

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**AsiaPhos Limited and Norwest Chemicals Pte Limited  
(the “Claimants”)**

**v.**

**People’s Republic of China  
(the “Respondent”)**

**(ICSID Case No. ADM/21/1)**

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**AWARD**

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***Members of the Tribunal***

Prof. Dr. Klaus Sachs, President of the Tribunal  
Dr. Stanimir Alexandrov, Arbitrator  
Prof. Albert Jan van den Berg, Arbitrator

***Secretary of the Tribunal***

Ms. Geraldine R. Fischer

***Assistant to the Tribunal***

Ms. Susanne Schwalb

*Date of Dispatch to the Parties:* 16 February 2023

*Place of Arbitration:* Geneva, Switzerland

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**I. INTRODUCTION**

1. This case concerns a dispute submitted to the Tribunal on the basis of the 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, which entered into force on 7 February 1986 (the "**PRC-Singapore BIT**" or "**Treaty**").<sup>1</sup>
2. Claimants are AsiaPhos Limited ("**First Claimant**" or "**AsiaPhos**") and its wholly-owned subsidiary Norwest Chemicals Pte Ltd ("**Second Claimant**" or "**Norwest Chemicals**"). Both companies ("**Claimants**") are incorporated under the laws of Singapore.
3. Respondent is the People's Republic of China (the "**PRC**" or "**Respondent**").
4. The dispute concerns the alleged violation of Respondent's obligations under the Treaty with respect to alleged investments made by Claimants in the phosphate industry in the PRC. Prior to Respondent's alleged unlawful acts, Claimants held, through their wholly-owned Chinese subsidiary Sichuan Mianzhu Norwest Phosphate Chemical Co. ("**Mianzhu Norwest**"), mining and exploration licenses for two phosphate mines, *i.e.*, the Cheng Qian Yan mine ("**Mine 1**") and the Shi Sun Xi mine ("**Mine 2**"). Claimants further own two plants which at the time of the impugned acts produced yellow phosphorus using phosphate rocks extracted from Mines 1 and 2.<sup>2</sup> In addition, First Claimant directly or indirectly holds a 55% equity interest in Deyang Fengtai Mining Co. Ltd ("**Deyang Fengtai**"), a Chinese company which held an exploration license and exploration rights for the Yingxiongya barite mine ("**Mine 3**", together with Mine 1 and Mine 2 the "**Mines**").<sup>3</sup> The Mines and

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<sup>1</sup> 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 signed on 21 November 1985 ("Treaty (EN)") (**Exhibit C-1**). Respondent has submitted its own version of the PRC-Singapore BIT as **Exhibit RL-0143**. In this Award, the Tribunal therefore makes reference to both versions submitted by the Parties.

<sup>2</sup> Request for Arbitration, dated 7 August 2020 ("Request for Arbitration"), para. 2.

<sup>3</sup> Claimants' Memorial on the Merits, dated 23 September 2021 ("Claimants' Memorial on the Merits"), para. 59; occasionally referred to as the "Deyang Fengtai mine", *cf.* Claimants' Memorial on the Merits, para. 3.

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the downstream plants are located in Mianzhu City, Sichuan Province, PRC.<sup>4</sup> The Mines are located in an area where the PRC's central government set up the pilot Giant Panda National Park (the "**Panda Park**") in 2017.<sup>5</sup> Mines 2 and 3 are also situated in the Jiudingshan Nature Reserve, which the Sichuan provincial government established for giant panda conservation in 1999.<sup>6</sup>

**II. PROCEDURAL HISTORY**

5. On 7 August 2020, Claimants notified a Request for Arbitration ("**Request for Arbitration**") to Respondent under Article 13(3) Treaty, thereby initiating the present *ad hoc* arbitration proceedings. In its Request for Arbitration, Claimants appointed Dr. Stanimir Alexandrov, a Bulgarian national, as arbitrator.
6. On 21 October 2020, Respondent informed Claimants that it appointed Prof. Albert Jan van den Berg, a Dutch national, as arbitrator.
7. On 10 February 2021, the two party-appointed arbitrators appointed Prof. Dr. Klaus Sachs, a German national, as the President of the arbitral tribunal ("**Tribunal**") and both parties confirmed their acceptance of such appointment on the same date. The Parties also confirmed that the Members of the Tribunal were duly and validly appointed in accordance with the PRC-Singapore BIT. Consequently, the Tribunal has been constituted as of that date.
8. On 2 March 2021, after having heard the Parties, the Tribunal decided to select ICSID as the administering institution for the present proceedings and provided the Parties with further guidance as to how it would refer to the ICSID Convention and ICSID Arbitration Rules in the arbitration proceedings. On 28 April 2021, the Parties agreed to the appointment of Ms. Susanne Schwalb as Assistant to the Tribunal.

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<sup>4</sup> Claimants' Memorial on the Merits, para. 3.

<sup>5</sup> Claimants' Memorial on the Merits, para. 7; Respondent's Memorial on Preliminary Objections and Request for Bifurcation, dated 12 November 2021 ("Respondent's Memorial"), paras. 28, 55, 73.

<sup>6</sup> Claimants' Memorial on the Merits, para. 7; Respondent's Memorial, paras. 27, 55, 68.

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9. After holding the First Session with the Parties by videoconference, on 13 July 2021, the Tribunal issued Procedural Order No. 1. In light of indications from Respondent that it was considering requesting a bifurcation of the proceedings, Paragraph 15.1 in conjunction with Annex B of the Procedural Order No. 1 set forth different timetables depending on whether a bifurcation would be requested and, if so, whether it would be granted by the Tribunal.
10. On 23 September 2021, Claimants submitted their Memorial on the Merits (“**Claimants’ Memorial on the Merits**”).
11. In accordance with Scenario 2 of the Procedural Timetable set forth in Annex B to the Procedural Order No. 1, Respondent filed its Memorial on Preliminary Objections and Request for Bifurcation (“**Respondent’s Memorial**”) on 12 November 2021, raising several objections to the Tribunal’s jurisdiction and the admissibility of Claimants’ claims and requesting the bifurcation of the arbitration due to these objections.
12. On 26 November 2021, Claimants submitted their Response on Bifurcation (“**Claimants’ Response**”) and on 10 December 2021 an Amended Response on Bifurcation, (“**Claimants’ Amended Response**”).
13. For further details of the events leading up to the Tribunal’s Decision on Bifurcation, reference is made to the procedural history in the Decision on Bifurcation dated 23 December 2021.
14. On 23 December 2021, the Tribunal issued its Decision on Bifurcation, granting Respondent’s Request for Bifurcation insofar as Respondent’s second objection concerning the scope of its consent to arbitrate by virtue of (i) Article 13(3) of the Treaty and (ii) the Most Favoured Nation (“**MFN**”) Provision in Article 4 of the Treaty (“**Bifurcated Jurisdictional Objection**”). In contrast, the Tribunal rejected Respondent’s first and third objections relating to the existence of a protected investment and the admissibility of Claimants’ claims. It held that these objections would be considered together with the merits of Claimants’ claims if and to the extent that Respondent’s consent and, thus, the Tribunal’s jurisdiction to hear Claimants’ claims, had been established. The

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Tribunal ordered the proceedings to go forward in accordance with Scenario 2A of the Procedural Timetable as set out in Annex B to the Procedural Order No. 1.

15. On 11 February 2022, Claimants submitted their Counter-Memorial on the Bifurcated Jurisdictional Objection (“**Claimants’ Counter-Memorial**”).
16. On 14 March 2022, Respondent submitted its Reply on Bifurcated Preliminary Objection (“**Respondent’s Reply**”).
17. On 14 April 2022, Claimants submitted their Rejoinder on the Bifurcated Jurisdictional Objection (“**Claimants’ Rejoinder**”).
18. Following the Parties’ joint request at the 25 May 2022 Pre-Hearing Conference, on 23 June 2022 the Tribunal provided the Parties with additional guidance on issues to address at the upcoming hearing.
19. On 30 June and 1 July 2022, the Tribunal held an oral hearing on Respondent’s Bifurcated Jurisdictional Objection with the Parties by video conference (the “**Hearing on Respondent’s Bifurcated Jurisdictional Objection**”).
20. On 20 August 2022, the Parties submitted their respective Statement on Costs (“**Claimants’ Statement on Costs**” and “**Respondent’s Statement on Costs**”).
21. On 24 August 2022, Respondent requested an opportunity for the Parties to file reply submissions to the other Party’s Statement on Costs as well as asked the Tribunal to order Claimants to disclose certain information about a third-party funding arrangement publicly announced a few days earlier.
22. On 31 August 2022, further to the Tribunal’s instructions, Claimants filed their response to Respondent’s request and provided the requested information about the third-party funding arrangement.
23. On 7 September 2022, the Tribunal informed the Parties that it considered itself to be fully briefed on costs and, with regard to the third-party funding arrangement, that no further

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decision was required at that stage. The Tribunal also notified the Parties that it did not have a conflict of interest with either funder.

24. After thorough and open-minded deliberations, the Tribunal has by majority reached the following decision on Respondent's Bifurcated Jurisdictional Objection.

**III. SUMMARY OF THE FACTUAL BACKGROUND**

25. In the following, the Tribunal will very briefly summarize the factual background of the case. Given the bifurcation of one of Respondent's three preliminary objections, the Tribunal will not render a decision on the merits and notes that the Parties have not fully pleaded their position on the facts of this case. At the same time, the factual background as it has been presented by the Parties up to this date may serve as context for the Parties' submissions and the Tribunal's reasoning on Respondent's Bifurcated Jurisdictional Objection.

**A. CLAIMANTS' ALLEGED INVESTMENT IN THE CHINESE PHOSPHATE MINING SECTOR**

26. The alleged investment of Norwest Chemicals in the Chinese phosphate mining sector commenced in 1996 with the establishment of Mianzhu Norwest as a Sino-foreign Joint Venture. At the time, Norwest Chemicals was an associate of Hwa Hong Corporation Limited, a publicly traded Singaporean company with the majority shareholders being family members of Dr. Hian Eng Ong.<sup>7</sup>
27. Mianzhu Norwest began production in 1996 using yellow phosphorus ("P<sub>4</sub>") processing facilities that were already in operation in Mianzhu City.<sup>8</sup> Mianzhu Norwest constructed a sodium tripolyphosphate ("STPP") plant in Hanwang Town in 1999.<sup>9</sup> In 2002, Mianzhu Norwest acquired two phosphate mines, Mines 1 and 2, nearby. The Sichuan Province Department of Land and Resources ("SCLRD") approved the transfer of the associated

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<sup>7</sup> Claimants' Counter-Memorial on the Bifurcated Jurisdictional Objection, dated 11 February 2022 ("Claimants' Counter-Memorial"), para. 16.

<sup>8</sup> Claimants' Counter-Memorial, para. 17.

<sup>9</sup> Claimants' Counter-Memorial, para. 17.

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- mining licenses to Mianzhu Norwest and reissued them in its name on 12 November 2002.<sup>10</sup>
28. In 2002, Norwest Chemicals acquired the remaining equity in Mianzhu Norwest from its Chinese joint venture partner, converting it to a wholly foreign-owned enterprise. The conversion was approved by the Deyang City Foreign Trade & Economic Cooperation Bureau and mining started in 2002 at Mine 1 and in 2008 at Mine 2.<sup>11</sup>
29. After the 2008 earthquake, Dr. Ong, along with several others, took over Norwest Chemicals and, through it, Mianzhu Norwest.<sup>12</sup> Dr. Ong and the Mianzhu Norwest management were continuously encouraged to reinvest in both mining operations and downstream production in Mianzhu, being granted various incentives in this regard.<sup>13</sup>
30. AsiaPhos Limited became the parent company of Norwest Chemicals in 2013.<sup>14</sup> After the acquisition of 100 % of LY Resources, a Singaporean company, AsiaPhos held a majority stake in Deyang Fengtai and, through it, in the exploration license and mineral rights for Mine 3.<sup>15</sup>
31. Mines 1, 2 and 3 are located in and around the Jiudingshan Nature Reserve.<sup>16</sup> Sichuan Province and Mianzhu City permitted extensive mineral exploration and exploitation in the Jiudingshan Nature Reserve and surrounding areas.<sup>17</sup> From 2002 until 2017, the Sichuan Province Government automatically granted Mianzhu Norwest license renewals and extensions as well as license changes upon submission of the appropriate paperwork.<sup>18</sup>

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<sup>10</sup> Claimants' Counter-Memorial, para. 18.

<sup>11</sup> Claimants' Counter-Memorial, paras. 19 *et seq.*

<sup>12</sup> Claimants' Counter-Memorial, para. 22.

<sup>13</sup> Claimants' Counter-Memorial, paras. 22-23.

<sup>14</sup> Claimants' Counter-Memorial, para. 24.

<sup>15</sup> Claimants' Counter-Memorial, para. 26-27.

<sup>16</sup> Claimants' Counter-Memorial, para. 28.

<sup>17</sup> Claimants' Counter-Memorial, paras. 29-31.

<sup>18</sup> Claimants' Counter-Memorial, para. 30.

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**B. PROHIBITION OF MINING IN AND AROUND JIUDINGSHAN NATURE RESERVE AND ITS AFTERMATH**

32. In the course of 2016 and 2017, Respondent developed and adopted a new policy that prohibited mining in and around the Jiudingshan Nature Reserve and the national panda park that was to be created. According to Claimant, this new policy led to the shutdown, sealing and mandatory “exit” of Mines 1, 2 and 3 and their associated mineral rights in 2017.<sup>19</sup>

33. Claimants’ case on this “exit” can be briefly summarized as follows:

- Between August and November 2017, the Sichuan Province Government and Mianzhu City Government issued a series of notices, orders, and policies that required mining to cease at Mines 1, 2 and 3 and the mineral rights to “exit”. The *Decision of the People’s Government of Mianzhu City on Closing (or Exiting) Exploration and Mining Rights Projects within the Jiudingshan Nature Reserve* (the “**Mianzhu Decision**”) listed 23 mining rights and 15 exploration rights as subject to mandatory “exit”.<sup>20</sup>
- Mine 1 was not within the Jiudingshan Nature Reserve but the Mianzhu City Government nonetheless sealed Mine 1 in July 2017, as evidenced by photographs of Mine 1 and 2. This also affected Mine 3 which was accessible only through Mine 1.<sup>21</sup>
- Mine 2 was sealed by the Mianzhu City Government in November 2017.<sup>22</sup> As Mianzhu Norwest’s production at its P<sub>4</sub> and STPP plants depended exclusively on phosphate rock from Mines 1 and 2, Mianzhu Norwest was forced to shut down the plants in June 2018 after its reserve of phosphate rock had been exhausted.<sup>23</sup>
- Claimants’ mineral licenses were not renewed after 2017 specifically because Respondent had adopted a new policy prohibiting mining in the Jiudingshan Nature

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<sup>19</sup> Claimants’ Counter-Memorial, paras. 32-33.

<sup>20</sup> Claimants’ Counter-Memorial, para. 38.

<sup>21</sup> Claimants’ Rejoinder on the Bifurcated Jurisdictional Objection, dated 14 April 2022 (“Claimants’ Rejoinder”), paras. 13-15; Claimants’ Counter-Memorial, para. 37.

<sup>22</sup> Claimants’ Counter-Memorial, para. 39.

<sup>23</sup> Claimants’ Counter-Memorial, para. 40.

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Reserve.<sup>24</sup> Despite Respondent's repeated recognition of its obligation to provide compensation as a result of its measures, Mianzhu Norwest and Deyang Fengtai have received no compensation for the "exit" of their mineral rights or for their downstream operations.<sup>25</sup>

34. Respondent's case on this issue, in turn, can be briefly summarized as follows:

- The Mianzhu City Government did not order the sealing of Mine 1 or 2.<sup>26</sup> In particular, Mine 1 was not listed in the Decision of the People's Government of Mianzhu City on Closing (or Exiting) Exploration and Mining Rights Projects within the Jiudingshan Nature Reserve.<sup>27</sup>
- The mining licenses held by Mianzhu Norwest and Deyang Fengtai were not revoked or terminated by the Chinese government. Rather, they simply expired, and after the expiration, the Chinese government did not issue any licenses for the relevant mines to any third party.<sup>28</sup> The Sichuan Province Government never automatically granted Mianzhu Norwest license renewals and extensions, but the renewal of a mining or exploration is subject to the discretion of the competent authorities.<sup>29</sup>

**IV. CLAIMANTS' CLAIMS ON THE MERITS**

35. As a preliminary matter, the Tribunal will address the scope of Claimants' claims on the merits, *i.e.*, the claims on which Claimants are asking the Tribunal to render a decision in this proceeding. Thereafter, the Tribunal will have to determine whether and to which extent it has jurisdiction to hear those claims.

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<sup>24</sup> Claimants' Counter-Memorial, paras. 41-42.

<sup>25</sup> Claimants' Counter-Memorial, paras. 44-47.

<sup>26</sup> Respondent's Reply on Bifurcated Preliminary Objections, dated 14 March 2022 ("Respondent's Reply"), paras. 18-19.

<sup>27</sup> Respondent's Reply, para. 18.

<sup>28</sup> Respondent's Reply, para. 16.

<sup>29</sup> Respondent's Reply, para. 17.

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36. Claimants raise four categories of claims:<sup>30</sup>
- Respondent violated Article 6 of the Treaty through unlawful measures having effect equivalent to expropriation (the “**Expropriation Claim**”);<sup>31</sup>
  - Respondent violated Article 3(2) of the Treaty through unfair and inequitable treatment, as Claimants had legitimate investment-backed expectations that exploration and mining would be permitted at Mines 1, 2 and 3, that they would be permitted to explore and mine during the period their licenses were valid and that their licenses would be renewed as long as mineral deposits remained at the Mines, and Respondent acted non-transparently and inconsistently through its measures to prohibit all mining and exploration in the Jiudingshan Nature Reserve and the panda park, to shut down and seal the Mines, and to refuse license renewal based on its change of mining policy;<sup>32</sup>
  - Respondent violated Articles 4 and 3(2) of the Treaty for failure to afford full protection and security, because it did not provide legal safeguards for the investment and investment returns;<sup>33</sup> and
  - Respondent violated Articles 15 and 4 of the Treaty for failure to observe its commitments with regard to Claimants’ investments when it prohibited exploration and mining and shut down and sealed the Mines during the period of validity of Claimants’ mining and exploration licenses.<sup>34</sup>

The last three categories of claims are also referred to as the “**Non-Expropriation Claims**”.<sup>35</sup>

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<sup>30</sup> Claimants’ Counter-Memorial, paras. 50-59.

<sup>31</sup> Claimants’ Counter-Memorial, paras. 51-54.

<sup>32</sup> Claimants’ Counter-Memorial, paras. 55-57.

<sup>33</sup> Claimants’ Counter-Memorial, para. 58.

<sup>34</sup> Claimants’ Counter-Memorial, para. 59.

<sup>35</sup> See, e.g. Respondent’s Memorial, paras. 189, 191; Respondent’s Reply, para. 302.

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37. In their Counter-Memorial, Claimants claim that their alleged investments in the PRC include their shareholding, their mineral rights and licenses, and their downstream facilities, *i.e.*: (i) 100% of the shares in Mianzhu Norwest; (ii) 55% of the shares in Deyang Fengtai; (iii) mineral rights for mining at Mines 1 and 2; (iv) mining licenses for Mines 1 and 2; (v) mineral rights for exploration at Mines 1, 2, and 3; (vi) exploration licenses for Mines 1, 2, and 3; (vii) the assets at Mines 1, 2, and 3; (viii) the P4 Plant; (ix) the STPP Plant; and (x) the whole of the economic operations related to the Mines.<sup>36</sup>
38. Respondent alleges that Claimants attempt to improperly enlarge the scope of their purported investments and to expand the coverage of their claims to these investments.<sup>37</sup> According to Respondent, the purported investments in mineral rights for three Mines, the assets at the Mines and the whole of the economic operations related to the Mines were not included in Claimants' Request for Arbitration, but only added in Claimants' subsequent submissions.<sup>38</sup> Furthermore, Respondent states that, initially, all of Claimants' claims were made with respect to the mining and exploration licenses of the Mines only, and Claimants only expanded these claims with respect to other purported investments in their Counter-Memorial.<sup>39</sup> Finally, Respondent claims that Claimants attempt to change the essence of the dispute – being whether an (indirect) expropriation has occurred and its lawfulness – by rephrasing their Expropriation Claim.<sup>40</sup> Specifically, Respondent argues that, only in their Counter-Memorial did Claimants distinguish between “*expropriation*”, “*nationalization*” and “*measures having effect equivalent to expropriation*”, acknowledging that Respondent's measures “*constituted measures having effect equivalent to expropriation*” only.<sup>41</sup>
39. Claimants take the position that they have presented consistent claims that have only undergone *de minimis* evolution during the present proceeding.<sup>42</sup> Claimants note that from

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<sup>36</sup> Claimants' Counter-Memorial, para. 49.

<sup>37</sup> Respondent's Reply, paras. 24-29.

<sup>38</sup> Respondent's Reply, paras. 26-27.

<sup>39</sup> Respondent's Reply, paras. 28-29.

<sup>40</sup> Respondent's Reply, paras. 30-34.

<sup>41</sup> Respondent's Reply, paras. 31-32.

<sup>42</sup> Claimants' Rejoinder, para. 17.

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the outset, they specifically defined their claim for indirect expropriation as concerning measures having effect equivalent to expropriation within the meaning of the Treaty.<sup>43</sup> Claimants further contend that there has only been a slight evolution of their claims, which is within the boundaries of what is normally permitted and permissible pursuant to the ICSID Convention and Rules.<sup>44</sup> As far as investments are mentioned for the first time in Claimants' Counter-Memorial, Claimants argue these investments are closely linked with the mining and exploration licenses for the Mines as well as the downstream facilities referenced in the Request for Arbitration.<sup>45</sup> Claimants argue that the express inclusion of all three Mines, the P<sub>4</sub> plant and the STPP plant in the Counter-Memorial does not change Claimants' case, since the term "*Mines*" was defined in the Memorial on the Merits to include all three mines and the P<sub>4</sub> plant, and the STPP plant were also specifically referenced in the Request for Arbitration.<sup>46</sup> Claimants also refute Respondent's allegation that Claimants' claims were made with respect to the mining and exploration licenses of the Mines only.<sup>47</sup> Finally, Claimants contend that, in any event, they are even allowed to exceed the boundaries of what is normally permitted, as they submitted the "*minor variations*" well before they were required to do so, *i.e.*, no later than the Reply on the Merits, so that Respondent would have full opportunity to respond.<sup>48</sup>

40. The Tribunal has carefully considered the arguments presented by the Parties on the scope of Claimants' claims on the merits. In the Tribunal's view, the changes that Claimants made to their claims are not so material as to justify a denial to consider hearing the amended claims. In addition, Respondent had the opportunity both in its Reply and during the Hearing on Respondent's Bifurcated Jurisdictional Objection to respond to the claims in their current form as far as required for the present phase of the proceedings, and it would have additional opportunity to respond in its written and oral submissions on the merits if the proceedings were to proceed to that stage. Therefore, the Tribunal decides to admit,

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<sup>43</sup> Claimants' Rejoinder, paras. 18-22.

<sup>44</sup> Claimants' Rejoinder, paras. 24, 26, 28.

<sup>45</sup> Claimants' Rejoinder, para. 27.

<sup>46</sup> Claimants' Rejoinder, para. 29.

<sup>47</sup> Claimants' Rejoinder, para. 30.

<sup>48</sup> Claimants' Rejoinder, paras. 25-26, 32.

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and will consider in its following assessment, the claims in the form they have been submitted by Claimants in its submissions on Respondent's bifurcated objection.

**V. BRIEF SUMMARY OF THE PARTIES' POSITIONS ON RESPONDENT'S BIFURCATED JURISDICTIONAL OBJECTION**

41. Below, the Tribunal will briefly summarize the Parties' respective positions on Respondent's Bifurcated Jurisdictional Objection to the Tribunal's jurisdiction based on an alleged lack of consent to arbitrate the dispute at hand.

**A. SUMMARY OF RESPONDENT'S POSITION**

42. Respondent argues that the Tribunal lacks jurisdiction because the dispute is not within the scope of Respondent's consent to arbitration.<sup>49</sup> This, Respondent argues, is true both for Claimants' Expropriation Claim and their Non-Expropriation Claims.<sup>50</sup> Respondent further contends that Claimants bear the burden to prove that the submitted claims fall within the Tribunal's jurisdiction.<sup>51</sup>

43. In this respect, Respondent submits that the arbitration clause contained in Article 13(3) of the Treaty is limited to disputes over the amount of compensation for expropriation, thus excluding disputes involving whether an expropriation has occurred and accordingly disputes on whether an obligation to compensate has arisen.<sup>52</sup> Respondent argues that where an expropriation is proclaimed or undisputed, the investor could directly submit a dispute over the amount of compensation for the expropriation to an international tribunal pursuant to Article 13(3) of the Treaty. However, in cases where an expropriation is neither proclaimed nor undisputed, the investor may request a competent local court to make a determination on whether an expropriation has occurred and its lawfulness pursuant to

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<sup>49</sup> Respondent's Memorial, paras. 187 *et seq.*; Respondent's Reply, paras. 35 *et seq.*

<sup>50</sup> Respondent's Reply, paras. 30-34.

<sup>51</sup> Respondent's Reply, para. 36.

<sup>52</sup> Respondent's Memorial, paras. 191 *et seq.*; Respondent's Reply, paras. 41 *et seq.*

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Articles 13(2) and 6(2) of the Treaty – and it has to do so before being permitted to submit the issue of the amount of compensation for expropriation to an international tribunal.<sup>53</sup>

44. Respondent states that the present dispute in its entirety falls outside the scope of its limited consent to arbitration as each of the claims raised by Claimants extends beyond the amount of compensation resulting from expropriation.<sup>54</sup>
45. Additionally, Respondent argues that its consent to arbitration cannot be expanded by means of the Treaty's Most-Favored-Nation Clause in Article 4.<sup>55</sup>

**B. SUMMARY OF CLAIMANTS' POSITION**

46. Claimants claim that the Tribunal has jurisdiction to hear both its Expropriation Claim and its Non-Expropriation Claims. Claimants further argue that they only bear the burden of proof on the facts necessary to show that they meet the Treaty requirements for jurisdiction and that these facts are not at issue.<sup>56</sup>
47. As for the Expropriation Claim, Claimants take the position that Article 13(3) of the Treaty gives the Tribunal jurisdiction to decide on both, the existence of an expropriation, as well as the amount of compensation due in case of such expropriation.<sup>57</sup> Claimants argue that Respondent's interpretation of the Treaty's legal framework is based on two conceptual errors.<sup>58</sup>
48. First, Claimants argue that the Treaty does not only provide protection against measures amounting to an expropriation under the law of the responding State but also against measures that have an effect equivalent to expropriation – a legal category that is meant to prevent the State from circumventing the protective standard of the Treaty by taking

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<sup>53</sup> Respondent's Reply, para. 40.

