IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 57

Civil Appeals No 139 and 167 of 2015

Between

SANUM INVESTMENTS LIMITED

... *Appellant*

And

THE GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

... *Respondent*

Summons No 2 of 2016

Between

THE GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

... *Applicant*

And

SANUM INVESTMENTS LIMITED

... *Respondent*

In the matter of Originating Summons No 24 of 2014

In the matter of Section 10 of the International Arbitration Act (Cap 143A)

And

In the matter of Order 69A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)

Between

THE GOVERNMENT OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

... *Plaintiff*

And

SANUM INVESTMENTS LIMITED

... *Defendant*

JUDGMENT

[International Law] — [Treaties]
[International Law] — [Arbitration]
[Arbitration] — [Arbitral tribunal] — [Jurisdiction]

Sanum Investments Ltd
v
Government of the Lao People's Democratic Republic

[2016] SGCA 57

Court of Appeal — Civil Appeals No 139 and 167 of 2015 and Summons No 2 of 2016
Sundaresh Menon CJ, Chao Hick Tin JA, Andrew Phang Boon Leong JA, Judith Prakash JA and Quentin Loh J
4 April 2016

29 September 2016 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

1 The present appeals arise out of proceedings commenced by the Government of the Lao People's Democratic Republic ("the Lao Government") under s 10(3)(*a*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"). An arbitral tribunal ("the Tribunal") ruled that it had jurisdiction to arbitrate certain expropriation claims brought by a Macanese investor, Sanum Investments Limited ("Sanum"), against the Lao Government ("the Arbitration"). Dissatisfied, the Lao Government brought proceedings before the High Court challenging the Tribunal's ruling on jurisdiction. Two questions had to be answered in the affirmative for the Tribunal to be found to have jurisdiction to arbitrate the present dispute: (a) whether the bilateral investment treaty entered into between the People's Republic of China ("the PRC") and the Lao People's Democratic Republic

("Laos") ("the PRC-Laos BIT") is applicable to the Macau Special Administrative Region of China ("Macau"); and (b) whether the subject-matter of the dispute falls within the dispute resolution clause of the PRC-Laos BIT.

2 The High Court judge ("the Judge") in *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 ("the Judgment") answered both questions in the negative, thereby concluding that the Tribunal did not have jurisdiction in the Arbitration and allowing the Lao Government's appeal against the Tribunal's ruling on jurisdiction. Sanum has brought the present appeals against the Judge's decision.

Background facts

3 The facts concerning this dispute are largely undisputed.

4 Prior to the handover of Macau to the PRC in 1999, Macau was under the administrative control and sovereignty of Portugal. Several salient events occurred prior to that. In 1987, the PRC and Portugal signed a joint declaration on the question of Macau ("the 1987 PRC-Portugal Joint Declaration"). The 1987 PRC-Portugal Joint Declaration provided that the PRC would resume the exercise of sovereignty over Macau with effect from 20 December 1999 and declared that the PRC's "one country, two systems" regime would apply to Macau.

5 On 31 January 1993, the PRC-Laos BIT was signed. Pursuant to its terms, the BIT entered into force on 1 June 1993. The BIT does not expressly state whether it would or would not in due course apply to Macau. Subsequently, in 1999, following the handover, the PRC "resumed sovereignty" over Macau and established it as a Special Administrative

Region ("SAR"). Nothing was said in the aftermath of the handover, either by the PRC or by Laos, on whether the BIT would or would not extend to Macau.

6 In 2007, Sanum began investing in the gaming and hospitality industry in Laos through a joint venture with a Laotian entity. Disputes subsequently arose between Sanum and the Lao Government which culminated in Sanum commencing arbitral proceedings against the Lao Government by a notice of arbitration issued pursuant to the PRC-Laos BIT on 14 August 2012. Sanum alleged, among other things, that the Lao Government had deprived it of the benefits to be derived from its capital investment through the imposition of unfair and discriminatory taxes. Sanum brought its claim on the basis of Art 8(3) of the PRC-Laos BIT, which provides as follows:

> 3. If a dispute involving the amount of compensation for expropriation cannot be settled through negotiation within six months as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article.

7 The Lao Government raised preliminary objections to the Tribunal's jurisdiction on two bases. The first was that the PRC-Laos BIT did not extend to protect a Macanese investor; and the second was that the claim was not arbitrable as it went beyond the permitted subject-matter prescribed under Art 8(3) of the BIT.

8 By way of a letter dated 19 April 2013, counsel for the Lao Government in the arbitral proceedings, Mr David J Branson, informed the Tribunal that the Lao Government was "reaching out to the PRC through diplomatic channels" concerning the PRC-Laos BIT "but it [was] difficult to know how quickly there can be a response". No response was forthcoming

from the PRC in the subsequent months. On 13 December 2013, the Tribunal held that the PRC-Laos BIT did apply to Macau and that the subject-matter of the claim did fall within Art 8(3) of the BIT, and concluded that it has jurisdiction to hear the claim ("the Award").

9 Dissatisfied with this decision, the Lao Government commenced Originating Summons No 24 of 2014 ("OS 24/2014") on 10 January 2014 to have the High Court of Singapore decide the question of the Tribunal's jurisdiction. Singapore was designated as the place of arbitration pursuant to Procedural Order No 1 issued by the Tribunal on 21 May 2013 prior to the Award being made and after consultation with the parties. Under s 10(3)(*a*) of the IAA, the Tribunal's determination that it has jurisdiction remains subject to overriding court supervision in the form of an appeal to the High Court of Singapore.

10 The Lao Government also filed Summons No 884 of 2014 ("SUM 884/2014") on 19 February 2014 to have two *Notes Verbales* ("the 2014 NVs") admitted into evidence before the High Court. The first NV was sent from the Laotian Ministry of Foreign Affairs ("the Lao MFA") to the PRC Embassy in Vientiane, Laos on 7 January 2014 ("the 2014 Laos NV"). In it, Laos expressed the view that the PRC-Laos BIT did not extend to Macau and sought the views of the PRC on this. The second NV was the reply from the PRC Embassy dated 9 January 2014 ("the 2014 PRC NV"), which stated its concurrence with the view that the PRC-Laos BIT did not apply to Macau "unless both China and Laos make separate arrangements in the future".

11 The Judge decided to admit the 2014 NVs into evidence. On the substantive questions, he allowed the Lao Government's challenge against the Tribunal's ruling on jurisdiction and awarded costs to the Lao Government.

12 Sanum appealed against the Judgment in Civil Appeal No 139 of 2015 ("CA 139/2015") by way of a Notice of Appeal dated 20 July 2015. Sometime after the Notice of Appeal was filed, the parties appeared before the Judge to determine the costs of the Arbitration and of SUM 884/2014 (on adducing further evidence). By way of an oral judgment dated 18 August 2015 ("the Costs Order"), the Judge applied the principle that costs follow the event, and granted costs of the Arbitration and of SUM 884/2014 to the Lao Government. By way of a Notice of Appeal filed on 27 August 2015, Sanum also appealed against the Costs Order in Civil Appeal No 167 of 2015 ("CA 167/2015").

13 Prior to the hearing of the present appeals, the Lao Government procured two further NVs ("the 2015 NVs") which it now seeks to admit into evidence by way of Summons No 2 of 2016 ("SUM 2/2016"). These consist of a NV sent from the Lao MFA to the PRC Embassy in Vientiane, Laos on 18 November 2015 ("the 2015 Laos NV") requesting that the PRC Ministry of Foreign Affairs ("the PRC MFA") confirm that the 2014 PRC NV is authentic, and a NV sent from the PRC MFA in reply confirming that the 2014 PRC NV had been sent with the authorisation of the PRC MFA ("the 2015 PRC NV").

Decision below

14 As noted above, the Judge found that the Tribunal did not have jurisdiction to arbitrate the expropriation claims between Sanum and the Lao Government.

15 As an anterior step, the Judge first found that the application was justiciable before the Singapore courts. The Lao Government's application was based on s 10(3)(*a*) of the IAA, which provides that if the arbitral tribunal rules as a preliminary matter that it has jurisdiction, any party may, within 30

days after having received notice of that ruling, apply to the High Court to decide the matter. The Judge was satisfied that the Lao Government had the right to have the Tribunal's ruling on jurisdiction reviewed by the High Court on the basis that the Lao Government was relying on s 10(3)(*a*) of the IAA, a Singapore statutory provision, and the issues that arose in the application had a bearing on Singapore domestic law and the rights or duties arising thereunder. This finding of the Judge is not contested by Sanum in the present appeal.

16 Secondly, the Judge held that although the Tribunal had heard arguments, considered the point and then concluded that it did have jurisdiction, when this was challenged before the court, the matter of jurisdiction was to be considered afresh without any deference being accorded to the Tribunal's reasoning or its conclusions. The Judge further noted that it did not matter that the Tribunal in this case was an eminent one; if deference was to be accorded based on the eminence of the Tribunal, a varying standard of review would be applied when the court considers applications under s 10 of the IAA, a position which the Judge was unwilling to accept.

17 Thirdly, the Judge took the view that the test in *Ladd v Marshall* [1954] 1 WLR 1489 did not strictly apply to the question of whether the 2014 NVs should be admitted. Instead, he applied the modified version of the test as was laid down in *Lassiter Ann Masters v To Keng Lam (alias Toh Jeanette)* [2004] 2 SLR(R) 392 ("*Lassiter*"). In *Lassiter*, the Court of Appeal held (at [24]) that with respect to certain types of appeals (such as, Registrar's Appeals), the first *Ladd v Marshall* condition – that it must be shown that the evidence could not have been obtained with reasonable diligence for use at trial – need not be applied as strictly. Instead, the judge should be given a wider discretion in the matter although sufficiently strong reasons would have to be advanced to explain why the new evidence had not been adduced at the

hearing below. The Judge held that the 2014 NVs should be viewed as the culmination of communications and meetings between the Lao Government and the PRC Government which undoubtedly took some time, and there was no evidence to suggest that the Lao Government would have obtained the 2014 NVs earlier even if it had attempted to do so. The Judge also held that the 2014 NVs would have an important bearing on the case because they furnish an indication of the parties' intentions on the question of whether the PRC-Laos BIT was to apply to Macau. Further, the Judge held that in the light of the affidavit of the Laotian Vice-Minister for Foreign Affairs attesting to the authenticity of the 2014 NVs, the veracity of which the Judge had no reason to doubt, the Lao Government had proved that the 2014 NVs were apparently credible. Satisfied that the conditions in *Lassiter* had been met, the Judge admitted the 2014 NVs into evidence.

18 Fourthly, the Judge held that the PRC-Laos BIT applied to Macau. He made this finding relying on several pieces of evidence:

(a) the 2014 NVs;

(b) the 1987 PRC-Portugal Joint Declaration which stated that Macau had the power to conclude and implement agreements with States on its own and that the application to Macau of international agreements to which the PRC is or becomes a party "shall be decided by [the PRC Government], in accordance with the circumstances of each case and the needs of [Macau] and after seeking the views of the [Macau Government]";

(c) the experience of the PRC and the United Kingdom ("the UK") in relation to Hong Kong ("HK") which was thought to be analogous with the present situation, and in respect of which the international

consensus was said to be that PRC treaties would not automatically apply to HK; and

(d) a 2001 World Trade Organisation Trade Policy Report ("the 2001 WTO Report") which stated that apart from two agreements signed with Portugal, "[Macau] has no other bilateral investment treaties or bilateral tax treaties".

The Judge decided against placing reliance on a 1999 note to the United Nations Secretary General ("the 1999 UNSG Note"), which did not list the PRC-Laos BIT as one of the treaties applicable to Macau. The Judge found that the 1999 UNSG Note only pertained to multilateral treaties and therefore its omission of any mention of the PRC-Laos BIT was not thought to be indicative that it was inapplicable to Macau.

19 Fifthly, the Judge held that the Tribunal, in any event, did not have subject-matter jurisdiction to hear Sanum's expropriation claims. The Judge found that Art 8(3) of the PRC-Laos BIT should be given a restrictive interpretation to mean disputes limited to the amount of compensation to be paid to Sanum in the event of an expropriation, for the following reasons:

(a) The word "involve" as used in Art 8(3) is capable of being interpreted restrictively to mean imply, entail or make necessary.

(b) The wording in Art 8(3) was to be contrasted with the breadth of the phrase "any dispute in connection with an investment" in Art 8(1) and this suggests that a more restrictive meaning was intended in relation to Art 8(3).

(c) A restrictive reading of Art 8(3) would not lead to the conclusion that an investor would *never* have access to arbitration. This was because the Judge was of the view that an investor could invoke Art 8(3) if three conditions were met: (i) a dispute remained unresolved after six months of negotiation; (ii) it concerned the amount of compensation for expropriation; and (iii) Art 8(2) had not been invoked by the investor.

The Judge also found that the limited scope for the submission of a dispute to arbitration was understandable because the current PRC-Laos BIT was an example of a "first-generation" PRC BIT which tended to have restrictive dispute settlement clauses.

20 For these reasons, the Judge found that the Tribunal did not have jurisdiction to arbitrate the dispute and allowed the Lao Government's appeal against the Award.

