UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd., plaintiffs, - against - Mongolia, defendant.	Civil Action Number 17 CV 7436

PETITION TO VACATE ARBITRAL AWARD DECLINING TO EXERCISE ARBITRAL JURISDICTION AND COMPEL ARBITRATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Petitioners Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. (collectively, "**Petitioners**") respectfully petition this Court for an order: (1) vacating an arbitral award rendered by an ad hoc tribunal (the "**Tribunal**") on June 30, 2017 (the "**Award**"), which, among other things, declined to exercise jurisdiction over the Petitioners' claims that Mongolia had expropriated their investments without compensation in violation of the bilateral investment treaty (the "**BIT**" or the "**Treaty**") between Mongolia and the People's Republic of China ("**PRC**"); and (2) directing the parties to submit to arbitration Petitioners' claims under the BIT.

PRELIMINARY STATEMENT

Petitioners are three companies organized under the laws of the PRC, which invested in a joint venture with a Mongolian company to develop an iron ore mine in Mongolia. Petitioners bring this petition because, when Mongolia unlawfully expropriated their investment and they sought recourse through arbitration pursuant to the BIT, the Tribunal erroneously declined to exercise jurisdiction. It determined that the question of whether an expropriation had occurred was not arbitrable. The Tribunal interpreted the Treaty, the purpose of which was to provide incentives for investment from the PRC into Mongolia, to require that the national courts of Mongolia first declare that other arms of the government of Mongolia had expropriated the assets of Chinese investors; only then could there be

arbitration, and the only arbitrable question would be the amount of compensation for the taking.

Because the Treaty does not explicitly assign the question of arbitrability to the Tribunal, this Court exercises *de novo* review of the Tribunal's decision to decline jurisdiction over the expropriation claims. It is well settled that, unless the relevant arbitration agreement (whether a contract or a treaty) clearly and unmistakably commits the question of an arbitral tribunal's jurisdiction to that tribunal, the arbitrability of a claim is a matter of law for a court to determine independently, without deference to the arbitrators' decision.

Here, the question of whether Mongolia expropriated Petitioners' investment must be submitted to arbitration. The contrary result reached by the Tribunal makes little sense. Among the central purposes of BITs is to afford to investors the certainty of access to an impartial tribunal *other than* the national courts of one of the contracting states. The Award deprives Petitioners of one of the essential benefits to which they were entitled. For that reason, together with the texts of the relevant treaties, the clear majority of other tribunals have reached the contrary conclusion under similar BITs. Indeed, every other tribunal to address this question under PRC BITs has rejected the narrow interpretation adopted by this Tribunal.

It is for this Court to determine whether, under the BIT at issue, Petitioners are entitled to have their expropriation claim decided by arbitration. Because the Tribunal erroneously determined that the consideration of expropriation was

outside its jurisdiction, leaving that question to the government of the very state that Petitioners contend committed the expropriation, Petitioners seek an order from this court vacating the Award and compelling Mongolia to proceed to arbitration of their claims.

STATEMENT OF FACTS

The underlying facts of the dispute are complex—the Award takes 153 pages to *decline* to exercise jurisdiction over the essential question. Fortunately, they are largely irrelevant to this petition. A great deal more detail is contained in the Award, attached to the Declaration of Michael A. Granne, dated September 28, 2017 (the "**Granne Decl.**") as Exhibit A, and in the Petitioners' request for arbitration (the "**RFA**"), attached to the Granne Declaration as Exhibit B. All references to exhibits are to the exhibits to the Granne Declaration.

BLT LLC, a Mongolian company, held a license to exploit certain iron ore deposits located in Mongolia (the "**939A License**"). At the time this license was obtained, the price of iron ore was low and there was little interest in commercial development. *See* Ex. B at ¶ 7. In 2002, the Petitioners formed a joint venture with BLT LLC called Tumturei Ltd ("**Tumturei**") to commercially develop these deposits, collectively owning 70% of Tumturei. *See id*. at ¶ 10. The 939A License was duly transferred from BLT LLC to Tumturei in 2005. *See id*. at ¶ 10. Iron ore production commenced at the beginning of 2006, s*ee id*. at ¶ 15, and exports to the PRC began, *see id*. at ¶ 17.