<sup>54</sup> Respondent's Memorial, paras. 325-336.

<sup>55</sup> Respondent's Memorial, paras. 294 *et seq.*; Respondent's Reply, paras. 306 *et seq.*

<sup>56</sup> Claimants' Rejoinder, para. 33.

<sup>57</sup> Claimants' Memorial on the Merits, para. 158; Claimants' Response on Bifurcation, dated 26 November 2021, para. 40; Claimants' Amended Response on Bifurcation, dated 10 December 2021 ("Claimants' Amended Response"), para. 49; Claimants' Counter-Memorial, paras. 65 *et seq.*

<sup>58</sup> Claimants' Counter-Memorial, paras. 65-68.

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measures that are not labelled as expropriation but have a similar effect. According to Claimants, only an international arbitral tribunal is able and fit to adjudicate this question.<sup>59</sup> Claimants contend that – if one were to follow Respondent’s interpretation of Articles 13(2) and 6(2) – the phrase “*measures having effect equivalent to nationalization or expropriation*” would be left out of the arbitral consent.<sup>60</sup>

49. Second, Claimants argue that – as the Treaty itself stipulates whether a measure amounts to an expropriation or has an equivalent effect – any decision by a Chinese national court on the responsibility for an expropriation under Chinese law would be irrelevant for the decision of an arbitral tribunal, which must determine “*whether responsibility for expropriation pursuant to Chinese law entails responsibility for expropriation under the Treaty.*”<sup>61</sup>
50. In any event, and also with regard to its Non-Expropriation Claims, Claimants assert that the MFN clause in Article 4 Treaty, based on its purpose to ensure that the guarantees offered to foreign investors from one State evolve to match those later offered to foreign investors from other States, also applies to provisions for the settlement of investment disputes and, thus, grants the Tribunal jurisdiction over all of Claimants’ claims.<sup>62</sup>

## **VI. RELIEF SOUGHT BY THE PARTIES**

### **A. RESPONDENT’S RELIEF SOUGHT**

51. In its Reply, Respondent requests that the Tribunal:

*I. issue an Award dismissing all of the Claimants’ claims on the ground that the Tribunal lacks jurisdiction to entertain them;*

*II. order the Claimants to pay the Respondent’s full costs and*

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<sup>59</sup> Claimants’ Counter-Memorial, para. 69.

<sup>60</sup> Claimants’ Rejoinder, para. 38.

<sup>61</sup> Claimants’ Counter-Memorial, paras. 70-71.

<sup>62</sup> Claimants’ Counter-Memorial, paras. 270 *et seq.*; Claimants’ Rejoinder, paras. 330 *et seq.* Whereas Claimants originally argued that their Non-Expropriation Claims are also within the scope of the arbitral consent in Article 13(3) of the Treaty, Claimants withdrew this position and take the position that these breaches are subject to jurisdiction of the Tribunal only under the MFN clause. Claimants’ Rejoinder, para. 334.

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*expenses associated with defending against the Claimants' claims on an indemnity basis, including the costs of the arbitrators and ICSID, legal representation, experts and consultants, as well as the Respondent's own officials and employees, together with interest thereon at a reasonable rate; and*

*III. grant such further relief against the Claimants as the Tribunal deems fit and proper.*<sup>63</sup>

**B. CLAIMANTS' RELIEF SOUGHT**

52. In their Counter-Memorial and their Rejoinder, Claimants request that the Tribunal:

*I. Dismiss the Respondent's bifurcated objection to jurisdiction;*

*II. Uphold jurisdiction over all of Claimants' claims pursuant to Articles 13(3) and 4 of the Treaty;*

*III. Award all legal fees and costs of this phase of the proceeding to Claimants; and*

*IV. Order any other relief that the Tribunal considers just and appropriate in the circumstances.*<sup>64</sup>

**VII. THE TRIBUNAL'S REASONING**

53. The following reasoning and decision reflects the view of the majority of the Tribunal. The minority view of arbitrator Alexandrov is set out in his Dissenting Opinion, which is attached as Annex 1 to this Award. At the outset of its reasoning, the Tribunal wishes to emphasize that it has carefully reviewed all of the arguments and evidence presented by the Parties in the present phase of the proceedings concerning Respondent's bifurcated objection as well as, to the extent they are relevant in the present context, the arguments and evidence adduced by the Parties on the merits of the case. Although the Tribunal may not address all such arguments and evidence in full detail in its reasoning below, the Tribunal has nevertheless considered and taken them into account in arriving at its decision.

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<sup>63</sup> Respondent's Reply, para. 343.

<sup>64</sup> Claimants' Counter-Memorial, para. 313; Claimants' Rejoinder, para. 404.

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54. In line with the order in which the Parties have presented their arguments on the bifurcated objection, the Tribunal will first address the question whether Claimants' Expropriation Claim is covered by Respondent's arbitral consent in Article 13(3) of the Treaty (**A.**). In a second step, the Tribunal will assess whether the scope of Respondent's consent can be expanded by means of the MFN clause in Article 4 of the Treaty to cover Claimants' Non-Expropriation Claims and, if necessary, based on the outcome of the first part of its analysis, also Claimants' Expropriation Claim (**B.**).

**A. THE SCOPE OF RESPONDENT'S CONSENT TO ARBITRATION UNDER ARTICLE 13(3) OF THE TREATY**

55. First, the Tribunal will address the question whether Respondent's arbitral consent in Article 13(3) of the Treaty covers Claimants' claims for indirect expropriation.

56. Article 13(3) of the Treaty reads:

*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.<sup>65</sup>*

57. The Parties agree that the scope of Respondent's arbitral consent in Article 13(3) of the Treaty is dependent on an interpretation of Article 13(3) pursuant to the rules provided in Article 31 (and, if necessary, as a supplementary means of interpretation, Article 32) of the Vienna Convention on the Law of Treaties of 23 May 1969 ("**Vienna Convention**").

58. Article 31 ("General rule of interpretation") of the Vienna Convention reads as follows:

*1. A treaty shall be interpreted in good faith in accordance with the*

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<sup>65</sup> Treaty (EN) (**Exhibit C-1**). Respondent has submitted a different version of the PRC-Singapore BIT as **Exhibit RL-143**, which slightly deviates from the version quoted above. See paragraph 68 below.

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*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.*

59. As a preliminary remark, the Tribunal notes that the jurisdiction of any arbitral tribunal should be based on the clear and unambiguous consent of both parties to have their dispute resolved by arbitration. This applies, in particular, in investment disputes where one of the parties is a sovereign State, which generally enjoys jurisdictional immunity from being sued in any kind of proceedings outside of its own State courts.<sup>66</sup> Only where a State has waived its jurisdictional immunity by expressing its consent to have a dispute resolved by international arbitration in a clear and unambiguous manner does an arbitral tribunal have jurisdiction to decide on that dispute. The Tribunal will bear this in mind when conducting

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<sup>66</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, *cf.* para. 198 (**Exhibit RL-54**).

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its interpretation of the scope of the arbitration clause pursuant to Article 31 (and, if necessary, Article 32) of the Vienna Convention.

**(1) The Ordinary Meaning of the Arbitration Clause in Article 13(3) of the Treaty**

60. In accordance with Article 31(1) of the Vienna Convention, the Arbitral Tribunal will first turn to the ordinary meaning of the text of Article 13(3) of the Treaty.

*a. Summary of Respondent's Position*

61. Relying on Article 31 of the Vienna Convention, Respondent argues that Article 13(3) of the Treaty (“*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*”) should be interpreted narrowly so as to exclude disputes involving the occurrence of an expropriation.<sup>67</sup>

62. According to Respondent, the word “*involving*” is neutral and, therefore, the phrase “*the amount of compensation resulting from expropriation [...], mentioned in Article 6*” is more critical.<sup>68</sup> Whereas Claimants argue that a dispute “*involves*” “*the amount of compensation*” as long as “*the amount of compensation*” is one of the elements of that dispute, Respondent argues that its treaty practice in the 1980s and early 1990s proves that “*involving*” is not critical to construe the arbitral consent contained in the Treaty. According to Respondent, the use of the expressions “*limited to*”; “*over*” or “*concerning*” in the different treaties cited by Claimants and the term “*involving*” used in the Treaty equally demonstrate the intention of the respective contracting States to narrow arbitral consent. This policy issue, Respondent argues, directly touches upon the principle of national sovereignty to which the PRC attached “*overriding importance*” at that time, which would have made it impossible to conclude treaties providing for such narrow arbitral consent with other countries while – almost at the same time – concluding the Treaty with Singapore providing for unrestricted arbitral consent.<sup>69</sup> With regard to Claimants’

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<sup>67</sup> Respondent’s Memorial, paras. 195 *et seqq.*

<sup>68</sup> Respondent’s Memorial, paras. 200 *et seq.*; Respondent’s Reply, para. 60.

<sup>69</sup> Respondent’s Reply, paras. 61-64.

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argument that a dispute “*involves*” the amount of compensation as long as it constitutes one element of that dispute, Respondent argues that such interpretation is impractical and leads to unreasonable results as it would allow investors to submit any dispute to an arbitral tribunal seeking any relief by using a dispute over the amount of compensation “*as its camouflage*”.<sup>70</sup>

63. Respondent argues that the expression “*the amount of compensation*” shows that only disputes over the quantification of compensation are within the jurisdiction of the Tribunal. Respondent contends that the interpretation of this expression provided by Claimants, *i.e.*, merely limiting the possible remedies that may be sought in arbitration to the remedy of compensation, fails to give *effet utile* to this expression and, in particular, the word “*amount*” therein.<sup>71</sup> In addition, Respondent argues that Claimants’ argument is self-contradictory as, according to Claimants’ reading of “*involving*”, the expression “*the amount of compensation*” used in the Treaty does not restrict the remedies either, as long as compensation is requested as one of the remedies.<sup>72</sup>
64. Respondent further argues that where an expropriation is proclaimed or undisputed, the investor can directly submit a dispute over the amount of compensation for the expropriation to an international tribunal. In cases where an expropriation is neither proclaimed nor undisputed, the investor may request a competent local court to make a determination on the occurrence of an expropriation and on its lawfulness pursuant to Articles 13(2) and 6(2) of the Treaty before submitting the issue of the amount of compensation for expropriation to an international tribunal. In order to decide on a dispute over the amount of compensation “*mentioned in Article 6*”, *i.e.*, a dispute over whether the amount of compensation for expropriation is equivalent to “*the value immediately before the expropriation*”, an arbitral tribunal would not be required to consider the legality of the expropriation.<sup>73</sup> With regard to Claimants’ argument on the preparatory work of the Treaty, Respondent argues that the PRC’s draft on arbitral consent was in fact accepted into the

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<sup>70</sup> Respondent’s Reply, paras. 65 *et seq.*

<sup>71</sup> Respondent’s Reply, paras. 67-70.

<sup>72</sup> Respondent’s Reply, paras. 71 *et seq.*

<sup>73</sup> Respondent’s Reply, paras. 73-75.

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final Treaty and that merely its wording required adaptation – a formal change that does not warrant any conclusion on the scope of the arbitral consent.<sup>74</sup>

65. Respondent argues that the expression “*resulting from*” does not imply that whether an expropriation has occurred is within the jurisdiction of the Tribunal. Rather, the expression “*resulting from expropriation*” is to limit the scope of compensation disputes that may be submitted to arbitration.<sup>75</sup> This, Respondent contends, follows from the context of the Treaty and, in particular, from Article 7 of the Treaty which provides for compensation for losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection or riot. The expression “*a dispute involving the amount of compensation resulting from expropriation [...], mentioned in Article 6*” in Article 13(3) of the Treaty refers only to disputes over the amount of compensation resulting from expropriation, thereby excluding disputes over the compensation as set out in Article 7 of the Treaty.<sup>76</sup>
66. Respondent argues that, contrary to what Claimants bring forward, the quantification of compensation is in fact separable from the existence and legality of the expropriation, and Article 13(3) of the Treaty grants an arbitral tribunal only jurisdiction to review the former issue. Respondent contends that the reasoning of the *EMV v. Czech Republic*<sup>77</sup> tribunal, cited by Claimants, is not applicable to the present dispute as the BLEU-Czech BIT underlying that case did not contain a clause equivalent to the Article 6(2) of the Treaty providing for the jurisdiction of domestic courts to decide on whether an expropriation has occurred and its lawfulness. In addition, Respondent contends that Claimants have failed to put forward an explanation as to why a tribunal cannot decide a dispute over the amount of compensation for expropriation in such cases where an expropriation has been proclaimed or otherwise established.<sup>78</sup>

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<sup>74</sup> Respondent’s Reply, paras. 76 *et seq.*

<sup>75</sup> Respondent’s Memorial, para. 203; Respondent’s Reply, paras. 78 *et seq.*

<sup>76</sup> Respondent’s Memorial, para. 203; Respondent’s Reply, para. 79.

<sup>77</sup> *European Media Ventures SA v. Czech Republic*, UNCITRAL (BLEU-Czech Republic BIT), Award on Jurisdiction, 15 May 2007 (**Exhibit CL-111**).

<sup>78</sup> Respondent’s Reply, paras. 80-84.

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67. Contrary to Claimants' contention that "*the present Tribunal is the only adjudicator that could determine China's responsibility for such measures*", Respondent contends that domestic courts are in fact available to determine whether a "*measure having effect equivalent to nationalization or expropriation*" occurred. Respondent, citing the tribunals in the cases of *Starrett Housing*<sup>79</sup> and *OOO Manolium-Processing*,<sup>80</sup> argues that the defining difference between direct and indirect expropriation is not whether the authority concerned "*recognizes*" the measure as expropriation but solely whether the legal title to the property remains with the original owner. In addition, Respondent argues that Claimants' interpretation, (*i.e.*, domestic courts never being competent to decide on "*other measures having effect equivalent to nationalization or expropriation*"), would render both Articles 6(2) and 13(2) of the Treaty, which provide for recourse to domestic courts, *inter alia*, regarding "*other measures having effect equivalent to nationalization or expropriation*", without any *effet utile*. In fact, Respondent claims that domestic courts are not only empowered to determine responsibility over measures alleged to have "*effect equivalent to nationalization or expropriation*," but they have exclusive jurisdiction to make such determination.<sup>81</sup>
68. For the same reason, Respondent argues that Claimants' interpretation of the expression "*mentioned in Article 6*" (*i.e.*, that the issue of responsibility, including whether the Treaty categorizes a measure as an expropriation, shall be decided by an international tribunal pursuant to Article 6 of the Treaty rather than pursuant to domestic law) would also render both Articles 6(2) and 13(2) of the Treaty without any *effet utile*. In addition, Respondent contends that the expression "*mentioned in Article 6*" is used to qualify "*amount of compensation*" and not the term "*expropriation*" as the Treaty stipulates on expropriation in Article 6 only. With regard to Claimants' argument on the order of words, Respondent notes that in the Treaty version submitted by Claimants, a comma immediately before the words "*mentioned in Article 6*" is missing, which reinforces that the words "*mentioned in*

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<sup>79</sup> *Starrett Housing Corporation, Starrett Systems, Inc. and others v. The Government of the Islamic Republic of Iran, Bank Markazi Iran and others*, IUSCT Case No. 24, Interlocutory Award, 19 December 1983 (**Exhibit CL-152**).

<sup>80</sup> *OOO Manolium-Processing v. Republic of Belarus*, PCA Case No. 2018-06, Final Award, 22 June 2021 (**Exhibit CL-154**).

<sup>81</sup> Respondent's Reply, paras. 85-92.

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Article 6” are used to qualify the expression “*the amount of compensation*” as argued by Respondent.<sup>82</sup>

***b. Summary of Claimants’ Position***

69. Claimants state that the arbitration clause contained in Article 13(3) of the Treaty – when interpreted in accordance with its ordinary meaning in context – covers not only the quantification of compensation but also responsibility for expropriation, nationalization, and measures having equivalent effect (including both the existence of such measures and their legality). Claimants argue that each of the seven expressions “*involving*,” “*the amount of compensation*,” “*resulting from*,” “*expropriation*,” “*nationalization*,” “*other measures having effect equivalent to nationalization or expropriation*,” and “*mentioned in Article 6*” in Article 13(3) of the Treaty confirms that the consent to arbitration extends to disputes involving both the responsibility for expropriation and the quantification of compensation.<sup>83</sup>
70. Whereas Respondent states that under Claimants’ interpretation any dispute may be submitted to arbitration as long as it entails any claim for compensation for expropriation, Claimants argue that *first*, jurisdiction pursuant to an investment treaty requires the investor to present at least a *prima facie* case of a qualifying dispute which – in the case at hand – they did, and *second*, a claim for an amount of compensation must be at the heart of the dispute to be covered by Article 13(3) of the Treaty.<sup>84</sup>
71. Claimants contend that the term “*involving*” has an inclusive meaning, citing multiple dictionary definitions that define the term to mean “*including*,” “*requiring*,” or “*containing*” “*as a necessary part*.”<sup>85</sup> If the Contracting Parties to the Treaty had the intention to narrow the arbitral consent, they could have used expressions like “*limited to*”; “*over*” or “*concerning*,” which were used in different treaties concluded between the PRC

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<sup>82</sup> Respondent’s Reply, paras. 93 *et seq.* Respondent therefore submitted its own version of the PRC-Singapore BIT as **Exhibit RL-143**. In this Award, the Tribunal therefore makes reference to both versions submitted by the Parties.

<sup>83</sup> Claimants’ Counter-Memorial, paras. 61 *et seq.*, 116-120.

<sup>84</sup> Claimants’ Rejoinder, paras. 52-54.

<sup>85</sup> Claimants’ Counter-Memorial, paras. 121-123; Claimants’ Rejoinder, paras. 56 *et seq.*

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and other countries.<sup>86</sup> As Claimants seek compensation for measures having effect equivalent to expropriation in the present case, the dispute also involves “*the amount of compensation*” for these measures as a necessary element of the dispute.<sup>87</sup> Claimants further state that the scope of the PRC’s investment treaties has drastically varied, in particular during the time period from 1997 to 1999 and that, as the PRC’s investment treaties use different formulations to express arbitral consent, there is no reason to accept that all of them have the same meaning. Rather, each treaty must be considered separately.<sup>88</sup> Citing multiple decisions by tribunals deciding on the scope of different investment treaties that the PRC concluded during the same era as the Treaty, Claimants maintain that the scope of consent in the Treaty is not dramatically out of line but generally consistent with the PRC’s other investment treaties that have been interpreted.<sup>89</sup>

72. According to Claimants, the expression “*the amount of compensation*” does not limit the Tribunal’s jurisdiction to the quantification of compensation. In particular, by contrast to the term “*a dispute involving expropriation*” used in different investment treaties, the Treaty merely limits the possible remedies that may be sought in international arbitration under the Treaty to claims for compensation (thereby excluding, *e.g.*, claims for restitution or declaratory relief).<sup>90</sup> However, the expression is not identical to a dispute solely regarding the quantification of compensation as the expression “*a dispute involving the amount of compensation*” is broader – encompassing the highly intertwined questions of whether there has been an expropriation, nationalization, or measures having equivalent effect, whether those measures were lawful or unlawful, and the appropriate quantification of compensation for such measure.<sup>91</sup> According to Claimants, all of these elements determine what the amount of compensation is and the Parties may dispute the amount of

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<sup>86</sup> Claimants’ Counter-Memorial, para. 124.

<sup>87</sup> Claimants’ Counter-Memorial, para. 125; Claimants’ Rejoinder, para. 57.

<sup>88</sup> Claimants’ Rejoinder, paras. 60 *et seq.*

<sup>89</sup> Claimants’ Rejoinder, para. 62.

<sup>90</sup> Claimants’ Counter-Memorial, paras. 126-128; Claimants’ Rejoinder, para. 64.

<sup>91</sup> Claimants’ Counter-Memorial, paras. 129 *et seq.*; Claimants’ Rejoinder, paras. 64, 71-73.

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compensation on all of these grounds which alone brings the dispute within the arbitral consent.<sup>92</sup>

73. Claimants further argue, citing the *EURAM*<sup>93</sup> tribunal, that the drafting history of the Treaty does not limit the Tribunal's jurisdiction to the quantification of compensation. While Singapore initially proposed that any dispute could be arbitrated under the Treaty, the final version of the arbitration clause in Article 13(3) of the Treaty restricts the Tribunal's jurisdiction to disputes involving both expropriation or measures having equivalent effect, and a claim for compensation on that basis. Additionally, the Contracting Parties also rejected the PRC's proposal of a much more restrictive arbitration clause and instead, deliberately adopted a broader arbitration clause.<sup>94</sup> Claimants further state that the phrase "*the amount of compensation*" is not identical to the expression "*the quantification of compensation*" as the latter merely describes the economic assessment of the loss suffered by the investor, *i.e.*, the asset's value immediately before the expropriation, while the former would be the actual monetary figure that the state owes to the investor – which depends on a range of additional factors different from the mere quantification.<sup>95</sup>
74. Claimants further argue that the expression "*resulting from*" establishes a direct connection between the amount of compensation and the measures giving rise to that compensation. According to Claimants, citing the decision of the court in the *European Media Ventures* case,<sup>96</sup> the question of compensation resulting from an expropriation or equivalent measures often depends on the specific details of the measures like the timing of the measures, their precise sequence and cumulative effects, and how they caused the loss. As a result of the inseparability of the issues of compensation and responsibility, the Tribunal's jurisdiction must encompass both issues.<sup>97</sup> This, Claimants argue, is supported by the fact that investor-State tribunals regularly refer to relevant aspects of the question of

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<sup>92</sup> Claimants' Rejoinder, paras. 71-73.

<sup>93</sup> *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, para. 387, Award on Jurisdiction, 22 October 2012 (**Exhibit RL-100**).

<sup>94</sup> Claimants' Counter-Memorial, paras. 131-134; Claimants' Rejoinder, paras. 74-77.

<sup>95</sup> Claimants' Rejoinder, paras. 66-70.

<sup>96</sup> *The Czech Republic v. European Media Ventures SA*, 2007 EWHC 2851 (Comm) (**Exhibit CL-133**).

<sup>97</sup> Claimants' Counter-Memorial, paras. 135-140; Claimants' Rejoinder, paras. 79-89.

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responsibility (e.g., the date of the expropriation or the precise sequence and cumulative effects of the breaches) when undertaking their analysis of damages – aspects that a court assessing only the question of responsibility would not have to address.<sup>98</sup>

75. Claimants take the position that the expression “*expropriation*” in the Treaty’s arbitral consent refers specifically to direct expropriation, whereas indirect expropriation is covered solely by the expression “*measures having effect equivalent to nationalization or expropriation*”.<sup>99</sup> Claimants further contend that an arbitral tribunal is, in fact, the only competent body that could determine responsibility for “*measures having effect equivalent to nationalization or expropriation*”, i.e., measures that the State or a State court does not formally recognize to amount to an expropriation but have an equal effect. Claimants argue that if a State formally recognized a certain measure as an expropriation, it would, under the Treaty, fall within the category of an expropriation. Thus, and as a result of the Treaty explicitly providing for the additional category of “*other measures having effect equivalent to nationalization or expropriation*”, responsibility for these measures cannot be adjudicated by a State court, but they must be determined by an arbitral tribunal. For this reason, Claimants argue, the Tribunal has jurisdiction to decide over the present dispute which involves the creeping expropriation of Claimants’ investment, i.e., “*measures having effect equivalent to nationalization or expropriation*”.<sup>100</sup>
76. According to Claimants, this category of indirect expropriations specifically aims at protecting against unacknowledged or concealed takings. As the arbitral consent also encompasses such indirect expropriations, Respondent’s interpretation – to afford access to international arbitration only for those indirect expropriations the State has recognized or acknowledged through its courts while leaving the entirely unacknowledged takings without international recourse – would deprive that agreement of any meaning.<sup>101</sup>

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<sup>98</sup> Claimants’ Counter-Memorial, para. 138; Claimants’ Rejoinder, paras. 85 *et seq.*

<sup>99</sup> Claimants’ Counter-Memorial, para. 141; Claimants’ Rejoinder, paras. 91-95.

<sup>100</sup> Claimants’ Counter-Memorial, paras. 142-149; Claimants’ Rejoinder, paras. 97 *et seq.*

<sup>101</sup> Claimants’ Rejoinder, paras. 99-106.

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77. According to Claimants, the term “*mentioned in Article 6*” in Article 13(3) of the Treaty does not merely qualify the phrase “*amount of compensation*” but the entire sentence, thereby making clear that measures only constitute expropriation, nationalization, or measures having equivalent effect where the Treaty itself categorizes the measures as such. This, Claimants state, is irrespective of the comma added by the PRC in its Treaty version. As a consequence, the dispute must involve measures categorized as “*expropriation, nationalization, or other measures with equivalent effect*” only pursuant to Article 6 of the Treaty (*i.e.*, not pursuant to domestic law but international law) and is, therefore, for an international tribunal to determine.<sup>102</sup> This principle, Claimants argue, does not provide an international tribunal with the exclusive responsibility for applying the law under which it exercises its mandate but instead means that it has final and independent authority to determine if there has been a breach of international law, regardless of what the domestic courts may have said on the matter. Claimants further state that it would not be meaningless to use the words “*mentioned in Article 6*” to qualify the phrase “*expropriation*” as it specifies that the subject of the Tribunal’s jurisdiction must be an expropriation or measure having equivalent effect pursuant to the Treaty itself.<sup>103</sup>

***c. The Tribunal’s Analysis***

78. In accordance with Article 31(1) of the Vienna Convention, the Tribunal will begin its interpretation of the scope of the arbitration clause with an assessment of the ordinary meaning of the text of Article 13 (1) to (3) of the Treaty, which reads in full as follows:

*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.*

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<sup>102</sup> Claimants’ Counter-Memorial, paras. 150-155; Claimants’ Rejoinder, paras. 107 *et seq.*, 112 *et seq.*

<sup>103</sup> Claimants’ Rejoinder, paras. 109-111.

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*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.*<sup>104</sup>

79. Articles 13(1) and (2) of the Treaty provide that – after a “cooling off” period of six months – any investment-related dispute may be brought before the competent court of the Contracting Party accepting the investment. As an exception to this general rule, Article 13(3) of the Treaty provides that – after a cooling off period of six months – disputes involving the amount of compensation resulting from expropriation, nationalization or other measures having effect equivalent to nationalization or expropriation may also be submitted to an arbitral tribunal. The narrowing wording of Article 13(3) of the Treaty – compared to the broad wording of Article 13(1) and (2)– makes clear that only a sub-group of the disputes covered by Article 13(1) and (2) may be submitted to arbitration. The scope of this exception, *i.e.*, the scope of the Tribunal’s jurisdiction, is the decisive question to be determined by the Tribunal.
80. The Parties have presented two alternative interpretations as to what the scope of this exception encompasses.
81. Claimants hold that the phrase “*involving the amount of compensation*” in Article 13(3) of the Treaty merely limits the possible remedies that may be sought in international arbitration under the Treaty to claims for compensation (in contrast, *e.g.*, to restitution claims or claims for declaratory relief).<sup>105</sup> Respondent contends that the exception in Article 13(3) of the Treaty comprises consent to international arbitration only for

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<sup>104</sup> Treaty (EN) (**Exhibit C-1**). Respondent has submitted a different version of the PRC-Singapore BIT as **Exhibit RL-143**, which slightly deviates from the version quoted above. See paragraph 68 above.