Parties' positions on appeal

21 Sanum submits that the Judge should have accorded deference to the findings of the Tribunal because the application concerned the interpretation of a treaty to which Singapore is not a party, as well as the application of principles of public international law. It further contends that the Judge had erred in finding that the PRC-Laos BIT did not apply to Macau. According to Sanum, the default rule on state succession (under Art 29 of the Vienna Convention on the Law of Treaties ("VCLT") and Art 15 of the Vienna Convention on Succession of States in respect of Treaties ("VCST")) has not been displaced by any of the pieces of evidence relied on by the Lao Government. Sanum also argues that the Judge erred in admitting the 2014

NVs into evidence because, in its submission, there were insufficient reasons to explain why the 2014 NVs had not been adduced before the Tribunal. Lastly, Sanum submits that the Judge erred in adopting a restrictive interpretation of Art 8(3) of the PRC-Laos BIT. According to Sanum, such an interpretation would render Art 8(3) wholly ineffective and run counter to the preponderance of authorities on similarly-worded BITs.

22 The Lao Government rejects this. It submits that there is no basis for suggesting that the Judge should have been deferential to the Tribunal on the question of jurisdiction when the very point of the application to the court was to challenge the Tribunal's finding on jurisdiction. To hold otherwise would mean that the court's role would be largely illusory. The Lao Government also contends that the Judge was correct in his reliance on the various pieces of evidence which, taken collectively, displace the default rule at international law, under which the PRC-Laos BIT would have applied to Macau. The Lao Government further argues that the Judge was correct to admit the 2014 NVs into evidence because in fact, there had been no delay in obtaining the 2014 NVs; the nature, pace and process of diplomatic communications meant that it had not been possible to make the 2014 NVs available prior to the Award. Lastly, the Lao Government submits that the restrictive interpretation of Art 8(3) fully accords with the object and purpose of the PRC-Laos BIT which is based on the principle of mutual respect for sovereignty, and is also supported by the fact that the PRC-Laos BIT is a "first-generation" PRC BIT. An expansive reading of Art 8(3) in contrast is untenable because it would effectively render otiose express words that had been chosen by the contracting States.

23 In respect of SUM 2/2016, the parties do not dispute that the *Ladd v Marshall* conditions apply but disagree over whether the conditions have been

satisfied. The Lao Government submits that the 2015 NVs should be admitted because they had been issued by a non-party to this dispute for the specific purpose of providing clarification to the Court of Appeal in response to challenges made by Sanum directed at the authenticity of the 2014 NVs in the present appeals.

24 On this, Sanum contends that the 2015 NVs should not be admitted because the Lao Government should have but did not take any steps to obtain such evidence from the PRC MFA while the proceedings below were afoot. The Lao Government only did so after leave to appeal to the Court of Appeal had been granted on 13 July 2015, without any adequate explanation for the delay.

25 Aside from the parties' submissions, we also had the benefit of a written joint opinion as well as oral submissions from the two *Amici Curiae* we appointed – Mr J Christopher Thomas, QC ("Mr Thomas") and Prof Locknie Hsu. We take this opportunity to thank the *Amici* for their invaluable assistance. Their submissions were very extensive, thorough and pertinent and we will refer to them as and when appropriate in the course of this judgment.

Issues

26 There are two main issues which arise in the present proceedings:

(a) whether the 2015 NVs should be admitted into evidence; and

(b) whether the Judge was correct in finding that the Tribunal did not have jurisdiction under the PRC-Laos BIT to hear the claims brought by Sanum.

Our decision

Whether the 2015 NVs should be admitted

27 Both parties accept that a party which seeks to admit further evidence before the Court of Appeal when it considers the substantive appeal must satisfy the three conditions laid down in *Ladd v Marshall*: (a) the evidence could not have been obtained with reasonable diligence for use in the lower court; (b) the evidence would probably have an important influence on the result of the case; and (c) the evidence must be apparently credible (see also *Chan Ah Beng v Liang and Sons Holdings (S) Pte Ltd and another application* [2012] 3 SLR 1088 ("*Chan Ah Beng*") at [17]).

28 The principal difference between the 2015 NVs and the 2014 NVs is that the former was issued by the PRC MFA whereas the latter was issued by the PRC Embassy in Laos. The stated purpose for the adducing of the 2015 NVs is to confirm the authenticity of the 2014 NVs.

29 Sanum argues that the 2015 NVs should not be admitted because none of the three *Ladd v Marshall* conditions have been satisfied. In our judgment, the strongest objection that Sanum can make against the admission of the 2015 NVs is with respect to the first *Ladd v Marshall* condition. In this regard, Sanum submits that it had raised concerns about the authenticity of the 2014 NVs as early as 19 March 2014, during the High Court proceedings, and no explanation has been given by the Lao Government as to why it has only sought to address these concerns by way of the 2015 NVs procured after the Judge's decision. In response, the Lao Government advances a few reasons:

(a) The 2015 NVs did not exist at the time of the High Court hearing and hence could not be produced.

(b) The 2015 NVs originated from a non-party to the dispute, the PRC, which was under no legal obligation to provide such evidence to the Lao Government.

(c) The Lao Government had filed an affidavit by its Vice-Minister of Foreign Affairs, Mr Alounkeo Kittikhoun ("Mr Kittikhoun"), after Sanum raised concerns over the authenticity of the 2014 NVs in the lower court. In the affidavit, Mr Kittikhoun, who was personally involved in the diplomatic process leading to the issuance of the 2014 NVs, confirmed that the 2014 NVs accorded with the official position of the PRC.

(d) Sanum did not file any further affidavit to respond to Mr Kittkhoun's evidence, and only raised its objections at the hearing of OS 24/2014.

(e) It was only after leave had been granted to the Lao Government to appeal the Judge's decision that the PRC indicated its willingness to provide the 2015 PRC NV to verify the authenticity of the 2014 PRC NV. This was in response to the objections to authenticity that had been raised by Sanum before the Judge.

30 In our judgment, the grounds we have summarised at (a) and (b) above are the factors which are determinative in the present application. Documents which had not yet come into existence before the hearing cannot possibly have been produced at that stage. This point should therefore not be taken against the party seeking to adduce the evidence at least as a general rule (see *Chan Ah Beng* at [24]). The real question in such circumstances is whether they *could* have been brought into existence at an earlier time; but where, as here, the evidence sought to be adduced on appeal originates from a non-party that

is under no legal obligation to provide the necessary evidence, the court will be more inclined to allow the new evidence to be admitted (*Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and another* [2006] 4 SLR(R) 807 at [15]-[16]).

31 On the present facts, the 2015 NVs were not in existence at the time of the hearing, were not in the Lao Government's possession, and were issued only in response to Sanum's filing of the present appeals. Though Sanum asserts that the 2015 NVs could have been obtained by the Lao Government with reasonable diligence prior to the High Court hearing, it is a fact that the Lao Government was dependent on the willingness of the PRC MFA to accommodate its request. Sanum points to the relatively short gap between the date of the 2015 Laos NV and the 2015 PRC NV to suggest that if the Lao Government had made its request earlier, it would have received the PRC MFA's response correspondingly earlier. In our judgment, this fails to take into account the likelihood that the Lao Government issued the 2015 NV to the PRC MFA only after informal discussions and consultations had transpired, culminating in the PRC indicating that it was willing in principle to issue a response. This would explain why the response from the PRC MFA was issued a short time after the Lao Government's formal request was made. Given the type of evidence that the Lao Government was seeking to adduce, namely, an official statement by the government of another country on important issues concerning the application of an international treaty affecting economic investments, it is likely that normal channels of diplomatic consultation and communication would have had to be followed, and this would explain the substantial amount of time that was required to obtain such documents. We do not think there is any basis for us to go behind the

assertions made by the Lao Government that it had done its best to obtain the relevant confirmation from the PRC.

32 Sanum also made much of the fact that in relation to the 2015 NVs, the Lao Government only approached the PRC MFA after Sanum had obtained leave to appeal to the Court of Appeal on 13 July 2015. In our judgment, nothing material turns on this because the PRC MFA would likely have been reluctant to issue the 2015 NVs until it was satisfied that this was *needed* and this would only be the case after Sanum had in fact obtained leave to pursue the matter before the Court of Appeal.

33 We are therefore satisfied that the first *Ladd v Marshall* condition is satisfied.

34 With respect to the second *Ladd v Marshall* condition, we find that the 2015 NVs could conceivably have an important influence on the resolution of the case. Inasmuch as the 2015 NVs confirm the authenticity of the 2014 NVs, their materiality would depend on the materiality of the 2014 NVs. But it is a fact that Sanum did mount a spirited attack on the 2014 NVs that extended to challenging their authenticity. Given that the 2015 NVs confirm the authenticity of the 2014 NVs, this evidence puts that objection to rest. As for the third *Ladd v Marshall* condition, we find that the 2015 NVs are apparently credible given that they represent formal diplomatic correspondence issued by the respective Ministries of two sovereign States bearing their respective official seals.

35 We therefore allow the Lao Government's application in SUM 2/2016 and admit the 2015 NVs into evidence.

Whether the Tribunal has jurisdiction to hear Sanum's claims

36 As noted above (at [1]), the Judge had to answer two questions to determine whether the Tribunal had the jurisdiction to hear Sanum's claims:

(a) whether the PRC-Laos BIT applies to Macau; and

(b) whether the Tribunal had subject-matter jurisdiction over Sanum's expropriation claims.

In the course of answering these two questions, however, the Judge also had to decide two preliminary points, namely whether the interpretation and application of the PRC-Laos BIT are matters that the Singapore courts can appropriately pronounce on; and if so, what standard of review ought to be applied in the light of the ruling that had already been made on this issue by the Tribunal. It is to these preliminary issues that we first direct our attention.

Whether the interpretation and application of the PRC-Laos BIT are matters that are justiciable before the Singapore courts

37 Sanum initially contended in the hearing below that the interpretation of the PRC-Laos BIT involved questions of pure international law that did not bear on the application of domestic law and hence was not something that could properly be pronounced on by the Singapore court. Sanum has not pursued this argument on appeal. It is therefore not necessary for us to consider it. Nevertheless, for completeness, we set out our brief views on this question.

38 There is no doubt, in our judgment, that the interpretation and application of the PRC-Laos BIT are matters that are entirely within the scope of what the Singapore courts had to deal with in this case. Indeed, we would

say that the High Court was not only competent to consider these issues, but in the circumstances, it was *obliged* to do so. This is so because the parties have designated Singapore as the seat of the Arbitration (as noted above at [9]). A necessary consequence of this is that the IAA applies to govern the Arbitration and this in turn *requires* the High Court to consider issues such as the jurisdiction of the Tribunal. The question of jurisdiction in this case is based on the terms of the PRC-Laos BIT both in relation to the question of the territorial application of the BIT and also the question of subject-matter jurisdiction. At the heart of the issue is the question: does the arbitral tribunal have jurisdiction in respect of these claims? The answer to this, in the final analysis, has to be furnished by the High Court in the event of a dispute and this is not displaced by the fact that in order to arrive at that answer, the Singapore court will have to interpret a BIT to which Singapore is not a party.

39 Therefore, in our judgment, the Judge was correct to find that the interpretation of the PRC-Laos BIT was a matter he could and in fact had to deal with.

What is the standard of review that should be applied?

40 Sanum accepts that the Judge was entitled in principle to undertake a *de novo* review of the Tribunal's award on jurisdiction. It contends, however, that due to the unique context and circumstances of this case, the Judge should have adopted a restrained approach by according deference and regard to the Tribunal's findings, especially when those findings arose in an investor-state arbitration concerning the application of principles of public international law.

41 We agree with the Lao Government that this submission by Sanum is misplaced and even contradictory. Once Sanum accepts that the court's task in

reviewing the Tribunal's ruling on jurisdiction is to conduct a *de novo* review, by definition, it follows that there is no basis for deference to be accorded to the Tribunal's findings. In *Black's Law Dictionary* (Bryan A Garner gen ed) (Thomson Reuters, 2014, 10th Ed), the term "hearing *de novo*" is defined (at p 837) as "a reviewing court's decision of a matter anew, *giving no deference* to a lower court's findings" [emphasis added] or "a new hearing or a matter, conducted as if the original hearing had not taken place". In our judgment, the court *should* consider the matter afresh. In doing this, it will of course consider what the Tribunal has said because this might well be persuasive. But beyond this, the court is not bound to accept or take into account the arbitral tribunal's findings on the matter.

42 This is consistent with the view we took in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*PT First Media*"). In *PT First Media*, we affirmed (at [163]) that a review on jurisdiction should be undertaken *de novo* and endorsed the observations of Lord Mance JSC in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 that "the tribunal's own view of its jurisdiction has no legal or evidential value before a court that has to determine that question". Similarly, in *PT Tugu Pratama Indonesia v Magma Nusantrara Ltd* [2003] 4 SLR(R) 257, Judith Prakash J (as she then was) noted (at [18]) that "the court makes an independent determination on the issue of jurisdiction and is not constrained in any way by the findings or the reasoning of the tribunal".

43 However, as was noted also by Prakash J in *AQZ v ARA* [2015] 2 SLR 972 (at [57]), this "does not mean that all that transpired before the Tribunal should be disregarded, necessitating a full re-hearing of all the evidence … it

simply means that the court is at liberty to consider the material before it, unfettered by any principle limiting its fact-finding abilities". We agree with these observations.