In 2006, a new government took power in Mongolia. *See id*. at ¶ 15. Significantly, with the then-higher price of iron ore, the new Mongolian government began efforts to find a way to take back their now-valuable mining concession. *See* Ex. B at ¶¶ 16 – 21. Among other things, the executive director of Tumturei was jailed for about two weeks, ostensibly on charges related to tax evasion. *See id*. at ¶ 20. Mongolia ultimately revoked the license on a variety of grounds, none of which have merit, determining that it properly belonged to a state-owned enterprise called the Darkhan Metallurgical Plant ("**Darkhan**"). *See id*. at ¶¶ 22 – 44. BLT LLC and Tumturei were unable to obtain relief through proceedings in Mongolia, *see id*. at ¶ 45, and Tumturei's executive director continued to suffer from official harassment. *See id*. at ¶ 46.

On February 12, 2010, the Petitioners served their RFA pursuant to the operative BIT — the *Agreement Between the Government of the Mongolian People's Republic and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments* signed on 26 August 1991, available at http://tfs.mofcom.gov.cn/aarticle/h/at/201002/20100206778627.html

An ad hoc tribunal was duly constituted, and the Permanent Court of Arbitration was selected to administer the proceedings. A detailed summary of the procedural history of the arbitration may be found in the Award. *See* Ex. A at ¶¶ 7 – 88. The Award was rendered on June 30, 2017. *See id*. at p. 153.

The Tribunal concluded (correctly) that the Petitioners are investors entitled to invoke the protections of the Treaty. *See id*. at ¶¶ 404 – 22. However, the Tribunal erroneously concluded that it lacked jurisdiction over the fundamental question of whether Mongolia had expropriated Petitioners' investment. Instead, according to the Tribunal, it could have jurisdiction only if Mongolia *admitted* that it had expropriated the investment (for example, by a declaration from its courts to that effect); in that theoretical event, the Tribunal would have jurisdiction only to resolve any controversy over the amount of compensation Mongolia should pay. *See id*. at ¶¶ 423 – 76.

Petitioners have therefore commenced this proceeding, pursuant to the FAA, to vacate this erroneous decision and compel Mongolia to arbitrate its claims under the Treaty.

ARGUMENT

I. This Court Has Jurisdiction Over This Petition

The FSIA governs whether Mongolia, a foreign sovereign, is subject to suit in the courts of the United States. 28 U.S.C. § 1330(a) provides that:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605 – 1607 of this title or under any applicable international agreement.

Subject matter jurisdiction therefore exists so long as Mongolia is not entitled to immunity under sections 1605 – 1607 of the FSIA.

Two separate provisions of the FSIA permit this Court to exercise jurisdiction over Mongolia. First, 28 U.S.C. § 1605(a)(6) provides in relevant part that Mongolia is not immune from suit in any case

> in which the action is brought, either *to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship*, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, *or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States* . . . .

28 U.S.C.A. § 1605(a)(6) (emphasis added). In a BIT, the two states make an offer to each other's nationals to arbitrate disputes. An investor accepts the offer by commencing arbitration. *See Ecuador v. Chevron Corp.*, 638 F.3d 384, 392 (2d Cir. 2011) ("Unlike the more typical scenario where the agreement to arbitrate is contained in an agreement between the parties to the arbitration, here the BIT merely creates a framework through which foreign investors, such as Chevron, can initiate arbitration against parties to the Treaty. In the end, however, this proves to be a distinction without a difference, since Ecuador, by signing the BIT, and Chevron, by consenting to arbitration, have created a separate binding agreement to arbitrate."); Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev. – Foreign Investment L.J. 232 (1995). The initial terms of the arbitration agreement between

Petitioners and Mongolia were set out in Article 8 of the BIT and were augmented by, *inter alia*, the agreement that New York would be the place of arbitration, *see Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia*, Permanent Court of Arbitration, Permanent Court of Arbitration, Procedural Order No. 1 (November 2, 2010), Granne Decl., Ex. C at ¶¶ 27-28.

