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Review of Investment Arbitration Cases by Hong Kong Investors



Agenda

1. Arbitration without privity: review of *SPP (Middle East) Ltd v Egypt* and *AAPL v Sri Lanka*
2. Do China's BITs apply to the SARs? Review of *Tza Yap Shum v Peru* and *Sanum Investments Ltd v Laos*

* This presentation only covers procedural aspect but not the substantive protections of the cases discussed.



1. Arbitration without privity

- Despite there are less than 10 investment arbitration cases by Hong Kong investors, 2 cases were prominent in investment arbitration history. They have made up the history of ‘arbitration without privity’ (of a contract).
- This term was first used by Jan Paulsson, ‘Arbitration Without Privity’ (1995) 10(2) ICSID Review 232.
- Professor M. Sornarajah of the NUS describes this as the ‘**original sin**’ (of Hong Kong investors): *Resistance and Change in International Law on Foreign Investment Law* (C.U.P 2015) Chapter 3.1 “The Original Sin: ‘Arbitration without Privity’”.



1. Arbitration without Privity

- *SPP (Middle East) Ltd v Egypt* (ICSID Case No. ARB/84/3)
 - ⇒ Legal Instrument: Egyptian Foreign Investment Law No.43
 - ⇒ Decision on Preliminary Objection to Jurisdiction (27 November 1985): 3 ICSID Reports 101
 - ⇒ Decision on Jurisdiction (13 April 1988) (2:1): 3 ISD Reports 131
 - ⇒ Award on Merits (20 May 1992) (2:1): (1992) 8 ICSID Review 328
- **Brief facts:**
 - ⇒ In 1974, SPP, a Hong Kong company, entered into agreements with Egypt to establish a joint venture, ETDC, with a view to develop an international tourist complex at the Pyramids Oasis in Egypt. SPP's Egyptian subsidiary, SPP(ME), held 60% of shares in ETDC, with the remaining 40% owned by the Egyptian partner.



1. Arbitration without privity

- ⇒ The project went ahead until 1978 when, as a result of parliamentary opposition, the Egyptian Government effectively cancelled the project placing ETDC in judicial trusteeship. By that time, SPP(ME) and SPP had invested approximately US\$5 million in the project (capital contributions and loans to ETDC, expenses for infrastructure design and development).
- ⇒ Pursuant to the contractual arbitration clause, SPP and SPP(ME) commenced an ICC arbitration (ICC Arbitration No. YD/AS No. 3493), and obtained an award of US\$12.5 million in damages published on 11 March 1983. However, this award was later set aside by the Court of Appeal, Paris on jurisdictional ground.



1. Arbitration without privity

⇒ In 1984, the Claimants decided to take the same matter before an ICSID Tribunal, pursuant to an Egyptian Law which contained an ICSID provision. The Claimants maintained that Egypt's actions violated the agreements and amounted to expropriation of the investment, and thus claimed compensation for the value of their investment in ETDC plus interest.



1. Arbitration without privity

- Article 8 of the Egyptian Foreign Investment Law No. 43 provide the following dispute resolution methods:
 - (1) By a complaint to the Egyptian courts
 - (2) In a manner agreed between the investor and the State
 - (3) In accordance with the terms of an agreement between the State of Egypt and the home State of the investor
 - (4) Under the ICSID Rules
- In the Award on the Merits dated 20 May 1992, the Tribunal held that Egypt's actions constituted an expropriation of the Claimants' investment (their shareholding in ETDC) and that Egypt was therefore liable to pay 'equitable compensation' for the value of the expropriated investment.
- First case for 'arbitration without privity' (of a contract) (see Jan Paulsson's article referred in slide number 3).



1. Arbitration without privity

- *AAPL v Sri Lanka* (ICSID Case No. ARB/87/3)
 - ⇒ Legal Instrument: UK and Sri Lanka BIT (1980), extended to cover Hong Kong
 - ⇒ Awards of Merits (27 June 1990) (2:1): (1991) 6 ICSID Review 526
- **Brief facts:**
 - ⇒ In late 1986, the northern and eastern provinces of Sri Lanka were marked by a major insurrection, resulting in a civil war.
 - ⇒ The area surrounding the shrimp farm was seized by a powerful and well-armed group of insurgents, who were engaged in sophisticated guerilla warfare against the security forces.
 - ⇒ The shrimp farm was destroyed by the security forces of Sri Lanka Government on 28 January 1987.