44 Accordingly, we find that the Judge did not err in holding that he was not required to defer to the findings of the Tribunal. It is of course the case that many of these rulings on jurisdiction will be made in the first instance by arbitration tribunals of great eminence. But it is the cogency and quality of their reasoning rather than their standing and eminence that will factor in the Judge's evaluation of the matter. We now turn to the two substantive questions (see above at [36]).

Whether the PRC-Laos BIT applies to Macau

45 We begin by setting out the context of our decision. Our decision relates *specifically* to what the contracting parties to the PRC-Laos BIT have done to establish whether *this particular treaty* applies to Macau. It does not concern what other parties may have done in relation to the signing of other treaties; nor does it pertain to what the PRC and Laos may have done in respect of any other treaties concluded between them. This might seem like an obvious point but we consider it an important one to make because of the way in which some of the arguments were put before us.

(1) Applicable rules and principles of international law

46 The rules of treaty interpretation are governed by Art 31 of the VCLT which encapsulates the following key principles:

(a) Treaties are to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, both:

(i) in their context; and

(ii) in the light of the object and purpose of the treaty.

(b) The context includes the text, preamble and annexes and any other instrument or agreement which was made in connection with the conclusion of the treaty.

(c) The court may also consider:

(i) any subsequent agreement between the parties regarding the interpretation of the treaty or its application; and

(ii) any subsequent practice in the application of the treaty which establishes the agreement between the parties.

47 Quite apart from the rules of treaty interpretation, the question of whether the PRC-Laos BIT applies to Macau, first and foremost, engages questions of state succession and the impact which such succession would have on the treaty obligations of States. The parties both accept, in this regard, that Art 15 of the VCST and Art 29 of the VCLT are the pertinent provisions to be considered. There is common ground between the parties that these two provisions reflect the customary international law rule known as the "moving treaty frontier" rule ("the MTF Rule"). Article 15 of the VCST provides:

> When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State:
>
> (*a*) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and
>
> (*b*) treaties of the successor State are in force in respect of the territory to which the succession of States

> relates from the date of the succession of States, *unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.*
>
> [emphasis added]

48 Article 29 of the VCLT provides under the heading "Territorial scope of treaties" that:

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

Although Art 29 does not directly concern state succession, where state succession leads to territorial changes, such as in the present case, it is thought that the MTF Rule is *implicitly embedded* in Art 29 and would apply: see Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) at p 489.

49 Simply put, because a treaty is binding in respect of the *entire* territory of a State, the MTF Rule presumptively provides for the automatic extension of a treaty to a new territory as and when it becomes a part of that State. The MTF Rule further provides that as a territory undergoes a change in sovereignty, it passes automatically *out* of the treaty regime of the predecessor sovereign *into* the treaty regime of the successor sovereign. At the same time, it is evident from the language of both Art 15 of the VCST and Art 29 of the VCLT that the MTF Rule is a presumptive rule that may be displaced by proof of certain specified matters. We return to this shortly, but what it means is that the PRC-Laos BIT will be presumed to automatically apply to the territory of Macau upon restoration of Chinese sovereignty with effect from 20 December

1999. On that date, the treaties of the predecessor sovereign, Portugal, will cease to apply in respect of Macau, while those of the PRC would apply instead unless the MTF Rule has been displaced. The experts who furnished opinions in this case are agreed that this is the approach to be taken when assessing the relevance and effect of the MTF Rule.

50 We return to the exceptions in Art 15 of the VCST and Art 29 of the VCLT, which overlap even though they are worded slightly differently. The exceptions under the VCST are somewhat narrower than those under the VCLT. Taking both Art 15 of the VCST and Art 29 of the VCLT together, it may be concluded on the basis of the default rule as we have summarised it above, that the PRC-Laos BIT will by operation of law apply to Macau unless one or more of the following exceptions can be shown:

(a) It appears from the PRC-Laos BIT, or is *otherwise established*, that the application of the PRC-Laos BIT would be *incompatible with the object and purpose* of the BIT (see Art 15(*b*) of the VCST).

(b) It appears from the PRC-Laos BIT, or is *otherwise established*, that the application of the BIT to Macau would *radically change the conditions of its operation* (see Art 15(*b*) of the VCST).

(c) An intention appears from the PRC-Laos BIT, or is *otherwise established*, that the BIT does not apply in respect of the entire territory of the PRC (see Art 29 of the VCLT).

51 In our judgment, the first two exceptions, namely those under Art 15 of the VCST, cannot readily be applied to the present case. As the Tribunal rightly observed (at [240] of the Award), the purpose and object of the PRC-Laos BIT is stated in its Preamble: it is to protect investments for the purpose

of the development of economic cooperation between both States. We do not see how an extension of the application of the BIT to Macau could be said to be incompatible with such a purpose. On the contrary, such an extension of the BIT would enlarge the scope of protection to capture a larger pool of investors and further economic cooperation between both States over a larger territory.

52 We are also satisfied that the Lao Government could not establish that the extension of the application of the treaty to Macau would have the effect of radically altering the conditions for the operation of the treaty. In this regard, we note that even the Lao Government's expert, Professor Simon Chesterman ("Prof Chesterman"), in the context of examining the exceptions to the MTF Rule, did not appear to explicitly consider how, having regard to the evidence, the exceptions under Art 15 of the VCST could be invoked. Prof Chesterman chose instead to focus on the exceptions under Art 29 of the VCLT in the present case. Our detailed analysis on the exceptions to the MTF Rule will therefore similarly focus on those under Art 29 of the VCLT which, in any event, are broader than the exceptions to Art 15 of the VCST.

53 In summary, for the Lao Government to be able to successfully establish that the PRC-Laos BIT does not apply to Macau, contrary to the default position under the MTF Rule, it must establish either (a) that an intention "appears" from the BIT that it is not meant to apply to Macau; or (b) the evidence must "otherwise establish" that the BIT is not meant to apply to Macau.

(2) Whether an intention appears from the PRC-Laos BIT that it is not meant to apply to Macau

54 Prof Chesterman thought that it "appear[ed] from the treaty" that the PRC-Laos BIT did not apply to Macau. His analysis on this issue, however,

was almost entirely dependent on the weight that he attributed to the 2014 NVs as a "subsequent agreement" within the scope of Art 31(3)(*a*) of the VCLT, which we have summarised at [46(c)(i)] above. In our judgment, it is appropriate first to consider the provisions of the PRC-Laos BIT and its context, objects and purposes *without recourse* to the 2014 NVs. After all, the 2014 NVs are not part of the PRC-Laos BIT and if one is to ascertain the intention of the parties as it appears from the treaty, then it would not be correct *in this context* to also examine other evidence. Such other evidence, including the 2014 NVs, may undoubtedly be separately considered but having regard to the terms of Art 29 of the VCLT, we consider that this would more appropriately be done when assessing whether it has been "otherwise established" that the BIT is not intended to apply to Macau.

55 In our judgment, there is nothing in the text, the objects and the purposes of the PRC-Laos BIT, or in the circumstances of its conclusion, that points to an intention to displace the MTF Rule such that it would lead to the conclusion that the BIT does not apply to Macau.

56 Turning to the provisions of the PRC-Laos BIT, as noted above (at [5]), the BIT is silent on its applicability to Macau. It contains neither an express provision stating that *it applies to Macau*, nor one *excluding* its application to Macau. Given that the conclusion of the PRC-Laos BIT in 1993 pre-dated the reversion of Macau to the PRC in 1999, it is perhaps unsurprising that the BIT did not contain a clause addressing its application or otherwise to Macau from 1999 and to that extent, no definite conclusion can be drawn from the absence of any express provisions on this issue in the BIT.

57 However, two factors present within the factual context of this case support the applicability of the PRC-Laos BIT to Macau. First, in the

chronological sequence of events, the 1987 PRC-Portugal Joint Declaration pre-dated the PRC-Laos BIT. Given that the Joint Declaration contemplated that the PRC Government would resume the exercise of sovereignty over Macau with effect from 1999, the handover of Macau to the PRC and the extension of the territorial applicability of the PRC's treaties to Macau, therefore, cannot be said to have been an unforeseen event at the time the PRC-Laos BIT was concluded. Although the PRC-Laos BIT does not contain an express provision stating that it *does apply* to Macau, this is not necessary, since the default position under the MTF Rule is that the PRC's treaties would *automatically* apply to Macau upon Macau's reversion to the PRC. In contrast, the fact that the PRC and Laos ("the Contracting States") did not exclude the applicability of the BIT to Macau despite the anticipated reversion of Macau seems to point, if anything, towards the applicability of the BIT to Macau.

58 This follows because although Macau was not under Chinese control or sovereignty at the time the PRC-Laos BIT was entered into, the Contracting States must be taken to have been aware that by virtue of the operation of the MTF Rule, which has been accepted by all the experts as being a part of customary international law, the PRC-Laos BIT would apply to Macau upon the handover unless the Contracting States did something to exclude its application. Nothing, however, was done by the Contracting States to that end. At the very least, the silence or inaction of the parties in this connection cannot displace the presumptive position that the PRC-Laos BIT would extend to Macau from 1999. This is unlike the position in *Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2007] 2 SLR(R) 453 ("*Lee Hsien Loong*") where the High Court found (at [114]–[115]) that, on the facts, there was sufficient evidence to show, at the time of the signing of the Treaty on Judicial Assistance in Civil and Commercial Matters between Singapore

and the PRC, that the signatories did not intend for the treaty to apply to Hong Kong. We note, in any event, that the parties did not cite *Lee Hsien Loong* to us for the purpose of supporting any argument that the MTF Rule had been displaced, presumably because *Lee Hsien Loong* was not squarely concerned with the application of the MTF Rule.

59 Secondly, in any event, even if the reversion of Macau to the PRC could be said to have been overlooked at the time the PRC-Laos BIT was entered into, the structure and in particular the time period for implementation and review of the BIT was such that the Contracting States would have undertaken a review of the PRC-Laos BIT shortly *after the handover*. Despite this, the parties chose not to include any specific provision expressly excluding the applicability of the treaty to Macau. In this regard, it is significant that the PRC-Laos BIT was initially to apply for a 10-year period (Art 12(1)). Each Contracting State had the option to give notice to terminate the BIT one year before the expiration of the 10-year period (Art 12(2)). As noted by Sanum's expert, Sir Daniel Bethlehem QC ("Sir Daniel"), this would necessarily have entailed a review of the application of the BIT sufficiently in advance of 1 June 2002 for the purposes of deciding whether the PRC-Laos BIT should continue to remain in force. The timing of this review would have coincided quite closely with the handover of Macau. Despite this, there was no evidence of any exchanges between the Contracting States pertaining to the exclusion of the applicability of the BIT to Macau in the time leading to the review. This is significant because it cannot be said that they (in particular the PRC) were unaware of the significance of Macau falling under the sovereignty of the PRC by this time. Yet, again, the Contracting States did nothing to expressly displace the effects of the MTF Rule.

60 In our judgment, the Contracting States' decision to remain silent on the applicability of the PRC-Laos BIT to Macau in this context would appear to favour the conclusion that the presumptive effect of the MTF Rule had not been displaced. Certainly, there is no force in the argument that an intention "appears" from the PRC-Laos BIT to exclude its application to Macau.

(3) Whether it has been "otherwise established" that the PRC-Laos BIT is not to apply to Macau after the PRC had resumed sovereignty

61 Before turning to the next substantive issue, an anterior question arises as to the standard of proof that applies to such matters under international law. Mr Thomas submitted that public international law does not feature the same level of specificity as national legal systems in describing the applicable standards of proof. As Mr Thomas explained, international law can be viewed as a "common denominator" of the expectations and practices of States of widely varying legal traditions and the level of specificity of the rules of evidence found in international law can therefore be expected to be simpler than those found in national systems, particularly in common law jurisdictions. International tribunals have similarly stated that they are not bound by technical or judicial rules of evidence (see *eg*, *Asian Agricultural Products Ltd v Republic of Sri Lanka* (ICSID Case No. ARB/87/3, Final Award, 27 June 2000) at [56]; *Rompetrol Group N.V. v Romania* (ICSID Case No. ARB/06/3, Award, 6 May 2013) at [181]).

62 Mr Thomas was also not able to find any indication from the decisions of investment treaty tribunals that a particular standard of proof must be met before it will be found that it has been "otherwise established" that a "different intention" has been shown under Art 29 of the VCLT. On balance, we find it appropriate to apply the standard of satisfaction on a balance of probabilities if only because to say something has been established is meaningless unless the

tribunal (or in this case the court) is satisfied that it is more probable or likely than not that it is so. We will thus examine whether the evidence establishes, on a balance of probabilities, that the PRC-Laos BIT is not intended to apply to Macau.

63 Sanum alleges that the Judge erred in relying on four distinct pieces of evidence to conclude that it had been "otherwise established" that the PRC-Laos BIT did not apply to Macau:

(a) ***the 1987 PRC-Portugal Joint Declaration*** which stated that Macau had the power to conclude and implement agreements with States on its own and that the application to Macau of international agreements to which the PRC is or becomes a party "shall be decided by [the PRC Government], in accordance with the circumstances of each case and the needs of [Macau] and after seeking the views of the [Macau Government]";

(b) an analogy with ***the experience of the PRC and the UK in relation to HK*** where the international consensus was that the PRC's treaties would not automatically apply to HK upon handover;

(c) ***The 2001 WTO Report*** which stated that apart from two agreements signed with Portugal, "[Macau] has no other bilateral investment treaties or bilateral tax treaties"; and

(d) ***the 2014 NVs***.