Second, 28 U.S.C. § 1605(a)(1) permits this court to exercise jurisdiction in any case "in which the foreign state has waived its immunity either explicitly or by implication." As the Second Circuit has observed, the House Report that accompanied FISA specifically listed three examples of an implied waiver—one of which is agreeing to arbitrate in another country. *See Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1017 (2d Cir. 1993) (citing H.R. Rep. No. 1487, 94th Cong., 2d Sess., 18 (1976), reprinted in 1976 U.S.S.C.A.N. 6604, 6617). When a foreign sovereign agrees to arbitration in the United States, it implicitly waives immunity from the jurisdiction of United States courts. *Maritime Ventures Int'l, Inc. v. Caribbean Trading & Fidelity, Ltd.*, 689 F. Supp. 2d 1340, 1351 (S.D.N.Y. 1988); *see also Blue Ridge Investments LLC v. Argentina*, 735 F.3d 72, 83-85 (2d Cir. 2013) (applying both implied waiver and arbitration FSIA exceptions). At the outset of the arbitral proceeding, the parties and the Tribunal discussed where the legal seat of arbitration should be and Mongolia consented to New York as the seat. *See* Ex. C at ¶¶ 27-28. Jurisdiction is therefore proper in this Court.

II. This Court Reviews *De Novo* the Question Whether Petitioners' Claims Are Arbitrable

This Court has the power to vacate an arbitral award rendered in New York pursuant to § 10 of the FAA, 9 U.S.C. § 10. Review of arbitral awards *on the merits* under the FAA is normally deferential. The situation is entirely different, however, when it comes to the question whether the dispute is arbitrable in the first place – the question at hand here. "'Question[ ] of arbitrability' is a term of art covering … disagreements about whether an arbitration clause … applies to a particular type of controversy." *Schneider v. Thailand*, 688 F.3d 68, 71 (2d Cir. 2012) (citations omitted). Here, the question is whether the arbitration clause in Article 8(3) of the BIT applies to a particular type of controversy – namely a dispute over whether an expropriation has occurred. It is thus a "question of arbitrability."

Courts must decide questions of arbitrability "independently" and without deference to the arbitrators, unless there is "clear and unmistakable evidence" that the parties agreed to submit the question of arbitrability to the arbitrators. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995). There is no such evidence here.

The language that governs the establishment and procedures of the tribunal is found in Article 8 of the BIT. It provides for an *ad hoc* tribunal, *see* Ex. C at Art. 8(3), without a single reference to the power of that panel to decide arbitrability, despite several paragraphs dedicated to the makeup and procedures that the tribunal must follow, *see id.* at Art. 8(4) – (9). The presumption of an "independent"

judicial determination of that question, therefore, is not overcome. *See Kaplan*, 514 U.S. at 943-44.

The Treaty in this case is distinguishable from many other BITs, which do commit the question of arbitrability to the arbitrators. They do so, typically, by incorporating arbitration rules that themselves explicitly give the arbitrators authority to determine their own jurisdiction. *See BG Group PLC v. Argentina*, 134 S. Ct. 1198, 1210 (2014) (treaty permitting arbitration pursuant to rules of the International Centre for Settlement of Investment Disputes ("**ICSID**") or UNCITRAL); 2012 United States Model Bilateral Investment Treaty, art. 24(3), *available at* https://www.state.gov/documents/organization/ 188371.pdf (ICSID and UNCITRAL rules). The PRC and Mongolia had many options to choose from, had they wanted to commit the question of arbitrability to the arbitrators; they chose not to. Having left unmentioned the question of arbitrability, this Court reviews the Award *de novo* with regards to findings related to arbitrability.