<sup>105</sup> Claimants’ Counter-Memorial, paras. 126-128; Claimants’ Rejoinder, para. 64.

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investment-related disputes dealing solely with the amount of compensation (by contrast to disputes over the occurrence or legality of the underlying expropriatory measure).<sup>106</sup>

82. With regard to the ordinary meaning of the term “*involving*”, the Tribunal is in agreement with the decisions by the Court of Appeal of Singapore in the case of *Sanum Investments v. Laos*<sup>107</sup> and the tribunal in the case of *Beijing Shougang v. Mongolia*<sup>108</sup> that this term is not clear in itself as the ordinary meaning to be determined under Article 31(1) of the Vienna Convention can be both broad and narrow depending on the context in which it is used. It is not equivalent to the term “*including*”, which would make clear that, as long as one element of the dispute concerns the question of compensation, it would be within the scope of the arbitration clause. At the same time, the term appears to be broader than the expressions “*over*” or “*limited to*” which would unequivocally limit the scope of the arbitration clause to disputes concerning the amount of compensation only. Like the Court of Appeal of Singapore in the case of *Sanum Investments v. Laos*, the Tribunal does not find the dictionary meaning of the term “*involving*” to be determinative for the interpretation of the Treaty under Article 31 of the Vienna Convention.<sup>109</sup> Nor does the Tribunal consider the dictionary meaning of the term to change its conclusion regarding the neutral nature of the term in the present case.

83. Thus, the Tribunal is in agreement with Respondent in that the term “*involving*” has a neutral, in the sense of non-conclusive, meaning for the present interpretation purposes.<sup>110</sup> The same applies to the Chinese version of this term “*关于 (guan yu)*” which, pursuant to the Treaty, is equally authentic but has not been established by either Party during the Hearing to carry a broader or narrower meaning than its English equivalent.<sup>111</sup>

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<sup>106</sup> Respondent’s Reply, paras. 67-70.

<sup>107</sup> *Sanum Investments v. Lao People’s Democratic Republic (I)*, PCA Case No. 2013-13, Judgment of the Court of Appeal of Singapore [2016] SGCA 57, 29 September 2016, para. 126 (**Exhibit RL-130**).

<sup>108</sup> *China Heilongjiang Int’l Econ. & Technical Coop. Corp. and others v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, para. 439 (**Exhibit RL-138**).

<sup>109</sup> *Sanum Investments v. Lao People’s Democratic Republic (I)*, PCA Case No. 2013-13, Judgment of the Court of Appeal of Singapore [2016] SGCA 57, 29 September 2016, para. 126 (**Exhibit RL-130**).

<sup>110</sup> Respondent’s Memorial, paras. 200 *et seq.*; Respondent’s Reply, para. 60.

<sup>111</sup> See Transcript, p. 31 line 13-p. 33 line 22; p. 250 line 19-p. 253 line 16.

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Consequently, the Tribunal does not consider the meaning of the term “*involving*” as being conclusive for determining the scope of the arbitration clause. Rather, it has to be considered in conjunction with the other terms that form the wording of the arbitration clause in Article 13(3) of the Treaty.

84. In the Tribunal’s view, the expression “*the amount of compensation*” is more informative to determine the scope of the arbitration clause. The Tribunal first notes that the Contracting Parties chose to use the wording “*a dispute involving the amount of compensation resulting from expropriation [...]*” instead of “*a dispute involving expropriation [...]*”. In accordance with Article 31(1) of the Vienna Convention, the inserted limitation “*the amount of compensation*” must be given effect in the interpretative approach taken by the Tribunal. In particular, if the Tribunal were to interpret the term “*involving*” as bearing an inclusive meaning, *i.e.*, to allow for arbitration as long as the issue of compensation is one of the elements of the dispute, the limiting insertion “*the amount of*” would be superfluous. Therefore, the ordinary meaning of this expression speaks in favor of the interpretative approach taken by Respondent, *i.e.*, that the arbitral consent only refers to the question of the amount of compensation that is awarded to an investor resulting from expropriatory measures whose existence and (il-)legality is either undisputed or have been previously established.
85. This interpretation is also supported by the drafting history of Article 13(3) of the Treaty, which the Tribunal took into account pursuant to Article 32 of the Vienna Convention as supplementary means of interpretation to confirm the meaning arrived at under Article 31 of the Vienna Convention. While a previous draft of this provision by Singapore (Draft Article 13(1) and (2) by Singapore, center column in the table below) contained a broad and unrestricted ICSID arbitration clause, the previous draft from the Chinese side (left column in the table below) provided that an arbitral tribunal would only be competent to review the amount of compensation after a challenge with the competent domestic authorities had not solved the dispute within a year. The two draft provisions in comparison to the final text read as follows:

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<b>Draft Article 10 by the PRC</b>	<b>Draft Article 13(1) and (2) by Singapore</b>	<b>Final version of Article 13(3) of the Treaty</b>
<p><i>“If an investor challenges the amount of compensation for the expropriated investment assets, he may file complaint with the competent authority of the Contracting Party taking the expropriatory measures. If it is not solved within one year after the complaint is filed, the competent court of the Contracting Party taking the expropriatory measures or an international arbitral tribunal shall, upon the request of the investor, review the amount of compensation.”</i><sup>112</sup></p>	<p><u>“Reference to the International Centre for Settlement of Investment Disputes</u></p> <p><i>(1) Any legal dispute arising directly out of an investment between either Contracting Party and a national or company of the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute.</i></p> <p><i>(2) If any such dispute cannot be so settled within six months of it being raised by either party to the dispute, it shall upon the request of either party to the dispute, unless such parties have otherwise agreed, be submitted to conciliation or arbitration by the International Centre for Settlement of Investment Disputes [...].”</i><sup>113</sup></p>	<p><i>“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 negotiations 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.</i></p> <p><i>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.”</i><sup>114</sup></p>

86. As is apparent from the narrow wording of Respondent’s draft in the left column above, limiting the jurisdiction of an arbitral tribunal to a “review [of] the amount of compensation”<sup>115</sup>, and Singapore’s broad draft in the center column, covering “[a]ny legal dispute arising directly out of an investment”,<sup>116</sup> the disagreement between the Contracting Parties during the negotiations concerned the question whether the scope of the arbitral consent should be limited to a review of the amount of compensation. In contrast, the

<sup>112</sup> Singapore’s proposed text of the Treaty, 24 October 1985 and the PRC’s proposed text of the Treaty, 24 October 1985, Draft Article 10 by the PRC (**Exhibit RL-8**).

<sup>113</sup> Singapore’s proposed text of the Treaty, 24 October 1985 and the PRC’s proposed text of the Treaty, 24 October 1985, Draft Article 13(1) and (2) by Singapore (**Exhibit RL-8**).

<sup>114</sup> Treaty (EN) (**Exhibit C-1**). Respondent has submitted a different version of the PRC-Singapore BIT as **Exhibit RL-143**, which slightly deviates from the version quoted above. See paragraph 68 above.

<sup>115</sup> Singapore’s proposed text of the Treaty, 24 October 1985 and the PRC’s proposed text of the Treaty, 24 October 1985, Draft Article 10 by the PRC (**Exhibit RL-8**).

<sup>116</sup> Singapore’s proposed text of the Treaty, 24 October 1985 and the PRC’s proposed text of the Treaty, 24 October 1985, Draft Article 13(1) and (2) by Singapore (**Exhibit RL-8**).

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drafting history does not reflect any disagreement between the Contracting Parties as to whether the scope of the arbitration clause should be limited to certain legal remedies (e.g., to the exclusion of restitution claims or claims for declaratory relief). Thus, of the two interpretations presented by the Parties in the present proceedings, the compromise struck by the Contracting Parties in the final wording of Article 13(3) of the Treaty with the use of the phrase “*involving the amount of compensation*” supports Respondent’s interpretation that its scope is limited to disputes dealing solely with the amount of compensation. In contrast, nothing in the drafting history suggests and the Tribunal is not convinced that the phrase “*involving the amount of compensation*” was meant to limit the possible remedies that may be sought in international arbitration under the Treaty to compensation as opposed to restitution claims or claims for declaratory relief.

87. The further language of Article 13(3) of the Treaty also does not warrant any different conclusion. In particular, the Tribunal is not convinced by Claimants’ argument that the phrase “*resulting from*” would create a direct link between the expropriatory measure and the amount of compensation to the effect that the Tribunal would also be competent to decide on the existence and/or legality of the measure itself. In the Tribunal’s view, the phrase rather confirms that the Tribunal’s jurisdiction is limited to disputes on the amount of compensation “*resulting from*” expropriation, *i.e.*, disputes arising once an expropriation has either been acknowledged by the State or declared by a domestic court.
88. Finally, as for the phrase “*mentioned in Article 6*”, the Tribunal does not follow Claimants’ argument that an international arbitral tribunal would be the only competent authority to determine whether an expropriation within the meaning of Article 6 has occurred (see also paras. 152 *et seq.* below). Therefore, this phrase also does not change the Tribunal’s interpretation set out in detail above.
89. As a result, the Tribunal concludes that the ordinary meaning of the arbitration clause in Article 13(3) of the Treaty supports the interpretative approach taken by Respondent, *i.e.*, that its arbitral consent only refers to the question of the amount of compensation that is awarded to an investor resulting from expropriatory measures.

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**(2) The Context of Respondent's Arbitral Consent with Regard to Article 6(2) of the Treaty**

90. Next, the Tribunal will turn to the context of the arbitral consent with regard to Article 6(2) of the Treaty, which provides that the legality of any expropriatory measures may be reviewed by a competent court of the host State. Article 6(2) of the Treaty reads as follows:

*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.*<sup>117</sup>

**a. Summary of Respondent's Position**

91. According to Respondent, citing decisions rendered by the tribunals in *Austrian Airlines v. Slovak*<sup>118</sup> and *ST-AD v. Bulgaria*,<sup>119</sup> Article 6(2) of the Treaty confirms that only domestic courts are competent to decide on disputes over whether an expropriation has occurred and its lawfulness.<sup>120</sup>

92. Respondent argues that the Treaty's text and negotiation history support its interpretation of Article 6(2) of the Treaty. Respondent states that the rationale for the Contracting Parties to use the term "may" is that the investor is not obliged to make a request for review but that, where it chooses to request a review of the legality of expropriation, such review shall be conducted exclusively by the domestic courts. Citing case law and other parts of the Treaty where the term "may" is used, Respondent argues that this term is not intended to provide the investor with a choice between a competent domestic court and an international arbitral tribunal.<sup>121</sup>

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<sup>117</sup> Treaty (EN) (**Exhibit C-1**). Respondent has submitted a different version of the PRC-Singapore BIT as **Exhibit RL-143**, which, however, does not deviate in substance from the version quoted above.

<sup>118</sup> *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award, 9 October 2009 (**Exhibit RL-84**).

<sup>119</sup> *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (**Exhibit RL-109**).

<sup>120</sup> Respondent's Reply, paras. 97 *et seq.*

<sup>121</sup> Respondent's Reply, paras. 100-103.

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93. With regard to Claimants' argument that Article 6(2) of the Treaty provides the investor with due process protection, Respondent contends, citing decisions by the tribunals in *EURAM v. Slovakia*,<sup>122</sup> *Austrian Airlines v. Slovak*<sup>123</sup> and *ST-AD v. Bulgaria*,<sup>124</sup> that this protection does not conflict with the essential function of Article 6(2) alone or in conjunction with Articles 13(2) and 13(3) of the Treaty, which is to reserve the question of legality of an expropriation to domestic courts.<sup>125</sup>
94. Regarding the clause invoked by Claimants that was contained in a previous draft of the Treaty, Respondent argues that this clause does not support Claimants' interpretation as it was only referring to the amount of compensation for expropriation while Article 6(2) of the Treaty deals with the legality of expropriation. Respondent further argues that Article 6(2) of Singapore's proposed text was covering the legality of expropriation as well as the amount of compensation for expropriation while in Article 6(2) Treaty the latter was removed. In addition, Respondent contends that – unlike Article 6(2) of Singapore's proposed text – Article 6(2) of the Treaty provides that the legality of expropriation shall be reviewed by the “*competent court*” of the host State, rather than any other competent authority like the one referred to in the clause invoked by Claimants. According to Respondent, this drafting history confirms that the scope of Article 6(2) of the Treaty is limited to the legality of expropriation and reserves this question to domestic courts while, pursuant to Article 13(2) and (3) of the Treaty, the amount of compensation for expropriation may be reviewed either by domestic courts or by an international arbitral tribunal.<sup>126</sup>
95. With regard to the different investment treaties cited by Claimants that contain clauses similar to Article 6(2) of the Treaty, Respondent states that these treaties are irrelevant to the interpretation of the Treaty as they have been concluded with third parties more than

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<sup>122</sup> *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012 (**Exhibit RL-100**).

<sup>123</sup> *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award, 9 October 2009 (**Exhibit RL-84**).

<sup>124</sup> *ST-AD GmbH (Germany) v. The Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (**Exhibit RL-109**).

<sup>125</sup> Respondent's Reply, paras. 104-106.

<sup>126</sup> Respondent's Reply, paras. 107-109.

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20 years after the conclusion of the Treaty. In addition, as the relevant provisions in those treaties do not differentiate between the amount of compensation and the legality of expropriation, Respondent argues that they would be incomparable to the relevant provisions of the Treaty.<sup>127</sup>

96. Respondent further claims that the case law confirms its interpretation of Article 6(2) of the Treaty. While Article 6(2) itself does not address arbitration, in conjunction with Articles 13(3) and 13(2) of the Treaty, it does establish a “*segregation of disputes*” between domestic courts and international arbitration.<sup>128</sup> The same, Respondent argues, is true for the investment treaties underlying the decisions by the tribunals in *Austrian Airlines v. Slovak*,<sup>129</sup> *ST-AD v. Bulgaria*<sup>130</sup> and *EURAM v. Slovakia*.<sup>131</sup> The respective provisions in these treaties equivalent to Articles 6(2), 13(2) and 13(3) of the Treaty would also sustain a material “*segregation of disputes*” – either by applying one provision or by applying multiple provisions together.<sup>132</sup>

97. In addition, Respondent argues that the Treaty’s segregation of disputes over the amount of compensation for expropriation and over the lawfulness of expropriation has been confirmed by Mr. Yimin Liu and Mr. Ruiqing Qi, two of the Chinese officials in charge of the negotiations of the Treaty at the time. Respondent states that according to the observations in the 1980s by Mr. Liu and Mr. Qi, which truthfully reflect the scope of arbitral consent Respondent offered in the Treaty, only disputes over the amount of compensation for expropriation could be submitted to international arbitration, while disputes over the lawfulness of expropriation could only be submitted to local courts.<sup>133</sup> Whereas Claimants criticize that Respondent does not present Mr. Liu or Mr. Qi as a witness in these proceedings, Respondent states that due to their advanced age this would

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<sup>127</sup> Respondent’s Reply, paras. 110-112.

<sup>128</sup> Respondent’s Reply, para. 121.

<sup>129</sup> *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award, 9 October 2009 (**Exhibit RL-84**).

<sup>130</sup> *ST-AD GmbH (Germany) v. The Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (**Exhibit RL-109**).

<sup>131</sup> *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012 (**Exhibit RL-100**).

<sup>132</sup> Respondent’s Reply, paras. 116-122.

<sup>133</sup> Respondent’s Reply, paras. 123-126.

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be considerably cumbersome, if not impossible and, additionally, unnecessary as the respective articles published in the 1980s, at a time much closer to the signing of the Treaty, are a better reflection of their true view at that time.<sup>134</sup>

98. Respondent further states that the segregation of disputes over the amount of compensation for expropriation and over the lawfulness of expropriation by the Treaty and other investment treaties entered into by the PRC before late 1990s has long been universally acknowledged by authoritative international law professors in the PRC and recognized by scholars and practitioners worldwide.<sup>135</sup>

***b. Summary of Claimants' Position***

99. Claimants state that pursuant to the Treaty's ordinary meaning and negotiating history, Article 6(2) of the Treaty does not contain any domestic litigation requirement. This, Claimants argue, follows from the wording of this provision by using the permissive term "may" and by stating that the review will be "*at the request of*" the investor. Such clauses are meant to afford the investor the substantive right to have the legality of expropriation reviewed before the domestic courts but not to restrict access to arbitration. In addition, Claimants assert that the PRC's invocation of Articles 13(5) and 14(4) of the Treaty provides no support that the permissive language in Article 6(2) of the Treaty has an obligatory meaning.<sup>136</sup>
100. Claimants argue that this understanding is also in line with the negotiation history of the Treaty where a previous draft contained both a clause similar to Article 6(2) of the Treaty and a separate requirement to pursue recourse before the competent domestic authorities prior to arbitration. In Claimants' view, this shows that the parties to the Treaty did not intend Article 6(2) of the Treaty to have an effect of requiring an investor to pursue domestic litigation prior to international arbitration. In this regard, Claimants contend that the reason for striking the expression "*the amount of compensation mentioned above*" in

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<sup>134</sup> Respondent's Reply, para. 127.

<sup>135</sup> Respondent's Reply, para. 128.

<sup>136</sup> Claimants' Counter-Memorial, paras. 220-222; Claimants' Rejoinder, paras. 179-185.

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Singapore's proposed text was not to reserve the question of responsibility to the domestic courts.<sup>137</sup>

101. Further Claimants argue that different BITs concluded by the PRC contain clauses similar to Article 6(2) of the Treaty which could not, however, serve as domestic litigation requirement as, in these treaties, they are combined with either unrestricted arbitration clauses or clauses with the option to submit any dispute to the domestic courts. Thus, Claimants claim that the PRC's treaty practice is inconsistent with Respondent's interpretation of Article 6(2) of the Treaty in these proceedings.<sup>138</sup> Claimants further contend that numerous leading scholars and arbitral tribunals have considered provisions like Article 6(2) of the Treaty to simply afford a due process right to the investor instead of reserving the issue of legality of the expropriation to domestic courts. In fact, Claimants argue, as the tribunals in the cases cited by Claimants evaluated whether expropriatory measures were unlawful pursuant to these clauses and other treaty requirements for expropriation, these tribunals could not have considered that these due process clauses reserved the matter of legality to the domestic courts.<sup>139</sup>
102. Whereas Respondent cites decisions by the tribunals in *Austrian Airlines v. Slovak*<sup>140</sup> and *ST-AD v. Bulgaria*<sup>141</sup> as well as *EURAM v. Slovakia*<sup>142</sup> that found the underlying treaties to contain a segregation of disputes relating to the lawfulness of the expropriation that should be examined by a domestic court and over the amount of compensation that should be determined by an arbitral tribunal, Claimants maintain that, in these cases, such express segregation of disputes was transparently provided for in the text of the underlying treaties. Contrary to that, Claimants claim, Article 6(2) of the Treaty does not draw such express line for a segregation of disputes and, in fact, does not address arbitration at all and does

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<sup>137</sup> Claimants' Counter-Memorial, para. 223; Claimants' Rejoinder, paras. 195-202.

<sup>138</sup> Claimants' Counter-Memorial, para. 224; Claimants' Rejoinder, paras. 191-194.

<sup>139</sup> Claimants' Rejoinder, paras. 186-190.

<sup>140</sup> *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award, 9 October 2009 (**Exhibit RL-84**).

<sup>141</sup> *ST-AD GmbH (Germany) v. The Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (**Exhibit RL-109**).

<sup>142</sup> *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012 (**Exhibit RL-100**).

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not provide any indication that it relates to the Treaty's dispute resolution clause in Article 13. Additionally, Claimants argue that the relationship between the domestic courts and international arbitration is fully defined within Article 13 of the Treaty itself whereas, by contrast, the investment treaties underlying the decisions by the above-referenced tribunals address the relationship between the domestic courts and international arbitration only in their expropriation provisions themselves.<sup>143</sup>

*c. The Tribunal's Analysis*

103. The Tribunal will now address the Parties' arguments regarding the context of the arbitral consent with regard to Article 6(2) of the Treaty.

104. Article 6(1)-(2) of the Treaty read as follows:

*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.*<sup>144</sup>

105. The Tribunal has carefully considered the arguments presented by the Parties as to the meaning of Article 6(2) of the Treaty in the context of interpreting the arbitration clause in

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<sup>143</sup> Claimants' Counter-Memorial, paras. 225-231; Claimants' Rejoinder, paras. 203-210.

<sup>144</sup> Treaty (EN) (**Exhibit C-1**). Respondent has submitted a different version of the PRC-Singapore BIT as **Exhibit RL-143**, which, however, does not deviate in substance from the version quoted above.

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Article 13(3). On the one hand, the Tribunal agrees with Claimants that a provision similar to Article 6(2) of the Treaty is found in many investment treaties in order to afford an investor the right to have the legality of expropriation reviewed before the domestic courts. The Tribunal is also in agreement with the assessment by Claimants that, by itself, a due process provision like Article 6(2) of the Treaty can, of itself, not be considered to restrict access to arbitration. The Tribunal further has noted Claimants' argument in this context regarding the permissive meaning implied by the use of the term "may" in Article 6(2) of the Treaty, which will be addressed further below.<sup>145</sup>

106. However, under Article 31(1) of the Vienna Convention, the Tribunal cannot limit itself to interpreting each provision of the Treaty independently, but it also has to determine what meaning the different provisions carry when analyzed in their context. As already established above, the ordinary meaning of Article 13(2) and (3) of the Treaty suggests that the scope of the arbitration clause is limited to disputes over the amount of compensation that is awarded to an investor resulting from expropriatory measures whose (il-)legality is either undisputed or has been previously established. The Tribunal considers that Article 6(2) of the Treaty – when examined in context with Article 13 – supports Respondent's position that the Contracting Parties differentiated between the legality of an expropriatory measure on the one hand and the amount of compensation resulting thereof on the other. In the Tribunal's view, Article 6(2) of the Treaty confirms that the parties to the Treaty had segregated proceedings in mind: *first*, proceedings on the question of legality of an expropriatory measure (which also encompasses the question of the occurrence of that measure); and, *second*, subsequent proceedings regarding the amount of compensation resulting from the measure in dispute. The wording of the arbitration clause in Article 13(3) of the Treaty – in particular when read in conjunction with the wording of Article 6(2) – refers only to the latter, *i.e.*, proceedings regarding the amount of compensation.
107. This interpretation is also consistent with the drafting history of Articles 6(2) and 13 of the Treaty. While a previous draft of Article 6(2) by Singapore (center column in the table below) explicitly provided that both the legality of any expropriatory measure and the

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<sup>145</sup> Claimants' Counter-Memorial, paras. 220-222; Claimants' Rejoinder, paras. 179-185.

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amount of compensation resulting thereof may be reviewed in the manner prescribed by the law of the Contracting Party taking the measure, the previous draft from the Chinese side (Draft Article 4(3) by the PRC, left column in the table below) simply provided for a review of “*the said expropriation*” by a competent state court. The two draft provisions in comparison with the final text of Article 6(2) of the Treaty read as follows:

Draft Article 4(3) by the PRC	Draft Article 6(2) by Singapore	Final version of Article 6(2) Treaty
<p>“3. <i>If an investor considers the expropriation mentioned in Paragraph 1 of this Article incompatible with the laws of the Contracting Party taking the expropriatory measures, the competent court of the Contracting Party taking the expropriatory measures may, upon the request of the investor review the said expropriation.</i>”<sup>146</sup></p>	<p>“(2) <i>The legality of any measure of expropriation, nationalization or other measures having effect equivalent to nationalization or expropriation and the amount of compensation mentioned above may, at the request of the national or company affected, be reviewed in the manner prescribed by the law of the Contracting Party taking the measures.</i>”<sup>147</sup></p>	<p>“2. <i>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.</i>”<sup>148</sup></p>

108. A comparison between these drafts and the final version of Article 6(2) of the Treaty (right column of the table above) shows that, while the draft of Article 6(2) by Singapore provided that both, “*the legality of any measure [...] and the amount of compensation*” resulting therefrom may be reviewed by a competent court of the host State, the final version of this provision only provides for a review of the legality of an expropriatory measure.<sup>149</sup> Singapore’s draft of Article 13 of the Treaty, on the other hand, originally contained a broad and unrestricted arbitration clause (see para. 85 above). In the final version of the arbitration clause, however, the qualification “*the amount of compensation*”, which was struck out from Article 6(2) of the Treaty (see right column of the above table), was in fact

<sup>146</sup> Singapore’s proposed text of the Treaty, 24 October 1985 and China’s proposed text of the Treaty, 24 October 1985, Draft Article 4(3) by PRC (**Exhibit RL-8**).

<sup>147</sup> Singapore’s proposed text of the Treaty, 24 October 1985 and China’s proposed text of the Treaty, 24 October 1985, Draft Article 6(2) by Singapore (**Exhibit RL-8**).

<sup>148</sup> Treaty (EN) (**Exhibit C-1**). Respondent has submitted a different version of the PRC-Singapore BIT as **Exhibit RL-143**, which, however, does not deviate in substance from the version quoted above.

<sup>149</sup> Singapore’s proposed text of the Treaty, 24 October 1985 and China’s proposed text of the Treaty, 24 October 1985 (**Exhibit RL-8**).

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inserted into Article 13(3). This decision by the Contracting Parties confirms their intention to differentiate between disputes on the legality of an expropriatory measure (to be resolved by the domestic courts of the host State) and the amount of compensation resulting therefrom (to be resolved – at the choice of the investor – by the domestic court or by an arbitral tribunal).

109. The Tribunal does not consider this understanding to be in contradiction with the use of the term “*may*” in both, Articles 6(2) and 13(3) of the Treaty. The Tribunal has taken note of the argument put forward by Claimants that, when contrasted with the term “*shall*”, one could interpret this wording as permissive to suggest that an investor is provided with a choice between a competent domestic court and an international arbitral tribunal.<sup>150</sup> However, the Tribunal does not see any basis for the assumption that an investor could opt for international arbitration instead for a domestic court when it comes to the review of the occurrence and/or legality of an expropriatory measure. Such an assumption cannot be made lightly as a State’s consent to arbitrate disputes with an investor must be expressed in clear and unambiguous terms. There is no indication in Article 6 or Article 13 of the Treaty that would support the existence of such an option for an investor to commence international arbitration proceedings in respect of the occurrence and/or legality of an expropriatory measure. To the contrary, to assume a choice between domestic courts and international arbitration would be in conflict with the limited wording in Article 13(3) of the Treaty, which contains and limits the consent of the contracting States to international arbitration to disputes “*involving the amount of compensation*” – without making any reference to the occurrence or legality of an expropriation. In the Tribunal’s view, this supports Respondent’s interpretation of the term “*may*”, which is to put emphasis on the fact that the investor – in case it is not satisfied with the result of the negotiations – may turn to the competent domestic courts but is not obliged to do so.
110. In light of the foregoing, the Tribunal considers the context of the arbitral consent with regard to Article 6(2) of the Treaty to favor the interpretative approach taken by

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<sup>150</sup> Claimants’ Counter-Memorial, paras. 220-222; Claimants’ Rejoinder, paras. 179-185.