The Lao Government, for its part, says the Judge was correct in his analysis, save that he should also have relied on the ***1999 UNSG Note*** to support his conclusion.

64 Before we turn to consider each of these specific pieces of evidence, this is an appropriate juncture to address a contention raised by Sanum, which is that the "critical date" doctrine under public international law prevents the Lao Government from relying on evidence that was generated only after the dispute had arisen. This has particular relevance to the reliance that may be placed on the 2014 NVs.

65 The critical date doctrine in the context of evidence in international arbitration operates in the following manner (Robert Pietrowski, "Evidence in International Arbitration", Arbitration International, 2006, Volume 22, Issue 3, pp 373-410, at p 399):

> A different kind of time constraint which involves the relevance rather than the admissibility of evidence is the so-called "critical date". In all cases, there is a point in time in the factual chronology of the dispute beyond which the conduct of the parties and other events can no longer affect the decision of the case. This time is called 'the critical date'.
>
> ...
>
> The critical date forecloses the use of evidence of self-serving conduct intended by the party concerned to improve its position in the arbitration after the dispute has arisen. ...

66 The Lao Government, on the other hand, argues that the critical date doctrine has no application in the present case, and in particular that it should not exclude the 2014 NVs, as that would be inconsistent with Art 31(3)(*a*) and (*b*) of the VCLT which envisages that there can be a "subsequent agreement" or "subsequent practice" which influences the interpretation of a treaty. This was also the view taken by the Judge (see [68]–[69] of the Judgment).

67 In our judgment, neither the argument of the Lao Government nor the Judge's reasoning quite addresses the point made by Sanum. The critical date that is relied on by Sanum is *the date on which the dispute had crystallised*

(which is 14 August 2012, when arbitration proceedings were initiated ("the Critical Date")). Sanum is not contending that all evidence which arose *after the handover of sovereignty* or possibly *after the conclusion of the PRC-Laos BIT* should be excluded. The Judge seems to us to have reasoned the issue without distinguishing between the date the dispute had crystallised on the one hand and the handover date or the date on which the PRC-Laos BIT was concluded on the other, as seen from [68]–[69] of the Judgment:

> 68 I have already set out the full text of the Two Letters above at [39]–[40]. Mr Yeo contends that the Two Letters are irrelevant as a matter of international law because the plaintiff is seeking to admit them ***after proceedings had been commenced on 14 August 2012, ie, the critical date***. According to Mr Yeo and the defendant's expert, Professor Shan, ***it is the PRC government's intent at the moment of handover that is relevant*** and their intent *today* is of no relevance.
>
> 69 However, this contention seems to ignore Art 31(3)(*a*) of the VCLT which allows subsequent agreements between the parties regarding the interpretation of the treaty or the application of its provisions to be taken into account. ...
>
> [emphasis in original in italics; emphasis added in bold-italics]

68 Perhaps because of the way the argument was presented to him, the Judge seemed to think that the critical date doctrine would preclude reliance on any material that came into being after the handover of Macau to the PRC had taken place. Such a position, he thought, would be inconsistent with Art 31(3)*(a)* of the VCLT. But as we see it, there is in fact no inconsistency between Sanum's reliance on the critical date doctrine and Art 31(3)(*a*) and (*b*) of the VCLT. Even if the critical date doctrine was applied, the Lao Government could still rely on evidence which came into being *after the conclusion of the PRC-Laos BIT or even after handover but before the dispute had commenced* to show that there was a subsequent agreement between the

parties. Sanum's objection is to reliance being placed on evidence which has been generated *after the Critical Date,* namely after the dispute had arisen.

69 In our judgment, the critical date doctrine remains relevant in this case when considering the various pieces of evidence that the Judge took into account. This does not mean that *any* evidence after the Critical Date is automatically inadmissible but special care would have to be taken in assessing the weight or relevance of such evidence. We consider this further (at [102]–[108] below).

70 In the circumstances, we categorise the evidence into three chronological periods and consider them accordingly: (a) the period before the handover of Macau in 1999; (b) the period between the handover and the Critical Date; and (c) the period subsequent to the Critical Date.

(A) THE PRE-HANDOVER EVIDENCE

71 There are two pieces of evidence which fall within this period – the 1987 PRC-Portugal Joint Declaration and the experience of the PRC in its dealings with the UK in relation to HK.

(I) THE 1987 PRC-PORTUGAL JOINT DECLARATION

72 At the time the PRC-Laos BIT was signed, the 1987 PRC-Portugal Joint Declaration had been entered into and made by the PRC and Portugal and it was treated as a bilateral treaty. The Joint Declaration was signed in the context of assurances that the PRC gave to Portugal relating to the future governance of Macau after the PRC resumed sovereignty. Annex I of the Joint Declaration elaborates on the PRC's basic policies in relation to Macau, and in

particular, clause VIII addresses the applicability to Macau of the PRC's international agreements in the following terms:

> ... The application to the Macau Special Administrative Region of international agreements to which the People's Republic of China is a party shall be decided by the Central People's Government in accordance with the circumstances and needs of the Macau Special Administrative Region and *after seeking the views of the Macau Special Administrative Region Government*. ... The Central People's Government shall, as necessary, authorize or assist the Macau Special Administrative Region Government to make appropriate arrangements for the application to the Macau Special Administrative Region of other relevant international treaties. [emphasis added]

73 Clause VIII also recognises that Macau would retain a measure of international personality of its own such that it could maintain and develop relations and conclude and implement agreements with other States in limited areas, including trade, finance and the economy.

74 The Judge thought that the 1987 PRC-Portugal Joint Declaration reflected the intention of the PRC that a treaty such as the PRC-Laos BIT would not apply to Macau unless some further steps were taken (see the Judgment at [92]). In this regard, the Judge appeared implicitly to accept the opinion of Prof Chesterman that the Joint Declaration suggests that the PRC Government would make a decision *at a future date* as to whether the PRC-Laos BIT would apply to Macau and to date, no such decision had been made. In other words, a positive act would be required in order to extend the PRC-Laos BIT to Macau. Given the absence of evidence before the court to suggest that the PRC had taken any such positive step to extend the scope of the PRC-Laos BIT to Macau or even to seek the views of the Macau government, the Judge concluded that the PRC-Laos BIT did not extend to Macau (the Judgment at [92]). We disagree.

75 Generally, applicable rules of international law form a substratum of international obligations that bind all States. It is of course true that the task of establishing precisely what norms and rules of international law apply may often be a more complex and nuanced inquiry than would be the case at domestic law. But once it is established that a particular rule of international law has become a part of customary international law then it will as a general rule bind all States. This is the position with the MTF Rule and that much does not appear to be controversial. The real question here is whether the PRC's position as reflected in the Joint Declaration could and in fact did displace the MTF Rule with respect to the PRC-Laos BIT.

76 It should first be noted that the 1987 PRC-Portugal Joint Declaration is a treaty concluded between the PRC and Portugal alone and binding only upon those States. On an uncontroversial application of the principles of public international law, such a treaty would *not* ordinarily create rights or duties for other States, including Laos (see *eg*, Malcolm N Shaw, *International Law* (Cambridge University Press, 6th Ed, 2008) at p 95). The PRC's bilateral treaty-partners would be entitled to rely on the presumptive effect of such rules as the MTF Rule in contracting with the PRC. In our judgment, absent specific steps being taken by the PRC to displace such a rule in any given case, the terms of a specific declaration such as the Joint Declaration made in the context of discussions between two sovereigns in connection with the imminent handover of a territory by one to the other, cannot override it. In our judgment, the MTF Rule, being a rule of customary international law, would and did apply to and bind the PRC. As a result, treaties to which the PRC was party - in this context, the PRC-Laos BIT - would extend to Macau upon the PRC resuming sovereignty of that territory, unless steps had been taken to disapply the MTF Rule in relation to any such treaty. The default position is

therefore the very opposite of what the Judge thought it to be and the Lao Government contends it to be, as set out in [74] above.

77 Therefore, even if we accept, which we do not, that the PRC had intimated a general intention in the 1987 PRC-Portugal Joint Declaration for its treaties not to extend by operation of the MTF Rule to Macau, it remains necessary for the Lao Government to establish that this was an understanding it in fact shared with the PRC during the negotiation of the PRC-Laos BIT. It is an accepted principle of international law that States may, by agreement, elect to derogate *inter se* from customary international law (see *eg*, Antonio Cassese, *International Law* (Oxford University Press, 2nd Ed, 2005) at p 154 and *Oppenheim's International Law Volume I: Peace* (Sir Robert Jennings QC and Sir Arthur Watts QC gen eds) (Longman, 9th Ed, 1996) at p 7); it follows that a State cannot unilaterally contract out of established norms of customary international law. If States agree to derogate from such norms when entering into a treaty, this must be reflected in the treaty or it must be shown to be a specific understanding they shared when negotiating it. This view is reflected in Richard K Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) ("*Treaty Interpretation*"), where it is said as follows (at para 3.1.1):

> The ILC linked subsequent agreements to *understandings reached during negotiation of a treaty*:
>
> > A question of fact may sometimes arise as to whether an understanding reached during the negotiations concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation. But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty ...
>
> The first of these quoted sentences suggests that *the underlying issue is what constitutes 'an agreed' basis for a treaty's interpretation. The implication is that 'an*

> *understanding' could constitute such a basis where reached during the negotiations, albeit that this would depend on whether a clear intention was manifested.* The commentary then notes that if an agreement on interpretation is established as having been reached before or at conclusion of a treaty, this is clearly to be read as forming part of the treaty.
> ...
>
> [emphasis added]

78 Therefore, in our judgment, the question of whether a State has effectively contracted out of or disapplied a rule of customary international law in a particular treaty with one or more other States by making a prior statement that is said to have such an effect, will depend on whether the statement formed an agreed basis for the negotiation and conclusion of that treaty. In this regard, we agree with Sir Daniel's observation that while the Joint Declaration "establishes an internal PRC constitutional basis on which the PRC might subsequently have engaged with its bilateral treaty-partners to address the application, or non-application, of PRC treaties to Macau, *it cannot operate as a substitute for such bilateral engagement*" [emphasis added]. In the present case, little or no evidence pertaining to the negotiation of the PRC-Laos BIT was put before us to support the contention that the Joint Declaration, and the asserted intention for PRC treaties not to apply to Macau, formed an agreed basis upon which the PRC-Laos BIT was concluded. Indeed, for the reasons we have outlined at [57]-[60] the reverse appears to have been the case.

79 In any event, we do not think that the content of the 1987 PRC-Portugal Joint Declaration connotes that all PRC treaties would not apply to Macau. This is so for two reasons. First, Annex I of the Joint Declaration is primarily a statement of undertakings given by the PRC to Portugal as to how the PRC would conduct certain *internal constitutional arrangements* in relation to Macau. This is to protect the interests of Portugal in relation to the

Macanese for whose welfare Portugal had been and would remain responsible until the handover. It is not directly material to the question of how existing PRC treaties would operate in the context of state succession affecting the rights of third parties. In this regard, the argument advanced by the Lao Government in reliance on Annex 1 runs contrary to Art 27 of the VCLT which provides that States may not rely on their internal laws to justify their failure to adhere to treaty obligations. The relevant part of Art 27 states:

> *Internal law and observance of treaties*
>
> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. ...

80 To demonstrate the difficulties in the argument that the internal constitutional arrangements outlined in the Joint Declaration could displace the MTF Rule, we take a hypothetical example of a Laotian natural person or legal entity who had invested in Macau after 1999 and subsequently sought to bring a claim under the PRC-Laos BIT. In such a situation, it would clearly be contrary to Art 27 of the VCLT for the PRC or Macau to mount an argument that the PRC-Laos BIT did not apply to Macau because the PRC had not implemented its internal constitutional arrangements in relation to extending the treaty to Macau. We can see no reason at all for thinking that the situation should be any different in the reverse situation where, as here, the investor is a Macanese investor who had invested in Laos.

81 Second, the wording of clause VIII could very well be interpreted to mean, as noted by Professor Wenhua Shan ("Prof Shan"), one of Sanum's expert witnesses, that until a decision has been made in the manner provided for by Art 8 of the 1987 Sino-Portuguese Joint Declaration, the matter remains undecided as a matter of PRC domestic law. Consequently, as argued by Sanum, the default position under international law would apply, which the

parties agree is that effected by the MTF Rule. To put it another way, Prof Shan's view is that the internal arrangements spell out a procedure to be followed before the PRC may conclude that it wishes to take steps to contract out of a result arrived at by the application of the default rules of international law.

82 It is not necessary for us to come to a firm view on Prof Shan's opinion because it is clear to us that the 1987 PRC-Portugal Joint Declaration could not constitute evidence that "otherwise establishes" that the PRC-Laos BIT is not intended to apply to Macau for the reasons set out at [75] – [80] above. However, we note that this view would harmonise these provisions in the Joint Declaration with the MTF Rule and it seems to us to be a plausible view.