1. Arbitration without privity

- Brief facts

- ⇒ *AAPL* invoked Article 2 of the BIT: ‘full protection and security of investments’; Article 3 of the BIT: MFN, or in the alternative Article 4(2) of the BIT: ‘restitution and freely transferable compensation if the destruction of property in situation of war or civil disturbances was not required by the necessity of the situation. The total amount of claim was around US\$8 million besides costs.
- ⇒ No contest on jurisdiction by Sri Lanka. Jurisdiction was simply assumed after the cooling-off period in the treaty had been passed.



1. Arbitration without privity

- Discussion
 - ⇒ Arbitration is a consensual process. But when the consent reached between the parties?
- For early ITs, some require a separate arbitration agreement after the alleged violation. Some ITs with clear language that arbitration could take place without an intervening arbitration agreement.
- The assumption is that **an unilateral offer for arbitration** in *either* the national legislation (first case: *SPP (Middle East) Ltd v Egypt*) *or* the BIT (first case: *AAPL v Sri Lanka*).
- That this offer is subsequently converted to an arbitration agreement when the foreign investor accepts that unilateral offer of arbitration through a request for arbitration.
- Since *AAPL*, different arbitral tribunals had assumed jurisdiction on the basis of treaties in which the technique was used (hence the ‘**original sin**’).



2. Do China's BITs apply to the SARs?

a) Review of China's BITs

- ⇒ First BIT with Sweden entered into force on 29 March 1982
- ⇒ The prevailing view is there are four generations of China's BITs
- ⇒ The first three generations classification based on national treatment and investor-State arbitration*
 - 1) 1982–1989: restrictive investor–State arbitration provisions or none at all
 - 2) 1990–1997: restrictive investor–State arbitration but also began to enable such limited arbitrations to be dealt with ICSID (China acceded to the Washington Convention 1966 on 6 February 1993, with reservation under Article 25(4): **limited to** amount of the compensation from **expropriation**)
 - 3) 1998 to early 2010's: China's acceptance of comprehensive investor-State dispute resolution provisions (China acceded to the WTO on 11 December 2001)

* Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practices* (O.U.P. 2009) 35-42.



2. Do China's BITs apply to the SARs?

a) Review of China's BITs

- 4) The emerging fourth generation*: from early 2010's, e.g. the proposed China-EU Comprehensive Agreement on Investment in 2013, draft China-United States BIT.

* Yuwen Li and Cheng Bian, 'China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options', (2020) *67 Netherlands International Law Review* 503, 523 to 524



2. Do China's BITs apply to the SARs?

b) Review of China's BITs

⇒ According to United Nations Conference on Trade and Development (UNCTAD), as at 18 April 2022:

		PRC	HKSAR	Macao SAR
1	BITs	145 (125)	21 (21)	2 (2)
2	TIPs	25 (25)	7 (7)	2 (2)
	Total	170 (150)	28 (28)	4 (4)

(bracket figures are figures for treaties that are in force)

<https://investmentpolicy.unctad.org/international-investment-agreements/>

c) China has the largest number of BITs/ TIPs besides Germany.



2. Do China's BITs apply to the SARs?

c) *Tza Yap Shum v Peru* (ICSID Case No. ARB/07/6)

- ⇒ Decision on Jurisdiction and Competence (19 June 2009)
- ⇒ Award on Merits (7 July 2011)
- ⇒ Decision on Annulment (12 Feb 2015): Dismissed
- ⇒ Legal Instrument: China-Peru BIT (1994)
- ⇒ First China BIT case

