

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2015] SGHC 15

Originating Summons No 24 of 2014

In the matter of Section 10 of the International Arbitration Act (Cap 143A,
2002 Rev Ed)

And

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

Between

**GOVERNMENT OF THE LAO
PEOPLE'S DEMOCRATIC
REPUBLIC**

... Plaintiff

And

SANUM INVESTMENTS LTD

... Defendant

JUDGMENT

[Arbitration] — [Arbitral Tribunal] — [Jurisdiction]

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Government of the Lao People's Democratic Republic

v

Sanum Investments Ltd

[2015] SGHC 15

High Court — Originating Summons No 24 of 2014
Edmund Leow JC
3, 4, 5 November 2014

20 January 2015

Judgment reserved.

Edmund Leow JC:

Introduction

1 The central question in this application concerns the applicability of the bilateral investment treaty (“BIT”) between the People’s Republic of China (“PRC”) and the Lao People’s Democratic Republic (“Laos”) to the Macau Special Administrative Region of China (“Macau”). The second issue that arises concerns the interpretation of the dispute resolution article in that treaty.

2 The plaintiff is the Government of Laos while the defendant, Sanum Investments Limited, is a company incorporated in Macau. The defendant made certain investments in the gaming and hospitality industry in Laos. Disputes subsequently arose in relation to those investments and the defendant ultimately commenced arbitration proceedings against the plaintiff. The

plaintiff disputed the jurisdiction of the arbitral tribunal (“the Tribunal”) on the basis that the BIT did not apply to Macau but the Tribunal held otherwise. The plaintiff then brought the present application to refer the issue of jurisdiction to the High Court under s 10 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (“the IAA”).

The facts

3 The pertinent facts of the present application are generally not in dispute.

Background facts and the relevant international instruments

4 Prior to its handover to the PRC in 1999, Macau was considered “Chinese territory”¹ over which Portugal exercised administrative power.² After the handover, the PRC “resumed sovereignty”³ over Macau and established it as a special administrative region.

5 The handover was not an unforeseen event. In 1987, the PRC and Portugal signed a joint declaration on the question of Macau (“the 1987 PRC-Portugal Joint Declaration”).⁴ Art 1 of the declaration provided that the PRC would resume the exercise of sovereignty over Macau with effect from 20

¹ Art 1 of 1987 PRC-Portugal Joint Declaration; 1st affidavit of Outakeo Keodouangsinh dated 10 January 2014, Exhibit OK-5 at p 456.

² Tribunal’s award on jurisdiction (“the Award”) at para 18; Defendant’s Core Bundle Vol 1 at p 11.

³ Art 1 of 1987 PRC-Portugal Joint Declaration; 1st affidavit of Outakeo Keodouangsinh dated 10 January 2014, Exhibit OK-5 at p 456.

⁴ 1st affidavit of Outakeo Keodouangsinh dated 10 January 2014, Exhibit OK-5 at p 456.

December 1999. Art 2 declared the PRC's one country, two systems principle and laid down in broad terms the PRC's basic policies regarding Macau to be pursued in accordance with that principle.

6 On 31 January 1993, the BIT between the PRC and Laos was signed ("the PRC-Laos BIT").⁵ The treaty does not mention whether the provisions therein extend to Macau.

7 A week before the handover of Macau to the PRC, on 13 December 1999, the PRC informed the United Nations Security-General ("UNSG") of the status of Macau in relation to the treaties deposited with the UNSG.⁶

8 On 20 December 1999, the PRC resumed its exercise of sovereignty over Macau.

The defendant's investment in Laos

9 The facts surrounding the defendant's investment in Laos and the alleged expropriation of its investments by the plaintiff are disputed. However, as the *merits* of the defendant's expropriation claim are not relevant to the present application, I shall only briefly summarise the key events to provide the factual backdrop to this application.

10 On 14 July 2005, the defendant was incorporated under the laws of Macau. In 2007, the defendant began investing in the gaming and hospitality

⁵ 1st affidavit of Outakeo Keodouangsinh dated 10 January 2014, Exhibit OK-3 at p 154.

⁶ 1st affidavit of Outakeo Keodouangsinh dated 10 January 2014 at pp 352–356.

industry of Laos through a joint venture with a Laotian entity. Disputes subsequently arose between the defendant and the Laotian entity. The defendant commenced arbitral proceedings by a notice of arbitration under the PRC-Laos BIT on 14 August 2012, alleging, amongst other things, that the plaintiff deprived them of the benefits from its capital investment by the imposition of unfair and discriminatory taxes.