(II) THE EXPERIENCE OF THE PRC AND THE UK WITH RESPECT TO HK

83 Sanum contends that the Judge erred in two respects when he relied upon the experience of the PRC and the UK in relation to HK as an analogy to the situation in Macau. First, there was a dearth of material before the Judge which could form the basis for any findings to be made with respect to the applicability to HK after the handover in 1997 of BITs to which the PRC was party. Secondly, there was also no basis to analogise the PRC-UK arrangements with the PRC-Portugal arrangements.

84 With respect to the first point, the Judge concluded (at [104] of the Judgment) that the common assumption in the period leading to the handover of HK was that the PRC's treaties would not apply to HK after handover. He reached this conclusion on the basis of the work of the Joint Liaison Group for HK which negotiated and concluded bilateral agreements on behalf of HK during the period leading up to 1997. This was referred to in an article written

by the outgoing Attorney-General of HK (Mr JF Mathews) ("the Mathews Article") at that time and a later speech in 2005 by HK's Secretary for Justice (Mr Wong Yan Lung SC) ("the Secretary's Speech").

85 However, when one scrutinises the content of both the Mathews Article and the Secretary's Speech, it becomes apparent that they do not in fact address the status of BITs that had already been concluded by the PRC and whether they would extend by operation of the MTF Rule to HK following the handover. In the Mathews Article, the following was stated:

> 4.4. International Rights and Obligations
>
> ... The United Kingdom has, over the years, extended more than two hundred *multilateral* international agreements to Hong Kong. Many of these agreements are important to Hong Kong and play a vital role in facilitating its legal and commercial links with the international community. ...
>
> ... So far, *the two sides have reached agreement*, in principle, *on the continued application of some two hundred treaties*, including those relating to many international organizations in which Hong Kong participates ...
>
> Over the years Britain also extended a large network of *bilateral* agreements to Hong Kong in a variety of practical areas ... On July 1, 1997, all these agreements will automatically lapse, unless renegotiated to continue beyond 1997. This would have serious implications. ...
>
> In order that bilateral agreements can be in place on the transfer of sovereignty, agreement has been reached in the Joint Liaison Group for Hong Kong to negotiate and conclude bilateral agreements in areas such as air services, investment promotion and protection, surrender of fugitive offenders, mutual legal assistance, and transfer of sentenced persons. ... Negotiations are continuing as quickly as possible with additional partners in order that a reasonably comprehensive framework of bilateral agreements can be in place by July 1, 1997. ...
>
> [emphasis added]

86 In the Secretary's Speech, the following was noted:

> International rights and obligations
>
> ... Before reunification, over 200 multilateral agreements, and a large network of bilateral agreements, had been extended to Hong Kong by the United Kingdom. If nothing were done, Hong Kong would lose the protection guaranteed by all these agreements at the time of reunification.
>
> ...
>
> The position in respect of bilaterals was different. It was not possible for bilateral agreements entered into by Britain to be transferred to China. It therefore became apparent that the network of agreements in such areas as extradition, air services, and mutual legal assistance would all fall away on reunification. The challenge we faced, therefore, was how to replace them with new ones as soon as possible.
>
> The Joint Liaison Group again proved to be the key to this process. Under an agreement reached in the JLG, Hong Kong was authorised to sign new bilateral agreements in the areas I have mentioned, and those agreements would be recognised after 1997. ...

87 It is evident from both the Mathews Article and the Secretary's Speech that the overriding concern was that, upon handover, HK would *lose* the protection that it had been afforded under treaties signed by the UK in the past. This would suggest that the parties were working on the basis of the MTF Rule applying at least in relation to the cessation of the applicability of the treaties to which the UK was party, upon the handover. Therefore, the following measures were implemented to address these concerns:

(a) The PRC and the UK reached an agreement, in principle, for the continued application of certain specifically identified multilateral treaties concluded by the UK in relation to HK.

(b) Given that bilateral agreements concluded by Britain in respect of HK would lapse automatically at the point of HK's reversion to the PRC, the Joint Liaison Group was established to negotiate and sign

> new bilateral agreements on behalf of HK so as to replace the bilateral agreements that the UK had previously extended to HK. This was especially significant in a number of specific areas, possibly including investment protection.

Sanum is thus correct in saying that these measures do not, in themselves, address the question of whether BITs *concluded by the PRC* would apply to HK after the handover.

88 Apart from relying on the Mathews Article and the Secretary's Speech, the Lao Government further contends that both in terms of state practice at the international level and the practice of the PRC and HK, the regime with respect to HK was that the PRC's treaties would not automatically apply to HK. In support of the former, the Lao Government contends that a substantial number of States such as Japan, the UK, Thailand, Kuwait and Finland signed BITs with HK despite having existing BITs with the PRC. Similarly, the Netherlands signed a BIT with Macau after handover even though it had a pre-existing BIT with the PRC. The Lao Government submits that because several States acted in accordance with the understanding that their existing investment treaties with the PRC would not extend to HK post-handover, a similar understanding would have applied to Macau. The Lao Government further cites Andreas Zimmermann and James G Devaney, "Succession to Treaties and the Inherent Limits of International Law", in Christian J Tams *et al*, *Research Handbook on the Law of Treaties* (Cheltenham: Edward Elgar, 2014), in which the learned authors note (at p 520) that "Chinese treaties have only selectively been applied to Hong Kong after 1 July 1997". According to the Lao Government, this "selective" approach suggests that the regime with respect to HK was not for all PRC Treaties to automatically apply to HK.

89 We do not find this persuasive. As we have observed at [73] above, it was contemplated in the Joint Declaration that Macau would retain a measure of international personality and would be able to enter into investment protection treaties if it wished. This does not in itself preclude the application of the MTF Rule. The Joint Declaration goes no further than to set out the PRC's *internal* constitutional arrangements in relation to extending the PRC's treaties to Macau but this cannot unilaterally displace the operation of the general principles and rules of international law in the context of state succession so as to affect the rights of third parties (see at [75] above). We assume for the moment that a similar arrangement was in place for HK. The fact that treaties of the PRC were applied, albeit selectively, would seem to suggest that there was no renunciation of the MTF Rule or exclusion of the normal operation of the rules of state succession in relation to HK. The PRC was willing to vest some of this power in HK by according it the power to enter into treaties in limited areas but this does not equate to the exclusion of the MTF Rule in relation to treaties that the PRC was party to. The manner in which other States subsequently chose to conduct their bilateral relations with the PRC and HK respectively, is likely to be driven by the specific financial or economic interests of a particular State when concluding a BIT. The fact that some States chose to conclude separate agreements with the PRC and HK only demonstrates that those States viewed it as being in their interest to do so, with one investment protection regime applying only to the PRC excluding HK, and a separate investment protection regime in respect of HK.

90 Finally, the experience of the PRC in relation to its discussions with the UK over HK would only be relevant to the present discussion if there was sufficient evidence before the court to conclude that this was a true analogue for the situation with Macau. In our judgment, such evidence was lacking.

91 We therefore conclude that there is insufficient evidence in the period leading up to the handover of Macau to find that it had been "otherwise established" that the MTF Rule would not apply in respect of the PRC-Laos BIT.

(B) THE TIME PERIOD BETWEEN THE HANDOVER OF MACAU AND THE CRITICAL DATE

92 We next turn to the evidence before the Judge which related to the period after the handover of Macau but before the Critical Date, which as we have noted at [67] above, we have taken to be 14 August 2012, being the date on which the arbitration proceedings were initiated.

(I) THE 1999 UNSG NOTE

93 In our judgment, contrary to the Lao Government's submissions, the Judge was correct not to place any weight on the 1999 UNSG Note. The note was recorded in a UN document entitled "Multilateral Treaties deposited with the Secretary-General" (UN Document No. ST/LEG/SER.E/26). The note referenced the 1987 PRC-Portugal Joint Declaration and listed treaties which were applicable to Macau. It went on to state that:

> IV. With respect to other treaties that are not listed in the Annexes to this Note, to which [the PRC] is or will become a Party, the Government [of the PRC] will go through separately the necessary formalities for their application to [Macau] if it is so decided.

The Lao Government seeks to rely on the absence of the PRC-Laos BIT in the annexes to the note to argue that it therefore could not have applied to Macau.

94 However, as was noted by the Judge (at [95] of the Judgment), and indeed by the Tribunal as well (at [209]–[210] of the Award), the 1999 UNSG

Note applies only to *multilateral treaties* for which the UN Secretary-General acts as depository. In fact, the UN Document No. ST/LEG/SER.E/26 in which the 1999 UNSG Note is recorded expressly states that the treaties covered by the publication pertain *only to multilateral treaties*, the UN Charter and certain pre-UN treaties. The absence of the PRC-Laos BIT from the annexes therefore says nothing of the applicability of the BIT to Macau. Accordingly, we are satisfied that the Judge was correct to ascribe no weight to this piece of evidence.

(II) THE 2001 WTO REPORT

95 The Judge relied upon the 2001 WTO Report as part of the basis for his conclusion that the PRC-Laos BIT did not apply to Macau, and in particular, the following statement in the report:

> 27. In 1999, [Macau] signed a double taxation agreement with Portugal ... [Macau] also signed a bilateral agreement on investment protection with Portugal ... [Macau] has no other bilateral investment treaties or bilateral tax treaties.

The Judge considered that if the PRC-Laos BIT had indeed applied to Macau, it is unlikely that an unequivocal statement to the contrary would have found its way into a report issued by the WTO. The Judge, however, also took into account the fact that the report explored a wide range of issues and was probably not intended to express a conclusive view on the legal issue of whether the PRC-Laos BIT applies to Macau. Notwithstanding this, he said that "the 2001 report suggests to a limited extent that the PRC-Laos BIT does not apply to Macau" (at [109] of the Judgment).

96 Sanum argues that the statement made in the 2001 WTO Report was far from unequivocal and may quite properly be read as saying that Macau had *itself* concluded no other BITs or bilateral tax treaties, a position which would

not be inconsistent with the application of the PRC-Laos BIT to Macau. Sanum further notes that this "throwaway line" was deleted from subsequent editions of WTO reports. Additionally, the WTO trade policy reviews are explicitly non-legal in nature and the WTO Dispute Settlement Body has held that statements made there should not be taken into account in the context of dispute resolution proceedings.

97 The Lao Government responds that Sanum's interpretation of that statement in the 2001 WTO Report is "contrived and contrary to the plain language in the Report". It also notes that the Judge did not regard the report as a legal or evidential lynchpin but that it remains relevant evidence which should be viewed in tandem with the totality of the evidence.

98 In our judgment, the Judge should not have placed any reliance on the 2001 WTO Report. Sanum's interpretation of what could have been meant by that statement in the report is certainly a plausible one. More importantly, in our judgment, it is significant that dispute resolution tribunals including those established under the auspices of the WTO, have held that statements made in such reports should not be relied upon in the course of dispute settlement procedures (see *eg*, Report of the Panel, *Canada – Measures affecting the export of civilian aircraft* (14 April 1999, WTO Document WT/DS70/R at [9.274]–[9.275]); Report of the Panel, *Chile – Price band system and safeguard measures relating to certain agricultural products* (3 May 2002, WTO Document WT/DS207/R at [7.95], fn 664)). This is understandably so since, as may be seen from the preceding analysis, the question of whether concluded PRC treaties do extend to Macau is a complex legal question which requires a consideration of evidence from several sources. There is no indication, nor is it likely, that the WTO would have undertaken such an analysis before making the statement it did above. The Judge was therefore

incorrect to rely upon the 2001 WTO Report in support of his conclusion that the PRC-Laos BIT did not apply to Macau.

99 We therefore do not find the evidence relating to the period between the handover of Macau and the Critical Date relevant, persuasive or sufficient to "otherwise establish" that contrary to the operation of the MTF Rule, the PRC-Laos BIT was not intended to apply to Macau.

(C) THE PERIOD SUBSEQUENT TO THE CRITICAL DATE

100 The overall position in relation to the pre-Critical Date evidence, as we have examined it, is therefore unhelpful to the Lao Government's position. It was in this context that the Lao Government sought to adduce the 2014 NVs before the High Court. It sought to do this not only subsequent to the Critical Date but even after the Award had been made, in an effort to persuade the Judge that the finding of the Tribunal on this issue was wrong in law and ought therefore to be reversed.

(I) THE 2014 NVS

101 The Judge relied significantly on the 2014 NVs to base his conclusion that the PRC-Laos BIT is not applicable to Macau. Although the Lao Government has consistently maintained that the 2014 NVs merely *confirm* the pre-existing legal position, in the light of our finding that the pre-Critical Date evidence does not warrant a finding that the non-applicability of the PRC-Laos BIT to Macau had been otherwise established, the 2014 NVs cannot be viewed as being purely confirmatory in nature. We turn to consider the Judge's analysis and his decision to admit the 2014 NVs against the backdrop of these observations.

102 The Judge thought that the *Ladd v Marshall* test did not strictly apply to the question of whether the 2014 NVs should be admitted, and he applied the modified version of the test as was laid down in *Lassiter*. The parties' submissions before us similarly turned on whether the 2014 NVs should be admitted into evidence based on either the *Ladd v Marshall* or the *Lassiter* test.

