tribunal, in considering this question, had quickly reached a conclusion that an entity incorporated in Macau did satisfy the definition of an investor protected under the China-Laos BIT.³⁰ This fact alone, irrespective of the China-Laos BIT's territorial scope, would have animated the arbitral tribunal's jurisdiction.

Sanum Investments is to be distinguished from the *Review Publishing* case, which the High Court cited in its analysis of the territorial application question and which was decided by the same court.³¹ That case concerned not the identity of the claimant party, but the location of the alleged wrongdoing.³² In contrast, the jurisdictional dispute in *Sanum Investments* should have turned on the nationality of the investor.

The assumption implicit in the High Court's approach in *Sanum Investments* is that an investor's entitlement to invoke a BIT's protection rests on both its nationality *and* whether the BIT extends to the territory in which it is incorporated. This appeared to be the view taken by both the High Court and the arbitral tribunal (which stated that

²⁵ Wenhua Shan and Norah Gallagher, 'China' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013) 131, 154–55.

²⁶ *Tza Yap Shum* (n 21) paras 54–61, 72–75.

²⁷ *Marvin Roy Feldman Karpas v United Mexican States (Interim Decision on Preliminary Jurisdictional Issues)* (2003) 18(2) ICSID Review 469, 477.

²⁸ *Lao Holdings v Laos* (n 5).

²⁹ *Sanum Investments* (n 1) para 2.

³⁰ *Sanum Investments (PCA)* (n 3) paras 301–15.

³¹ *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453, 479–81 (*Review Publishing*).

³² *ibid.* This claim concerned whether an allegedly defamatory article published by a publisher incorporated in Hong Kong could be said to be published in the territory of China for the purposes of a judicial assistance treaty between China and Singapore. The nationality of the parties was not at issue.

the territorial application issue was ‘central’ to its jurisdiction)³³ and, for that matter, accepted by both parties. Arguably, it also resolves one dilemma of the *Tza Yap Shum* case. In that case, the tribunal decided that Hong Kong investors investing abroad could invoke the relevant BIT’s protections based on the nationality test, but it was not clear that foreign investors investing in Hong Kong, who would need to prove territorial application, would be so protected.³⁴ This asymmetry could be removed by following the approach in *Sanum Investments* where investors are protected only if the territory in which they are incorporated is subject to the provisions of a treaty.

(ii) Territorial application of the China-Laos BIT

Aside from the separate question of nationality, the High Court’s ruling on whether the China-Laos BIT extended to Macau merits comment. The Court’s analysis rested primarily on an analysis of article 29 of the VCLT. Regrettably, the Court elucidated no standard of proof required to establish that the parties harboured an intention to exclude certain territory from a treaty’s operation, and devoted no attention to the form in which, or the time at which, such an intention must be expressed. Already, the arbitral tribunal had complained about the paucity of evidence concerning the parties’ intention as to the China-Laos BIT’s territorial scope.³⁵ The High Court also noted that much of the evidence before it suggested only ‘to a limited extent’ that Macau was to be excluded from the treaty’s operation.³⁶ Where evidence is so palpably lacking, a statement by the Court as to the standard of proof required to establish an intention to exclude territory would have given its decision a stronger conceptual foundation. This is especially so where the most decisive piece of evidence, the pair of letters, was challenged on multiple grounds by the investor: its dubious authenticity as an expression of the views of the Chinese government, its provenance after the arbitral proceedings had commenced, and its admission to the Court without having been tendered to the arbitral tribunal.³⁷

Another significant piece of evidence was the China-Portugal Joint Declaration.³⁸ While this note, at best, revealed the Chinese government’s intentions over the territorial application of treaties to which it is a party, it did not speak to the Lao government’s intentions. The Court did not explain the extent to which both parties’ intentions must be captured. Moreover, the China-Portugal Joint Declaration was not expressed contemporaneously with the creation of the China-Laos BIT. The weight attributed to this evidence reflected an uncertainty arising from the finding of the High Court in *Review Publishing* that parties’ intentions concerning territorial application must be established at the time at which they signed an agreement.³⁹ In that decision, the Court had also

³³ *Sanum Investments (PCA)* (n 3) para 205.

³⁴ *Tza Yap Shum* (n 21) para 73.

³⁵ *Sanum Investments (PCA)* (n 3) [232], cited in *Sanum Investments* (n 1) para 67.

³⁶ *Sanum Investments* (n 1) paras 88, 109.

³⁷ *ibid* paras 42, 53–56.

³⁸ *ibid* paras 89–93.

