State Practice of Asian Countries in International Law

Singapore

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STATE RECOGNITION – KOSOVO

Singapore recognized the Republic of Kosovo as an independent State on 1 December 2016 and established diplomatic relations. Singapore is the fourth member State of the Association of Southeast Asian Nations (ASEAN) to recognize the independence of Kosovo. The other three States are Malaysia, Brunei, and Thailand.

BILATERAL INVESTMENT TREATY – STANDARD OF REVIEW ON APPEALS IN JURISDICTIONAL RULINGS – “MOVING TREATY FRONTIER” (“MTF”) DOCTRINE IN CUSTOMARY INTERNATIONAL LAW – INTERPRETATION OF TREATY

Sanum Investments Limited v the Government of the Lao People's Democratic Republic [2016] SGCA 57

On 29 September 2016, the Singapore Court of Appeal (“SGCA”) released its decision in *Sanum Investments Ltd v the Government of the Lao People's Democratic Republic*, reversing the decision of the Singapore High Court which had previously held that an arbitral tribunal had no jurisdiction to hear the claims by a Macanese investor under the 1993 Bilateral Investment Treaty between the People's Republic of China and the Lao People's Democratic Republic (“PRC-Laos BIT”).

This case relates to a dispute between a Macanese investor, Sanum Investments Limited (“Sanum”) and the Lao Government. Sanum alleged that the Lao Government deprived it of the benefits it derived from its capital investment through the imposition of unfair and discriminatory taxes. An arbitral tribunal was constituted under the UNCITRAL Arbitration Rules, with the seat in Singapore. The arbitral tribunal rendered a preliminary award upholding its

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jurisdiction and the Lao government then commenced challenge proceedings before the High Court in Singapore. The High Court held that the PRC-Laos BIT did not extend to Macau which resulted in Sanum's appeal to the SGCA.

Key Findings of the SGCA

First, the SGCA found that a *de novo* standard of review applied to jurisdictional rulings, consistent with Singapore case law, and this applied equally in investor-state arbitrations.

Second, the SGCA found that the PRC-Laos BIT equally applied to Macau based on the "moving treaty frontier" ("MTF") doctrine in customary international law, even if Macau had been under Portuguese rule when the PRC-Laos BIT was signed in 1993 and was only handed over to the PRC in 1999. A State's treaty would automatically extend to new territory that became a part of that state. The MTF doctrine applied as a matter of presumption to the BIT, and as none of the evidence adduced by the Lao Government could displace this presumption, the MTF doctrine applied to cover Macau after it was transferred.

Third, Laos had sought to adduce evidence after the arbitral award was issued by way of two Note Verbales ("NVs"). The SGCA found that the new evidence would be given weight if they were consistent with the evidence adduced before the critical date. However, the SGCA did not accord the NVs any weight because they contradicted the pre-critical date position.

Fourth, the SGCA rejected Laos' arguments that the NVs constituted subsequent agreement or subsequent practice under Article 31(3)(a) or (b) of the Vienna Convention on the Law of Treaties. This was because subsequent agreement or practice could not have retroactive effect and there was no evidence before the critical date to show that there was any agreement that the PRC-Laos BIT did not apply to Macau. Giving effect to the 2014 NVs could amount to effecting a retroactive amendment of the PRC-Laos BIT, which would not be permissible.

Fifth, in respect of Laos' second jurisdictional objection that Sanum's claims fell outside the scope of the dispute resolution clause in the BIT, the court agreed with a broad construction of the relevant clause ("Article 8(3)") and found that Article 8(3) permitted arbitration as long as the claims included a dispute over the amount of compensation. Considering the fork in the road provision in Article 8(3), the Court found that a narrow reading would violate the principle of effective interpretation as it would be open to a host state to avoid arbitration by not submitting the liability dispute to its courts altogether, which would render protection under Article 8(3) illusory. In this regard, the specific context surrounding Article 8(3) pointed in favour of a broad interpretation.

ARBITRATION – APPLICABILITY OF ARBITRAL CLAUSE IN MAIN CONTRACT

Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza Spa [2016] SGCA 53

In this case, the SGCA affirmed that a negotiable instrument is not governed by an arbitration agreement in an underlying contract unless that agreement is expressly incorporated into the negotiable instrument. Rals International Pte Ltd (“Rals”) entered into a contract with Oltremare SRL, which contained an arbitration clause. The contract provided for payment to be made in cash instalments and promissory notes. The promissory notes were then assigned to a bank. However, when the bank presented the first four notes for payment, they were dishonoured by Rals. The bank sued Rals in the High Court, and Rals sought to stay the bank’s claim under Section 6 of the International Arbitration Act. The High Court declined to stay the action.

Invoking *Larsen Oil and Gas Pte Ltd v Petropod Ltd* [2011] 3 SLR 414, Rals appealed to the SGCA on the sole ground that a widely drafted arbitration clause meant that the notes fell within its scope. It argued that arbitration clauses should be construed generously. In response, the bank argued that the notes did not fall under the arbitration agreement, and even if they did, the bank’s status as an endorsee meant that its claim was outside the scope of the arbitration agreement.

The SGCA found in the bank’s favor. Importantly, the SGCA stated that the rule of construction, as in the English case of *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] 2 ALL ER (Comm) 1053 was that all disputes between parties to an arbitration agreement are assumed to fall within the scope of the agreement unless shown otherwise, but could not be applied when there were compelling reasons that would displace the assumed intention of the parties. Here, the obligations under the promissory notes were separate and autonomous from the main contract, as an obligation under such a promissory note was simply an unconditional promise in writing made by one person to another agreeing to pay a sum of money. Further, there was no term in the arbitration agreement or the main contract that expressly stated that the arbitration agreement was to encompass disputes arising out of the notes; neither was an arbitration agreement expressly incorporated into the notes. Ral’s application was dismissed.