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Respondent, *i.e.*, that its arbitral consent only refers to disputes on the amount of compensation that is awarded to an investor resulting from an expropriatory measure.

**(3) The Context of Respondent's Arbitral Consent with Regard to the Fork-in-the-Road Clause in Article 13(3) of the Treaty**

111. Next, the Tribunal will turn to the context of Respondent's arbitral consent with regard to the fork-in-the-road clause in Article 13(3) Sentence 2 of the Treaty. Article 13(3) in its entirety reads as follows:

*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.*<sup>151</sup>

**a. Summary of Respondent's Position**

112. Respondent contends that investment treaties are not simply meant to internationalize investment disputes but to promote foreign investment by balancing the contracting States' sovereignty, which is evidenced by the fact that there are investment treaties which do not provide for investor-State arbitration at all. In addition, the bias against domestic courts would be inconsistent with the text of the Treaty and the meanings that the Contracting Parties intended Articles 13(2) and 6(2) of the Treaty to have.<sup>152</sup>

113. In response to Claimants' argument that Articles 13(2) and (3) of the Treaty do not specify local litigation as a prerequisite to international arbitration, Respondent clarifies that its position is not that the Treaty explicitly requires the investor to file a local litigation as a prerequisite to any international arbitration. Rather, its position is that – as the jurisdiction

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<sup>151</sup> Treaty (EN) (**Exhibit C-1**). Respondent has submitted a different version of the PRC-Singapore BIT as **Exhibit RL-143**, which slightly deviates from the version quoted above. See paragraph 68 above.

<sup>152</sup> Respondent's Reply, paras. 113-115.

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of an international arbitration tribunal is limited to disputes over the amount of compensation for expropriation pursuant to Article 13(3) – all other disputes including those over the existence and legality of expropriation shall be resolved by local courts pursuant to Articles 13(2) and 6(2) of the Treaty.<sup>153</sup>

114. With regard to Claimants' argument that any submission to domestic courts would prevent an investor from taking recourse to international arbitration due to the fork-in-the road clause in Article 13(3) Sentence 2 of the Treaty, Respondent argues that this clause, when interpreted in context, only applies to disputes pursuant to Article 13(3) Sentence 1 of the Treaty, *i.e.*, disputes involving the amount of compensation. Respondent contends that, if one were to follow Claimants' interpretation, due to the broad wording of Article 13(2) of the Treaty, any litigation before the domestic courts – even unrelated to any violations of Articles 1-12 of the Treaty or concerning a different investment – would prevent an investor from taking recourse to international arbitration. Respondent claims that this interpretation is unreasonable and that, instead, the fork-in-the-road clause means that once the investor submitted a dispute over the amount of compensation for expropriation to a domestic court, the jurisdiction of an *ad hoc* arbitral tribunal over the same dispute is barred.<sup>154</sup>
115. Respondent further argues that the PRC's initial proposed text contained a prerequisite to submit a dispute over the amount of compensation to a domestic authority first – not only before taking recourse to an international arbitration but also before submitting the dispute to local court proceedings. However, irrespective of this additional prerequisite, the initial proposal by the PRC too provided for the exclusive jurisdiction of domestic courts over disputes relating to the legality of the expropriation, and, therefore, Respondent asserts that Claimants' argument based on the removal of this prerequisite fails.<sup>155</sup>

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<sup>153</sup> Respondent's Reply, para. 137.

<sup>154</sup> Respondent's Reply, paras. 138-142.

<sup>155</sup> Respondent's Reply, paras. 143 *et seq.*

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116. With regards to the decisions by the tribunals in the cases of *Tza Yap Shum v. Peru*,<sup>156</sup> *Sanum v. Laos (I)*<sup>157</sup> and *BUCG v. Yemen*,<sup>158</sup> Respondent argues that the reasoning in these decisions is not applicable in the case at hand. In particular, the treaties underlying these cases do not contain a provision similar to Article 6(2) of the Treaty and the reasonings of those tribunals were made in the context of the legal regimes of Peru, Laos or Yemen which are not applicable in the context of Chinese law and practice.<sup>159</sup>
117. Respondent further states that the PRC's position in the *Hela Schwarz*<sup>160</sup> case is irrelevant to the Treaty's interpretation as both the text of the underlying treaty as well as the factual background of that case are incomparable to the case at hand.<sup>161</sup>
118. Respondent also states that the triple identity test does apply to the Treaty's fork-in-the-road clause in Article 13(3) Sentence 2 of the Treaty. According to Respondent, when interpreted in context, the fork-in-the-road clause is not broad and categorical but only prevents an investor from submitting a dispute over the amount of compensation for expropriation to an international arbitral tribunal after having previously submitted the same dispute to a domestic court.<sup>162</sup>
119. Respondent argues that the triple identity test will not be satisfied if domestic litigation is appropriately filed, *i.e.*, if it is limited to the existence and legality of an expropriation – an issue that is separable from a dispute over the amount of compensation. This, Respondent states, is evidenced by both the text of the Treaty as well as a comparison of that text with Singapore's proposed text. According to Respondent, the tribunals in the cases of *Sanum*

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<sup>156</sup> *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009 (**Exhibit CL-8(bis)**) (Claimants' translation).

<sup>157</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic (I)*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013 (**Exhibit CL-9**).

<sup>158</sup> *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017 (**Exhibit CL-10**).

<sup>159</sup> Respondent's Memorial, paras. 280-293; Respondent's Reply, para. 145.

<sup>160</sup> *Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19.

<sup>161</sup> Respondent's Reply, paras. 148-152.

<sup>162</sup> Respondent's Reply, paras. 153 *et seq.*

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*v. Laos (I)*<sup>163</sup> and *BUCG v. Yemen*<sup>164</sup> incorrectly assumed that a domestic court would have to consider the requirements with which a host State must comply in cases where it takes a measure of expropriation in order to determine whether an expropriation had taken place.<sup>165</sup>

120. Respondent contends that its arbitral consent would be given *effet utile* in cases of both direct and indirect expropriation. With regards to the former, Respondent argues that – as Claimants acknowledge that a formally proclaimed expropriation would be subject to arbitration – Article 13(3) of the Treaty would encompass all disputes regarding compensation for direct expropriation. In support of its argument, Respondent lists examples of circumstances in which a Singaporean investor would be able to submit a dispute over the amount of compensation for expropriation to international arbitration without having to first take recourse to a Chinese court. According to Respondent, this would apply to all disputes over the amount of compensation for any proclaimed direct expropriation as in these cases there is no dispute over whether an expropriation has occurred and, thus, no need to first approach a Chinese court.<sup>166</sup> Respondent further states that its interpretation would equally apply in cases where Singapore serves as the host State for Chinese investors under the Treaty.<sup>167</sup>
121. Respondent argues that the arbitral consent would also be given *effet utile* regarding indirect expropriation, *i.e.*, “*other measures having effect equivalent to nationalization or expropriation*” under the Treaty. According to Respondent, the PRC’s domestic courts are competent to rule on “*measures having effect equivalent to nationalization or expropriation*”. With regards to the Treaty, Respondent argues that Articles 6(2) and 13(2) of the Treaty would be left without *effet utile* if disputes relating to such measures could

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<sup>163</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic (I)*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013 (**Exhibit CL-9**).

<sup>164</sup> *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017 (**Exhibit CL-10**).

<sup>165</sup> Respondent’s Reply, paras. 155-160.

<sup>166</sup> Respondent’s Reply, paras. 161-165.

<sup>167</sup> Respondent’s Reply, paras. 166 *et seq.*

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not be submitted to Chinese domestic courts.<sup>168</sup> Respondent further contends that Articles 2(1) and 12 of the Administrative Procedure Law of the People's Republic of China (the "APL") as well as a number of Chinese administrative laws provide a Singaporean investor with the right to submit a dispute over any government measure that it considers to have "the effect equivalent to nationalization or expropriation" to a Chinese domestic court to rule on that question.<sup>169</sup> Relatedly, Respondent argues that under Chinese administrative laws, the PRC's courts – when requested to rule on a government measures – may establish responsibilities to compensate while reserving the quantification issues for further legal proceedings, e.g., international arbitration pursuant to Article 13(3) of the Treaty. In this regard, Respondent cites multiple cases where the PRC's courts found government measures to have "the effect equivalent to nationalization or expropriation", for example the case of *Lighthouse Slaughterhouse v. Beibei District*<sup>170</sup> where the court ordered the district government to compensate the plaintiff without ruling on the amount of compensation.<sup>171</sup>

***b. Summary of Claimants' Position***

122. Claimants argue that the fork-in-the-road clause in Article 13(3) of the Treaty provides recourse to the national courts only as an alternative to arbitration but not as a mandatory precursor to it. Otherwise, the decision on responsibility for measures amounting to expropriation would lie solely with the host State's self-judgment through its domestic courts.<sup>172</sup> This, Claimants contend, follows from both the Treaty's text which states that the investor "shall be entitled to submit the dispute to the competent court" instead of "shall submit the dispute to the competent court" and its negotiating history, where an initial proposal by the PRC that an investor would have to pursue remedies before the domestic authorities for one year prior to resorting to international arbitration was rejected. As a

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<sup>168</sup> Respondent's Reply, paras. 168-171.

<sup>169</sup> Respondent's Reply, paras. 172-177.

<sup>170</sup> *Lighthouse Slaughterhouse v. Beibei District Government of Chongqing City*, Administrative Judgment of the Chongqing Municipal People's Court, Case No. (2005) Yu Gao Fa Xing Zhong No. 54, 20 June 2005 (**Exhibit R-86-CH**).

<sup>171</sup> Respondent's Reply, paras. 178-185.

<sup>172</sup> Claimants' Counter-Memorial, paras. 157-159.

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consequence, the fork-in-the-road clause would not allow for recourse to the domestic courts prior to initiating arbitral proceedings.<sup>173</sup> Rather Claimants argue, citing the *Tza Yap Shum* tribunal,<sup>174</sup> according to the ordinary meaning and context of Article 13(3) of the Treaty, any previous recourse to the PRC's domestic courts for a decision on responsibility of the measures in dispute would trigger the fork-in-the road clause and preclude access to international arbitration for any subsequent dispute on the amount of compensation.<sup>175</sup>

123. Claimants reject Respondent's position that under the Treaty, an investor would have to submit the issue of responsibility to the domestic courts of the host State first before it could choose the forum for the issue of quantification of compensation: either an arbitral tribunal or the domestic courts of the host State.<sup>176</sup> Claimants contend that in the *Hela Schwarz*<sup>177</sup> case, an investor's Chinese subsidiary challenged a direct expropriation before the PRC's domestic courts, seeking solely to have the expropriation decision revoked while not challenging or addressing the issue of compensation in those proceedings. According to Claimants, as in the subsequent ICSID arbitration brought by the investor, the PRC contested the jurisdiction of the arbitral tribunal based on the investor's supposed failure to comply with a local litigation waiver clause, it is likely that Respondent would have raised the same objection in the present dispute – based on the even broader fork-in the road clause – if Claimants had resorted to the PRC's domestic courts first.<sup>178</sup>
124. Claimants further argue that the triple identity test invoked by Respondent does not apply to the Treaty's fork-in-the-road clause. According to Claimants, Respondent's argument that the fork-in-the-road clause applies only if strictly identical disputes are submitted to both fora is flawed and even contradicted by the PRC's own submission. Any claim for compensation would be an aspect of a dispute that Respondent says must be submitted to

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<sup>173</sup> Claimants' Counter-Memorial, paras. 162-168.

<sup>174</sup> *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009 (**Exhibit CL-8(bis)**) (Claimants' translation).

<sup>175</sup> Claimants' Counter-Memorial, paras. 169-172; Claimants' Rejoinder, paras. 137-141.

<sup>176</sup> Claimants' Counter-Memorial, paras. 173 *et seq.*

<sup>177</sup> *Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19.

<sup>178</sup> Claimants' Counter-Memorial, paras. 176-178, Claimants' Rejoinder, paras. 145 *et seq.*

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its domestic courts. Citing decisions by the *Tza Yap Shum* tribunal<sup>179</sup> and the *Sanum* Court of Appeals,<sup>180</sup> Claimants argue that a fork-in-the-road clause as broad and categorical as the clause in the case at hand would mean that, if any dispute is brought to the domestic courts, Claimants would no longer be entitled to refer any aspect of that dispute to arbitration.<sup>181</sup>

125. In any case, the triple identity test would be necessarily fulfilled if the PRC's domestic courts had to decide on the question of responsibility prior to arbitral proceedings as the PRC's courts would have to decide on the PRC's responsibility for expropriation, nationalization, or equivalent measures pursuant to the Treaty itself. According to Claimants, even pursuant to the PRC's own leading authority, the triple identity test would necessarily be fulfilled.<sup>182</sup> Claimants further state, citing numerous cases that put emphasis on the question whether the two disputes share the same fundamental bases, that under this standard the fork-in-the-road clause would apply in the case at hand as the fundamental basis of the disputes – Article 6(1) and (3) of the Treaty – would be exactly the same in both the domestic litigation and international arbitration.<sup>183</sup>
126. Claimants further contend that triggering the triple identity test could not be avoided by submitting the domestic claim through another legal entity as, under the Treaty, only the foreign investor, not its domestic subsidiary, has any rights.<sup>184</sup> Equally, Claimants could not circumvent triggering the triple identity test by bringing only domestic law claims before the domestic courts as, pursuant to Article 6 of the Treaty, the claims would have to be based on the Treaty in both the domestic litigation and international arbitration.<sup>185</sup> Claimants argue that they could also have not avoided triggering the triple identity test by reserving the matter of compensation for the arbitral proceedings as the issue of

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<sup>179</sup> *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009 (**Exhibit CL-8(bis)**) (Claimants' translation).

<sup>180</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic (I)*, Judgment of the Court of Appeal of Singapore [2016] SGCA 57, 29 September 2016 (**Exhibit RL-130**).

<sup>181</sup> Claimants' Counter-Memorial, paras. 179-184; Claimants' Rejoinder, paras. 142-145.

<sup>182</sup> Claimants' Counter-Memorial, para. 185; Claimants' Rejoinder, paras. 147-151.

<sup>183</sup> Claimants' Rejoinder, para. 152.

<sup>184</sup> Claimants' Counter-Memorial, paras. 186 *et seq.*

<sup>185</sup> Claimants' Counter-Memorial, para. 188.

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compensation is inseparable from the existence and lawfulness of an expropriation, nationalization, or a measure having equivalent effect. In that regard, Claimants refer to Article 6(1) of the Treaty which prohibits such measures “*unless the measures are taken [...] against compensation*”, and argue that, thus, the issue of compensation would have to be submitted to the PRC’s domestic courts. Citing the decisions by the *Sanum* tribunal<sup>186</sup> and the *BUCG* tribunal,<sup>187</sup> Claimants state that, in such case, they would be precluded to re-litigate the amount of compensation in arbitration. Whereas Respondent states that the reasoning of these decisions does not apply as, under Chinese law, Claimants would be able to challenge the government’s expropriation decision without referring to the court any dispute over the amount of compensation, Claimants contend that considerations of Chinese national law are beside the point as the questions is solely governed by the Treaty, *i.e.*, international law.<sup>188</sup>

127. Whereas Respondent asserts that either the existence of an expropriation or the legality of the expropriation is separable from the amount of compensation, Claimants argue that the payment of adequate compensation is one of the core requirements under international law for expropriatory measures to be legal and that, thus, it would be impossible for a domestic court to determine the legality of an expropriation or equivalent measure without addressing the question of compensation pursuant to Article 6(1) of the Treaty.<sup>189</sup> In this regard, Claimants further claim that the existence of measures having effect equivalent to expropriation is also inseparable from the question of compensation as the former heavily depends on the questions whether the measures caused a loss to the value of the investment or assets and the extent of that loss.<sup>190</sup>

128. With regard to Respondent’s argument that only in cases where the PRC formally proclaims an expropriation an investor could submit a dispute over the amount of

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<sup>186</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic (I)*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013 (**Exhibit CL-9**).

<sup>187</sup> *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017 (**Exhibit CL-10**).

<sup>188</sup> Claimants’ Counter-Memorial, paras. 189-192.

<sup>189</sup> Claimants’ Rejoinder, paras. 158-164.

<sup>190</sup> Claimants’ Rejoinder, paras. 165-168.

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compensation for expropriation to international arbitration without having to take recourse to a Chinese court first, Claimants state that this interpretation is contrary to the dispute resolution procedure and the plain text of Article 13 of the Treaty and would cause complexity and inefficiency.<sup>191</sup> Additionally, Claimants argue that this interpretation would leave the consent to arbitration in the Treaty without *effet utile*. According to Claimants, such an understanding of the Treaty would leave it purely to the PRC's discretion on a case-by-case basis to allow access to arbitration. Further, Claimants hold that the possibility of a formally proclaimed expropriation would not allow for the arbitration of disputes involving "*measures having effect equivalent to nationalization or expropriation*" despite the Treaty explicitly providing for arbitration over these measures.<sup>192</sup>

129. Claimants further argue that under Respondent's interpretation of Article 13 of the Treaty, measures equivalent to expropriation are only ever subject to arbitration after recourse to the PRC's courts and that – as the Treaty's fork-in-the-road clause would block any subsequent arbitral proceedings – this interpretation deprives the arbitral consent for "*measures having effect equivalent to nationalization or expropriation*" of *effet utile*.<sup>193</sup>

***c. The Tribunal's Analysis***

130. The Tribunal will now address the Parties' argument on the context of Respondent's arbitral consent with regard to the fork-in-the-road clause in Article 13(3) Sentence 2 of the Treaty which, to recall, reads as follows: "*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*".
131. Claimants contend that any previous recourse to Chinese domestic courts for a decision on responsibility of the measures in dispute would trigger the fork-in-the road clause in Article 13(3) Sentence 2 of the Treaty and thereby preclude access to international arbitration for any subsequent dispute on the amount of compensation. In the Tribunal's view, the validity

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<sup>191</sup> Claimants' Rejoinder, paras. 121-130.

<sup>192</sup> Claimants' Counter-Memorial, paras. 194-197; Claimants' Rejoinder, paras. 131 *et seq.*

<sup>193</sup> Claimants' Rejoinder, paras. 169-173.

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of this argument depends primarily on the scope of the fork-in-the-road clause, *i.e.*, on whether it is triggered by any proceeding before a domestic court or only in cases where the proceedings before the domestic court and the subsequent proceedings before an arbitral tribunal concern the same dispute, *i.e.*, specifically the amount of compensation.

132. The wording of the fork-in-the-road clause “*if the national or company concerned has resorted to the procedure specified in the paragraph (2) of this Article*” is reflective but not in itself determinative. Thus, the Tribunal will assess the meaning of this clause by way of a contextual analysis. In this regard, it is noteworthy that the fork-in-the-road clause is systematically located within Article 13(3) of the Treaty whose first sentence provides for an exception to the general rule in Article 13(2) specifically for “*disputes involving the amount of compensation*”. Its location within Article 13(3) of the Treaty suggests that the fork-in-the-road clause in Sentence 2 applies only in case a dispute referred to in Sentence 1, “*involving the amount of compensation*”, is brought before a domestic court.
133. This understanding is also in line with the object and purpose of a fork-in-the-road clause like Article 13(3) Sentence 2 of the Treaty, which is to avoid parallel or subsequent proceedings on the same issue creating the risk of contradicting decisions. In case the investor is able to limit its request for relief before the national court to the question of the legality of the measure in dispute and defer the question of the appropriate amount of compensation to a subsequent arbitral proceeding, there is no such risk of contradicting decisions as the two proceedings deal with different issues.
134. In light of the foregoing, the Tribunal is not convinced that an investor would be deprived of making use of the Treaty’s arbitration clause or that the arbitration clause would be left without any *effet utile*. As already elaborated above, the Treaty envisages – as the primary forum for the settlement of investment-related disputes which have not been settled amicably pursuant to Article 13(1) of the Treaty – that the foreign investor submits its claim to the domestic courts of the host State (Article 13(2) of the Treaty). Only as an exception to this general rule and only with regard to disputes that deal with the amount of compensation does Article 13(3) of the Treaty provide the investor with the option to submit its claim to an arbitral tribunal.

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135. The Tribunal does not agree with Claimants' argument that a domestic court could not decide on the legality of an expropriatory measure pursuant to Article 6(2) of the Treaty without addressing the question of compensation and, thus, triggering the fork-in-the-road clause in Article 13(3).<sup>194</sup> The Tribunal has taken note of the fact that under Article 6(1) of the Treaty, the contracting States may only take expropriatory measures, *inter alia*, 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*”. The Tribunal has further considered the arguments exchanged between the Parties on whether the fulfilment of these requirements forms part of the legality criteria of an expropriation under Article 6.
136. The Tribunal is mindful of the controversial question of whether the payment of (adequate) compensation forms part of the legality of an expropriation or, in other words, whether the non-payment of compensation or the payment of inadequate compensation alone would suffice to render an expropriation unlawful and might lead to the application of the valuation standards for unlawful expropriations.
137. However, the Tribunal does not consider it necessary to decide on that question as, in the case at hand, the State has not paid any compensation at all to the investor. In this scenario, the domestic court, when explicitly requested to solely rule on the question of legality, would only have to establish that no compensation at all has been paid yet (without having to opine on the appropriate amount) and, if necessary, render its decision as to whether the non-payment of compensation suffices to render the expropriation unlawful.
138. Respondent has brought forward (and Claimants did not dispute) that under Chinese law an investor can reserve the question of the amount of compensation and defer it to separate proceedings.<sup>195</sup> The Tribunal is not convinced that in this scenario, a domestic court, when requested by the investor to decide only on the question of legality, would also address,

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<sup>194</sup> Claimants' Rejoinder, paras. 158-168.

<sup>195</sup> Respondent's Memorial, paras. 232 *et seq.*

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*sua sponte* or rather *ultra petita*, the amount of compensation – beyond the finding that compensation has not yet been paid.<sup>196</sup> Even if the Chinese Government were to apply for a ruling on the amount of compensation by the domestic court, such a scenario could not trigger the fork-in-the-road clause of the Treaty as Article 13(3) Sentence 2 is expressly limited to the scenario where “*the national or company concerned has resorted to the procedure specified in the paragraph (2) of this Article*”. This requirement is not fulfilled where a ruling involving the amount of compensation has been requested only by the Government.

139. Finally, even in the hypothetical scenario where the investor was paid a certain amount of compensation by the State and the domestic court were requested by the investor to rule that the payment of insufficient compensation renders the expropriation unlawful, such a finding would not trigger the fork-in-the-road clause. The domestic court would be requested to make a determination on the adequacy of the compensation paid as part of its determination of the legality of the expropriation; however, this is distinct from a determination of the precise quantum of the compensation to be paid for an unlawful expropriation in case the domestic court were to find that the compensation paid was in fact inadequate. This latter determination could still be made by an arbitral tribunal under Article 13(3) of the Treaty.

140. In light of the foregoing, the Tribunal concludes that the context of Respondent’s arbitral consent again speaks in favor of the interpretative approach brought forward by Respondent, *i.e.*, that the arbitral consent only refers to the question of the amount of compensation that is awarded to an investor resulting from expropriatory measures.

**(4) The Legal Framework on Expropriatory Measures Under Chinese Law**

141. The Tribunal will now address the legal framework under Chinese law regarding expropriatory measures.

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<sup>196</sup> Cf. *China Heilongjiang Int’l Econ. & Technical Coop. Corp. and others v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, para. 449 (Exhibit RL-138).

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**a. Summary of Respondent's Position**

142. Respondent argues that the PRC's courts are available to determine whether an expropriation has occurred and to rule on its lawfulness under the Treaty. Otherwise, Respondent argues, Articles 6(2) and 13(2) of the Treaty (which empower the domestic courts to decide on “[t]he legality of any measure of expropriation, nationalization or other measures having effect equivalent to nationalization or expropriation” and “whether the relevant measures were taken in compliance with the conditions that Article 6(1) of the Treaty imposes”) would be left without *effet utile*.<sup>197</sup>
143. Respondent contends, quoting the tribunal in the case of *ST-AD v. Bulgaria*,<sup>198</sup> that the Tribunal's jurisdiction is rooted solely in the Contracting Parties' arbitral consent and independent of the substantive protections granted under the Treaty. Thus, Respondent argues, the Tribunal does not need to rule on Claimants' insinuations that the PRC's courts are not available to make the relevant determination of responsibility.<sup>199</sup>
144. Respondent argues that the same is true under Chinese law and that it is Claimants who bear the burden to establish that the PRC's courts are not available to a foreign investor for a determination of responsibility. In support of its argument, Respondent invokes a general legal principle under Chinese law and multiple individual Chinese statutes according to which the PRC's courts are competent or even required to apply international treaties. In addition, Respondent cites multiple cases in which the PRC's courts have applied international treaties to which the PRC is a party in making their decisions.<sup>200</sup>
145. Respondent further disputes the statement made by Claimants that “*decisions of domestic courts are never binding on an international tribunal*” and argues that this issue is unrelated to the question of jurisdiction. In any case, Respondent claims that, should an international tribunal determine that it must not be bound by any domestic decisions, and

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<sup>197</sup> Respondent's Reply, paras. 186-189.

<sup>198</sup> *ST-AD GmbH (Germany) v. The Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (**Exhibit RL-109**).

<sup>199</sup> Respondent's Reply, paras. 190-193.

<sup>200</sup> Respondent's Reply, paras. 194-201.

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should it wish to investigate into an issue on its own, it should then turn to the threshold question, *i.e.*, whether it has jurisdiction to rule on that issue.<sup>201</sup>

***b. Summary of Claimants' Position***

146. Claimants argue that the PRC's domestic courts cannot resolve the issue of responsibility for expropriation, nationalization, or measures having equivalent effect as such determination would require the application of Article 6(1) of the Treaty, *i.e.*, the application of international law. According to Claimants, Respondent has not identified any statutory basis for its courts to assess measures having effect equivalent to expropriation and, in any event, the courts are unable to apply international investment treaties or international law generally in the course of domestic administrative proceedings.<sup>202</sup>
147. Claimants further claim, citing the decisions by numerous investment tribunals, that a decision rendered by a domestic court applying Chinese law would not have a binding effect for the decision of an arbitral tribunal on the question of the PRC's responsibility as a matter of international law. In addition, Claimants contend that the Tribunal is legally compelled to undertake an independent evaluation of its own jurisdiction, which, on Respondent's position, would entail a decision on the existence of expropriatory measures.<sup>203</sup>
148. According to Claimants, a proper interpretation of the Treaty must make the Contracting Parties' arbitral consent legally effective and – as the PRC's domestic courts are unable to resolve the issue of responsibility for measures having effect equivalent to expropriation – excluding this issue from the Tribunal's jurisdiction would deprive the arbitral consent of its appropriate effect for such measures.<sup>204</sup> In any case, Claimants argue, citing the decision

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<sup>201</sup> Respondent's Reply, paras. 202 *et seq.*

<sup>202</sup> Claimants' Counter-Memorial, paras. 198-207.