III. Petitioners' Claims Are Arbitrable under Article 8(3) of the Treaty

Dispute-resolution provisions giving the investor access to arbitration are a "critical element" of modern BITs. *BG Grp.*, 134 S. Ct. at 1206 (quoting K. Vandevelde, Bilateral Investment Treaties: History, Policy & Interpretation 430–432 (2010)). The Tribunal's decision to refuse jurisdiction effectively wrote that critical element out of the Mongolia-PRC Treaty.

Article 8 of the Treaty provides for settlement of disputes between either of the sovereign signatories (*i.e.*, Mongolia or the PRC) and an investor who is a national of the other sovereign. Its text is typical of BITs concluded with various states by the PRC during the period when the Mongolia-PRC BIT was concluded. The Tribunal in this case adopted an extremely narrow construction, in which the only matter that is arbitrable is the amount of compensation for an expropriation. According to the Tribunal, only the allegedly offending state itself can determine whether it expropriated property; if it denies having done so, the independent tribunal established by the BIT can never come into existence. *See* Ex. A at ¶¶ 435 – 54. Thus, an investor is left in the perverse position that only if the state's executive or legislature admits that it has expropriated the investment, or if the state's own courts can be persuaded so to declare, can that investor then proceed to international arbitration.

This interpretation defeats the purpose of investor-state arbitration and deprives the investor of much of the benefit of the Treaty – a Treaty intended to provide security to investors so as to entice them to invest in the host state, whose courts the investor may (quite reasonably) not trust to be evenhanded in an dispute with a foreign investor. The conclusion of other tribunals and courts, which have held that such arbitration clauses give tribunals jurisdiction to determine, *inter alia*, whether an expropriation has occurred and whether it was effected legally, is therefore the correct one.

Article 8(3) provides for arbitration if "a dispute involving the amount of compensation for expropriation cannot be settled" through negotiations. As this is an international treaty, it is interpreted according to rules set out in the Vienna Convention on the Law of Treaties (the "**Vienna Convention**"), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679, to which both Mongolia and the PRC are party (although the United States is not). Fortunately, we are not left to review the Vienna Convention without guidance; there are several international judicial and arbitral decisions applying the Vienna Convention to other treaties that similarly provide for arbitration of disputes "involving," "relating to," or "concerning" the amount of compensation. The majority of these decisions concerning the scope of such provisions have held that the scope of arbitration may include the question whether an expropriation has occurred.

These cases include those that interpret other BITs concluded by the PRC. Indeed, in *Tza Yap Shum v. Republic of Peru*, the tribunal interpreted a BIT that contains the same operative language. The tribunal found that a narrow interpretation of "involving the amount of compensation" would "invalidate" the arbitration clause. Thus, the host state's consent to arbitration would be illusory, because the investor could not actually have access to arbitration clause unless the host state agreed to allow it. *See Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, at ¶ 148, *available at* https://www.italaw.com/sites/default/files/case-documents/ita0880.pdf (Spanish original). This finding makes eminent sense as it would undermine a central purpose of any BIT to so invalidate the arbitration clause. Leaving the

availability of arbitration in the host state's hands, after a dispute has arisen, would exacerbate the "central concern of investors who are averse to allowing the host State to act as judge and party in measuring the monetary extent of its own liability." *Renta 4 S.V.S.A. et al v. Russian Federation*, SCC Case No. V 024/2007, Award on Preliminary Objections, ¶ 33 (2009), *available at* https://www.italaw.com/sites/default/files/case-documents/ita0714.pdf; *see also* Separate Opinion of Hon. Charles N. Brower, *available at* https://www.italaw.com/sites/default/files/case-documents/ita0715.pdf (concurring in part and dissenting in part). The decision of the *Tza Yap Shum* tribunal was upheld by an annulment committee, which is the body that reviews applications to vacate awards in the ICSID system. *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, 12 February 2015, *available at* https://www.italaw.com/sites/default/files/case-documents/italaw4371.pdf (English original).