INTERNATIONAL AGREEMENT – PARIS AGREEMENT

Singapore ratified the Paris Agreement in 2016. By ratifying the Agreement, Singapore formalized its pledge to reduce its Emissions Intensity by 36% from

2005 levels by 2030 and to stabilize emissions with the aim of peaking around 2030. The pledge builds on Singapore's existing commitment to reduce greenhouse gas emissions by 16% by 2020 from the business-as-usual level.

INTERNATIONAL AGREEMENT – DOMESTIC INCORPORATION

Parliament passed the Choice of Court Agreements Act on 14 April 2016 to domestically incorporate the Convention on Choice of Court Agreements done at The Hague on 30 June 2005. The law came into force on 1 October 2016.

INTERNATIONAL AGREEMENT – CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS

Singapore ratified the Convention on Mutual Administrative Assistance in Tax Matters ("the Convention") on 20 January 2016. It signed the Convention on 29 May 2013. The Convention facilitates bilateral tax information exchange agreements between state parties. It was developed by the OECD and the Council of Europe, and entered into force in 1995. Among its signatories are all G20 countries, most OECD countries as well as major financial centres such as Singapore, Switzerland, and Luxembourg. Ratifying the Convention expands Singapore's network of partners for exchange of information on request and furthers Singapore's strong commitment to combat cross-border tax evasion.

INTERNATIONAL AGREEMENT – SINGAPORE-AUSTRALIA COMPREHENSIVE STRATEGIC PARTNERSHIP

Singapore and Australia signed a first set of agreements on 13 October 2016 under the Comprehensive Strategic Partnership (CSP), a landmark pact that is expected to advance bilateral relations between the two countries. This first set comprised four Memorandums of Understanding (MOU) in the areas of defence, trade, science and innovation, and anti-drug trafficking. Under the defence initiatives, the Singapore Armed Forces (SAF) will be able to extend its training in Australia for 18 weeks a year with a larger contingent of troops. Both sides will also jointly develop new training facilities in Australia. With respect to trade, revisions will be introduced to the Singapore-Australia Free Trade Agreement, which will facilitate business travel between the two countries as well as improve access to government procurement in both countries. Further collaborations and matching contributions will be made in science

and innovation to support areas of mutual interests. This includes collaborations on research and development, the sharing of research space, and cooperation among tech start-ups from both sides. Lastly, the countries agreed to work together to counter international drug trafficking, including greater cooperation, joint trainings, as well as exchange of information and best practices among law enforcement agencies.

INTERNATIONAL AGREEMENTS – BILATERAL INVESTMENT TREATIES

Singapore signed three Bilateral Investment Treaties (BITs) in 2016, i.e., with Mozambique, Nigeria, and Iran. Of these, the Singapore-Iran BIT is of the most interest. It was signed on 29 February 2016, following a time of renewed interest among the business community with the lifting of sanctions against Iran. Singapore is the second country after Japan to sign a BIT with Iran following the lifting of United Nations sanctions in January 2016. The signing of the BIT took place in conjunction with a business delegation visit to Iran, which comprised representatives from the oil and gas, petrochemicals, logistics, information communications, and professional services industries.

INTERNATIONAL AGREEMENTS – AVOIDANCE OF DOUBLE TAXATION AGREEMENTS (“DTAs”)

Singapore signed several bilateral treaties concerning double taxation in 2016:

- Singapore and Cambodia signed an Agreement for the Avoidance of Double Taxation on 20 May 2016;
- Singapore and Ethiopia signed an Agreement for the Avoidance of Double Taxation on 24 August 2016; and
- Singapore and India signed a new Protocol to amend their bilateral DTA on 30 December 2016.

The Singapore-Cambodia and Singapore-Ethiopia DTAs clarify the taxing rights of both countries on all forms of income flows arising from cross-border business activities, and minimises the double taxation of such income. This will lower barriers to cross-border investment and boost trade and economic flows between the two countries.

The Singapore-India Protocol comes on the heels of the India-Mauritius DTA to phase out capital gains tax exemptions. As the capital gains tax exemption for shares in the Singapore-India DTA was pegged to the India-Mauritius DTA,

the Singapore-India DTA had to be similarly amended. The updated DTA preserves the existing tax exemption on capital gains for shares acquired before 1 April 2017, while providing a transitional arrangement for shares acquired on or after 1 April 2017. For shares acquired on or after 1 April 2017, there will be a two-year transition period, during which the capital gains from such shares will be taxed at 50% of India's domestic tax rate if the capital gains arise during 1 April 2017 to 31 March 2019. The new Protocol will be underpinned by stringent substance requirements which are unique to the Singapore-India DTA, and which ensure that the Protocol can only be enjoyed by tax residents with substantive economic activities.

The following treaties concerning double taxation also entered into force in 2016:

- The Singapore-Rwanda DTA entered into force on 15 February 2016.
- The revised Singapore-Thailand DTA entered into force on 15 February 2016.
- The Second Protocol amending Singapore's standing DTA with the United Arab Emirates entered into force on 16 March 2016. The revised terms include longer threshold periods to ascertain the presence of a permanent establishment and lower withholding tax rates for dividends and interest income.
- The revised Singapore-France DTA entered into force on 1 June 2016. The revised DTA offers improved terms such as lower withholding tax rates for dividends and includes anti-abuse provisions.
- The new Singapore-Lao People's Democratic Republic DTA entered into force on 11 November 2016.
- The Protocol amending the existing Singapore-Russian Federation DTA entered into force on 25 November 2016.
- The revised Singapore-Republic of South Africa DTA entered into force on 16 December 2016.