<sup>203</sup> Claimants' Counter-Memorial, paras. 208-216; Claimants' Rejoinder, paras. 226-231.

<sup>204</sup> Claimants' Rejoinder, para. 236.

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by the tribunal in *ST-AD v. Bulgaria*,<sup>205</sup> they would be entitled to dispense with domestic litigation prior to international arbitration because it would be futile.<sup>206</sup>

149. According to Claimants, Respondent bears the burden to prove that its courts are available to a foreign investor for a determination of responsibility.<sup>207</sup> Claimants maintain, citing numerous Chinese scholars, that Chinese Law does not contain any concept of measures equivalent to expropriation.<sup>208</sup> With respect to the Chinese administrative procedural law, Claimants claim that its provisions do not provide any substantive legal basis for a court to make a finding that the PRC's authorities have taken a measure equivalent to expropriation.<sup>209</sup> With regard to the Chinese administrative laws invoked by Respondent, Claimants argue that these laws do not refer to any form of indirect expropriation.<sup>210</sup> Claimants further contend that in none of the cases cited by Respondent does a Chinese court make a determination that measures having the effect equivalent to nationalization or expropriation have transpired nor does any court apply a legal concept or standards for identifying such measures. For example, with regards to the decision *Lighthouse Slaughterhouse v. Beibei District*<sup>211</sup> cited by Respondent, Claimants state that the court in this decision did not make any reference to measures equivalent to expropriation.<sup>212</sup>
150. Claimants further argue that Respondent's courts are not authorized to apply investment treaties in administrative disputes as – by virtue of the amendment of the Chinese administrative procedure law in 2014 – the provision that previously allowed for the application of international treaties in certain circumstances has been removed. According to Claimants, the current administrative procedure law provides that only domestic law and

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<sup>205</sup> *ST-AD GmbH (Germany) v. The Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (**Exhibit RL-109**).

<sup>206</sup> Claimants' Rejoinder, para. 237.

<sup>207</sup> Claimants' Rejoinder, paras. 239 *et seq.*

<sup>208</sup> Claimants' Rejoinder, paras. 241-244.

<sup>209</sup> Claimants' Rejoinder, para. 246.

<sup>210</sup> Claimants' Rejoinder, para. 247.

<sup>211</sup> *Lighthouse Slaughterhouse v. Beibei District Government of Chongqing City*, Administrative Judgment of the Chongqing Municipal People's Court, Case No. (2005) Yu Gao Fa Xing Zhong No. 54, 20 June 2005 (**Exhibit R-86-CH**).

<sup>212</sup> Claimants' Rejoinder, para. 248-252.

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regulations are applicable in administrative disputes. This, Claimants allege, has been confirmed by Chinese legal scholars and is consistent with the decision *Pioneer International Holdings*<sup>213</sup> by the Supreme People's Court.<sup>214</sup>

151. Claimants contend that there is neither a general legal principle under Chinese law nor other Chinese statutes which would authorize Chinese courts to apply international investment treaties in investment disputes.<sup>215</sup> With regard to the cases cited by Respondent in this context, Claimants argue that none of these cases concern investment disputes and, thus, they do not provide evidence that Chinese courts are able to decide disputes involving claims raised based on the breach of an investment treaty.<sup>216</sup>

***c. The Tribunal's Analysis***

152. The Tribunal will now turn to the arguments exchanged by the Parties on the legal framework on expropriatory measures under Chinese law.
153. Claimants argue that the PRC's domestic courts are unable to resolve the issue of responsibility for measures having effect equivalent to expropriation under international law and, thus, excluding this issue from the Tribunal's jurisdiction would deprive the arbitral consent of its appropriate effects for such measures. In this regard, the Tribunal has taken note of Claimants' statement during the Hearing that both international and domestic law may be applied in State court proceedings.<sup>217</sup> Consequently, the Tribunal does not consider it established that a foreign investor would in fact be left without the protection required by the Treaty. More importantly, however, Article 6(2) of the Treaty is clear in that the legality of measures having effect equivalent to expropriation may be reviewed by a competent domestic court of the host State. Accordingly, Articles 6(1) and (3) of the Treaty oblige the Contracting Parties to the Treaty to ensure that, within their jurisdiction,

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<sup>213</sup> *Pioneer International Holdings Pty Limited v. Mineral Resources Management Bureau of Guangzhou City, Guangdong Province*, Supreme People's Court of the People's Republic of China, Case No. (2001) Xing Zhong Zi 15, Administrative Judgment, 27 November 2003 (**Exhibit C-115**).

<sup>214</sup> Claimants' Rejoinder, para. 253-261.

<sup>215</sup> Claimants' Rejoinder, paras. 263 *et seq.*

<sup>216</sup> Claimants' Rejoinder, paras. 265-269.

<sup>217</sup> Transcript, Day 2 p. 350 line 18- p. 351 line 15.

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sufficient protection against, and compensation for, such measures is provided. Whether the respective Contracting Parties to the Treaty have complied with this obligation is not for this Tribunal to decide and not relevant to assessing the scope of Respondent's consent to investor-State Arbitration under the Treaty.

**(5) The Object and Purpose of the Treaty**

*a. Summary of Respondent's Position*

154. Respondent contends that, contrary to Claimants' allegations, the Treaty's object and purpose do not require unlimited access to international arbitration.<sup>218</sup> According to Respondent, Claimants' proposition that limited arbitral consent would undermine an investment treaty's object and purpose is not reflected in treaty practice, since there is a number of investment treaties which do not provide for an investor-State arbitration mechanism but contain preambles framing their object and purpose as to protect investment.<sup>219</sup>

155. Respondent further argues that its interpretation does not lead to the Treaty's investor-State dispute settlement mechanism lacking legal feasibility, as an investor is still able to seek relief before an international arbitration tribunal under specific circumstances.<sup>220</sup> Additionally, Respondent argues, citing decisions by the *Sanum* tribunal<sup>221</sup> and the *Sanum* court,<sup>222</sup> that the Treaty's object and purpose are not decisive to determine the Tribunal's jurisdiction.<sup>223</sup>

*b. Summary of Claimants' Position*

156. Claimants argue, citing decisions by multiple investment tribunals, that the Treaty's object and purpose, *i.e.*, to stimulate foreign investment through providing effective protection in

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<sup>218</sup> Respondent's Reply, paras. 204 *et seq.*

<sup>219</sup> Respondent's Reply, paras. 209-212.

<sup>220</sup> Respondent's Reply, para. 206.

<sup>221</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic (I)*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013 (**Exhibit CL-9**).

<sup>222</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic (I)*, Judgment of the Court of Appeal of Singapore [2016] SGCA 57, 29 September 2016 (**Exhibit RL-130**).

<sup>223</sup> Respondent's Reply, paras. 213-214.

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the form of access to international arbitration for such investment against potential violations by the host State, requires that such access is directly available to investors and cannot be limited to the quantification of compensation. According to Claimants, again citing numerous decisions by investment tribunals, it must be assumed that the contracting parties to an investment treaty would not exclude effective arbitral protection for foreign investors as such lack of investment protection would discourage investments. As the Treaty is founded on a commitment to the encouragement of foreign investment through international investment protection, it would be contrary to its object and purpose to restrict access to international arbitration where another interpretation is not only available but also superior.<sup>224</sup> According to Claimants, this interpretation is not inconsistent with Articles 13(2) and 6(2) of the Treaty which guarantee access to domestic courts as the Contracting Parties would not have seen the need to grant access to international arbitration in the Treaty had they considered domestic courts to be fully adequate.<sup>225</sup>

157. Claimants hold that the object and purpose of a treaty is, in fact, relevant to a jurisdictional decision, arguing that the decision by the *Renta 4* court<sup>226</sup> cannot be relied on due to its lack of serious consideration. By contrast, the *Sanum* tribunal<sup>227</sup> merely rejected the respondent state's position and not the investor's position, and the *Sanum* court,<sup>228</sup> in fact, accepted the relevance of the object and purpose to a jurisdictional decision.<sup>229</sup>

***c. The Tribunal's Analysis***

158. The Tribunal has taken note of the respective arguments brought forward by the Parties on the object and purpose of the Treaty. It also shares Claimants' view that one of the reasons for the Treaty's conclusion was to promote foreign investments between the Contracting

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<sup>224</sup> Claimants' Counter-Memorial, paras. 232-243; Claimants' Rejoinder, paras. 211-222.

<sup>225</sup> Claimants' Rejoinder, paras. 223.

<sup>226</sup> *Quasar de Valores SICAV S.A. and others v. The Russian Federation*, Svea Court of Appeal, Case No. T 9128-14, Judgment, 18 January 2016), (**Exhibit RL-128**).

<sup>227</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic (I)*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013 (**Exhibit CL-9**).

<sup>228</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic (I)*, Judgment of the Court of Appeal of Singapore [2016] SGCA 57, 29 September 2016 (**Exhibit RL-130**).

<sup>229</sup> Claimants' Rejoinder, para. 224.

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Parties. However, this is (one of) the object(s) and purpose(s) of virtually any bilateral or multilateral investment agreement, including, as Respondent pointed out, some agreements which do not provide for international arbitration as a means of dispute resolution at all.<sup>230</sup>

159. Thus, the mere fact that the drafters of the Treaty envisaged to stimulate foreign investments between the Contracting Parties does not mean that they intended to waive their sovereign immunity with regard to any investment-related dispute under that treaty and have them resolved by an international arbitral tribunal. In particular, where, as in the case at hand, the Contracting Parties provided for a restricted arbitration clause only encompassing certain disputes (*i.e.*, “*involving the amount of compensation*”), the Tribunal does not consider it appropriate to discard this careful distinction drawn by the Contracting Parties by invoking the general purpose of the Treaty to promote foreign investment.
160. As a consequence, the object and purpose of the Treaty do not alter the Tribunal’s assessment on the scope of the arbitration clause in Article 13(3) of the Treaty.

**(6) Prior Case Law**

161. Finally, the Tribunal will address the Parties’ extensive submissions on prior case law and verify whether any of these submissions warrant a different conclusion on the interpretation of Article 13(3) of the Treaty.

*a. Summary of Respondent’s Position*

162. Respondent contends that a consistent line of established jurisprudence confirms its interpretation of the arbitral consent contained in the Treaty. At the same time, Respondent alleges that no adjudicators have so far interpreted the consent terms under Article 13(3) of the Treaty, as all existing jurisprudence was based on the provisions of other investment treaties.<sup>231</sup> Respondent argues that the determination of the scope of arbitral consent should focus on the examination of the specific clause containing the arbitral consent (in this case, Article 13(3) of the Treaty) as well as the provision providing for dispute settlement

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<sup>230</sup> Respondent’s Reply, paras. 209 *et seq.*

<sup>231</sup> Respondent’s Reply, paras. 244-246.

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mechanisms for disputes which are not covered by the scope of arbitral consent (in this case, Article 13(2) and Article 6(2) of the Treaty). According to Respondent, the conclusion on the appropriate interpretation of the clause resulting from this examination may only subsequently be checked against the fork-in-the-road-clause to confirm whether that interpretation gives *effet utile* to the Treaty text.<sup>232</sup>

163. Respondent alleges that tribunals following the above order have consistently denied jurisdiction.<sup>233</sup> In that regard, Respondent refers to the decision by the *Beijing Shougang* tribunal<sup>234</sup> which declined jurisdiction, determining that the arbitral consent was limited to the quantification of compensation and that such interpretation would not deprive the arbitral consent of *effet utile*.<sup>235</sup> Respondent contests Claimants' allegation that the arbitration clause in Article 8(3) of the China-Mongolia BIT underlying the *Beijing Shougang* decision is "*materially narrower*" than its equivalent in the Treaty and that the reasoning of the *Beijing Shougang* decision would therefore be inapplicable to the Treaty.<sup>236</sup> In this respect, Respondent argues that the reference to "*expropriation*" in the arbitration clause of the China-Mongolia BIT is defined in that treaty as also covering "*nationalization*" and measures having effect "*equivalent to nationalization [or] expropriation*" and thus has the same scope as Article 13(3) of the Treaty.<sup>237</sup> Respondent further contends that the investors in the *Beijing Shougang* case raised similar arguments as Claimants did in this case regarding indirect expropriation, which were rejected by the tribunal.<sup>238</sup> Therefore, Respondent concludes that the reasoning of the *Beijing Shougang* tribunal is applicable to the interpretation of the Treaty.<sup>239</sup>

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<sup>232</sup> Respondent's Reply, para. 247.

<sup>233</sup> Respondent's Reply, para. 248.

<sup>234</sup> *China Heilongjiang Int'l Econ. & Technical Coop. Corp. and others v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017 (**Exhibit RL-138**).

<sup>235</sup> Respondent's Reply, para. 252.

<sup>236</sup> Respondent's Reply, paras. 253-254.

<sup>237</sup> Respondent's Reply, para. 255.

<sup>238</sup> Respondent's Reply, paras. 256-257.

<sup>239</sup> Respondent's Reply, para. 258.

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164. Respondent further claims that the reasoning in *Austrian Airlines v. Slovakia*,<sup>240</sup> *EURAM v. Slovakia*<sup>241</sup> and *ST-AD v. Bulgaria*<sup>242</sup> confirms its interpretation of Article 6(2) of the Treaty.<sup>243</sup> Besides, Respondent contends that the *Berschader v. Russia*<sup>244</sup> and *RosInvest v. Russia*<sup>245</sup> decisions are of relevance to the interpretation of the Treaty, thereby contesting Claimants' allegation that the tribunals in these cases commented on the jurisdiction issue only in *obiter dicta*.<sup>246</sup>
165. Respondent claims that, by contrast, the cases raised by Claimants are not suitable authorities for the present case and do not assist Claimants' case.<sup>247</sup> Respondent contends that the *Tza Yap Shum*,<sup>248</sup> *Sanum*<sup>249</sup> and *BUCG*<sup>250</sup> tribunals gave the fork-in-the-road clause an unwarranted meaning in their reasoning.<sup>251</sup> According to Respondent, the reasoning provided by the tribunals in these cases, being that an investor would not be able to take advantage of international arbitration to resolve a dispute involving compensation if it had submitted a dispute to the domestic courts for a finding of expropriation, is not persuasive. In this respect, Respondent argues that the fork-in-the-road clause of the Treaty bars an investor from submitting a dispute over the amount of compensation for expropriation to an international arbitration only in cases where the investor has submitted the same dispute to a competent court of the host State. Respondent states that the

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<sup>240</sup> *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award, 9 October 2009 (**Exhibit RL-84**).

<sup>241</sup> *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012 (**Exhibit RL-100**).

<sup>242</sup> *ST-AD GmbH (Germany) v. The Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (**Exhibit RL-109**).

<sup>243</sup> Respondent's Reply, para. 259.

<sup>244</sup> *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006 (**Exhibit RL-62**).

<sup>245</sup> *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, 5 October 2007, (**Exhibit RL-72**).

<sup>246</sup> Respondent's Reply, paras. 261-265.

<sup>247</sup> Respondent's Reply, para. 268.

<sup>248</sup> *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence 19 June 2009 (**Exhibit CL-8(bis)**) (Claimants' translation).

<sup>249</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic (I)*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013 (**Exhibit CL-9**).

<sup>250</sup> *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017 (**CL-10**).

<sup>251</sup> Respondent's Reply, paras. 269, 272-274.

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quantification of compensation is separable from the existence and legality of the expropriation, and that the possibility for an investor to request a domestic court to determine that an expropriation has occurred but reserve the quantification of compensation to an international arbitral tribunal is real and feasible.<sup>252</sup>

166. Respondent further alleges that the treaties involved in these three cases as well as the treaties in the *Renta 4*<sup>253</sup> and *European Media Ventures*<sup>254</sup> cases contain no provisions equivalent to Article 6(2) of the Treaty.<sup>255</sup> Citing the decision by the Singapore Court of Appeal in the *Sanum* case,<sup>256</sup> Respondent deduces that, had the PRC-Laos BIT contained a provision similar to Article 6(2) of the Treaty, the jurisdiction clause in the PRC-Laos BIT would have been interpreted as covering quantum issues only.<sup>257</sup> Respondent argues that the *Renta 4* and *European Media Ventures* tribunals also acknowledged that the absence of a clear provision providing a forum to determine the existence and legality of expropriation underlaid their decision to uphold jurisdiction.<sup>258</sup> According to Respondent, the treaties invoked in *Renta 4* and *European Media Ventures* are further distinguishable from the Treaty in that the consent terms of these BITs are differently drafted.<sup>259</sup> Respondent contends that, unlike Article 13(3) of the Treaty, the BITs underlying *Renta 4* and *European Media Ventures* incorporate the word “*due*”, being at the center of the *Renta 4* tribunal’s reasoning as well as being relied upon as establishing a linkage between the provisions concerning dispossession and arbitration in the BIT in question by the English High Court in the *European Media Ventures* case.<sup>260</sup> Besides, Respondent alleges that the

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<sup>252</sup> Respondent’s Reply, paras. 275-279.

<sup>253</sup> *Renta 4 S.V.S.A and others v. Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009, (**Exhibit RL-77**).

<sup>254</sup> *European Media Ventures SA v. Czech Republic*, UNCITRAL, Award on Jurisdiction, 15 May 2007 (**Exhibit CL-111**).

<sup>255</sup> Respondent’s Reply, paras. 269, 280-281, 287.

<sup>256</sup> *Sanum Investments Limited v. The Government of the Lao People’s Democratic Republic (I)*, Judgment of the Court of Appeal of Singapore [2016] SGCA 57, 29 September 2016 (**Exhibit RL-130**).

<sup>257</sup> Respondent’s Reply, para. 282.

<sup>258</sup> Respondent’s Reply, paras. 290-292.

<sup>259</sup> Respondent’s Reply, paras. 294-296.

<sup>260</sup> Respondent’s Reply, paras. 294-295.

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treaty invoked in the *European Media Ventures* case did not contain the words “*amount of compensation*”.<sup>261</sup>

167. With regards to the three cases cited by Claimants where the tribunals accepted jurisdiction under arbitral clauses covering only disputes “relating to” or “concerning” compensation or its amount, Respondent alleges that the treaties underlying these cases provide for an arbitral consent which is less restrictive than that of the Treaty.<sup>262</sup> In Respondent’s view, the fact that the respondent States in these cases did not challenge jurisdiction is of no relevance to the present case.<sup>263</sup>

***b. Summary of Claimants’ Position***

168. According to Claimants, the case law supports their case as in every decision with reasoning applicable to the Treaty, the competent body has assumed jurisdiction over both the responsibility for an expropriation, and the quantification of compensation. A deviation from this jurisprudence would result in inconsistent case law.<sup>264</sup>
169. Claimants contend that previous decisions rendered pursuant to treaties with a fork-in-the-road clause confirm the Tribunal’s jurisdiction as the respective bodies in these cases (*i.e.*, the *Tza Yap Shum* tribunal;<sup>265</sup> the *Sanum* tribunal;<sup>266</sup> the *Sanum* Court of Appeals in Singapore;<sup>267</sup> and the *BUCG* tribunal<sup>268</sup>) all upheld their jurisdiction. According to Claimants, these decisions were heavily based on the argument that the fork-in-the-road clauses in the underlying treaties would preclude an investor from initiating arbitral proceedings to determine the amount of compensation after having previously resorted to

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<sup>261</sup> Respondent’s Reply, para. 296.

<sup>262</sup> Respondent’s Reply, para. 301.

<sup>263</sup> Respondent’s Reply, paras. 298-300.

<sup>264</sup> Claimants’ Counter-Memorial, para. 80.

<sup>265</sup> *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence 19 June 2009 (**Exhibit CL-8(bis)**) (Claimants’ translation).

<sup>266</sup> *Sanum Investments Limited v. The Government of the Lao People’s Democratic Republic* (I), PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013 (**Exhibit CL-9**).

<sup>267</sup> *Sanum Investments v. Lao People’s Democratic Republic* (I), Judgment of the Court of Appeal of Singapore [2016] SGCA 57, 29 September 2016 (**Exhibit RL-130**).

<sup>268</sup> *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017 (**CL-10**).

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the domestic courts of the host State for a finding only on responsibility as the two issues are heavily intertwined.<sup>269</sup> Claimants argue that the absence of a provision comparable to Article 6(2) of the Treaty in the treaties underlying these decisions is irrelevant to both the reasoning these adjudicators advanced on the fork-in-the-road clause, and their other core reasoning leading them to uphold jurisdiction.<sup>270</sup>

170. According to Claimants, the reasoning of the decision rendered by the *Beijing Shougang* tribunal relied on by Respondent,<sup>271</sup> *i.e.*, that arbitration before an *ad hoc* tribunal would be available in cases where an expropriation has been formally proclaimed and, thus, that arbitral consent would not be deprived of *effet utile* if the tribunal's jurisdiction was limited to the quantification of compensation, is not applicable to the case at hand. Claimants state that the text of the treaty underlying that decision vastly differed from the text of the Treaty, which makes the reasoning in that decision inapplicable to the Treaty. In particular, the treaty underlying the decision of the *Beijing Shougang* tribunal only provides for jurisdiction over a dispute involving the amount of compensation for expropriation and not – like the Treaty in the case at hand – also for measures having effect equivalent to expropriation. Claimants argue that, while a decision by a national court on a formally proclaimed expropriation may give *effet utile* to the term “*expropriation*” in the Treaty, the same would not apply to the expression “*measures having effect equivalent to [...] expropriation.*”<sup>272</sup>
171. Claimants further argue that the reasoning of previous decisions based on treaties with an arbitration clause similar to Article 13 of the Treaty, all upholding jurisdiction, is applicable to the interpretation of the Treaty and, thus, confirms the Tribunal's jurisdiction.<sup>273</sup> In that regard, Claimants cite the decision rendered by the *European Media Ventures*<sup>274</sup>

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<sup>269</sup> Claimants' Amended Response, paras. 51-53; Claimants' Counter-Memorial, paras. 82-92.

<sup>270</sup> Claimants' Rejoinder, paras. 304-306.

<sup>271</sup> *China Heilongjiang Int'l Econ. & Technical Coop. Corp. and others v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017 (**Exhibit RL-138**).

<sup>272</sup> Claimants' Counter-Memorial, paras. 93-97; Claimants' Rejoinder, paras. 307-314.

<sup>273</sup> Claimants' Counter-Memorial, paras. 99 *et seq.*

<sup>274</sup> *European Media Ventures SA v. Czech Republic*, UNCITRAL, Award on Jurisdiction, 15 May 2007 (Exhibit CL-111).

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- tribunal.<sup>275</sup> According to Claimants, the *European Media Ventures* tribunal held that in order to determine the amount of compensation, the tribunal would need to know what and how the expropriation or dispossession took place; and since the BIT in that case did not provide a forum to determine the question of responsibility, the tribunal had to determine whether an act of dispossession had occurred in order to prevent the system of investment protection created by the Treaty from being wholly ineffective.<sup>276</sup>
172. In support of this argument, Claimants further refer to the reasoning of the decisions rendered by the English High Court, rejecting an application to set aside the *European Media Ventures* Award on Jurisdiction,<sup>277</sup> and the *Renta 4*<sup>278</sup> tribunal.<sup>279</sup>
173. In addition, Claimants cite three cases where the tribunals accepted jurisdiction under arbitral clauses covering only disputes “*relating to*” or “*concerning*” compensation or its amount and where the underlying treaty did not even contain a fork-in-the-road clause.<sup>280</sup>
174. With regard to the five decisions cited by Respondent, Claimants argue that these decisions are not comparable to the case at hand – in particular because the treaties underlying these decisions do not contain a fork-in-the-road clause. Further, Claimants contend that two of the five decisions cited by Respondent have not ruled on the question of jurisdiction but only addressed this topic in *obiter dicta*. Regarding the remaining three decisions, Claimants state that the arbitration clauses underlying these disputes vastly differ from the arbitration clause in the case at hand, Article 13 of the Treaty, which renders the reasoning provided by these tribunals inapplicable to the Tribunal’s analysis.<sup>281</sup>

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<sup>275</sup> Claimants’ Counter-Memorial, paras. 100 *et seq.*

<sup>276</sup> Claimants’ Counter-Memorial, para. 102; Claimants’ Rejoinder, paras. 315 *et seq.*

<sup>277</sup> *The Czech Republic v. European Media Ventures SA*, 2007 EWHC 2851 (Comm) (**Exhibit CL-133**).

<sup>278</sup> *Renta 4 S.V.S.A and others v. Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections, 20 March 2009, (**Exhibit RL-77**).

<sup>279</sup> Claimants’ Counter-Memorial, paras. 104-108; Claimants’ Rejoinder, paras. 317-319.

<sup>280</sup> Claimants’ Counter-Memorial, para. 109; Claimants’ Rejoinder, paras. 320-322.

<sup>281</sup> Claimants’ Counter-Memorial, paras. 111-114; Claimants’ Rejoinder, paras. 323-329.

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*c. The Tribunal's Analysis*

175. The Tribunal has carefully considered the decisions cited by the Parties and, in particular, the decisions of the *Tza Yap Shum* tribunal,<sup>282</sup> the *Sanum* tribunal,<sup>283</sup> the *Sanum* Court of Appeals in Singapore,<sup>284</sup> and the *BUCG* tribunal<sup>285</sup> cited by Claimants as these decisions reached a deviating conclusion on the scope of arbitral consent. The Tribunal also notes that, while the Parties have referred to multiple decisions considering either the scope of a fork-in-the-road clause or provisions comparable to Article 6(2) of the Treaty, neither of the Parties has presented a decision where an arbitral tribunal was faced with the interpretation of a treaty that contains both such clauses at the same time. Thus, none of the treaties underlying the respective decisions is directly comparable to the Treaty at hand. Nonetheless, the Tribunal has taken the carefully reasoned decisions mentioned above into account and has considered to what extent the reasoning of these decisions may also serve as guidance for the interpretation of the Treaty.
176. As elaborated in paragraphs 105-110 above, in particular, the interplay of Articles 13(3) and 6(2) of the Treaty as well as the drafting history of these provisions show the intention of the Contracting Parties to differentiate between the legality of an expropriatory measure and the resulting amount of compensation – with the arbitration clause in Article 13(3) only referring to the latter. Also, as explained in paragraphs 134 *et seq.* above, the Tribunal is not convinced that this result would deprive an investor of making use of the Treaty's arbitration clause or that the arbitration clause would be left without any *effet utile*. The fork-in-the-road clause in Article 13(3) Sentence 2 does not extend beyond the scope of disputes covered by Article 13(3) Sentence 1 and is thus triggered only where the investor submits a dispute involving the amount of compensation to a domestic court.