11 In its notice of arbitration, the defendant argued that it fell within the definition of “investor” under Art 1(2)(b) of the PRC-Laos BIT because it was incorporated in Macau.⁷ This gave rise to the plaintiff’s preliminary objection to the Tribunal’s jurisdiction. In particular, the plaintiff argued that the territorial scope of the PRC-Laos BIT did not include Macau and that the defendant’s claims were not arbitrable.

12 On 13 December 2013, the Tribunal delivered its award on jurisdiction. It held that the PRC-Laos BIT applied to Macau and that it had the jurisdiction to arbitrate the defendant’s expropriation claims under Art 8(3) of the PRC-Laos BIT.

13 I note in passing that on the same day that arbitral proceedings leading to the present application were commenced by the defendant, *separate* arbitral proceedings were commenced by the defendant’s parent company incorporated in the Netherlands pursuant to the BIT concluded between the

⁷ Notice of Arbitration at para 54, 1st affidavit of Outakeo Keodouangsinh dated 10 January 2014 at p 49.

Netherlands and Laos in 2005.⁸ It therefore appears that the defendant is pursuing two claims under two BITs in relation to the same subject matter.

The present proceedings

14 The plaintiff filed the present application, Originating Summons No 24 of 2014 (“OS 24/2014”), on 10 January 2014.

15 On 19 February 2014, the plaintiff filed Summons No 884 of 2014 (“SUM 884/2014”) praying for the admission of two diplomatic letters (“the Two Letters”) that were exhibited in Outakeo Keodouangsinh’s affidavit of 19 February 2014. The first letter dated 7 January 2014 (“the Laos Letter”) was sent from the Laotian Ministry of Foreign Affairs to the PRC Embassy in Vientiane, Laos.⁹ The letter stated Laos’ view that the PRC-Laos BIT did not extend to Macau and sought the views of the PRC Government on the same. The second letter dated 9 January 2014 (“the PRC Letter”) was the reply from the PRC Embassy in Vientiane, Laos stating its view that the PRC-Laos BIT did not apply to Macau “unless both China and Laos make separate arrangements in the future”¹⁰.

16 On 11 April 2014, I heard SUM 884/2014 and granted the prayers therein, subject to the defendant’s right to object to admissibility at the hearing of OS 24/2014. The defendant raised the issue of admissibility of the Two Letters and this will be addressed below at [38]–[56].

⁸ [42] of the Award, Defendant’s Core Bundle Vol 1 at p 17.

⁹ 3rd affidavit of Outakeo Keodouangsinh dated 19 February 2014 at p 8.

¹⁰ 3rd affidavit of Outakeo Keodouangsinh dated 19 February 2014 at pp 10-12.

The parties' submissions

17 The plaintiff's submissions can be summarised as follows:

(a) The PRC-Laos BIT does not apply to Macau and official correspondence between the two states confirms this. The other pieces of positive evidence point towards the same conclusion.

(b) The defendant's expropriation claims exceed the scope of the agreement to arbitrate under the PRC-Laos BIT; Art 8(3) of the PRC-Laos BIT only applies to disputes involving the quantum of compensation payable to investors.

18 The defendant's submissions can be summarised as follows:

(a) The application raises only questions of pure international law which are not justiciable by the court. Singapore is not a party to the PRC-Laos BIT and the issues involving the interpretation of international treaties have nothing to do with Singapore domestic law. Even if the issues are justiciable, the standard of review is a limited one of deference and respect for the Tribunal.

(b) The Two Letters should not be admitted as further evidence for the present application because the plaintiff has not satisfied any of the *Ladd v Marshall* conditions.

(c) According to the moving treaty frontiers rule in international law, the PRC-Laos BIT is presumed to apply to Macau because it formed part of the territory of PRC from 20 December 1999 upon the restoration of Chinese sovereignty. None of the exceptions to this rule

applies. Laos has failed to establish that the PRC-Laos BIT does not apply to Macau.

(d) The Tribunal had the jurisdiction to decide the defendant's expropriation claims under Art 8(3) of the PRC-Laos BIT.

Issues

19 There are two preliminary issues to be determined in this application:

(a) Whether the present application only raises issues of international law which are non-justiciable.

(b) Whether the Two Letters should be admitted as evidence in this application.

20 The two substantive issues arising in this application are as follows:

(a) Whether the PRC-Laos BIT applies to Macau.

(b) Whether the defendant's expropriation claims fall outside the scope of Art 8(3) of the PRC-Laos BIT.