■ **Brief facts**

- ⇒ Mr Tza, a Hong Kong permanent resident with a HKSAR passport (born in Fujian Province)
- ⇒ Mr Tza invested in Peru and owned 90% of TSG Peru S.A.C ('TSG')
- ⇒ The claim involved an alleged tax debt and a tax lien imposed by Peruvian Tax Authority, SUNAT on TSG
- ⇒ SUNAT froze TSG's bank accounts



2. Do China's BITs apply to the SARs?

c) *Tza Yap Shum v Peru* (ICSID Case No. ARB/07/6)

■ Brief facts

- ⇒ Mr Tza claimed that the freezing of TSG's bank accounts amounted to a denial of (i) 'fair and equitable treatment', (ii) 'full protection and security', (iii) a restriction on the transfer of capital and earnings; and (iv) expropriation without compensation
- ⇒ Peru contested the jurisdiction of the Tribunal. One issue was whether Mr Tza was an 'investor' under the China Peru BIT.
- ⇒ Article 2 of the BIT states:

The term "investors" means: in respect of the People's Republic of China:

*a. natural persons who have nationality of the People's Republic of China **in accordance with its laws**;*

b. economic entities established in accordance with the laws of the People's Republic of China and domiciled in the territory of the People's Republic of China;



2. Do China's BITs apply to the SARs?

c) *Tza Yap Shum v Peru* (ICSID Case No. ARB/07/6)

■ Discussions

⇒ Article 18 of the Basic Law of the HKSAR provides, *inter alia*:

National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.

⇒ Annex III includes the Nationality Law of the People's Republic of China

⇒ Note: Article 24 of Basic Law of the Hong Kong SAR only defines 'permanent resident' and 'non-permanent resident'.

⇒ At [70] of the Decision, the Tribunal found the BIT did not exclude Chinese nationals resided in the HKSAR or even elsewhere in the world.

⇒ The Tribunal therefore found Mr Tza fulfilled the definition of 'investor' under the BIT



2. Do China's BITs apply to the SARs?

c) *Tza Yap Shum v Peru* (ICSID Case No. ARB/07/6)

■ Discussions

⇒ Decision criticised by Mainland China academics, e.g. Wei Shen (formerly of City University of Hong Kong and now Dean of the School of Law, Shangdong University), 'The Good, the Bad or the Ugly? A Critique of the Decision on Jurisdiction and Competence' in *Tza Yap Shum v The Republic of Peru* (2011) 10 *Chinese JIL* 55

⇒ In [12] of the article, Professor Shen asked

...the Tza Yap Shum case only addressed the nationality of a natural person, not all issues surrounding legal persons, corporate ownership or nationality. It is not clear whether a Hong Kong-incorporated entity is entitled to treaty protections under a Chinese BIT.

⇒ The answer to this question comes in *Sanum Investments Ltd v Laos* (Sanum is a Macanese investor).



2. Do China's BITs apply to the SARs?

c) *Sanum Investments Ltd v Laos* (PCA Case No. 2013-13)

- ⇒ Decision on Jurisdiction (13 December 2013)
- ⇒ Award on the Merits (6 August 2019)
- ⇒ Legal Instrument: China-Laos BIT (1993)

■ Brief facts

- ⇒ Sanum, through a joint venture in Laos, made certain investments in the gaming and hospitality industry in the Laos for over US\$85 million.
- ⇒ The main complaint of Sanum was through the imposition of unfair and discriminatory taxes by Government of Lao, it had been deprived of its benefits to be derived from its capital investment.
- ⇒ Sanum commenced arbitral proceedings against the Government of Lao by a notice of arbitration issued pursuant to the China-Laos BIT on 14 August 2012.



2. Do China's BITs apply to the SARs?

d) *Sanum Investments Ltd v Laos* (PCA Case No. 2013-13)

■ Brief facts

- ⇒ Sanum alleged there were breaches under (i) Article 3.1 Fair and Equitable treatment; (ii) Article 3.2 MFN; (iii) Article 4 Expropriation; and (iv) Article 5 Repatriation of Investment under the BIT.
- ⇒ The Government of Lao contested the jurisdiction of the Tribunal
- ⇒ After rendering the Decision on Jurisdiction, the Government of Lao referred the issue of jurisdiction to the supervisory court in the seat of arbitration, the Singapore High Court under section 10 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) for a declaration that the Tribunal had no jurisdiction to adjudicate the claims brought by the defendant.
- ⇒ Before the Singapore High Court, the Government of Lao adduced two letters (*Notes Verbales*) under the rule of *Ladd v Marshall* [1954] 1 WLR 1489. The Notes were issued after the rendering of the Decision on Jurisdiction.