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<sup>282</sup> *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009 (**Exhibit CL-8(bis)**) (Claimants' translation).

<sup>283</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic (I)*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013 (**Exhibit CL-9**).

<sup>284</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic (I)*, Judgment of the Court of Appeal of Singapore [2016] SGCA 57, 29 September 2016 (**Exhibit RL-130**).

<sup>285</sup> *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017 (**CL-10**).

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177. The decisions cited by the Parties and the reasoning provided therein serve to confirm the Tribunal's conclusion. In particular, the decisions relied on by Claimants, which considered the fork-in-the-road clauses in the respective treaty as a decisive criterion to affirm their jurisdiction, do not warrant reconsideration of the Tribunal's conclusions. Not only did they lack a provision comparable to Article 6(2) of the Treaty and, together with the drafting history, a clear intent to provide for a segregation of proceedings. In the Tribunal's view, it would also be a circular argument to rely on a fork-in-the-road clause, whose scope is 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. In light of all the arguments addressed above, the Tribunal therefore maintains its conclusion that the scope of Article 13(3) of the Treaty is limited to disputes involving (only) the amount of compensation resulting from expropriation.

**(7) Circumstances of the Treaty's Conclusion**

178. As a final step, the Tribunal will turn to the Parties' submissions on the circumstances of the Treaty's conclusion. Such circumstances are identified as a supplementary means of interpretation pursuant to Article 32 of the Vienna Convention and, thus, relevant only if the primary means of interpretation under Article 31 have not yielded an unambiguous result.

***a. Summary of Respondent's Position***

179. Respondent alleges that the preparatory work of the Treaty, in particular the Treaty's negotiation records, as well as the circumstances of the Treaty's conclusion confirm that Respondent consented only to limited access to international arbitration.<sup>286</sup> Respondent argues that in 1985, when the Treaty was concluded, the PRC took the political position that all disputes related to investments shall be settled by domestic courts, and only, as an exception, agreed in investment treaties that disputes over the amount of compensation for expropriation may be submitted to international arbitration.<sup>287</sup> Respondent states that, based on this position, Respondent only consented to submit to international arbitration

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<sup>286</sup> Respondent's Reply, paras. 217-242.

<sup>287</sup> Respondent's Reply, paras. 219, 230.

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disputes over the amount of compensation for expropriation, excluding disputes involving whether an expropriation has occurred and its lawfulness from the scope of international arbitration.<sup>288</sup>

180. Respondent further contests Claimants' assertion that, at the time of the conclusion of the Treaty in 1985, Chinese law did not recognize the concept of "*Expropriation*" and did not provide for the administrative procedure law to challenge expropriate measures of the Chinese government.<sup>289</sup> Respondent argues that, contrary to Claimants' allegation, the materials presented by the PRC to demonstrate its foreign investment policy are not different from the arbitral consent of the Treaty, as all BITs concluded by the PRC from 1982 to 1992, according to Respondent, protect against both, direct and indirect expropriation.<sup>290</sup> Respondent claims that in every treaty Claimants invoke as protecting solely against direct expropriation, the term "*expropriation*" is defined in the treaties as "*expropriation, nationalization or other measures having effect equivalent to nationalization or Expropriation*" or a similar formulation.<sup>291</sup>

***b. Summary of Claimants' Position***

181. Claimants contend that, contrary to Respondent's interpretation, the circumstances of the Treaty's conclusion establish that the Treaty was intended to afford broad access to international arbitration. This, Claimants argue, follows from the fact that at the time of the conclusion of the Treaty in 1985, Chinese law did not recognize the concept of "*Expropriation*" and did not provide for the administrative procedure law to challenge expropriatory measures of the Chinese government. Claimants argue that this did not change after the enactment of the Law on Wholly Foreign-owned Enterprises in 1986, *i.e.*, after the conclusion of the Treaty, as the law did not recognize a concept of expropriation that would cover the vast majority of cases protected by the Treaty, including the measures equivalent to expropriation at issue in the present arbitration. Claimants contend that the

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<sup>288</sup> Respondent's Reply, paras. 229-232.

<sup>289</sup> Respondent's Reply, paras. 222-228.

<sup>290</sup> Respondent's Reply, paras. 238-240.

<sup>291</sup> Respondent's Reply, para. 239.

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same is true for the Chinese Civil Procedure Law, which does not empower the courts to review administrative disputes but only applies in cases where another law empowers parties to challenge governmental actions before the PRC's domestic courts.<sup>292</sup> Moreover, it was not until after the 2014 revision of the Administrative Procedure Law that a cause of action to challenge an expropriation was added to the law.<sup>293</sup>

182. Claimants further claim that as of 1985, the Chinese political system was unpredictable and its legal system “*weak and rudimentary*” and that, therefore, a number of authorities – including the PRC's own legal authorities – recognized international investment treaties as a means to overcome the mistrust of foreign investors. In this context, Claimants also cite a press release from 1985 by Singapore's Ministry of Trade and Industry announcing that the Treaty provided Singaporean investors with access to international arbitration for disputes against the PRC. It made no reference to any restrictions on access to international arbitration and Claimants argue that, in light of this political and legal climate at the time of conclusion of the Treaty, the Contracting Parties would not have intended a Singaporean investor having to resort to Chinese courts before being able to turn to an arbitral tribunal.<sup>294</sup>
183. Claimants further state that the PRC's unilateral policy positions, in particular its commitment to the principle of national sovereignty, are irrelevant to the interpretation of the Treaty as only the common intentions of both parties at the time of conclusion of the Treaty bear any relevance in this regard. Claimants state that Singapore did not accept that the principle of national sovereignty should govern access to arbitration and notes that the PRC and Singapore neither had nor have a common foreign investment policy. According to Claimants, the materials presented by the PRC to demonstrate its supposed foreign investment policy are different from the arbitral consent of the Treaty and should, thus, not be considered by the Tribunal as none of them – unlike the Treaty – combine the inclusive expression “*involving*” and the expression “*measures having effect equivalent to*

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<sup>292</sup> Claimants' Counter-Memorial, paras. 245-249; Claimants' Rejoinder, paras. 271-283.

<sup>293</sup> Claimants' Rejoinder, para. 282.

<sup>294</sup> Claimants' Counter-Memorial, paras. 250-256; Claimants' Rejoinder, paras. 284-291.

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*nationalization or expropriation*". Claimants further argue that, as both the expression "*expropriation*" and the expression "*measures having effect equivalent to nationalization or expropriation*" appear in the arbitral consent itself, both expressions must be given separate *effet utile* in the arbitral consent. With regard to the writings by Yimin Liu and Ruiqing Qi cited by Respondent, Claimants hold that these writings merely repeat part of the language contained in certain of the PRC's investment treaties and should, thus, not be considered when interpreting the Treaty. Claimants further argue that, as Respondent has not presented these individuals as witnesses, it cannot rely on their writings as a substitute for witness testimony. According to Claimants, the secondary commentary regarding the PRC's investment treaties from the 1980s cited by Respondent is unreliable and irrelevant to the dispute at hand.<sup>295</sup>

***c. The Tribunal's Analysis***

184. The Tribunal has taken note of the Parties' arguments on the further circumstances of the Treaty's conclusion which, as noted at the outset, are considered as a supplementary means of interpretation in accordance with Article 32 of the Vienna Convention. As Article 32 of the Vienna Convention itself makes clear, the Tribunal shall take recourse to supplementary means of interpretation such as the circumstances of a treaty's conclusion only if the interpretation according to Article 31 (i) leaves the meaning ambiguous or obscure or (ii) leads to a result which is manifestly absurd or unreasonable.
185. As outlined above, when interpreted in accordance with Article 31 of the Vienna Convention, the arbitral consent in Article 13(3) of the Treaty does not cover Claimants' claim for the occurrence and (il-)legality of an indirect expropriation. The scope of the arbitration clause is limited to disputes involving the amount of compensation, whereas disputes on the occurrence and legality of an expropriation can only be brought before domestic courts as provided in Articles 13(2) and 6(2) of the Treaty. In the Tribunal's view, the meaning of Article 13(3) is neither ambiguous nor obscure and the interpretation also does not lead to a manifestly absurd or unreasonable result.

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<sup>295</sup> Claimants' Counter-Memorial, paras. 257-267; Claimants' Rejoinder, paras. 292-302.

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186. In any case, the Tribunal has already extensively considered the *travaux* of the BIT in the preceding sections, which the Tribunal finds confirms the interpretation of Article 13(3) of the Treaty arrived at by using the tenets of interpretation in Article 31 of the Vienna Convention. As a result, the Tribunal does not consider it necessary or appropriate to resort to the circumstances of the Treaty's conclusion as a supplementary means of interpretation under Article 32 of the Vienna Convention.

**(8) Conclusion**

187. For the reasons set out above, the Tribunal arrives at the conclusion that when interpreted in accordance with Article 31 of the Vienna Convention, the arbitral consent in Article 13(3) of the Treaty does not cover Claimants' claims for indirect expropriation. The scope of the arbitration clause is limited to disputes involving the amount of compensation, whereas disputes on the occurrence and legality of an expropriation can only be brought before domestic courts as provided in Articles 13(2) and 6(2) of the Treaty.

**B. EXPANSION OF RESPONDENT'S CONSENT TO ARBITRATION BY MEANS OF THE MOST-FAVORED-NATION CLAUSE IN ARTICLE 4 OF THE TREATY**

188. The Tribunal will now turn to the second disputed issue, *i.e.*, whether the MFN clause in Article 4 of the Treaty serves to expand the arbitral consent to cover both, Claimants' Expropriation Claim (given that it is not covered by Article 13(3) of the Treaty) and its Non-Expropriation Claims. Article 4 of the Treaty reads as follows:

*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.*<sup>296</sup>

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<sup>296</sup> Treaty (EN), Article 4, (**Exhibit C-1**). Respondent has submitted a different version of the PRC-Singapore BIT as **Exhibit RL-143**, which does not, however, deviate from the version quoted above.

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**(1) Summary of Respondent's Position**

189. Respondent submits that the limits of its consent to arbitration cannot be extended by the MFN clause contained in Article 4 of the Treaty.<sup>297</sup> In this regard, Respondent argues that MFN provisions, while as a matter of principle recognized in case law, cannot operate to import the consent to arbitration from other treaties.<sup>298</sup> In Respondent's view, this general principle is reinforced by the drafting history and objective of the carefully negotiated dispute resolution mechanisms provided for in the PRC-Singapore BIT as well as the wording of the MFN clause.<sup>299</sup> Respondent contends, *inter alia*, that Article 4 of the Treaty grants MFN treatment only in respect of "*investments*" rather than procedural rights and is geographically limited to the treatment granted by the host State in its territory whereas international arbitration is not an activity inherently linked to the territory of one state.<sup>300</sup>
190. Respondent further contends that the term "*treatment*" in Article 4 of the Treaty refers only to substantive protection.<sup>301</sup> Arguing that the MFN treatment is not granted to both investments *and* investors, but only to investments, Respondent contends that jurisdictional rights, which are exclusively conferred to investors, are precluded from the application scope of the MFN clause.<sup>302</sup>
191. Respondent alleges that, as the English and Chinese texts of Article 4 of the Treaty are inconsistent, the rule of interpretation under Article 33(4) of the Vienna Convention shall apply; and, as the Chinese text is inaccurate, the English text shall prevail.<sup>303</sup> Respondent claims that consequently, the terms "*in its territory*" are not to be understood as a modifier to "*investment*" but as a modifier to "*subject investments [...] to treatment*", limiting the

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<sup>297</sup> Respondent's Memorial, paras. 294 *et seq.*

<sup>298</sup> Respondent's Memorial, paras. 296-302; Respondent's Reply, paras. 306-309.

<sup>299</sup> Respondent's Memorial, paras. 303-318.

<sup>300</sup> Respondent's Memorial, paras. 305-310.

<sup>301</sup> Respondent's Reply, paras. 312-313, 332.

<sup>302</sup> Respondent's Reply, paras. 313-316.

<sup>303</sup> Respondent's Reply, paras. 317-322.

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scope of MFN treatment to the territory of the Contracting Party accepting the investment and thereby precluding international arbitration from the scope of MFN treatment.<sup>304</sup>

192. Maintaining that Singaporean investors are obligated to submit disputes concerning the legality of an expropriation to the PRC's courts under Article 6(2) of the Treaty, Respondent alleges that Claimants cannot rely on the MFN clause to submit the dispute to the Tribunal, since Article 6(2) of the Treaty is precluded from the application scope of Article 4 of the Treaty.<sup>305</sup> Citing the cases of *ICS v. Argentina*,<sup>306</sup> *Suez v. Argentina*<sup>307</sup> and *Kiliç v. Turkmenistan*,<sup>308</sup> Respondent further contends that the explicit exclusion of matters under Articles 5, 6 and 11 of the Treaty from MFN treatment does not mean inclusion of all matters and therefore does not indicate that international dispute settlement should be included.<sup>309</sup> Besides, Respondent contests Claimants' assertion that, since the scope of MFN treatment in Article 4 of the Treaty has not been limited to the fair-and-equitable treatment clause, as originally proposed by the PRC's draft, the MFN treatment must apply to the entire Treaty.<sup>310</sup>
193. Respondent states that, considering the balance of rights between the Parties and their common intention, the restrictive interpretation of the MFN Clause is also consistent with the object and purpose of the Treaty.<sup>311</sup>
194. Regarding the *UP and CD Holding v. Hungary* case<sup>312</sup> cited by Claimants, Respondent argues that the relevant text of the BIT invoked in that case is fundamentally different from

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<sup>304</sup> Respondent's Reply, paras. 319-323.

<sup>305</sup> Respondent's Reply, para. 325.

<sup>306</sup> *ICS Inspection and Control Services Ltd (United Kingdom) v. The Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, para. 313 (**Exhibit RL-95**).

<sup>307</sup> *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006 (**Exhibit CL-186**).

<sup>308</sup> *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013 (**Exhibit RL-107**).

<sup>309</sup> Respondent's Reply, paras. 326-327.

<sup>310</sup> Respondent's Reply, para. 331.

<sup>311</sup> Respondent's Reply, paras. 328-330.

<sup>312</sup> *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 3 2016 (**Exhibit CL-11**).

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that of the Treaty. According to Respondent, it is, in addition, of limited reference value, being an isolated and exceptional individual case compared to a large number of precedents in which tribunals held that the MFN clause could not be applied to expand the Contracting Parties' consent to arbitration.<sup>313</sup>

195. Respondent further invokes the irrelevance of the distinctions drawn by Claimants between the present case and the cases cited by Respondent to demonstrate the consensus among investment arbitration tribunals that an MFN clause in a basic treaty cannot be used to expand the jurisdiction of a tribunal. Respondent argues that the cited cases prove the existence of the foresaid consensus and are of reference value in the present dispute.<sup>314</sup>

**(2) Summary of Claimants' Position**

196. Claimants argue that the MFN clause in Article 4 of the Treaty, based on its purpose to ensure that the guarantees offered to foreign investors from one State evolve to match those later offered to foreign investors from other States, also applies to provisions for the settlement of investment disputes. Whereas Respondent states that MFN clauses are generally inapplicable to dispute resolution provisions, and in particular, that the text of Article 4 and the circumstances surrounding the conclusion of the Treaty do not justify the expansion of its consent given in the Treaty, Claimants argue that this interpretation is incorrect for four reasons.<sup>315</sup>
197. First, Claimants argue that ordinary meaning of Article 4 of the Treaty shows that it applies to expand the scope of jurisdiction. According to Claimants, the term “*treatment*”, used in both the English and the Chinese text of Article 4 of the Treaty, has a broad ordinary meaning and includes both substantive matters and dispute settlement.<sup>316</sup> Whereas Respondent cites the decision of the tribunal in the case *Wintershall v. Argentina*,<sup>317</sup> Claimants argue that the reasoning of this case is not applicable to the case at hand as the

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<sup>313</sup> Respondent's Reply, paras. 334-337.

<sup>314</sup> Respondent's Reply, paras. 333-342.

<sup>315</sup> Claimants' Counter-Memorial, paras. 270-274.

<sup>316</sup> Claimants' Counter-Memorial, paras. 280 *et seq.*

<sup>317</sup> *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 (Exhibit RL-74).

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Argentina-Germany BIT underlying this case contained two MFN clauses entirely different from Article 4 of the Treaty.<sup>318</sup> With regard to the press release by the Singapore Ministry of Trade and Industry cited by Respondent, according to which a purpose of the Treaty “*is to ensure fair and equitable treatment of investment by each party,*” Claimants argue that nothing in the Treaty or the press release suggests that fair and equitable has a “*close link*” to MFN treatment.<sup>319</sup>

198. Claimants further hold that the expression “*Subject to Articles 5, 6 and 11*” provides an exhaustive list of exceptions from the MFN clause. The arbitration clause in Article 13 of the Treaty would have been included in that list if, under the Treaty, that clause should have been excluded from the MFN treatment. By not excluding the dispute resolution clause from the list in Article 4, the Contracting Parties made a deliberate choice to include it in the scope of the MFN treatment. According to Claimants, neither the publication by Professor Schreuer nor the case law cited by Respondent supports its argument that the principle of *expressio unius est exclusio alterius* is not applicable in the case at hand.<sup>320</sup>
199. Claimants further contend that the exclusion of Article 6 of the Treaty has no relevance to the jurisdiction of the Tribunal established under Article 13 as Article 6(2) merely provides that such measures by the host State “*may at the request of the national or company affected, be reviewed by the competent court*”, thereby establishing a substantive right of due process for foreign investors but no obligation to request review by domestic courts.<sup>321</sup>
200. Claimants further contend that Article 5 of the Treaty, which excludes “*treatment, preference or privilege*” connected to certain regional arrangements, does not allow for the conclusion that the MFN clause in Article 4 merely concerns substantive protections. Claimants state that, as a previous and more restrictive draft of the MFN clause, which only provided for limited protection regarding the fair-and-equitable treatment clause, was not accepted during the negotiations of the Treaty, the MFN clause as included in the final text

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<sup>318</sup> Claimants’ Rejoinder, paras. 340-343.

<sup>319</sup> Claimants’ Rejoinder, paras. 344-348.

<sup>320</sup> Claimants’ Counter-Memorial, paras. 282 *et seq*; Claimants’ Rejoinder, paras. 368-373.

<sup>321</sup> Claimants’ Counter-Memorial, para. 285.

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- applies to the entire Treaty, subject to only a few explicit exceptions that do not include the dispute resolution clause.<sup>322</sup>
201. In addition, Claimants argue that, in view of Article 33(4) of the Vienna Convention, the term “*territory*” does not limit the scope of the “*treatment*” to the territory of the Contracting States, thereby eliminating “*international*” arbitration from the scope of MFN treatment as the expression “*within its territory*” merely modifies the term “*investments*” and not the term “*treatment*”. According to Claimants, the Chinese version of Article 4 of the Treaty does not contain a drafting error and – as there is nothing “*manifestly absurd or unreasonable*” in the Chinese text – the ordinary meaning of the text may not be distorted by way of supplementary means of interpretation. Claimants hold that – as there is no divergence between the Chinese and English texts – the argument by Respondent based on Article 33(4) of the Vienna Convention must be rejected.<sup>323</sup>
202. Claimants further argue that, based on the general concept of the MFN clause, the express terms of the Treaty and the decision by numerous other investment tribunals, MFN treatment must be granted to both investments and investors.<sup>324</sup>
203. Claimants contend that the object and purpose of the Treaty, *i.e.*, promotion of foreign investment through access to international arbitration, also confirms that the MFN clause in Article 4 of the Treaty serves to expand the Tribunal’s jurisdiction. In particular, Claimants argue, the application of the MFN clause to jurisdictional matters would not endanger mutual benefit and prosperity for the Contracting Parties.<sup>325</sup>
204. In addition, citing the cases of *UP and CD Holding v. Hungary*<sup>326</sup> and *Gas Natural v. Argentina*<sup>327</sup> as well as various eminent legal scholars such as Professor Schreuer,

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<sup>322</sup> Claimants’ Counter-Memorial, paras. 286-290.

<sup>323</sup> Claimants’ Counter-Memorial, paras. 291-299; Claimants’ Rejoinder, paras. 356-367.

<sup>324</sup> Claimants’ Rejoinder, paras. 349-355.

<sup>325</sup> Claimants’ Counter-Memorial, para. 300; Claimants’ Rejoinder, paras. 374-380.

<sup>326</sup> *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016 (**Exhibit CL-11**).

<sup>327</sup> *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction, 17 June 2005 (**Exhibit CL-188**).

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Claimants contend that with regard to the current investment case law, there is no general presumption or prohibition against the application of MFN clauses to dispute resolution clauses and that tribunals generally admit that MFN clauses can be used to determine the scope of a State's consent to arbitrate.<sup>328</sup>

205. In respect of the case law cited by Respondent, Claimants argue that there is no such thing as *the* MFN clause, as each clause needs to be examined individually and that it is, thus, unnecessary for the Tribunal to consider cases interpreting MFN clauses that are readily distinguishable from the one in the present Treaty.<sup>329</sup>
206. Claimants further argue that the exchange of letters between the Contracting Parties at the time of the Treaty's conclusion demonstrates that the term "*treatment*" in the MFN clause covers access to international arbitration and that Respondent was, in fact, aware of the possibility of MFN treatment being applied to the scope of investment disputes.<sup>330</sup>

**(3) The Tribunal's Analysis**

207. As noted at the outset of the Tribunal's reasoning, an arbitral tribunal has jurisdiction only if, and to the extent that, the Parties have consented thereto in a clear and unequivocal manner. This fundamental approach must also be considered when assessing whether the arbitral consent of one party can be expanded by virtue of an MFN clause.
208. In this regard, the Tribunal is generally in agreement with the arbitral tribunal in the case of *Plama v. Bulgaria* which held:

*Conversely, dispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context. [...] When concluding a multilateral or bilateral investment treaty with specific dispute resolution provisions, states cannot be expected to leave those provisions to future (partial) replacement by*

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<sup>328</sup> Claimants' Counter-Memorial, paras. 301-308; Claimants' Rejoinder, paras. 388-402.

<sup>329</sup> Claimants' Counter-Memorial, paras. 309 *et seq.*; Claimants' Rejoinder, paras. 399-402.

<sup>330</sup> Claimants' Rejoinder, paras. 381-387.

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*different dispute resolution provisions through the operation of an MFN provision, unless the States have explicitly agreed thereto (as in the case of BITs based on the UK Model BIT).*<sup>331</sup>

209. Likewise, the tribunals in the cases of *European American Investment Bank AG v. The Slovak Republic* and *Berschader v. The Russian Federation* held that an MFN clause is only capable of expanding the scope of an arbitration clause where the terms of the respective treaty clearly and unambiguously provide for such an expansion or where it can otherwise be clearly inferred that this was the intention of the Contracting Parties.<sup>332</sup> However, if such a clear and unambiguous stipulation on the scope of the MFN clause is lacking, one cannot – on the basis of an MFN clause such as the one in the present case – assume “that the dispute resolution provisions must be deemed to be incorporated.”<sup>333</sup> This applies, in particular, where, as in the present case, any such intention of the Contracting Parties also cannot be inferred otherwise – to the contrary, as will be set out in paragraphs 216 and 217 below.
210. Whereas the tribunal in the case of *UP and CD Holding v. Hungary*<sup>334</sup> cited by Claimants found that the MFN clause in the underlying treaty did apply to and served to enlarge the scope of the arbitration clause in that treaty, the Tribunal is wary of the consequences that would follow from the reasoning put forward in that decision. In particular, it would mean that the scope of consent to arbitration – as the flipside of waiving immunity from being sued in international proceedings – could be expanded massively and also be interpreted differently for each contracting State, depending on the scope of consent included in other treaties concluded by that State. In the Tribunal’s view, this would place at risk the

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<sup>331</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, paras. 207, 212 (**Exhibit RL-54**).

<sup>332</sup> *European American Investment Bank AG (Austria) v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, paras. 450-451 (**Exhibit RL-0100**); *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, para. 206 (**Exhibit RL-62**).

<sup>333</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 203 (**Exhibit RL-54**).

<sup>334</sup> *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016 (**Exhibit CL-11**).

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importance attached to the concept of consent as the basis for arbitration proceedings in general and investor-State proceedings in particular.

211. Therefore, the Tribunal rather concurs with the view expressed by the tribunals cited above that 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 this effect.
212. In the case at hand, the Treaty does not provide for such expansion of the arbitration clause by virtue of the MFN clause. First, pursuant to its ordinary meaning, the wording of Article 4 of the Treaty cannot be considered an unambiguous expansion of the arbitration clause. Article 4 reads as follows:

*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.*<sup>335</sup>

213. Whereas Claimants argue that the use of the term “*treatment*” used in both the English and the Chinese text of Article 4 Treaty has a broad ordinary meaning and includes both substantive matters and dispute settlement, the Tribunal considers that the mere use of this term is not sufficient to assume the Contracting Parties’ intention to apply the MFN clause to the scope of the arbitration clause in Article 13(3) of the Treaty. In particular, the term “*treatment*” which refers to the “*investment*” protected by the Treaty cannot be considered to unambiguously apply to procedural provisions such as the dispute settlement clause in Article 13 of the Treaty.
214. The same is true for the reference to Articles 5, 6 and 11 of the Treaty as explicit exceptions in the MFN clause (while leaving Article 13(3) of the Treaty unmentioned). Not only is there an explicit exception for Article 6 of the Treaty, which contains the expropriation standard. There is no indication in Article 4 or elsewhere in the Treaty that the exceptions specifically mentioned in Article 4 were intended to identify anything but the substantive

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<sup>335</sup> Treaty (EN), Article 4, (**Exhibit C-1**). Respondent has submitted a different version of the PRC-Singapore BIT as **Exhibit RL-143**, which does not, however, deviate from the version quoted above.

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protection standards that should not be subject to the MFN clause. In the Tribunal's view, this reference is not sufficient to extend the MFN clause to the dispute settlement provision in Article 13 of the Treaty.