Whether the present application only raises issues of international law which are non-justiciable

21 The defendant submits that this application only concerns questions of pure international law because it stems from an investment treaty arbitration which operates on an international plane different from typical international commercial arbitrations. It also argues that a decision on the interpretation of the PRC-Laos BIT would potentially have significant consequences for approximately 130 other BITs to which the PRC is party.

22 In adopting this position, the defendant acknowledges that the courts may well find justiciable a question of international law that in fact bears on the application of domestic law (see the Singapore High Court decision of *Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2007] 2 SLR(R) 453 (“*Review Publishing*”) at [98]).

23 However, the defendant attempts to distinguish *Review Publishing* by pointing out that the court there was only concerned with the procedure to be adopted when private litigants wish to serve the process of the Singapore court on defendants residing in Hong Kong under a treaty concluded between Singapore and the PRC. The defendant further submits that Singapore is not a party to the PRC-Laos BIT and the issues here have nothing to do with Singapore domestic law.

24 I am unable to accept the defendant’s submission on the issue of justiciability. While it cannot be denied that Singapore is not a party to the PRC-Laos BIT, it does not necessarily follow that the issues in this application have nothing to do with a person’s rights or duties under Singapore law.

25 Here, the plaintiff is relying on s 10(3)(a) of the IAA, a Singapore statutory provision, to seek a review of the Tribunal’s positive ruling on jurisdiction. This issue evidently has a bearing on the application of Singapore law and on the right of the plaintiff to have the Tribunal’s ruling on jurisdiction reviewed by this court.

26 At the hearing before me, counsel for the plaintiff, Mr Bull, referred me to the English Court of Appeal decision of *Republic of Ecuador v Occidental Exploration and Production Co* [2006] 2 WLR 70 (“*Occidental Exploration*”). In that case, the defendant, a Californian corporation, sought

tax reimbursements from the Ecuadorian tax authorities. The authorities refused those claims and arbitration proceedings were commenced under a BIT between the United States of America (“the US”) and Ecuador. The arbitrators decided that London would be the place of arbitration and subsequently held in favour of the defendant on all issues except for one. Ecuador applied for the award to be set aside under the Arbitration Act 1996 (c 23) (UK) (“the UK Arbitration Act”) while the defendant challenged the court’s jurisdiction to determine the application on the basis that the court would be required to interpret provisions of the BIT which were non-justiciable in an English court.

27 The court held that it had the jurisdiction to interpret an international instrument where it was necessary to do so in order to determine a person’s rights and duties under domestic law. In holding that it did have the jurisdiction to interpret the BIT between Ecuador and the US, the court took into account the special character of a BIT and the parties’ agreement to arbitrate.

28 In relation to the special character of a BIT, the court held (at [32]) that:

The treaty involves, on any view, a deliberate attempt to ensure for private investors the benefits and protection of consensual arbitration; and this is an aim which national courts should, in an internationalist spirit and *because* it has been agreed between states at an international level, aspire to give effect ...

[emphasis in original]

29 As for the parties’ agreement to arbitrate, the court held that it was recognised under English private international law and was subject to the UK Arbitration Act because London was the place of arbitration. It was further

held (at [46]) that the English courts were being asked to interpret the scope of the agreement in order to give effect to the rights and duties contained in the agreement to arbitrate.

30 In my view, the reasoning and conclusions reached in *Occidental Exploration* are applicable to the facts of the present case. The present facts are similar to those found in *Occidental Exploration* in two significant respects: the international instrument to be interpreted here is also a BIT and Singapore is not a party to the PRC-Laos BIT just as the UK was not party to the US-Ecuador BIT. While there are undoubtedly differences between the dispute resolution articles of the PRC-Laos BIT and those of the US-Ecuador BIT, there is no dispute between the parties that the plaintiff was entitled to bring a review of the Tribunal's jurisdictional ruling under s 10 of the IAA. I am therefore of the view that the present application does not raise questions of international law that are non-justiciable; it concerns the rights of parties seeking to invoke this court's jurisdiction under s 10 of the IAA to review the Tribunal's ruling on jurisdiction. Put another way, I am unable to determine the plaintiff's rights under s 10 of the IAA without first considering the issue of whether the PRC-Laos BIT applies to Macau.

31 Moreover, the issues raised in this application do not concern the exercise of sovereign or legislative prerogative in matters of high policy such as sovereign immunity, deployment of troops overseas, boundary disputes or recognition of foreign governments (see *Review Publishing* at [100]). I am only concerned with the legitimacy of the plaintiff's challenge to the Tribunal's jurisdiction under s 10 of the IAA which in turn involves an interpretation of the PRC-Laos BIT. Mr Yeo, on behalf of the defendant, raises an alternative argument. He argues that even if the issue here is

justiciable, the standard of review is a limited one of deference and respect for the Tribunal.

