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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)

DISSENTING OPINION

Stanimir A. Alexandrov

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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”),¹ 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.

¹ 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**).

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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.²

(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*

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

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contain”;³ “*to have within or as part of itself*”;⁴ “*to include as a necessary circumstance, condition, or consequence; ... to include, contain or comprehend within itself or its scope*”;⁵ “*include, contain, take in, embrace*”;⁶ “*to include something as a necessary part of an activity, event, or situation*”.⁷ 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.*”⁸ 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

³ Oxford Dictionary (**Exhibit CL-0141**).

⁴ Merriam-Webster Dictionary (**Exhibit CL-0142**).

⁵ Random House Dictionary (**Exhibit CL-0143**).

⁶ Collins English Dictionary (**Exhibit CL-0144**).

⁷ Macmillan Dictionary (**Exhibit CL-0145**).

⁸ **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)⁹ and in its closing statement (slide 11)¹⁰ provisions of other Chinese BITs using the words “disputes over” or “disputes

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

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

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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*).”¹¹ 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 Singapore¹² and the other of the tribunal in the case of *Beijing Shougang v. Mongolia*¹³) 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*

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

¹² *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**).

¹³ *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.¹⁴

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*”

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

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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.*”¹⁵ 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

¹⁵ 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.*”¹⁶ The only way to avoid

¹⁶ *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.¹⁷

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.¹⁸ Read

¹⁷ Treaty (EN) (**Exhibit C-0001/Exhibit RL-0143**).

¹⁸ 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.”¹⁹ 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.’*”²⁰
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*

¹⁹ *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)**).

²⁰ *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.'*²¹

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

²¹ *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. [...]”²²

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.²³ 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

²² *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).

²³ *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.*²⁴

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*

²⁴ *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.*²⁵

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.²⁶ 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.”²⁷ 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.²⁸
50. *Beijing Shougang and others v. Mongolia*, which has reached the opposite conclusion,²⁹ 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.³⁰ 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.

²⁵ *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**).

²⁶ *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**).

²⁷ *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**).

²⁸ *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**).

²⁹ *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**).

³⁰ *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.*”³¹ 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*.³² 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.*³³

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),

³¹ *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**).

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

³³ *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*.”³⁴ 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

³⁴ *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.*³⁵

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.³⁶ (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*

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

³⁶ *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."

* * *

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