³⁹ *Review Publishing* (n 31) para 112.

expressed doubt that states would agree to treaties that could be interpreted according to unilateral expressions of intention by another party.⁴⁰ Despite these pronouncements, the Court in *Review Publishing* had proceeded to take into account the Chinese government's unilateral intention as expressed in a note announcing the applicability of its existing treaty obligations to the territory of Hong Kong.⁴¹ Both *Review Publishing* and *Sanum Investments* indicate that unilateral declarations may contribute to establishing a party's intention as to territorial scope. Perhaps relevant criteria for such declarations should be that they be made publicly and, as the High Court in *Sanum Investments* considered, the governments in question should 'have been fully aware of the implications' of a declaration 'worded in general terms'.⁴² This approach broadly accords with the practice of the United Nations Secretary-General, who has published a policy of accepting declarations and reservations concerning territorial exclusions provided that they are made public and do not undermine the fundamental purpose of the treaty in question.⁴³

(iii) Impact on other BITs

Sanum Investments claimed that a finding against it could 'deprive Macanese investors and foreign investors in Macau of the protections of nearly 130 [China] BITs and disrupt a stable legal framework for investment'.⁴⁴ The repercussions of this decision may not be as significant as this forecast suggests. The High Court made clear that intentions expressed in relation to a state's BIT with one state will not always permit inferences to be drawn in relation to its other BITs.⁴⁵ In this case, the Court gave little weight to territorial intentions expressed in connection with four of China's other BITs, despite their 'very similar provisions'.⁴⁶ Thus, the letters exchanged in relation to the China-Laos BIT will have little salience for the interpretation of other BITs in future disputes. In contrast, statements expressing intentions regarding territorial application in general terms, such as the China-Portugal Joint Declaration, may carry more enduring weight.

3.2 The High Court's departure from arbitration-friendly decisions

Singaporean courts are renowned for their 'pro-arbitration' bent. This reputation, acknowledged by members of Singapore's own judiciary,⁴⁷ is based on a pattern of

⁴⁰ *ibid* para 113.

⁴¹ *ibid* para 116–17.

⁴² *Sanum Investments* (n 1) para 76 (emphasis in original).

⁴³ United Nations Office of Legal Affairs, Treaty Section, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, UN Doc ST/LEG/7/Rev 1 (1999) paras 284–85.

⁴⁴ *Sanum Investments* (n 1) paras 21, 75.

⁴⁵ *ibid* paras 85–86. See also *Sanum Investments (PCA)* (n 3) para 299.

⁴⁶ *Sanum Investments* (n 1) paras 79–88.

⁴⁷ *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732, 745 para 28; Sundares Menon, 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere)' (ICCA Congress 2012, Opening Plenary Session) <http://www.globalarbitrationreview.com/cdn/files/gar/articles/AGs_Opening_Speech_ICCA_Congress_2012.pdf> accessed 6 March 2015.

courts respecting the finality of arbitral decisions,⁴⁸ and liberally interpreting arbitration clauses.⁴⁹

Sanum Investments stands apart from this trend. It bears noting that the High Court declined to consider whether the interpretive task should be informed by a 'pro-' or 'anti-' arbitration stance. In previous decisions, the same Court has explicitly recognised the 'pro-arbitration stance' expressed in the IAA.⁵⁰ Courts in America and England have informed their interpretation of arbitral agreements with a similar proclivity to promote arbitration.⁵¹

The Court introduced two propositions into Singaporean jurisprudence which may have a stultifying effect on arbitration clauses. The first proposition is that arbitration clauses in bilateral investment treaties should not be interpreted based on an assumption that the parties' intent was to promote investments. The Court emphasised the need to assess faithfully the degree to which states had intended to balance the promotion of investments with curtailments of their sovereignty.⁵² This aspect of the Court's ruling ran counter to the ICSID decision in *Tza Yap Shum*, which saw the promotion of investments as an informative intent of the parties.⁵³ The High Court's second proposition is that a state's communist orientation can support a restrictive reading of an arbitration clause. This proposition did not appear to be based on the parties' submissions or substantial external evidence. The Court did refer to statements in *Tza Yap Shum* that communist states are likely to have been concerned about the decisions of international tribunals over which they had little control. Despite such statements, the ICSID Tribunal in that case adopted a broad interpretation of the arbitration clause, informed by the assumption that the parties intended to promote investment. The High Court in *Sanum Investments* arguably placed unwarranted weight on the communist character of the Chinese and Lao governments in 1993.

3.3 The future of this complaint

Under Singaporean law, *Sanum Investments* may appeal the High Court's jurisdictional decision to the Court of Appeal, provided that the High Court grants it leave to do so.⁵⁴ If that occurs, the Court of Appeal may favour a more liberal interpretation of the arbitration clause, in light of its arbitration-friendly decisions in recent years. This would not, however, assist the investor unless it could first establish that the BIT relevantly included Macau or Macanese investors.

⁴⁸ *BLC v BLB* [2014] 4 SLR 79.

⁴⁹ *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5 (19 February 2013).

⁵⁰ *Astro* (n 7) paras 398–99.

⁵¹ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 626 (1985); *Premium Nafta Products Ltd v Fili Shipping Company Ltd* [2007] UKHL 40, [2007] Bus LR 1719.

⁵² *Sanum Investments* (n 1) para 124.

⁵³ *Tza Yap Shum* (n 21) para 103.

⁵⁴ IAA s 10(4).

Alternatively, the investor may turn its attention to the ICSID proceeding instigated by its Dutch parent company, in which the claimant has already passed the jurisdictional phase.⁵⁵ In the meantime, we can watch for further clarification from China and its bilateral investment partners about the status of Macau and Hong Kong in their BITs.

⁵⁵ *Lao Holdings v Laos* (n 5).