32 I am unable to agree with Mr Yeo's submission because the standard of review under s 10 of the IAA and Art 16(3) of the Model Law is generally regarded as *de novo* (see the recent Court of Appeal decision of *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 ("Astro")). In that case, the Court of Appeal affirmed at [162]–[163] the *de novo* standard of judicial review which entailed a fresh examination of the issue of joinder and jurisdiction decided by the arbitral tribunal in its award on preliminary issues.

33 Mr Yeo attempted to distinguish *Astro* on the basis that the dispute there was a commercial one unlike the present investor-state arbitration which concerned the interpretation of international treaties. There is, to my mind, no principled basis for such a distinction presented by Mr Yeo: nothing in *Astro* indicates that a different standard of review is to apply to a challenge under s 10 of the IAA on jurisdiction involving investor-state arbitration.

34 It was also argued in the defendant's written submissions that the qualifications and expertise of the arbitral tribunal counselled against the adoption by this court of anything other than a limited review of the Tribunal's positive jurisdictional ruling.¹¹

¹¹ Defendant's written submissions at para 47.

35 While I had no reason to doubt the eminence or expertise of the Tribunal, this does not mean that a limited standard of review is appropriate. The defendant's submission, if taken to its logical conclusion, would mean that there would be a varying standard of review in every application under s 10 of the IAA depending on the relative expertise and qualifications of the High Court Judge hearing the application as compared to that of the arbitral tribunal members. That cannot be the case; there is nothing in s 10 of the IAA or *Astro* that supports the defendant's submission in this regard.

36 For these reasons, I dismiss the defendant's objection that the issues in this application are non-justiciable.

37 There is one final ancillary point I wish to deal with before considering the evidence tendered by the parties. Public international law is not technically foreign law which needs to be proved by expert evidence. It was therefore not strictly necessary for the parties to file Prof Chesterman's and Sir Daniel Bethlehem's affidavits. However, I found them helpful in crystallising the issues and the parties' positions on those issues for the purposes of the present application, and I was therefore happy to accept them.

Whether the Two Letters should be admitted as evidence in this application

38 The Two Letters constituted a key plank of the plaintiff's case and therefore it came as no surprise that Mr Yeo devoted a substantial portion of his oral submissions to argue that the Two Letters should not be admitted as evidence.

39 It is apposite to set out the full text of the Two Letters. As stated above at [15], the Laotian Ministry of Foreign Affairs first sent a letter dated 7 January 2014 to the PRC Embassy in Vientiane, Laos.¹² The letter stated Laos' view that the PRC-Laos BIT did not extend to Macau and sought the views of the PRC Government on the same:

The Ministry of Foreign Affairs of the Lao People's Democratic Republic presents its compliments to the Embassy of the People's Republic of China and, with reference to the meeting between His Excellency Mr. Alounkeo Kittikhoun, Vice-Minister of Foreign Affairs and His Excellency Mr. Guan Huabing, Ambassador Extraordinary and Plenipotentiary of the People's Republic of China to the Lao People's Democratic Republic on January 3rd, 2014 and the meeting between the Director General of the Department of Treaties and Law, Ministry of Foreign Affairs with the Counselor, Deputy Chief of Mission of the Embassy of the People's Republic of China on December 27th, 2013, has the honour to seek views of the Government of the People's Republic of China regarding the status of the Agreement between the Government of the Lao People's Democratic Republic and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investment signed on January 31st, 1993 (the Agreement) in relation to [Macau].

The Ministry of Foreign Affairs has the further honour to inform the Embassy that the Laos Government is of the view that the Agreement does not extend to [Macau] for the reasons based on the People's Republic of China's policy of one country, two systems, its constitutional and legal framework, the Basic Law of [Macau] as well as the fact that the Agreement itself is silent on its extension to [Macau], which returned to the sovereignty of the People's Republic of China in 1999, six years after the signing of the Agreement.

It would be highly appreciated if the Embassy would communicate this request to the agencies concerned of the People's Republic of China and could provide a response in due course.

¹² 3rd affidavit of Outakeo Keodouangsinh dated 19 February 2014 at p 8.

The Ministry of Foreign Affairs of the Lao People's Democratic Republic avails itself of this opportunity to renew to the Embassy of the People's Republic of China the assurances of its highest consideration.