103 In our judgment, the broad principles of relevance, reason for prior non-admission, and credibility laid down in *Ladd v Marshall* and in *Lassiter* are undoubtedly helpful to our analysis as to whether the 2014 NVs should have been admitted into evidence. However, it must also be recognised that where the substantive dispute engages questions of public international law, as is the case here, the court must consider the question of admissibility and weight within the framework of any other applicable principles of international law, such as the critical date doctrine.

104 The critical date doctrine, explained above at [65], acts as a time constraint in the context of determining the relevance or weight of evidence in cases concerning issues of public international law. In short, the doctrine or principle renders evidence, which comes into being after the critical date and is self-serving and intended by the party putting it forward to *improve* its position in the arbitration, as being of little, if any, weight.

105 Sanum submits that the 2014 NVs should be excluded altogether on the basis that their post-hoc character renders them irrelevant as a matter of international law. Sanum relies on Professor L.F.E Goldie's ("Prof Goldie") observations in "The Critical Date" (1963) 12(4) International and Comparative Law Quarterly 1251 ("Prof Goldie's Article") at 1251 that the critical date is the "date after which the actions of the parties to a dispute can

no longer affect the issue" and "is exclusionary" and "terminal". Similarly, the tribunal in *Compania de Aguas del Aconquija SA and anor v Argentine Republic* (ICSID Case No ARB/97/3, Decision on Jurisdiction, 14 November 2005) observed that "[e]vents that take place before [the critical date] may affect jurisdiction; events that take place after [the critical date] do not … [O]nce established, jurisdiction cannot be defeated" (at paras 61 and 63). On that basis, given that the 2014 NVs were dated about one and a half years after the commencement of arbitral proceedings, Sanum argues that they are inadmissible because Laos seeks to derive an evidential advantage from the NVs.

106 Leaving aside the Lao Government's initial objections to the applicability of the critical date doctrine to the present case (addressed at [66]-[69] above), the Lao Government appears to accept that post-Critical Date evidence should not be admitted or at least be accorded any weight to the extent that it *modifies* the pre-existing legal position of the parties. Its position, however, is that it is seeking merely to adduce post-Critical Date evidence in the present case in order to *confirm* the pre-existing position. Referring to Prof Goldie's Article, the Lao Government points out that there is no blanket prohibition on the admissibility of post-critical date evidence. Instead, Prof Goldie appeared to have adopted a more nuanced consideration of whether such post-critical date evidence confirms or contradicts pre-existing evidence. At p 1254, he states the following:

> … Their admissibility is dependent on whether they are in *continuation of, or may effectively throw light on,* the substantive events anterior to the critical date. Hence subsequent facts are admissible – but only in a subordinate capacity. They do not create or perfect title; nor may they be adduced directly in proof of title, but only indirectly and to *corroborate* and explain the probative events occurring before the critical date. …

[emphasis added]

This suggests that if post-critical date evidence is sought to be adduced, it should be consistent with and a continuation of what the pre-existing position establishes. Its function is to corroborate and to explain. To the extent that it contradicts what has been established by the pre-existing position to give the party seeking to rely on it an evidential advantage in its case, it should not be admitted.

107 Pietrowski adopts a similarly nuanced approach in "Evidence in International Arbitration" at pp 399-400:

> This is not to say that evidence of events occurring after the critical date is always irrelevant. The tribunal may consider facts occurring after the critical date in order to evaluate facts occurring prior to that date. As Fitzmaurice explained it:
>
> > Just as the subsequent practice of parties to a treaty, in relation to it, cannot alter the meaning of the treaty, but may yet be evidence of what that meaning is, or what the parties had in mind in concluding it, so equally events occurring after the critical date in a dispute about territory *cannot operate to alter the position as it stood on that date, but may nevertheless be evidence of, and throw light on, what the position was.*

[emphasis added]

108 In our judgment, there is a spectrum of possible positions. At one end of that spectrum, it seems clear that post-critical date evidence should not be accorded any weight if it is adduced in order to contradict a position which has been *established* by the pre-critical date evidence. Since a party cannot rely on post-critical date doctrine to *improve* its position, such evidence would be rendered irrelevant. At the other end of the spectrum, if the post-critical date evidence merely confirms the position which has been established by the pre-critical date evidence, such evidence could be relevant and may be considered.

The difficulty arises where the pre-critical date evidence is inconclusive. In our judgment, it is possible to admit post-critical date evidence in such a situation but we consider that special attention should then be given to the weight that should be attached to such evidence. Greater weight may be placed on such evidence, for example, if the content of such evidence demonstrates evidentiary continuity and consistency with pre-critical date evidence.

109 We now apply these principles to the facts before us. The 2014 Laos NV states as follows:

> ... the Lao Government is of the view that the Agreement does not extend to Macau [SAR] for the reasons based on the [PRC]'s policy of one country, two systems, its constitutional and legal framework, the Basic Law of Macau [SAR] as well as the fact that the Agreement itself is silent on its extension to Macau [SAR], which returned to the sovereignty of the [PRC] in 1999, six years after the signing of the Agreement".

110 In response, the PRC replied as follows:

> In accordance with the <<Basic Law of the Macau [SAR] of the [PRC]>>, the Government of Macau [SAR], may with the authorisation of the Central People's Government conclude and implement investment agreements of its own with foreign states and regions; in principle the bilateral investment agreements concluded by the Central People's Government are not applicable to the Macau [SAR], unless the opinion of the [SAR] Government has been sought, and separate arrangements have been made after consultation with the contracting party.
>
> In view of the foregoing, [the PRC-Laos BIT] concluded in Vientiane on 31 January 1993 is not applicable to the Macau [SAR] unless both China and Laos make separate arrangements in the future.

111 The Lao Government's position is that the 2014 NVs are confirmatory in nature in setting out what the parties' position on the application of the PRC-Laos BIT *had always been* and it is this common position which establishes the "subsequent agreement" between the parties.

112 First, as noted above (at [100]), we do not consider that the 2014 NVs in fact *confirm* the pre-existing position. Indeed, from our examination of the pre-Critical Date evidence both separately and as a whole, we consider that the evidence that was put forward does not establish that the MTF Rule had been displaced. In contrast, the 2014 NVs advance the position that the PRC-Laos BIT does not extend to Macau and therefore that the MTF Rule has been displaced, although this is based on the internal laws and policies of the PRC and Macau. In short, the 2014 NVs reflect a position based on the domestic law of the PRC which is contradictory to the pre-existing position as a matter of international law. Since the Lao Government has the burden of proving that which it asserts (see *eg*, *Pulp Mills (Argentina v Uruguay)*, Judgment, ICJ Reports 2010 at [162]; *The Mavrommatis Jerusalem Concessions* [1925] PCIJ (ser A) No 5 at pp 29–30), its failure to show that it has been otherwise established that the MTF Rule had been displaced prior to the Critical Date, would mean that its effort to introduce the 2014 NVs is to *contradict* the position which prevailed at the time arbitration proceedings were commenced. Yet its counsel and its expert, Prof Chesterman, accepted that this would be impermissible. Prof Chesterman stated (at para 43 of his second report) that "it is correct that any attempt by Laos to use the [2014 NVs] to *change* the legal position of the parties after the Critical Date should be rejected by both [the Tribunal] and by this Court." It was similarly accepted that parties to a dispute should not seek to create new evidence after legal proceedings have commenced to *alter* their legal positions. The Lao Government's case in the present appeals was only ever based on the fact that the 2014 NVs "seek to confirm what the position of the parties has always been". It submits that there is no evidence that the respective governments (whether the PRC or Laos) are changing or departing from an earlier understanding regarding the application of the PRC-Laos BIT. Given that we have found otherwise on the facts of the

present case, in our judgment, the 2014 NVs should not bear any weight because they are post-Critical Date evidence adduced to *contradict* the pre-Critical Date position.

113 Nonetheless, for completeness, we proceed on the assumption that the evidence prior to the Critical Date is inconclusive on the question of the applicability of the PRC-Laos BIT to Macau. Even if, on that basis, the 2014 NVs were admissible, we consider that no material weight can be placed on them for the following reasons.

114 First, the only stated justification in the 2014 PRC NV to support the PRC's view that the PRC-Laos BIT is inapplicable to Macau is the PRC's internal legislation in relation to Macau (namely the Basic Law). But this is irrelevant and inadmissible as a consideration in international law given Art 27 of the VCLT (which we have examined at [79]-[80] above in the context of the PRC-Portugal Joint Declaration) and which states that the internal laws of a State cannot be invoked to justify the non-performance of a treaty. Art 27 stems from the wider principle that the internal domestic laws of a state will not generally affect a state's international rights and obligations because they each operate on separate planes.

115 Second, still less can *Laos* invoke the operation of *the PRC's internal laws* in order to justify Laos' position that it is not bound to arbitrate the claim brought by Sanum.

116 Third, we reject the Lao Government's attempts to characterise the 2014 NVs as evidencing a "subsequent agreement" or "subsequent practice" which shall be taken into account when interpreting a treaty pursuant to Arts 31(3)*(a)* and (*b*) of the VCLT. The parties as well as the *Amici* are agreed that

a subsequent agreement or practice cannot have retroactive effect. The Lao Government, however, contends that there is no such retroactivity because "[n]othing in the [2014 NVs] suggests it is only the parties' intentions 'today' that the PRC-Laos BIT does not apply to [Macau]". Although this is the Lao Government's stated position, the fact remains that there is nothing by way of evidence, prior to the Critical Date, to show that there was ever any accord between the Contracting States for the PRC-Laos BIT not to apply to Macau. The evidence we have examined suggests either that the parties were aware of the issue and did nothing that was effective, as a matter of international law, to exclude the operation of the MTF Rule in relation to the applicability of the PRC-Laos BIT to Macau, or they overlooked it. On either view, as a matter of international law, we consider that there is no evidence of any pre-existing agreement as contended by the Lao Government. Indeed, the first manifestation of such an agreement would be the 2014 NVs. But consistent with our view that there was never any agreement on the issue, *nothing* in the 2014 NVs in fact points or even refers to any agreement. Instead the 2014 NVs refer to the PRC's domestic constitutional and legal framework. Therefore, giving effect to the 2014 NVs as a subsequent agreement in relation to the interpretation of the PRC-Laos BIT would amount to effecting a retroactive amendment of the BIT. We do not think this is permissible. We recognise that this conclusion might appear counter-intuitive because the two States that are the parties to the treaty in question, namely the PRC and Laos, both take the position before us that the treaty does not extend to Macau. However, we consider that this must be seen in the context of the following considerations:

(a) The MTF Rule is a rule of customary international law – see at [75]-[78] and [80] above. It affects treaties that have been entered into by a State whose frontiers change. But such a rule can be derogated

from if the parties to such a treaty expressly agree or share an understanding that it will be excluded (see in particular [77]-[78] above).

(b) Even if we were to accept that the PRC had manifested an intention to exclude the MTF Rule in relation to Macau by way of the Joint Declaration in 1987, there is nothing to suggest that Laos had the same understanding in relation to the PRC-Laos BIT prior to the commencement of the arbitration.

(c) Consistent with this, nothing in the 2014 NVs suggests that both the parties to the PRC-Laos BIT *shared* a common understanding to this effect either at the time the treaty was concluded or even at any subsequent time prior to the Critical Date.

(d) Moreover the conclusion that is expressed in the 2014 NVs that the PRC-Laos BIT does not extend to Macau is based neither on any prior agreement or understanding nor even on an interpretation of the treaty. Rather it is based on an understanding of how the rules of international law would apply to the two States in the light of the domestic constitutional arrangements in one of them, namely the PRC. If we were to conclude that the reasoning, which underlies that view as to how the rules of international law co-exist with and are affected by a State's domestic legal framework, was correct, we would have adopted and applied it, not because it was an agreement between the parties but because we concluded that the reasoning was correct. But for the reasons we have already dealt with we do not think that reasoning is correct.

(e) In the circumstances, while it may well be open to the PRC and Laos to enter into an express agreement today to modify the treaty in question to accord with their presently stated intentions, we do not consider this can take retroactive effect and adversely affect a third party which has already brought proceedings, which in substance is what the Lao Government is contending for.

117 The Lao Government has sought to rely on certain cases where notes of interpretation issued *after the critical date* have been accorded significant weight in interpreting a treaty. There are, however, pertinent distinguishing factors between those cases and the present. One example of this is the case of *ADF Group Inc v United States of America* (ICSID Case No ARB(AF)/00/1, Award, 9 January 2003) ("*ADF v United States*"). There, the tribunal considered the effect of a note of interpretation which was issued by the Free Trade Commission ("the FTC") *after* the tribunal had received the notice of arbitration. The note articulated the views of the Commission as to how Art 1105 of the NAFTA (*ie*, the Minimum Standard of Treatment provision) should be interpreted. Critically, however, this note was issued pursuant to Article 1131(2) which provides that "[a]n interpretation by the Commission of this Agreement *shall be binding* on a Tribunal established under this Section" [emphasis added]. The tribunal took into consideration the note of interpretation that had been issued and held as follows:

> 177. We have noted that the Investor does not dispute the binding character of the FTC Interpretation of 31 July 2001. At the same time, however, the Investor urges that the Tribunal, in the course of determining the governing law of a particular dispute, is authorized to determine whether an FTC interpretation is a "true interpretation" or an "amendment." We observe in this connection that the FTC Interpretation of 31 July 2001 expressly purports to be an interpretation of several NAFTA provisions, including Article 1105(1), and not an "amendment," or anything else. No document purporting to

> be an amendment has been submitted by either the Respondent or the other NAFTA Parties. There is, therefore, no need to embark upon an inquiry into the distinction between an "interpretation" and an "amendment" of Article 1105(1). But whether a document submitted to a Chapter 11 tribunal purports to be an amendatory agreement in respect of which the Parties' respective internal constitutional procedures necessary for the entry into force of the amending agreement have been taken, or an interpretation rendered by the FTC under Article 1131(2), we have the Parties themselves—all the Parties— speaking to the Tribunal. No more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA, is possible. ...