2. Do China's BITs apply to the SARs?

d) *Sanum Investments Ltd v Laos* (PCA Case No. 2013-13)

- Discussion

- ⇒ Same issue as *Tza Yap Shum*: does the China-Laos BIT 1993 apply to the Macau SAR?
- ⇒ This would again depend on whether the BIT has excluded the SARs and also whether the Claimant could meet the definition of 'investor' of the BIT.
- ⇒ Let's visit the later issue first.



2. Do China's BITs apply to the SARs?

d) *Sanum Investments Ltd v Laos* (PCA Case No. 2013-13)

■ Discussions

⇒ Article 2 of the China-Laos BIT 1993 provides:

The term “investors” means; in respect of both Contracting States:

a. natural persons who have nationality of each Contracting State;

*b. economic entities established in accordance with the **laws and regulations of each Contracting State.***

⇒ **Almost** the same definitions as the definition of ‘investors’ for PRC in the China-Peru BIT 1994.

⇒ In [304] of the Decision on Jurisdiction, the Tribunal held ‘*[t]here is no doubt that the PRC has sovereignty over the Macao SAR and the Hong Kong SAR; it would not be respectful of that sovereignty for the Tribunal to consider that the laws enacted in either of the two SARs are not enacted in the PRC.*’



2. Do China's BITs apply to the SARs?

d) *Sanum Investments Ltd v Laos* (PCA Case No. 2013-13)

■ Discussions

⇒ Therefore, the Tribunal held Sanum was an investor under the BIT

⇒ Other relevant facts/ matters:

- 1) Both the Tribunal and the Singapore Court of Appeal [2016] 5 SLR 536 also considered the Convention of Succession of States in Respect of Treaties 1978 and the 'Moving Treaty Frontier Rule' under customary international law in their decisions.
- 2) The Singapore Court of Appeal held the *Notes Verbales* had no retroactive effect.
- 3) On 13 December 1999, the PRC informed the United Nations Security-General (UNSG) of the status of Macau in relation to the multilateral treaties deposited with the UNSG. The note was recorded in a UN document entitled '*Multilateral Treaties deposited with the Secretary-General*'.
- 4) No reliance has been placed by the Singapore courts as this document was held **not concerning any bilateral treaty**.



2. Do China's BITs apply to the SARs?

- e) Lessons from *Tza Yap Shum and Sanum Investments Ltd*
- 1) Given there are few BITs / TIPs for the SARs (see slide no. 13), the reason for an investor invoking a China BIT is obvious. Whether a China BIT applies to the SARs depend on:
 - ⇒ Whether the SARs are excluded territories under the BIT; and
 - ⇒ Whether the claimant can fulfil the definition of ‘investor’ and ‘investment’ under the BIT.
 - 2) In vast majority of China BITs, there is no definition of the term ‘territory’ of a State. Even if it does, e.g. China- Finland BIT, e.g. China-Finland BIT 2004, the definition is of no utility. Article 1.4 of the said BIT provides:

The term “territory” means the territory of either Contracting Party, including the land area, internal waters and territorial sea and the airspace above them under the sovereignty of that Contracting Party, as well as any maritime area beyond the territorial sea of that Contracting Party, over which that Contracting Party exercises sovereign rights or jurisdiction in accordance with domestic and international law.



2. Do China's BITs apply to the SARs?

- e) Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 21 October 2016

Q: The Court of Appeal of Singapore ruled on an investment arbitration case filed by a Macao-based company against Laos, holding that the 1993 China-Laos agreement Concerning the encouragement and Reciprocal Protection of Investments applies to Macao. How do you respond to this ruling? How does China handle the application of treaties to Hong Kong and Macao special administrative regions (SARs)?