215. This is true, in particular, when interpreting the wording in its context as required under Article 31(1) of the Convention. As seen above under Section VII.A, the Contracting Parties to the Treaty have negotiated and agreed on an arbitration clause with a carefully negotiated and limited scope, *i.e.*, encompassing only disputes over the amount of compensation. They cannot be presumed to have agreed that the diligently negotiated scope of the arbitration clause could be enlarged without any additional agreement but rather based on subsequently negotiated arbitration clauses from unrelated treaties negotiated in an unrelated context.
216. That such an expansion of the arbitration clause by virtue of the MFN clause was, in fact, not intended by the Contracting Parties is confirmed by the exchange of letters Ib and IIb dated 21 November 1985 attached to the Treaty which reads:<sup>336</sup>

*[...] Excellency, With reference to Article 13 of the Agreement between the Government of the Republic of Singapore and the Government of the People's Republic of China concerning the Promotion and Protection of Investments signed today, I have the honour to state that it is the understanding between the parties that as soon as the Government of the People's Republic of China becomes a party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March, 1965 ("the Convention") the Contracting Parties shall promptly enter into negotiations on the possibility to expand the area of investment disputes which may be submitted for conciliation and arbitration by the International Centre for Settlement of Investment Disputes established by the Convention. In relation to the expanded area agreed upon between the Contracting Parties following such negotiations, the People's Republic of China shall accord the Republic of Singapore treatment no less favourable than that which would be accorded by it in the same circumstances to any other State. The new provision agreed upon between the Contracting Parties shall replace Article 13. [...]*

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<sup>336</sup> Treaty (EN), pp. 9, 10. (**Exhibit C-1**). Respondent has submitted a different version of the PRC-Singapore BIT as **Exhibit RL-5**, which, however, does not deviate in substance from the version quoted above.

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*For and on behalf of the Government of the Republic of Singapore*  
[...]

*I confirm the above understanding between the two parties. [...] For*  
*and on behalf of the Government of the People's Republic of China*  
[.]

217. From this communication, it is clear in the Tribunal's view that Singapore and the PRC shared the common understanding that any expansion of the scope of the arbitration clause in Article 13(3) of the Treaty would require an explicit and separate agreement by the Contracting Parties.
218. In the Tribunal's view, this confirms that the reference to Articles 5, 6 and 11 of the Treaty as the only explicit exceptions to the MFN clause was not intended to be read as including the dispute settlement provision within the scope of the MFN clause. In particular, in light of the negotiation history of both Articles 13(3) and 6(2) as well as the exchange of letters mentioned above under paragraph 216, the Tribunal cannot draw the conclusion from this list of substantive protections to which the MFN clause should not apply that the MFN clause should, *e contrario*, apply to the scope of consent as contained in Article 13(3) of the Treaty.
219. For the reasons stated above, the Tribunal concludes that the scope of the arbitration clause in Article 13(3) cannot be expanded by virtue of the MFN clause in Article 4 of the Treaty. This applies to both Claimants' Expropriation Claim and its Non-Expropriation Claims.

**VIII. CONCLUSION**

220. In conclusion, Respondent's arbitral consent provided in Article 13(3) of the Treaty does not cover Claimants' Expropriation and Non-Expropriation Claims (these claims are described in paragraph 36 above). Rather, the scope of the arbitration clause is limited to disputes regarding the amount of compensation. The scope of Respondent's consent also cannot be expanded by virtue of the MFN clause in Article 4 of the Treaty.
221. Consequently, the Tribunal does not have jurisdiction over any of Claimants' claims.

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**IX. DECISION ON COSTS**

222. On 20 August 2022, both Parties submitted their statements of costs, reflecting the costs, fees and expenses they incurred in this arbitration.

223. Pursuant to its Statement of Costs, Claimants have incurred the following costs:

- Fees, costs and expenses related to Respondent's Bifurcated Jurisdictional Objection:
  - Legal fees for the services of its external legal counsel Dechert: USD 2,642,448
  - Costs and expenses for experts and other services (transportation, lodging, translation, etc.): USD 228,265
- Fees, costs and expenses not related to Respondent's Bifurcated Jurisdictional Objection:
  - Legal fees for the services of its former external legal counsel King & Spalding: USD 1,795,383
  - Costs and expenses for experts and other services (transportation, lodging, translation, etc.): USD 387,777

224. Respondent in turn has incurred the following costs:

- Costs of external legal representation: CNY 6,296,130
- Disbursements (travel costs, outsourced services, etc.): CNY 55,272.48

225. Article 13(10) of the Treaty provides:

*Each party concerned shall bear the cost of its own arbitrator and its representation in the arbitral proceedings. The cost of the Chairman in discharging his arbitral function and the remaining costs of the tribunal shall be borne equally by the parties concerned. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two parties, and this award shall be binding on both parties.*

**AWARD**

226. This provision gives the Tribunal the discretion to allocate costs of the arbitration, including representation fees and other costs, between the Parties as it deems appropriate.<sup>337</sup>
227. As the Tribunal grants Respondent's Bifurcated Jurisdictional Objection and thereby finds that it does not have jurisdiction over any of Claimants' claims, Claimants' claims are dismissed in their entirety. Against this background, the Tribunal considers it justified that Claimants shall bear in full the costs of the arbitration as well as the costs incurred by Respondent in connection with this arbitration.
228. The costs of this arbitration amount to the following (in USD):

Arbitrators' fees and expenses	
Prof. Dr. Klaus Sachs	290,477.60
Dr. Stanimir A. Alexandrov	75,875.00
Prof. Albert Jan van den Berg	97,770.81
ICSID's administrative fees	84,000.00
Direct expenses	12,694.61
<b><u>Total</u></b>	<b><u>560,818.02</u></b>

229. The costs incurred by Respondent in connection with this arbitration, consisting of legal fees and disbursements, amount to CNY 6,351,402.48.
230. In consequence, Claimants shall reimburse to Respondent a total amount of USD 280,409.01, reflecting the expended portion of the advance on costs paid by Respondent, as well as CNY 6,351,402.48.
231. Respondent requests that it be awarded post-award interest on any amount of costs awarded to it at a reasonable rate until full payment of those amounts is made. The Tribunal considers it appropriate to award interest on the amount of costs that Claimants are ordered

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<sup>337</sup> See also Procedural Order No. 1, Section 6.2; Claimants' Memorial, para. 332 ("The Tribunal has the power to award the Claimants all its costs, expenses and legal fees pursuant to Article 13(10) of the Treaty").

**AWARD**

to reimburse at a rate corresponding to the US Prime Rate, compounded annually. Such interest shall start to accrue from the 90<sup>th</sup> day after the date of dispatch of this Award.

**X. DECISION BY THE ARBITRAL TRIBUNAL**

232. For the above reasons, the Tribunal hereby decides as follows:

- I. the PRC's Bifurcated Jurisdictional Objection is granted. The Tribunal finds that it does not have jurisdiction over any of Claimants' claims.
- II. Claimants shall bear the costs of the arbitration, *i.e.*, the fees and expenses of the members of the Tribunal as well as ICSID's administrative fees and direct expenses, in the total amount of USD 560,818.02, in full. Consequently, Claimants shall reimburse to Respondent an amount of USD 280,409.01.
- III. Claimants shall further bear the costs incurred by Respondent in connection with these arbitration proceedings and, thus, reimburse to Respondent an amount of CNY 6,351,402.48.
- IV. Claimants shall pay to Respondent post-award interest on the amount of costs to be reimbursed under II and III as from the 90<sup>th</sup> day following the date of dispatch of this Award until the date of payment at a rate corresponding to the US Prime Rate, compounded annually.
- V. All further requests raised by the Parties are denied.

**AWARD**

*Place of Arbitration:* Geneva, Switzerland

*Date:* 16 February 2023

(Signed)

(Signed)

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Dr. Stanimir A. Alexandrov  
Member of the Tribunal  
*Subject to the attached Dissenting Opinion*

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Prof. Albert Jan van den Berg  
Member of the Tribunal

(Signed)

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Prof. Dr. Klaus Sachs  
President of the Tribunal

# ANNEX 1

## INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**AsiaPhos Limited and Norwest Chemicals Pte Limited  
(the “Claimants”)**

**v.**

**People’s Republic of China  
(the “Respondent”)**

**(ICSID Case No. ADM/21/1)**

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**DISSENTING OPINION**

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Stanimir A. Alexandrov

16 February 2023

**ANNEX 1- DISSENTING OPINION**

**I. INTRODUCTION**

1. Although I have the greatest respect for my two colleagues (the “Majority”), it is my view that they have erred in interpreting the relevant provisions of the *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* (the “China-Singapore BIT” or “Treaty”),<sup>1</sup> and, in particular, the scope of Respondent’s consent under Article 13(3) of the Treaty. The correct interpretation is that the scope of Respondent’s consent to arbitration under the Treaty covers Claimants’ claims for indirect expropriation.

**II. THE CORRECT INTERPRETATION OF ARTICLE 13(3)**

2. Article 13(3) must be interpreted pursuant to the rules provided in Article 31 (and, if necessary, as a supplementary means of interpretation, Article 32) of the Vienna Convention on the Law of Treaties of 23 May 1969 (the “Vienna Convention”).
3. Article 31 of the 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.*

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<sup>1</sup> 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 signed on 21 November 1985 (Treaty (EN), **Exhibit C-0001/Exhibit RL-0143**).

**ANNEX 1- DISSENTING OPINION**

*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. The first step, therefore, is to interpret Article 13(3) “*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.*”

**A. THE ORDINARY MEANING OF ARTICLE 13(3) OF THE TREATY, IN ITS CONTEXT, AND IN LIGHT OF THE OBJECT AND PURPOSE OF THE TREATY**

5. Article 13(3) of the Treaty reads:

*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 negotiations 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.<sup>2</sup>*

**(1) The Ordinary Meaning of Article 13(3) of the Treaty**

6. The term “involving” is not a defined term in the Treaty. Therefore, one has to look at the ordinary meaning of the verb “involve,” which is defined *inter alia* as: “*to include; to*

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<sup>2</sup> Treaty (EN) (Exhibit C-0001/Exhibit RL-0143).

**ANNEX 1- DISSENTING OPINION**

*contain*”;<sup>3</sup> “*to have within or as part of itself*”;<sup>4</sup> “*to include as a necessary circumstance, condition, or consequence; ... to include, contain or comprehend within itself or its scope*”;<sup>5</sup> “*include, contain, take in, embrace*”;<sup>6</sup> “*to include something as a necessary part of an activity, event, or situation*”.<sup>7</sup> It is thus clear from the ordinary meaning of the term “involving” that it is inclusive rather than limiting. It captures disputes that involve – but are not limited to – the amount of compensation resulting from expropriation. Indeed, had the provision been intended to allow that only disputes about the amount of compensation could be submitted to international arbitration, it would have been drafted differently, *e.g.*, “disputes only/solely about” or “disputes limited to” the amount of compensation. In other words, the provision would have been exclusive (“solely,” “only,” “limited to”) rather than inclusive (“involving”). A phrase such as “a dispute about the amount of compensation resulting from expropriation” might be interpreted as neutral, neither restrictive nor inclusive. But a dispute about the amount of compensation is not the same as a dispute involving the amount of compensation. It is obvious that a dispute that “involves” the amount of compensation may also involve other elements, such as whether the property was expropriated.

7. Respondent argues that the numerous definitions of the word “involving” “*manifest the limited help of dictionary definition in interpreting the term.*”<sup>8</sup> Quite the opposite, the numerous dictionary definitions are very helpful: all of them demonstrate that the word “involving” is inclusive rather than exclusive.
8. Respondent’s additional argument is that the word “involving” is neutral and, therefore, the interpretation should focus on the phrase “*the amount of compensation resulting from expropriation.*” (Paragraph 62 of the Award.) Respondent argues that its treaty practice in 1980s and early 1990s proves that “involving” is not critical to construe the arbitral

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<sup>3</sup> Oxford Dictionary (**Exhibit CL-0141**).

<sup>4</sup> Merriam-Webster Dictionary (**Exhibit CL-0142**).

<sup>5</sup> Random House Dictionary (**Exhibit CL-0143**).

<sup>6</sup> Collins English Dictionary (**Exhibit CL-0144**).

<sup>7</sup> Macmillan Dictionary (**Exhibit CL-0145**).

<sup>8</sup> **Exhibit RD-0002**, p. 12.

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consent contained in the Treaty. According to Respondent, the use of the expressions “limited to,” “over” or “concerning” in the different treaties cited by Claimants and the term “involving” used in this Treaty equally demonstrate the intention of the respective contracting states to narrow arbitral consent. This policy issue, Respondent argues, directly touches upon the principle of national sovereignty to which the PRC attached overriding importance at that time, “*which would have made it impossible [for the PRC] to conclude treaties providing for such narrow arbitral consent with other countries while – almost at the same time – concluding the Treaty with Singapore providing for unrestricted arbitral consent.*” (Paragraph 62 of the Award.)

9. The flaws in Respondent’s position are manifest. First, Respondent seeks to establish the ordinary meaning of Article 13(3) of the Treaty in relation to other treaties with other parties. Such other treaties are not even “context” for the purposes of the Vienna Convention. If anything, they demonstrate that the negotiators knew how to draft a limiting provision yet chose not to include such a limiting provision in this Treaty. Second, Respondent seeks to determine the ordinary meaning of the word “involving” in relation to what it says were important policy issues at the time, which violates the Vienna Convention rules of treaty interpretation. Third, Respondent’s only argument that relates specifically to the ordinary meaning of the word “involving” is that it is “neutral”; however, (i) this argument remains unsupported; and (ii) Respondent contradicts its own argument by alleging that the term should be read narrowly to restrict the scope of consent.
10. Notably, at the hearing, Respondent argued that “disputes involving” means “disputes over” or “disputes concerning”; thus, Respondent contended, the disputes to be submitted to international arbitration only covered or only concerned the amount of compensation. Leaving aside the point that “over” is not the same as “solely over” and “concerning” is not the same as “concerning only,” Respondent’s argument was defeated by Respondent itself. Respondent showed in its opening statement (slide 27)<sup>9</sup> and in its closing statement (slide 11)<sup>10</sup> provisions of other Chinese BITs using the words “disputes over” or “disputes

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<sup>9</sup> Respondent’s Opening Presentation, p. 27 (**Exhibit RD-0001**).

<sup>10</sup> Respondent’s Closing Presentation, p. 11 (**Exhibit RD-0002**).

ANNEX 1- DISSENTING OPINION

concerning” the amount of compensation. Respondent’s own presentation demonstrated, however, that a different Chinese word was used in those other BITs. As Respondent showed on its closing slide 11, the Chinese text of this Treaty, which, pursuant to the Treaty, is equally authentic, uses the term “关于 (*guan yu*)” translated as “involving” while the other BITs that Respondent referred to use the term “有关 (*you guan*).”<sup>11</sup> Clearly, the meaning of those other BITs that may allow resort to arbitration to disputes “over” or “concerning” the amount of compensation is different from the meaning of the Treaty at issue here, which uses a different word both in English (“involving”) and in Chinese (“关于” rather than “有关”). Had the Chinese negotiators intended to use a neutral Chinese term in this Treaty, they would have used the term “有关 (*you guan*)” (“over” or “concerning” in English); instead, they used the term “关于 (*guan yu*)” (“involving” in English).

11. The Majority has agreed with Respondent, however, that the meaning of the term “involving” is “*neutral*,” which in the view of the Majority means that it is “*non-conclusive*.” (Paragraph 83 of the Award.) Thus, the Majority “*does not consider the meaning of the term ‘involving’ as being conclusive for determining the scope of the arbitration clause. Rather, it has to be considered in conjunction with the other terms that form the wording of the arbitration clause in Article 13(3) of the Treaty.*” (Paragraph 83 of the Award.) I disagree with this conclusion for several reasons.
12. First, the Majority does not perform its own analysis of the ordinary meaning of the word “involving.” It does not look at dictionary definitions or any other sources to determine the ordinary meaning of “involving.” It simply agrees with two other decisions (one of the Court of Appeal of Singapore<sup>12</sup> and the other of the tribunal in the case of *Beijing Shougang v. Mongolia*<sup>13</sup>) that the term “involving” is “*not clear in itself as the ordinary meaning to be determined under Article 31(1) of the Vienna Convention can be both broad and narrow*

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<sup>11</sup> Respondent’s Closing Presentation, p. 11 (**Exhibit RD-0002**).

<sup>12</sup> *Sanum Investments Limited v. The Government of the Lao People’s Democratic Republic*, Judgment of the Court of Appeal of Singapore [2016] SGCA 57, 29 September 2016, para. 126 (**Exhibit RL-0130**).

<sup>13</sup> *China Heilongjiang International Economic & Technical Cooperative Corp et al v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, para. 439 (**Exhibit RL-0138**).

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*depending on the context in which it is used.*” (Paragraph 82 of the Award.) Leaving aside the fact that the Majority does not address decisions and awards that have reached the opposite conclusion, as discussed in section II.B below, agreeing with prior case law is not a substitute for performing a tribunal’s own analysis. Notably, the Majority recognizes that the term “involving” used in Article 13(3) is broader than the expressions “over” or “limited to” “*which would unequivocally limit the scope of the arbitration clause to disputes concerning the amount of compensation only*” (paragraph 82 of the Award) yet in essence the Majority interprets the provision to mean exactly that: “over” or “limited to.”

13. Second, the Majority – without establishing the ordinary meaning of “involving” – moves on to discuss the expression “the amount of compensation,” which it finds “*more informative to determine the scope of the arbitration clause.*” (Paragraph 84 of the Award.) This expression provides context for the interpretation of the term “involving” (as discussed in the next section), but it is no substitute for determining the ordinary meaning of that term.
  
14. Third, the Majority – contrary to the Vienna Convention rules of interpretation – relies for its conclusion on the drafting history of Article 13(3) of the Treaty. As a result, the Majority concludes that “*the ordinary meaning of the arbitration clause in Article 13(3) of the Treaty supports the interpretative approach taken by Respondent, i.e., that its arbitral consent only refers to the question of the amount of compensation that is awarded to an investor resulting from expropriatory measures.*” (Paragraph 89 of the Award.) The Majority refers to the drafting history for the purpose of determining the ordinary meaning of the provision before it discusses the context and the object and purpose pursuant to Article 31(1) of the Vienna Convention. This is problematic: Article 32 of the Vienna Convention allows resort to supplementary means of interpretation, such as the drafting history of the Treaty, where *inter alia* it is necessary to confirm the meaning of the interpretation that has been reached by applying Article 31(1). The Majority, however, resorts to the drafting history *before* it has completed its analysis pursuant to Article 31(1), in particular before discussing the context and the object and purpose of the Treaty.

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15. Fourth, the Majority focuses on the phrase “the amount of compensation,” which it considers more important than the term “*involving*.” (Paragraph 84 of the Award.) I understand the logic of the Majority to be as follows: If the term “involving” is inclusive rather than limiting, why is the “amount of compensation” the only element “included” and why are no other elements of a dispute (or types of disputes) mentioned? The only explanation, in the view of the Majority, is that the term “involving” must be read as “limited to” in the context of the phrase “the amount of compensation.” In the view of the Majority, if the term “involving” did not mean “limited to” then the words “the amount of” would be superfluous. (Paragraph 84 of the Award.) The Majority dismisses the argument advanced by Claimants that the limitation relates to disputes not “involving” “the amount of compensation resulting from expropriation” (see paragraph 86 of the Award), *i.e.*, that what is excluded are: (i) claims for restitution or declaratory relief; and (ii) disputes about the amount of compensation resulting from other violations of the Treaty different from expropriation. This latter interpretation of the ordinary meaning of Article 13(3), however, is the only one that is consistent with the clear and unambiguous ordinary meaning of the term “involving,” as well as with the context and the object and purpose of the Treaty, as discussed below.

**(2) The Context**

16. The conclusion that the ordinary meaning of the term “involving” is inclusive rather than exclusive, and that the scope of Article 13(3) is not limited to disputes only about the amount of compensation for expropriation, is confirmed by the context. What qualifies as context is defined in Article 31(2) of the Vienna Convention. It includes the text of the Treaty (as well as other elements – agreements and instruments between the parties related to the Treaty – that are not relevant here). The context, *i.e.*, the text of the Treaty, supports the ordinary meaning of the term “involving” as inclusive rather than exclusive for the following reasons.

17. First, this interpretation of Article 13(3) is consistent with the text and structure of Article 13. The relevant provisions are Article 13(1) to Article 13(3). The remaining provisions

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of Article 13 address the constitution of the tribunal and its procedures. The text of Article 13(1), (2) and (3) reads as follows:

*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 negotiations 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.<sup>14</sup>*

18. Article 13(1) requires that the parties first resort to negotiations with respect to “*any dispute*” (without limitation). If the dispute is not thereby resolved within six months, Article 13(2) gives the parties – either party – the right (“*shall be entitled to*”), but not the obligation, to resort to the domestic courts of the host state. Article 13(3) provides for consent to international arbitration. This consent is subject to two conditions. The first condition is that the parties must have complied with Article 13(1), *i.e.*, they must have tried to resolve the dispute amicably. This is a mandatory, not an optional, condition. By contrast, there is no requirement of compliance with Article 13(2) before submitting the dispute to international arbitration. In other words, the parties are not required to submit a dispute to domestic courts under Article 13(2) as a condition of consent under Article 13(3). Thus, any dispute “*involving the amount of compensation resulting from expropriation*”

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<sup>14</sup> Treaty (EN) (Exhibit C-0001/Exhibit RL-0143).

**ANNEX 1- DISSENTING OPINION**

can be submitted directly to international arbitration without prior submission to a domestic court. The second condition is provided for in the last sentence of Article 13(3) (referred to as the “fork-in-the-road” provision). Pursuant to the “fork-in-the-road” provision, if the investor “*has resorted to the procedure specified in the paragraph (2) of this Article,*” i.e., if it has submitted the dispute to the domestic courts of the host state, the investor loses its right to submit that dispute to international arbitration.

19. The “fork-in-the-road” provision reads: “*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.*”<sup>15</sup> According to Respondent’s and the Majority’s interpretation of Article 13(3), disputes about the legality of expropriation can only be submitted to the domestic courts of the host State. Disputes “involving” (in the view of the Majority, “limited to”) the amount of compensation for expropriation, on the other hand, can be submitted to international arbitration, but only if such disputes have not been submitted to the domestic courts. Respondent’s and the Majority’s interpretation of Article 13(3) leads to an absurd result in the context of the whole of Article 13, and in particular in the context of the “fork-in-the-road” provision.
20. Under that restrictive interpretation, the investor can submit disputes about the legality of expropriation only to the domestic courts of the host State. If those courts determine that there has been an expropriation in breach of the Treaty, then the investor has the right to submit a dispute only about the amount of compensation arising from such expropriation to international arbitration. But what prevents a domestic court from deciding not only the question of the legality of the expropriation, but also the question about the amount of compensation that follows from it? Indeed, it would be strange for the domestic court not to do so. Moreover, as discussed below, a domestic court cannot decide on the legality of the expropriation without addressing the matter of compensation. But if the domestic court proceeds to do so, the investor, pursuant to the “fork-in-the-road” provision, loses its right to submit to international arbitration even a dispute limited to the amount of compensation. That dispute could not be submitted to international arbitration because the second

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<sup>15</sup> Treaty (EN), Article 13(3) (Exhibit C-0001/Exhibit RL-0143).

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condition of Article 13(3) would not have been satisfied – the dispute would have already been decided by a domestic court.

21. The absurdity of this result is further emphasized by the language of Article 13(2), which reads: “*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.*” It is notable that the government itself (the provision expressly refers to “*either party*”) can submit any dispute under the Treaty, including a dispute about the amount of compensation, to its domestic courts. Arguably, the “fork-in-the-road” provision is triggered only “*if the national or company concerned [rather than the government] has resorted*” to domestic courts, *i.e.*, it is triggered only if a claimant, not the respondent, has resorted to domestic courts. But the object and purpose of the “fork-in-the road” provision is to avoid an international arbitration tribunal sitting as a court of appeal over domestic court decisions. An interpretation that allows a respondent to submit to its domestic courts a dispute involving the amount of compensation and then allows the investor to submit that same dispute to international arbitration would lead to an absurd result and would defeat the *effet utile* of the “fork-in-the-road” provision and its object and purpose.
22. Alternatively, the host State could submit a dispute about the amount of compensation to its domestic courts pursuant to Article 13(2) and then argue that the “fork-in-the-road” provision has been triggered because the dispute has been resolved by those courts. That would arguably preserve the *effet utile* of the “fork-in-the-road” clause, and its object and purpose, but would deprive of any meaningful effect the first paragraph of Article 13(3) – the consent to arbitration. As discussed below in the section on case law, the Singapore Court of Appeal in the *Sanum* case raised that very question and concluded: “*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.*”<sup>16</sup> The only way to avoid

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<sup>16</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, Judgment of the Court of Appeal of Singapore [2016] SGCA 57, 29 September 2016, para. 133 (**Exhibit RL-0130**).

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this evidently absurd result is to read Article 13(3) as allowing the Tribunal to also determine liability, not just quantum.

23. Either scenario – (i) the investor submitting to a domestic court a dispute about the legality of the expropriation and the court proceeding *sua sponte* to resolve the matter of the amount of compensation due; or (ii) the government itself submitting to its courts a dispute about the amount of compensation – demonstrates that the Majority’s interpretation of Article 13(3) leads to an absurd result, *i.e.*, a result that deprives the consent to arbitration in Article 13(3) of its *effet utile*. Under both scenarios, a dispute about the amount of compensation would arise out of a determination of the amount of compensation made by a domestic court. If the “fork-in-the road” provision is respected, the investor would never have the option of arbitration for its dispute over the amount of compensation. Alternatively, if – as the Majority believes – such disputes could proceed to arbitration (*i.e.*, if Article 13(3) could still operate), that would require that a Treaty-based tribunal review and rule on the correctness of the domestic court’s decision disregarding the object and the purpose of the “fork-in-the-road” provision. Notably, the Majority agrees that “*the object and purpose of a fork-in-the-road clause like Article 13(3) Sentence 2 of the Treaty [...] is to avoid parallel or subsequent proceedings on the same issue creating the risk of contradicting decisions*” (paragraph 133 of the Award), yet its interpretation of Article 13(3) is inconsistent with that object and purpose. Moreover, although the Majority concludes that the object and purpose of the fork-in-the-road clause is “*to avoid parallel or subsequent proceedings on the same issue creating the risk of contradicting decisions,*” it immediately contradicts itself by stating that the fork-in-the-road provision is not triggered when “*a ruling involving the amount of compensation has been requested only by the Government*” (paragraph 138 of the Award) ignoring the obvious: that parallel or subsequent proceedings would still exist and create the risk of inconsistent decisions regardless of who initiated them.
24. Second, the absurdity of the limiting interpretation of Article 13(3) is further confirmed by Article 6, to which Article 13(3) expressly refers. Article 6(2) states that the parties may submit a dispute about the legality of expropriation to domestic courts – but have no obligation to do so. This defeats the argument that disputes about the legality of the

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expropriation can only be submitted to domestic courts and cannot be submitted to international arbitration. Articles 6(1) – 6(2) of the Treaty read as follows:

*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.<sup>17</sup>*

25. The Majority interprets Article 6(2) to mean that an investor has a choice to submit a dispute about the legality of expropriation to domestic courts or not to submit it – to any forum. (Paragraph 109 of the Award.) This interpretation deprives the provision of any meaning and any *effet utile*. The investor would not be granted any real choice. The provision would be limited to stating that the investor may submit such a dispute to the Chinese courts (assuming such a right exists under Chinese law) or may simply abandon the dispute entirely. To make such a statement in the Treaty would be, at best, superfluous. It would not confer on the investor any Treaty right.
26. The only interpretation that gives this provision a meaning – and thus *effet utile* – is that it gives the investor a real choice, *i.e.*, a choice between submitting a dispute about the legality of expropriation to domestic courts or submitting it to another forum.<sup>18</sup> Read

<sup>17</sup> Treaty (EN) (Exhibit C-0001/Exhibit RL-0143).