118 The obvious distinction between that case and the present is that the note of interpretation issued in *ADF v United States* was in the nature of a *binding interpretation* rendered pursuant to an express provision in the NAFTA. This would explain why significant weight was placed on the note of interpretation notwithstanding that it was only issued after the dispute had arisen.

119 The Lao Government also seeks to rely on the decision of the High Court in *Lee Hsien Loong*. The main questions there, in a dispute between private parties, were whether leave to serve certain writs out of jurisdiction should have been granted and whether the writs had been served in an appropriate manner. Service of the writs had been effected by a process server in HK personally serving the writs on the second appellant, and by leaving copies of the writs and other court documents at the registered address of the first appellant. The applicability of a treaty concluded between Singapore and the PRC to HK had to be considered, which if applicable, would affect the principles governing the manner of service outside of jurisdiction. In particular, an issue was raised as to the relevance of a letter from the Singapore Ministry of Foreign Affairs ("the MFA") which stated that the treaty was not applicable to HK. Although that letter post-dated the

commencement of the dispute, the court observed that the letter "might potentially be material … as evidence of subsequent state practice in the application of the treaty" (see *Lee Hsien Loong* at [74]).

120 In our judgment, the Lao Government's reliance on that observation in *Lee Hsieng Loong* is misplaced and has been taken out of context. The issue of the retroactive amendment of treaties and the applicability of the critical date doctrine did not arise in that case because these points had neither been raised nor argued. In contesting the relevance of the MFA letter, the parties' arguments had centred on the question of the separation of powers, and specifically on whether the letter was relevant or decisive on the basis that the courts should not depart from the views of the executive branch of government on the question of the applicability of a treaty (see *Lee Hsien Loong* at [75]). Further, although recourse was had to rules of treaty interpretation, the central issue in that case was ultimately one of service under our domestic rules. The present case, on the other hand, involves a question of jurisdiction that is governed *entirely* by the rules of public international law. We therefore do not think that that observation in *Lee Hsien Loong* can be of any assistance to the Lao Government.

121 In the circumstances, we consider that the Judge was wrong to place any evidentiary weight on the 2014 NVs. We are therefore satisfied that there is insufficient evidence to prove that it has been otherwise established that the PRC-Laos BIT was not to apply to Macau. For completeness, we also note that in the circumstances, the 2015 NVs ultimately did not have any bearing on the dispute since our decision did not turn, at all, on the authenticity of the 2014 NVs.

122 We therefore find that that the PRC-Laos BIT does apply to Macau and reverse the Judge's ruling in this regard and restore the decision of the Tribunal on this point.

Whether the Tribunal has subject-matter jurisdiction over Sanum's claims

123 The next and final issue to be considered is whether the Tribunal has subject-matter jurisdiction over the expropriation claims brought by Sanum. In this regard, the interpretation of the provisions in the PRC-Laos BIT is of paramount importance. We therefore set out the relevant provisions of the BIT in full:

> Article 4
>
> 1. Neither Contracting State shall expropriate, nationalize or take similar measures (hereinafter referred to as "expropriation") against investments of investors of the other Contracting state in its territory, unless the following conditions are met:
>
> a. as necessitated by the public interest;
>
> b. in accordance with domestic legal procedures;
>
> c. without discrimination;
>
> d. *against appropriate and effective compensation;*
>
> 2. The compensation mentioned in paragraph 1 (d) of this Article shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay. ...
>
> Article 7
>
> 1. *Any dispute* between the Contracting States concerning the interpretation or application of this Agreement shall, as far as possible, be settled by consultation through diplomatic channel.
>
> 2. If a dispute cannot thus be settled within six months, it shall, upon the request of either Contracting State, be submitted to an ad hoc arbitral tribunal. ...

Article 8

1. *Any dispute* between an investor of one Contracting State and the other Contracting State *in connection with an investment* in the territory of the other Contracting State shall, as far as possible, be settled amicably through negotiation between the parties to the dispute.

2. If the dispute cannot be settled through negotiation within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting State accepting the investment.

3. If a dispute *involving the amount of compensation* for expropriation cannot be settled through negotiation within six months as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. *The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article.*

[Emphasis added]

124 The main controversy which arises here is the proper interpretation to be accorded to the words "dispute involving the amount of compensation for expropriation" in Art 8(3) of the PRC-Laos BIT. Sanum argues that a broad interpretation of Art 8(3) should be taken such that any claim which *includes* a dispute over the amount of compensation for expropriation may be submitted to arbitration ("the Broad Interpretation"). The Lao Government, on the other hand, contends that a restrictive interpretation should be adopted such that recourse to arbitration may be had in the limited circumstances where *the only issue in dispute* is the amount of compensation for expropriation ("the Narrow Interpretation").

125 In ascertaining which interpretation is to be preferred, we consider the following (pursuant to Art 31 of the VCLT):

(a) the ordinary meaning to be accorded to the words used in Art 8(3) of the PRC-Laos BIT;

(b) the context of the PRC-Laos BIT; and

(c) the object and purpose of the PRC-Laos BIT.

(1) The ordinary meaning of Art 8(3)

126 In support of the Broad Interpretation, Sanum argues that the word "involving" is an inclusive term, rather than an exclusive one. In this regard, it relies on the conclusion of the Tribunal that "[t]o involve" means "to wrap", "to include". On the other hand, the Lao Government embraces the Judge's view that the term "involve" connotes a more restrictive interpretation, namely "imply, entail or make necessary" (see the Judgment at [121]). With great respect to the parties, we think the word "involve" is certainly capable of supporting either of the Broad or Narrow Interpretations and to cavil over the possible dictionary definitions of the word "involve" will not help us interpret Art 8(3) of the PRC-Laos BIT. Rather, the words in Art 8(3) can only be accurately, and more meaningfully, understood by considering the context of the provision and it is to this which we now turn.

(2) The context surrounding Art 8(3) of the PRC-Laos BIT

127 According to Sanum, part of the context of Art 8(3) is Art 4(1) of the PRC-Laos BIT which sets out the four criteria for determining *whether an expropriation* has occurred. The last of the four criteria is whether "effective and appropriate compensation" has been accorded by the Contracting State. Sanum argues that this demonstrates the intertwined nature of the issues of liability and quantum when adjudicating a claim of expropriation and that if an issue arose as to whether a permissible expropriation had taken place and if

this *had* to be referred to the national court under Art 8(2), that court would not be able to determine the question without first determining whether effective and appropriate compensation has been paid. The significance of this is best understood by reference to the qualifier in Art 8(3) which provides that recourse to arbitration cannot be had if "the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article", which is a reference to a submission of the dispute to the national court. This is what is commonly referred to as a "fork-in-the-road provision" which requires a party to make an election as to how and where it will pursue its remedy.

128 Sanum contends that if the submission of the Lao Government is correct and if an investor must first go to a competent national court to determine *whether* an impermissible expropriation has occurred (on the basis of the Narrow Interpretation of Art 8(3)), it would very likely find itself precluded from then submitting any dispute, on the amount of compensation it claims is due to it, to arbitration since the national court would already have determined the issue of compensation. This would render Art 8(3) wholly ineffective since, practically speaking, investors would never be able to bring a dispute to investor-state arbitration under the PRC-Laos BIT. This was the same view taken by the Tribunal (at [333] of the Award), which found that the Narrow Interpretation would offend the principle of *effet utile* (which is the principle of effective interpretation). This requires that international agreements be interpreted "so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text and in such a way that a reason and meaning can be attributed to every part of the text" (see *Treaty Interpretation* at p 149). There are other variants to the same point. What if Sanum (or any other investor) objected to the alleged expropriation on a variety of grounds ranging from the lack of a public

interest, the presence of discrimination and the amount of compensation offered? The prospect of trying to situate the dispute in the appropriate forum without losing the right to arbitration would seem implausibly difficult.

129 On the other hand, the Lao Government contends that these concerns are baseless and exaggerated. It submits that where the amount of compensation is one of many disputed issues in an expropriation claim, the claimant could submit the other disputed issues to the court while asking the court not to determine the appropriate amount of compensation. In so doing, the claimant would remain free to have an arbitral tribunal determine the issue of compensation. In essence, the Lao Government argues that the issue of liability and quantum are not as intertwined as envisaged by Sanum and that the Narrow Interpretation of Art 8(3) of the PRC-Laos BIT would not render the provision ineffective.

130 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 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.

131 We note a broadly similar conclusion was reached in the ICSID decision in *Tza Yap Shum v Republic of Peru*, (ICSID Case No ARB/07/06, Decision on Jurisdiction and Competence, 19 June 2009) ("*Tza Yap Shum*") where a similarly worded BIT between the PRC and Peru was considered. In *Tza Yap Shun*, a PRC national who had made investments in Peru brought a claim to ICSID arbitration pursuant to a dispute resolution clause in the PRC-Peru BIT. One of the grounds of his claim was that the Peruvian Tax Administration had taken expropriatory measures against his investments. As is the case here, the dispute resolution clause considered in *Tza Yap Shun* provided that only disputes "involving the amount of compensation for expropriation" may be brought to ICSID arbitration. The tribunal noted, as we have done, that the words "involving the amount of compensation for expropriation" was open to a range of possible meanings and preferred a broad interpretation (at [188]):

> The Tribunal concludes that to give significance to all the elements of the article, the words "involving the amount of compensation for expropriation" should be interpreted to include not only the mere determination of the amount but also the rest of the questions normally inherent in an expropriation, among others, if the property was actually expropriated within the standards and requirements of the Treaty, as well as the determination of the amount of compensation due, if any. *To rule otherwise, the Tribunal finds, would eviscerate the provision relating to ICSID arbitration,* since, according to Respondent, arbitration would be available only after a determination as to the legality, etc. by the courts of the Host state. At that point, the final sentence of Article 8(3) would clearly foreclose the possibility of international arbitration. ...
>
> [emphasis added]

132 The Judge in the present case was mindful of the concern that taking the Narrow Interpretation might denude the arbitration clause of force (see [127] of the Judgment). However, he nevertheless adopted the Narrow Interpretation on the basis that an investor might resort to arbitration where the *only* issue in dispute is that of compensation and the investor does not first submit the dispute to the national courts (that is to say, an investor may rely on Art 8(3) if it is *the State* which has submitted the dispute to the national courts) (see [122] of the Judgment).

133 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 of the position urged upon us by the Lao Government.

134 We do note, however, that there are some case authorities, which were relied upon by the Lao Government, that might *appear* to support the Narrow Interpretation, and it is to these which we now turn.

135 First, the Lao Government relies on *Plama Consortium Limited v Republic of Bulgaria* (ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005) ("*Plama Consortium*"). There, the dispute resolution clause in question, which was in the Bulgaria-Cyprus BIT, provided as follows:

> *Article 4*
>
> *4.1 The legality of the expropriation shall be checked at the request of the concerned investor through the regular administrative and legal procedure of the contracting party that had taken the expropriation steps. In cases of dispute with regard to the amount of compensation, which disputes were not settled in an administrative order, the concerned investor and the legal representatives of the other Contracting Party shall hold consultations for fixing this value. If within 3 months after the beginning of consultations no agreement is reached, the amount of compensation at the request of the concerned investor shall be checked either in a legal regular procedure of the Contracting Party which had taken the measure on expropriation or by an international "Ad Hoc" Arbitration Court.*

136 It should be noted that the claimant in *Plama Consortium* was not relying directly on Art 4.1 of the Bulgaria-Cyprus BIT but was instead seeking to rely on a Most Favoured Nation ("MFN") clause found in the BIT to argue

that it should be able to avail itself of a broader dispute resolution mechanism found in another treaty, which provided investors with the right to bring disputes to ICSID arbitration. This led the tribunal to observe (at [186]) that:

> The Claimant's position appears to be prompted by the limited dispute settlement provisions in the Bulgaria-Cyprus BIT ... Said provisions are concerned only with disputes relating to expropriation, the legality of which *"shall be checked at the request of the concerned investor through the regular administrative and legal procedures of the Contracting Party that had taken the appropriate steps."* (Article 4.1). A dispute *"with regard to the amount of compensation ... shall be checked either in a legal regular procedure of the Contracting Party which has taken the measure on expropriation or by an international 'Ad Hoc' Arbitration Court"* (*id.*) ... The Claimant does not invoke these dispute settlement provisions in the present case. [emphasis in original]

The Lao Government relies on the tribunal's description of Art 4.1 as a "limited dispute resolution settlement [procedure]" to argue that a Narrow Interpretation of the PRC-Laos BIT should be taken.