<https://www.mfa.gov.cn/ce/cegv/eng/fyrth/t1407743.htm>



2. Do China's BITs apply to the SARs?

- e) Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 21 October 2016

*A: I have noted the ruling made by the Singaporean court. The geographical scope of application of the China-Laos investment agreement is **a question of fact concerning acts of state, which is up to the contracting parties to decide**. China has confirmed twice in diplomatic notes that the China-Laos investment agreement does not apply to Macao SAR. The ruling made by the Singaporean court on this question of fact is incorrect.*



2. Do China's BITs apply to the SARs?

- e) Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 21 October 2016

A (cont'd): *The Chinese side handles the application of treaties to Hong Kong and Macao SARs in line with the 'One Country, Two Systems' policy and the Basic Laws in Hong Kong and Macao. To be specific, the Chinese central government decides whether or not the international treaties to which the People's Republic of China is or becomes a party apply to the SARs based on the circumstances and their needs after seeking the views of the governments of the SARs. The SARs can conclude agreements with foreign countries on their own in the appropriate fields, including economy, finance, trade and investment, in accordance with the Basic Laws or under specific authorization of the central government. Therefore, as a principle, the investment agreements between the central government and foreign countries do not apply to SARs, unless otherwise decided by the central government after seeking the views of the SAR governments and consulting with the other contracting parties of the agreement.*



2. Do China's BITs apply to the SARs?

- f) Lessons from *Tza Yap Shum and Sanum Investments Ltd*
 - 3) So far only the China-Russia BIT 2006 excludes the SARs. Article 1 of the said BIT provides:
 - 1. *Unless otherwise agreed by both Contracting Parties, the Agreement does not apply to the Hong Kong Special Administrative Region of the People's Republic of China and the Macao Special Administrative Region of People's Republic of China.*
 - 4) While Article 153 of the HKSAR Basic Law provides, *inter alia*,
 - The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region.*
- (see similarly Article 138 of the Macao SAR Basic Law)

The Basic Law is a national law.



2. Do China's BITs apply to the SARs?

- f) Lessons from *Tza Yap Shum and Sanum Investments Ltd*
- 4) International law takes precedence over in pertaining to the performance of a treaty obligation. Article 27 of the Vienna Convention on the Law of Treaties 1969 (in which the PRC is a party) provides:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.
- 5) Article 29 of the said Convention further provides (emphasis added):

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.



2. Do China's BITs apply to the SARs?

- f) Lessons from *Tza Yap Shum and Sanum Investments Ltd*
- 6) Further, Articles 31 to 33 of the Vienna Convention (the rules for the interpretation of treaties) **does not provide** intention of a contracting State is a relevant factor for the interpretation of a treaty.
- 7) In the premises, it is submitted that all China's BITs DO apply to the two SARs, **unless contrary intention is shown** on the face of the BIT (e.g. China-Russia BIT 2006).
- 8) Whether a claimant to an investment arbitration case can satisfy the definition of 'investment' and 'investor' are two other jurisdictional hurdles a claimant needs to cross for invoking any China's BIT.
- 9) Let's see whether the Tribunal in *Alpene Ltd v Malta* (ICSID Case No, ARB/21/36) will hold the China-Malta BIT 2009 does apply to Hong Kong SAR if the applicability of the BIT is being contested by Malta.



3. References

- a) CL Lim, Jean Ho, and Martins Papparinskis, *International Investment Law and Arbitration: Commentary, Awards and other Materials* (2nd ed, C.U.P. 2021)
- b) Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (5th ed, C.U.P. 2021)
- c) Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law* (3rd ed, O.U.P. 2022)
- d) Michael Hwang and Aloysius Chang, ‘Government of the Lao People’s Republic v Sanum Investments Ltd: A Tale of Two Letters’ (2015) 30(3) *ICSID Review* 506
- e) John Shijian Mo, ‘The Dilemma of Applying Bilateral Investment Treaties of China to Hong Kong and Macao: Challenge Raised by Sanum Investments to China’ (2018) 33(1) *ICSIR Review* 125