<sup>18</sup> For a very similar analysis, see *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, para. 84 (Exhibit CL-0010).

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together with Article 13(3), it is obvious that this other forum is international arbitration. That is the only reason why this provision appears in the Treaty – it confers on the investor a real Treaty right, a real choice between two available fora.

27. There is more. Respondent contends that domestic courts are in fact available and empowered to determine the legality of any measure of expropriation under Article 6(2). (See paragraph 121 of the Award.) This is a bare assertion, unsupported by sufficient documentary evidence or any expert evidence. Assuming that the assertion is correct, however, it means that domestic courts will review and determine the legality of an expropriatory measure in relation to the Treaty standards, specifically the standards of Article 6. But one of the Treaty requirements for a measure of expropriation to be in compliance with the Treaty, *i.e.*, to be “legal” under the Treaty, is that compensation meeting the requirements of Article 6(1) must be paid. Article 6(1) requires that compensation be equivalent to the value of the asset immediately before the expropriation, “*effectively realisable*,” and “*convertible and transferable*.” The question arises, of course, how a domestic court would determine the “legality” under the Treaty of a measure of expropriation without making a determination whether compensation meeting the requirements of Article 6(1) has been paid.
28. If compensation has not been paid or if the compensation paid does not meet the conditions stated in the Treaty, then the expropriation is not “legal” pursuant to Article 6 of the Treaty. As a result, to rule on the legality of the expropriation, the domestic court must also decide at a minimum whether compensation has been paid or whether the compensation paid meets the requirements of Article 6 of the Treaty. But then the dispute “involving the amount of compensation” will have been submitted to and decided by a domestic court and the investor would not be able to submit it to international arbitration because of the second condition of Article 13 (the “fork-in-the-road”).
29. The Majority reaches a different conclusion, with which I disagree on several levels. First, the Majority concludes that the parties to the Treaty had “*segregated proceedings in mind: first, proceedings on the question of legality of an expropriatory measure (which also encompasses the question of the occurrence of that measure); and, second, subsequent*

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*proceedings regarding the amount of compensation resulting from the measure in dispute.”* (Paragraph 106 of the Award.) But Article 6(2) does not address disputes about the occurrence of expropriation; it addresses disputes about the legality of a measure of expropriation. The adjudication of such disputes necessarily requires a determination whether compensation that meets the requirements of Article 6 has been paid—there cannot be a separation of the kind the Majority envisages. Further, the argument that Article 13(3) covers disputes about the amount of compensation in cases where the expropriation has been “*previously established*” (paragraph 84 of the Award) rings hollow. Again, Article 6(2) covers disputes about the legality of a measure of expropriation. The existence of a measure of expropriation does not, in and of itself, resolve the question about its legality; such legality (or illegality) in relation to the Treaty remains to be determined and that determination necessarily includes answering the question whether compensation pursuant to Article 6 has been paid.

30. The Majority is aware of the problem. It says that it is “*mindful*” of the question “*whether the payment of (adequate) compensation forms part of the legality of an expropriation or, in other words, whether the non-payment of compensation or the payment of inadequate compensation alone would suffice to render an expropriation unlawful.*” (Paragraph 136 of the Award.) However, the Majority “*does not consider it necessary to decide on that question as, in the case at hand, the State has not paid any compensation at all to the investor. In this scenario, the domestic court, when explicitly requested to solely rule on the question of legality, would only have to establish that no compensation at all has been paid yet (without having to opine on the appropriate amount) and, if necessary, render its decision as to whether the non-payment of compensation suffices to render the expropriation unlawful.*” (Paragraph 137 of the Award.) There are several problems with that conclusion.
31. There is no basis in the Treaty to differentiate between situations where no compensation has been paid and situations where the compensation paid does not meet the requirements of Article 6. In either case, there would be a violation of Article 6 – because Article 6 requires the payment of compensation and includes requirements for such compensation.

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There is nothing in Article 6(2) to suggest that it distinguishes between disputes about the legality of an expropriation where no compensation at all has been paid and where some (but inadequate from the Treaty's perspective) compensation has been paid. In either scenario, the question about the legality of the expropriation measure (*i.e.*, whether it is in violation of Article 6 or not) must be resolved.

32. Further, the Majority seems to suggest that there is a distinction between lawful and unlawful expropriation, perhaps under customary international law. But such a distinction is irrelevant here, where the question of "legality" or "illegality" boils down to whether the measure of expropriation complies with the requirements of Article 6 or not. If it does, there is no Treaty violation; if it does not, the Treaty has been breached. In other words, an expropriation is illegal – in relation to the Treaty – either if no compensation is paid or if inadequate compensation is paid. Article 6(2) clearly applies to either scenario. The Majority is incorrect to the extent that it suggests that Article 6(2) applies differently (a) where no compensation at all is paid (such as in this case), and (b) where some (but inadequate) compensation has been paid. The Majority's suggestion that Article 13(3) and Article 6(2) read together should be interpreted as applying in one way in scenario (a) and in another way in scenario (b) has no basis in the Treaty.
33. The Majority is aware of that problem and tries to thread the needle. In its view, "*even in the hypothetical scenario where the investor was paid a certain amount of compensation by the State and the domestic court were requested by the investor to rule that the payment of insufficient compensation renders the expropriation unlawful, such a finding would not trigger the fork-in-the-road clause. The domestic court would be requested to make a determination on the adequacy of the compensation paid as part of its determination of the legality of the expropriation; however, this is distinct from a determination of the precise quantum of the compensation to be paid for an unlawful expropriation in case the domestic court were to find that the compensation paid was in fact inadequate. This latter determination could still be made by an arbitral tribunal under Article 13(3) of the Treaty.*" (Paragraph 139 of the Award). Thus, according to the Majority, a domestic court would have to determine that the amount of compensation paid does not comply with the

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requirements of Article 6 but stop short of ruling what precise amount would comply. This interpretation raises more questions than it answers. What would make a domestic court perform an analysis concluding that the amount paid is inadequate but stop short of completing the analysis to determine the correct amount? How would a domestic court conclude that the amount paid is inadequate without addressing issues such as the methodology of the valuation and the correctness of the calculations – the same issues that an arbitral tribunal would have to address when determining the correct amount? Would a dispute about “the amount of” compensation even exist at the stage where a domestic court has determined that the amount paid is inadequate and ordered the State to pay an adequate (but undetermined and unknown) amount? The Majority’s interpretation does not, and cannot, provide answers to those questions.

34. There is one more question that needs to be addressed in interpreting Article 6(2) of the Treaty, which provides context for the interpretation of Article 13(3). Claimants argue that Respondent’s domestic courts “*cannot resolve the issue of responsibility for expropriation, nationalization, or measures having equivalent effect as such determination would require the application of Article 6(1) of the Treaty, i.e., the application of international law.*” (Paragraph 146 of the Award.) According to Claimants, Respondent bears the burden to prove that its courts are available to a foreign investor for such a determination of responsibility under international law. (Paragraph 149 of the Award.)
35. Respondent argues, to the contrary, that its courts are available and authorized by Chinese law to make such determination (paragraph 142 of the Award); however, Respondent’s support for its argument is lacking. Respondent bears the burden of proof to demonstrate that its courts are indeed available to a foreign investor to make the determination of legality or illegality required by Article 6(2) – and Respondent has not met that burden.
36. The Majority takes note of this point but does not consider it necessary or appropriate to express an opinion on it. According to the Majority, Article 6 of the Treaty “*is clear in that the legality of measures having effect equivalent to expropriation may be reviewed by a competent domestic court of the host State*” and “*oblige[s] the Contracting Parties to the Treaty to ensure that, within their jurisdiction, sufficient protection against, and*

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*compensation for, such measures is provided.”* (Paragraph 153 of the Award.) The Majority concludes, however, that “[w]hether the respective Contracting Parties to the Treaty have complied with this obligation is not for this Tribunal to decide and not relevant to assessing the scope of Respondent’s consent to investor-State Arbitration under the Treaty.” (Paragraph 153 of the Award.)

37. But that is an important question to decide – because it bears heavily on the interpretation of Article 13(3) in the context of Article 6(2). If Respondent’s courts are unavailable to decide the question of the legality of a measure of expropriation, as required by Article 6(2), then under the Majority’s interpretation of Article 13(3) the foreign investor would be left with no remedy whatsoever. That would again lead to an absurd result, which is unacceptable under the Vienna Convention rules of interpretation. Pursuant to the Majority’s interpretation of Article 13(3), the legality – or the occurrence – of the expropriation must first be determined by domestic courts before an investor can submit a dispute about the amount of compensation to international arbitration. But if Respondent’s courts are unavailable to make that determination, under the Majority’s interpretation, Article 13(3) remains inoperable, deprived of any *effet utile*. The only interpretation of Article 13(3) that does not lead to such an absurd result is that it covers disputes about the legality of a measure of expropriation “involving” the amount of compensation.

**(3) The Object and Purpose of the Treaty**

38. The Majority agrees that one of the reasons for the Treaty’s conclusion was to promote foreign investments between the contracting parties. The Majority agrees with Respondent’s argument, however, that (i) this is (one of) the object(s) and purpose(s) of virtually any investment agreement, including some that do not provide for international arbitration at all; and (ii) the object and purpose of the Treaty cannot supersede carefully negotiated language circumscribing the scope of dispute settlement. (Paragraphs 158-159 of the Award.) I do not disagree with the Majority on these points.
39. On that basis, the Majority concludes that the object and purpose of the Treaty do not alter its assessment of the scope of the arbitration clause in Article 13(3) of the Treaty. (Paragraph 160 of the Award.) But it is also correct to state that the object and purpose of

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the Treaty do not alter the inclusive (rather than exclusive) interpretation of the arbitration clause in Article 13(3) of the Treaty. Indeed, to the extent that one might consider the two conflicting interpretations equally plausible (*quod non*), the object and purpose of the Treaty would “tip the scale” in favor of the inclusive interpretation.

**B. CASE LAW**

40. The Majority notes that, “*while the Parties have referred to multiple decisions considering either the scope of a fork-in-the-road clause or provisions comparable to Article 6(2) of the Treaty, neither of the Parties has presented a decision where an arbitral tribunal was faced with the interpretation of a treaty that contains both such clauses at the same time*” and concludes that “*none of the treaties underlying the respective decisions is directly comparable to the Treaty at hand.*” (Paragraph 175 of the Award).
41. I respectfully disagree. There are numerous decisions that are quite on point and could serve as guidance for the interpretation of Article 13(3) of the Treaty – to the extent, of course, that such guidance is even needed or helpful after performing the analysis pursuant to the Vienna Convention rules of interpretation.
42. In *Tza Yap Shum v. Peru*, for example, the tribunal declined to read the word “involving” as having the same meaning as “limited to” and instead interpreted it as “including.”<sup>19</sup> The tribunal stated: “*A good faith interpretation of these words implies that the sole requirement established in the [BIT] is that the dispute must ‘include’ the determination of the amount of compensation and not that the dispute must be restricted to this element. Obviously, other formulations were available such as ‘limited to’ or ‘exclusively,’ but the language used from this provision reads ‘involves.’*”<sup>20</sup>
43. In *Sanum Investments Limited v. Lao People's Democratic Republic*, the tribunal concluded: “*The term ‘involving’ has a wider meaning than other possible terms such as*

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<sup>19</sup> *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, paras. 150-152 (**Exhibit CL-0008 (bis)**).

<sup>20</sup> *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, para. 151 (**Exhibit CL-0008 (bis)**).

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*'limited to' which could have been used if the intention of the State Parties had been to limit the jurisdiction of the Tribunal exclusively to disputes on the amount of compensation. 'To involve' means 'to wrap', 'to include', terms that are inclusive rather than exclusive.'*<sup>21</sup>

44. The *Sanum* tribunal continued to discuss how the context supports the ordinary meaning of the text, a discussion that is quite on point in relation to the present case – it addresses almost the exact same issues that are before the Tribunal here:

*330. The interpretation of this provision shall also take into account its "context". The Tribunal considers that the first sentence of Article 8(3) cannot be read in isolation, (a) from the sentence that follows, namely, "[t]he provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article"; (b) from Article 8(2) and (3) from the conditions to establish expropriation set forth in Article 4(1).*

*331. The second sentence of Article 8(3) denies access to arbitration if the party concerned has resorted to "the competent court of the Contracting State accepting the investment." The Respondent has argued that this sentence in Article 8(3) refers to recourse to the competent court for a dispute involving the amount of compensation for expropriation and not generally to recourse to a competent court. While this is arguably coherent in the context of Article 8, it is difficult to accommodate in the wider context of Article 4(1).*

*332. In accordance with Article 4(1), to establish whether an expropriation had taken place, a competent court would need to decide whether the action of Laos meets the four conditions set forth in that paragraph. The fourth condition is "appropriate and effective compensation." Thus if Articles 8 and Article 4(1) are read together, an investor who would have recourse to a competent court to determine whether an expropriation has occurred would be precluded from submitting the dispute on the amount of compensation to international arbitration because the competent court would have already determined the compensation. There is an overlap between the conditions to be met by an expropriation under the Treaty and the Respondent's reading of Article 8(3) in isolation of its context. The Respondent has ignored completely this overlap and has assumed that the jurisdiction may be split between the local courts and an arbitral tribunal. Indeed, the Respondent has argued*

<sup>21</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, para. 329 (**Exhibit CL-0009**).

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that “[t]he liability/quantum split under Article 8(2) and (3) is consistent with the substantive split under Article 4(1) and 4(2).” The alleged neat relationship between the two Articles ignores the result that emerges from the preceding analysis by the Tribunal.

333. The Respondent’s interpretation would leave Article 8(3) without effect. The task of the Tribunal is to interpret the Treaty in such a way that all the provisions of the Treaty have effect even if specific provisions do not refer to each other. [...]”<sup>22</sup>

45. Thus, the *Sanum* tribunal reached a conclusion that is the exact opposite of the conclusion reached by the Majority in this case that an expropriation dispute could be “segregated.” According to the Majority, such a dispute could be “segregated” as follows: “*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.*” (Paragraph 106 of the Award.) In the view of the *Sanum* tribunal, however, an expropriation dispute cannot be “segregated”; an interpretation based on such segregation is incorrect as it leaves the dispute resolution clause in favor of arbitration without effect.
46. The Singapore Court of Appeal, which reviewed the *Sanum* tribunal’s award on jurisdiction and the related decision of the lower court, agreed.<sup>23</sup> It stated:

*In our judgment, the Lao Government's interpretation of Art 8(3) of the PRC-Laos BIT is not tenable. The words of the provision do not seem to us to be capable of accommodating the segregation of an expropriation claim in the way it was suggested such that the question of liability may be determined by the national courts leaving the issue of the quantum of compensation to be heard by an arbitral tribunal. In our judgment, the words ‘[t]he provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in paragraph 2’ means that if any dispute is brought to the national court, the claimant will no longer be entitled to refer any aspect of that dispute to arbitration. Hence once an expropriation claim is referred to the national court, no aspect of that claim can then be brought to arbitration. It should be noted that this does not mean that any and every dispute relating to*

<sup>22</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, paras. 330-333 (**Exhibit CL-0009**) (emphasis added).

<sup>23</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, Judgment of the Court of Appeal of Singapore [2016] SGCA 57, Judgment, 29 September 2016 (**Exhibit RL-0130**).

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*expropriation may be referred to arbitration. As provided in Art 8(3), this only avails if the dispute does involve a question as to the amount of compensation.*<sup>24</sup>

47. Further, the Singapore Court of Appeal explained why the interpretation that the dispute settlement provision covered only disputes “limited to” the amount of compensation, while disputes about expropriation had to be submitted to domestic courts, effectively bars the investor from submitting any dispute to international arbitration:

*In our judgment, the Judge's conclusion ignores several difficulties. First, 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. Aside from this, it has been observed as a matter of practical reality that ‘cases of direct expropriation (with only quantum issues being in dispute) are becoming increasingly rare, and that it is entirely open to the host State to avoid arbitration over the amount of compensation for indirect expropriation simply by not submitting the dispute on liability to its municipal courts’ (see Michael Hwang & Aloysius Chang, “Government of the Lao People's Democratic Republic v Sanum: A Tale of Two Letters” (2015) 30(3) ICSID Review 506 at 522). In such cases, the investor would then be compelled to bring a claim to a national court for a ruling that the host State had committed an expropriatory act but in so doing, it may be barred from bringing a dispute on compensation to arbitration. It should also be added that even in the rare cases of direct expropriation, host States would be in a position effectively to avoid arbitration by simply denying that they had engaged in expropriatory acts (see eg, August Reinisch, ‘How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties’ (2011) Journal of International Dispute Settlement 1 at 57). This would once again compel the investor to resort to the national courts, thereby barring a claim in arbitration. In this regard, we note that the tribunal in Tza Yap Shum similarly concluded (at [154]) that the interpretation urged by Peru ‘would lead to an untenable conclusion - namely that the investor could never actually have access to arbitration’. On the whole, we think the same could be said*

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<sup>24</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, Judgment of the Court of Appeal of Singapore, Judgment of the Court of Appeal of Singapore [2016] SGCA 57, 29 September 2016, para. 130 (Exhibit RL-0130) (emphasis added).

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*of the position urged upon us by the Lao Government.*<sup>25</sup>

48. In sum, the analyses of the *Sanum* tribunal and the Singapore Court of Appeal address the exact same questions at play in this case and the result reached is the exact opposite of the conclusions of the Majority here.
49. The tribunal in the *Beijing Urban Construction v. Yemen* case also agreed.<sup>26</sup> Notably, the *Beijing Urban Construction* tribunal dealt with treaty language that was arguably more restrictive than “involving” – the relevant wording was “relating to the amount of compensation” rather than “involving the amount of compensation.”<sup>27</sup> Nevertheless, the tribunal reached the same conclusion as the *Sanum* tribunal – that the provision was not limited to disputes only about the amount of compensation and included disputes about the underlying expropriation.<sup>28</sup>
50. *Beijing Shougang and others v. Mongolia*, which has reached the opposite conclusion,<sup>29</sup> and on which both Respondent and the Majority rely, is distinguishable. The China-Mongolia BIT at issue in that case does not have a provision like Article 6(2) of the present Treaty.<sup>30</sup> Thus, while I believe that the *Beijing Shougang* tribunal erred in interpreting “involving” as “limited to,” contrary to the ordinary meaning of the term “involving,” it is noteworthy that the *Beijing Shougang* tribunal did not have the context of a provision similar to Article 6(2) of the Treaty here, which should have affected its analysis and conclusions.

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<sup>25</sup> *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, Judgment of the Court of Appeal of Singapore [2016] SGCA 57, 29 September 2016, para. 133 (**Exhibit RL-0130**).

<sup>26</sup> *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, paras. 70-87 (**Exhibit CL-0010**).

<sup>27</sup> *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, para. 74 (**Exhibit CL-0010**).

<sup>28</sup> *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, paras. 70-87 (**Exhibit CL-0010**).

<sup>29</sup> *China Heilongjiang International Economic & Technical Cooperative Corp et al v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, paras. 446-451 (**Exhibit RL-0138**).

<sup>30</sup> *China Heilongjiang International Economic & Technical Cooperative Corp et al v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, para. 441 (**Exhibit RL-0138**).

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51. *Beijing Shougang and others v. Mongolia* is further distinguishable because the tribunal found support for its conclusion in the fact that “...*both States* [to the applicable BIT] *then had similar political and economic systems and did not have any reason to question the judicial system of the other Treaty Party and consequently to favour international arbitration for the settlement of investment disputes.*”<sup>31</sup> This is not the case here: Singapore does not have, and never had, a similar political and economic system as that of Respondent.
52. Finally, Respondent relies heavily on *ST-AD v. Bulgaria*.<sup>32</sup> Not only can this case be easily distinguished, but it demonstrates the flaws in Respondent’s argument. Article 4(3) of the BIT applicable in that case (between Bulgaria and Germany) reads as follows:

*The lawfulness of the expropriation shall, at the request of the investor, be reviewed in a properly constituted legal proceeding of the Contracting Party which has carried out the expropriation measure. In the event of disagreement over the amount of the compensation, the investor and the other Contracting Party shall hold consultations in order to determine the value of the expropriated investment. If agreement has not been reached within three months from the commencement of the consultations, the amount of the compensation shall, at the request of the investor, be reviewed either in a properly constituted proceeding of the Contracting Party that has carried out the expropriation measure, or by means of an international arbitral tribunal.*<sup>33</sup>

53. First, this provision states that disputes relating to the lawfulness of the expropriation “*shall ... be reviewed*” by the domestic courts of the host state. This is in contrast with Article 6(2) of the Treaty here, which states that the submission of a dispute regarding the legality of the expropriation to domestic courts is a matter of choice. The drafters of the Treaty could have made Article 6(2) a binding provision (like that in the Bulgaria-Germany BIT),

<sup>31</sup> *China Heilongjiang International Economic & Technical Cooperative Corp et al v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, para. 451 (**Exhibit RL-0138**).

<sup>32</sup> *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (**Exhibit RL-0109**).

<sup>33</sup> *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, para. 341 (**Exhibit RL-0109**).

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in which case there would have been no doubt that a dispute regarding the legality of the expropriation could only be submitted to domestic courts – but they did not.

54. Second, the ordinary meaning of Article 4(3) of the Bulgaria – Germany BIT is quite different from the text of Article 13(3) of the Treaty here. Unlike Article 13(3) of the Treaty, which covers disputes “*involving the amount of compensation,*” Article 4(3) of the Bulgaria – Germany BIT is much narrower – it states that “*the amount of the compensation shall, at the request of the investor, be reviewed either in a properly constituted proceeding of the Contracting Party that has carried out the expropriation measure, or by means of an international arbitral tribunal.*”<sup>34</sup> The contrast between (i) “disputes involving the amount of compensation” and (ii) a “review” of “the amount of compensation” is stark. The negotiators of the Treaty at issue here could have drafted Article 13(3) in a similar fashion as the Bulgaria – Germany BIT. They did not.
55. In sum, the case precedents are not neutral. The cases on which Respondent relies are either distinguishable or plainly contradict Respondent’s arguments. By contrast, the cases discussed above are quite on point and support the interpretation of Article 13(3) of the Treaty as encompassing disputes including the amount of compensation in the case of expropriation rather than only disputes “limited to” the amount of compensation in the case of expropriation.

**III. EXPANSION OF RESPONDENT’S CONSENT TO ARBITRATION BY MEANS OF THE MOST-FAVORED-NATION CLAUSE IN ARTICLE 4 OF THE TREATY**

56. The Majority should not have reached the question whether the MFN clause in Article 4 of the Treaty operates to expand the scope of Article 13(3) of the Treaty for the simple reason that the scope of Article 13(3) needs no expansion to cover Claimants’ expropriation

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<sup>34</sup> *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, para. 341 (**Exhibit RL-0109**) (emphasis added).

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claims. For that reason, I do not need to, and do not, reach a conclusion on that question. Nevertheless, I find the Majority's analysis of the MFN clause somewhat problematic.

57. Article 4 of the Treaty reads as follows:

*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.<sup>35</sup>*

58. First, the Majority disagrees with the tribunal in *UP and CD Holding v. Hungary*, which found that the MFN clause in the underlying treaty did apply to and served to enlarge the scope of the arbitration clause.<sup>36</sup> (Paragraph 210 of the Award). But it does so not on the basis of the interpretation of the relevant provisions of the Treaty but rather on the basis of policy considerations. The Majority says that it “*is wary of the consequences that would follow from the reasoning put forward in that decision. In particular, it would mean that the scope of consent to arbitration – as the flipside of waiving immunity from being sued in international proceedings – could be expanded massively and also be interpreted differently for each contracting State, depending on the scope of consent included in other treaties concluded by that State. In the Tribunal's view, this would place at risk the importance attached to the concept of consent as the basis for arbitration proceedings in general and investor-State proceedings in particular.*” (Paragraph 210 of the Award.) Yet the role of a tribunal is not to rule on the basis of policy considerations; a tribunal must interpret the Treaty in compliance with the Vienna Convention rules of interpretation.

59. Second, the Majority refers to the term “treatment” used in both the English and the Chinese text of Article 4 of the Treaty. But it performs no analysis of the ordinary meaning of that term, which Claimants have argued includes dispute settlement. The Majority simply concludes “*that the mere use of this term is not sufficient to assume the Contracting*

<sup>35</sup> Treaty (EN) (**Exhibit C-0001/Exhibit RL-0143**).

<sup>36</sup> *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, para. 193 (**Exhibit CL-0011**).

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*Parties' intention to apply the MFN clause to the scope of the arbitration clause in Article 13(3) of the Treaty*" because "*the term 'treatment' which refers to the 'investment' protected by the Treaty cannot be considered to unambiguously apply to procedural provisions such as the dispute settlement clause in Article 13 of the Treaty.*" (Paragraph 213 of the Award.) Whether that conclusion is correct or not, however, depends on the analysis of the meaning of the Treaty term "treatment," in which the Majority does not engage in any detail.

60. Third, the Majority deals equally briefly with the argument that the explicit exceptions from the scope of the MFN clause, such as the references to Articles 5, 6 and 11 of the Treaty, do not mention Article 13(3). According to the Majority, "[t]here is no indication in Article 4 or elsewhere in the Treaty that the exceptions specifically mentioned in Article 4 were intended to identify anything but the substantive protection standards that should not be subject to the MFN clause." (Paragraph 214 of the Award.) But this logic is circular: because the exceptions relate to the Treaty's substantive protections only, the scope of the whole MFN clause must also be limited to the Treaty's substantive protections. An equally (if not more) plausible interpretation could reach the conclusion that what is not covered by the exceptions is within the scope of the provision.
61. In my view, the analysis should have started with the ordinary meaning of the MFN provision, in particular of the term "treatment," in its context. The Majority is correct to note (in paragraph 215 of the Award) that Article 13 (an arbitration clause with a carefully and diligently negotiated scope) provides relevant context; but that argument is no substitute for a detailed analysis of the ordinary meaning of "treatment."

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62. For all the above reasons, I respectfully disagree with the Majority's decision to decline jurisdiction over Claimants' expropriation claims.

Respectfully submitted: (Signed)

Stanimir A. Alexandrov