The other case concerning the same language as the Treaty in this case – the "involving" formulation – reached the same conclusion and was upheld in national court. The arbitrators concluded that the clause made the existence of an expropriation arbitrable. *See Sanum Investments Ltd. v. Lao People's Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction, ¶ 342 (Dec. 13, 2013), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw3322.pdf. A first-instance court in Singapore disagreed, but the Court of Appeal of Singapore reinstated the arbitrators' decision. *Sanum Investments Limited v. Lao People's Democratic Republic*, [2016] SGCA 57, ¶ 147. Thus, where

PRC BITs are concerned, it appears that all three tribunals (other than the Tribunal in this case) preferred the broader interpretation; the ICSID annulment (reviewing) committee did so as well; and so did the Singapore appellate court. This Tribunal is thus an outlier with regard to PRC BITs, its only companion being the Singaporean judge whose decision was reversed on appeal.

An even more recent award further supports a broad interpretation of the BIT's language. In the PRC-Yemen BIT, under which the parties consented to arbitrate "any dispute relating to the amount of compensation for expropriation," the tribunal found that, in the context of the BIT as a whole, a narrow interpretation limiting arbitral jurisdiction to the amount of damages alone would contradict the treaty's object and purpose. *See Beijing Urban Construction Grp. Co. v. Yemen*, ICSID Case No. ARB/14/30, ¶¶ 78-87 (2017), *available at* www.italaw.com/sites/default/files/case-documents/italaw8968.pdf. This was apparent to the tribunal because the host state could unilaterally eliminate the investor's option to go to arbitration, simply by contesting any element of the underlying question of whether an expropriation had actually occurred. The tribunal therefore held that it had jurisdiction to determine the ultimate question of the existence of an expropriation. *See id.* at ¶¶ 78-87.

In other related contexts, similarly broad conclusions have been reached. In *EMV v. Czech Republic*, the tribunal decided that, under a dispute-resolution clause providing that in a treaty providing for arbitration for disputes "concerning compensation due by virtue of Article 3 paragraphs (1) and (3) [pertaining to

expropriation]," the questions of whether and how an expropriation had occurred were arbitrable. The Czech Republic sought to vacate the award in the English courts – which upheld the award (and its inherent decision on arbitrability), saying:

> The word 'concerning', however, is broad. The word is not linked to any particular aspect of 'compensation'. 'Concerning' is similar to other common expressions in arbitration clauses, for example 'relating to' and 'arising out of'. Its ordinary meaning is to include every aspect of its subject: in this case 'compensation due by virtue of Paragraphs (1) and (3) of Article 3'. As a matter of ordinary meaning this covers issues of entitlement as well as quantification.

Czech Republic v. European Media Ventures SA [2007] EWHC 2851, ¶ 44 (English Comm'l Court).[1] The same holds true for "involving," at used in Article 8(3) of the Treaty in the instant case.

In light of the plain language of the BIT, and the wealth of judicial and arbitral authority and undeniable policy considerations in favor of the broad interpretation of the relevant language, this Court should vacate the Award and hold that Article 8(3) supports the arbitrability of questions of whether expropriation occurred.

[1] While there are occasional decisions going the other way, in the context of Russian and Eastern European treaties, *see, e.g., Berschader v. Russian Federation* (SCC Case No 080/2004) Award, 21 April 2006, *available at* https://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf; *RosInvest UK Ltd v. Russian Federation* (SCC Case No V 079) Award on Jurisdiction, 5 October 2007, *available at* https://www.italaw.com/sites/ default/files/case-documents/ita0719.pdf, the weight of authority, however, favors the broader interpretation of clauses of this nature and the policy rationale, too, argues for breadth; the narrow interpretation essentially deprives the clauses of any practical significance.

REQUEST FOR AN ORAL HEARING

This petition raises important issues concerning the interests of foreign nationals and a foreign state; therefore, Petitioners respectfully request that the Court schedule oral argument on this petition.

CONCLUSION

For all of the foregoing reasons, the Award should be vacated and the parties compelled to arbitrate Petitioners' claims.

Dated: September 28, 2017
New York, NY

Respectfully Submitted,

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