137 As should be obvious, however, the context in which that tribunal had made this observation is entirely different from the present case. First, the tribunal in *Plama Consortium* was not in fact tasked to determine the precise ambit of Art 4.1 of the Bulgaria-Cyprus BIT since the provision had not been invoked by the claimant. Second, the tribunal was describing Art 4.1 of the BIT as being "limited" on the basis that it only deals with "disputes relating to expropriation". The tribunal did not, in fact, make a finding that the phrase "with regard to the amount of compensation" meant that only claims in which the *only issue in dispute* is compensation could be brought to arbitration. We therefore do not consider that the tribunal's observation can lend support to the Lao Government's contention that a narrow interpretation of Art 8(3) of the PRC-Laos BIT should be preferred (that is to say, that only disputes on *compensation* can be brought to arbitration). In any event, we also note that

there was an express demarcation in Art 4.1 of the Bulgaria–Cyprus BIT between "disputes concerning the legality of expropriation" and "disputes with regard to the amount of compensation". This demarcation, which was directed specifically at which forum may determine the lawfulness of the expropriation, is simply absent in the PRC-Laos BIT. Third, the structure of the Bulgaria-Cyprus BIT is significantly different from the PRC-Laos BIT. The former does not contain a similar fork-in-the-road provision to that found in the latter. Therefore, the tribunal in *Plama Consortium* did not have to direct its mind to the analysis we have set out above (at [127]–[133]) as to how the Narrow Interpretation could effectively render the right to bring a claim to arbitration illusory. Accordingly, we do not consider that *Plama Consortium* supports the Lao Government's position.

138 The second case which was cited by the Lao Government is *Austrian Airlines v Slovakia* (UNCITRAL Final Award, 9 October 2009) ("*Austrian Airlines*"). This case concerned the interpretation of the Austria-Czech/Slovak BIT of which the relevant provisions read as follows:

> Article 8
>
> (1) Any disputes arising out of an investment ... concerning the amount or the conditions of payment of a compensation pursuant to Article 4 of this Agreement, or the transfer obligations pursuant to Article 5 of this Agreement, shall, as far as possible, be settled amicably between the parties to the disputes.
>
> (2) If a dispute pursuant to para. 1 above cannot be amicably settled within six months ..., the dispute shall, unless otherwise agreed, be decided upon the request of the Contracting Party or the Investor of the other Contracting Party by way of arbitral proceedings ...
>
> Article 4
>
> ...

> (4) The investor shall have the right to have the legitimacy of the expropriation reviewed by the competent authorities of the Contracting Party which prompted the expropriation.
>
> (5) The investor shall have the right to have the amount of compensation and the conditions of payment reviewed either by the competent authorities of the Contracting Party which prompted the expropriation or by an arbitral tribunal according to Article 8 of this Agreement.

139 The tribunal in *Austrian Airlines* relied both on the ordinary meaning of the words found in Art 8(1) of the BIT and the context provided in Art 4 to find that recourse to arbitration was limited only to a dispute on the amount of compensation and the conditions of payment and said as follows (at [97]):

> Such meaning is confirmed by the context of Article 8, which includes *Articles 4(4) and 4(5). Article 4(4) provides that an investor may challenge the "legitimacy" of the expropriation before the competent authorities of the host State. Article 4(5) provides, in contrast, that an investor who challenges the "amount of the compensation and the conditions of payment" may do so either before the local authorities or before an arbitral tribunal.* For this second possibility, Article 4(5) refers expressly to Article 8. The distinction made in Article 4(5), which is not present in Article 4(4), shows that access to arbitration was intended to be limited to the amount and conditions of the indemnity, as opposed to the "legitimacy", or lawfulness, or principle of expropriation. [emphasis added]

140 Once again, it may be seen that the context surrounding the dispute resolution clause in the Austria-Czech/Slovak BIT is significantly different from that found in the PRC-Laos BIT. The tribunal in *Austrian Airlines* took into account the fact that Art 4(4) of the Austria-Czech/Slovak BIT *expressly* provides that the "legitimacy of the expropriation" is to be considered by the competent authorities of the host state. As had been noted above (at [137]), this demarcation, which was directed specifically at which forum may determine the lawfulness of the expropriation, is absent in the PRC-Laos BIT. Further, the BIT considered in *Austrian Airlines* too did not have a fork-in-the-road provision such as is found in the PRC-Laos BIT.

141 It is for the same reasons that we find the third case relied upon by the Lao Government – *ST-AD GmbH v The Republic of Bulgaria* (PCA Case No 2011-06, Award on Jurisdiction, 18 July 2013) ("*ST-AD GmbH*") – also to be unhelpful in the present context. In that case, there was similarly an express segregation of disputes relating to the "lawfulness of the expropriation" and that of disagreements "over the amount of compensation". The former had to be reviewed in a "properly constituted legal proceeding of the Contracting Party" whereas the latter could be reviewed by an international arbitral tribunal (see Art 4(3) of the Germany-Bulgaria BIT, reproduced at [145] of *ST-AD GmbH*). The structure of the dispute resolution clause also expressly contemplated that an investor may bring a disagreement on compensation to an arbitral tribunal *after* the lawfulness of the expropriation is reviewed and determined by a national court (see *ST-AD GmbH* at [346]). For the reasons we have outlined in the preceding paragraphs, this is wholly different from the present case and we therefore do not find the reasoning in *ST-AD GmbH* applicable to the present case.

142 Finally, the Lao Government relies on two cases in which BITs that the Russian Federation ("Russia") was party to were interpreted: *Vladimir Berschader and Moise Berschader v The Russian Federation* (SCC Case No 080/2004, Award, 21 April 2006) ("*Berschader*") and *RosInvest Co UK Ltd v The Russian Federation* (SCC Case No V079/2005, Award on Jurisdiction, 1 October 2007) ("*RosInvest*"). In *Berschader*, which concerned an investment treaty among Belgium, Luxembourg and Russia, the expropriation-defining and dispute resolution clauses in question were reproduced at [47] of the award as follows:

> ARTICLE 5
>
> Investments made by investors of one Contracting Party in the territory of the other Contracting Party may not be

> expropriated, nationalized, or subjected to any other measures having a similar effect, except when such measures are taken for public interest, according to legal process and are not discriminatory.
>
> In addition, they must be accompanied by payment of compensation, the amount of which must correspond to the real value of the investments in question immediately before the date the measures were taken or made public ...
>
> ...
>
> ARTICLE 10
>
> 1. Any dispute between one Contracting Party and an investor of the other Contracting Party concerning the amount or mode of compensation to be paid under Article 5 of the present Treaty shall be the subject of a written notice, accompanied by a detailed memorandum, to be submitted by the investor to the Contracting Party involved in the dispute. ...

143 As for *RosInvest*, which pertained to a BIT between the UK and Russia, the relevant clauses provided as follows (as reproduced at [23] of the award):

> ARTICLE 5
> Expropriation
>
> (1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a purpose which is in the public interest and is not discriminatory and against the payment, without delay, of adequate and effective compensation. ...
>
> ...
>
> ARTICLE 8
> Disputes between an Investor and the Host Contracting Party
>
> (1) This Article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the non-

> implementation, or of the incorrect implementation, of Article 6 of this Agreement.
>
> (2) Any such disputes which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.
>
> ...

144 The tribunals in both cases found that the dispute resolution clauses should be accorded a narrow interpretation having regard to both the ordinary meaning of the words used as well as the unique context surrounding Russian BITs. The tribunals accepted that Russia had specifically intended in relation to its earlier BITs, entered into in 1989 and 1990, that these should have arbitration clauses with a limited scope. In *Berschader*, it was further noted (at [155]) that "a definite change of policy can be observed in the BITs concluded by the Russian Federation in the late 1990s subsequent to the dissolution of the Soviet Union". This saw arbitration clauses in later BITs that were generally much broader in scope and encompassing disputes concerning all aspects of claims arising out of acts of expropriation.

145 We do not think that the specific context relevant to the Russian BITs may be transposed to BITs concluded by the PRC generally, or in particular, the present PRC-Laos BIT. Some commentators do suggest that, similar to Russia, many of the PRC BITs signed in the late 1990s provided limited rights to investors to resort to international arbitration, in contrast to the second generation of PRC BITs (such as the PRC-Netherlands BIT signed on 26 November 2001 and the PRC-Germany BIT signed on 1 December 2003) in which the PRC consented to the unconditional submission to international arbitration of *all* disputes between investors and a contracting state (see *eg*, Wei Shen, "The Good, the Bad or the Ugly? A Critique of the Decision on Jurisdiction and Competence in *Tza Yap Shum v The Republic of Peru*" (2011)

10 Chinese Journal of International Law 55 at pp 56-57; Kim M Rooney, "ICSID and BIT Arbitrations and China" (2007) 24(7) Journal of International Arbitration 689 at pp 701-703).

146 In the final analysis, the interpretation of an arbitration clause in a BIT cannot be affected by general observations made by commentators, or even by what might be said to be the general policy stance of a state. Where there is evidence of a specific intention that was shared by both parties to a BIT, this might well be relevant; but that is not the contention advanced in relation to the PRC-Laos BIT. We are therefore driven to consider the language of this treaty and when that is done an important difference emerges between it and the Russian BITs – the latter did not contain a fork-in-the-road provision which would limit the investor's access to arbitration if the investor had recourse first to the national courts to determine whether an expropriation had actually occurred. This fundamental distinction was recognised by the Tribunal as well in its Award (at [340]) and is significant because in BITs where there are no fork-in-the-road provisions, according a narrow interpretation to similarly-worded dispute resolution clauses would not render illusory the availability of access to arbitration, and therefore would not offend the principle of effective interpretation (see above at [128] and [133]). This is an additional consideration which we must take into account in the present case. Here, we reiterate a point that was also made by the *Amici* – that caution is needed when applying the conclusions reached by other tribunals which interpret similarly-worded treaties. Minor differences in wording can alter, sometimes even significantly, the operation of two otherwise similar treaties. As was observed by an ICSID tribunal in *AES Corporation v The Argentine Republic* (ICSID Case No ARB/02/17, Decision on Jurisdiction, 26 April 2005) at [24]–[25], each BIT has its own identity and "striking similarities in

the wording of many BITs often dissimulate real differences in the definition of certain key concepts".

147 In our judgment, given the specific context surrounding Art 8(3) of the PRC-Laos BIT, the Broad Interpretation should apply to that clause. This leaves us to consider whether such an interpretation would be consistent with the object and purpose of the BIT.

(3) Object and purpose of the PRC-Laos BIT

148 Sanum relies on the preamble to the PRC-Laos BIT to argue that Art 8(3) read in its context, should be read expansively to promote investor protection. The preamble of the PRC-Laos BIT states as follows:

> Desiring to encourage, protect and create favourable conditions for investment by investors of one Contracting State in the territory of the other Contracting State based on the principles of mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic cooperation between both States ....

149 As noted above (at [51]), the preamble reveals that the primary object and purpose of the PRC-Laos BIT is to promote investment by investors and to advance the development of economic cooperation between both States. From the literal wording of the preamble, however, it is clear that although the promotion of investor protection is one of the key purposes of the PRC-Laos BIT, it is to be "based on the principles of mutual respect for sovereignty". Therefore, as the Judge observed, one cannot simply rely on the objective of "protection of investments" to resolve all ambiguities in favour of the investor. However, we do not think Sanum's argument is quite so simple. Sanum submits that *in addition* to the ordinary meaning of the words used in Art 8(3) and the context surrounding the provision, the Broad Interpretation is also consistent with the BIT's objective of protecting investments. Indeed, Art

31(1) of the VCLT requires the court to take into account these considerations cumulatively when interpreting a provision in a treaty.

150 Having found that the context of Art 8(3) supports the Broad Interpretation and that the ordinary meaning of the words accommodates such an interpretation, we agree with Sanum that the Broad Interpretation is also in line with the object and purpose of the PRC-Laos BIT.

151 For these reasons, we conclude that the Tribunal does have subject-matter jurisdiction over the claims brought by Sanum and that the Judge erred in finding otherwise.

Conclusion

152 In conclusion, we find first that the PRC-Laos BIT does apply to Macau and secondly, that the Tribunal has subject-matter jurisdiction over the claims brought by Sanum. The cumulative effect of our findings is that the Judge was wrong to conclude that the Tribunal lacked the jurisdiction to hear the claims.

153 We therefore allow the appeal in CA 139/2015. In the light of this holding, we also allow the appeal in CA 167/2015 and award the costs of the High Court hearing to Sanum. We also award Sanum the costs of the appeal. These costs are to be taxed if not agreed. We note that the Tribunal had reserved the issue of costs for the preliminary ruling in the arbitration to be determined along with the merits of the dispute. That order will continue to apply and our costs order has no bearing on the costs of the arbitration.

154 We once again express our deep gratitude to the *Amici* for their invaluable assistance in the determination of this appeal.

Sundaresh Menon
Chief Justice

Chao Hick Tin
Judge of Appeal

Andrew Phang Boon Leong
Judge of Appeal

Judith Prakash
Judge of Appeal

Quentin Loh
Judge

Alvin Yeo SC, Koh Swee Yen, Monica Chong Wan Yee and Mak Shin Yi (WongPartnership LLP) for the appellant;
Cavinder Bull SC, Lim Gerui, Darryl Ho Ping and Eunice Chan Swee En (Drew & Napier LLC) for the respondent;
Mr J Christopher Thomas QC and Professor Locknie Hsu as *Amici Curiae*.