40 The PRC Embassy in Vientiane, Laos replied to the Laos Letter, stating its view that the PRC-Laos BIT did not apply to Macau "unless both China and Laos make separate arrangements in the future"¹³:

The Embassy of the People's Republic of China presents our compliments to the Ministry of Foreign Affairs of the People's Democratic Republic of Laos, and our reply to [the Laos Letter] is as follows:

In accordance with the <<Basic Law of [Macau]>>, the Government of [Macau] may, with the authorisation of the Central People's Government conclude and implement investment agreements on its own with foreign states and regions; in principle the bilateral investment agreements concluded by the Central People's Government are not applicable to [Macau], unless the opinion of the Special Administrative Region 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 [Macau] unless both China and Laos make separate arrangements in the future.

We avail ourselves of this opportunity to express to you the assurances of our highest consideration.

41 Mr Yeo contends that the *Ladd v Marshall* conditions are applicable here (or, in the alternative, relevant) and that the plaintiff has not satisfied any of the conditions for the admission of the Two Letters. In particular, Mr Yeo contends that Laos could have but did not obtain the Two Letters with reasonable diligence and that there was no evidence of any communications

¹³ 3rd affidavit of Outakeo Keodouangsinh dated 19 February 2014 at pp 10-12.

between the two countries even though Laos claimed that it was reaching out to the PRC government a year ago in April 2013.

42 At the hearing before me, Mr Yeo raised doubts as to the authenticity and credibility of the PRC Letter as there was no reference to the author's department or designation and there was no indication that a PRC governmental entity was involved in its preparation. He also mentioned that the translation provided by the plaintiff was suspicious because the PRC national emblem that appeared in the second letter was also affixed to the translation.

Whether the Ladd v Marshall principles apply

43 The *Ladd v Marshall* principles do not strictly apply in this application. Section 37(4) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) states that the Court of Appeal should not receive further evidence, except in relation to an interlocutory order, unless there are "special grounds" (see also O 57 r 13 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)). The expression, "special grounds", has been judicially interpreted to mean the three conditions of *Ladd v Marshall* (see the Court of Appeal's decision in *Lassiter Ann Masters v To Keng Lam (alias Toh Jeanette)* [2004] 2 SLR(R) 392 ("*Lassiter Ann Masters*") at [22]). I note that there is no equivalent provision for an originating summons commenced in the High Court or, more specifically, in relation to a review by the High Court of a jurisdictional ruling under s 10 of the IAA.

44 However, a party does not in my view have a full unconditional power to adduce fresh evidence at will. As observed in *Lassiter Ann Masters* at [26], the court has discretion whether to admit such evidence and reasonable

conditions must be set. In exercising this discretion, I thought it appropriate to refer to the three conditions of the *Ladd v Marshall* test, with a slightly less stringent first condition (see *Lassiter Ann Masters* at [24]). Applying these conditions, fresh evidence may be admitted if:

- (a) the party seeking to admit the evidence demonstrates sufficiently strong reasons why the evidence was not adduced at the arbitration hearing;
- (b) the evidence if admitted would probably have an important influence on the result of the case though it need not be decisive; and
- (c) the evidence must be apparently credible though it need not be incontrovertible.

45 In relation to the first modified *Ladd v Marshall* condition, Mr Bull's argument is essentially that the diplomatic communications between PRC and Laos took time and effort to bear fruit and the Two Letters could not have been produced at an earlier date. Mr Yeo on the other hand argues that Laos could have obtained a response from the PRC government much earlier since it only took two days for the PRC government to respond to the Laos Letter. Mr Yeo further submits that the plaintiff was entirely silent on their efforts to obtain the Two Letters between April 2013 when the intention to challenge the Tribunal's challenge was made by the plaintiff and the issuance of the arbitral award in December 2013.

46 Mr David J Branson, counsel for the plaintiff in the arbitration proceedings, sent an email dated 19 April 2013 to the Tribunal explaining the

plaintiff's position on various procedural issues in the arbitration. It was also stated in the email that¹⁴:

Further the Government is having difficulty reconstructing the history of the [PRC-Laos BIT]. It is also reaching out to the PRC through diplomatic channels, but it is difficult to know how quickly there can be a response. It would be important to have the PRC view if it can be obtained.

The Laos Letter dated 7 January 2014 (see [39] above) made reference to two prior meetings between high-ranking officials of the plaintiff and the PRC government on 27 December 2013 and 3 January 2014.¹⁵

47 While Mr Yeo is technically correct to point out that not much was said after the 19 April 2013 email, I do not think that the plaintiff had a continuing duty to update the Tribunal on whether its efforts to reach out to PRC through diplomatic channels had borne any fruit. Leaving aside the issue of credibility of the Two Letters which I shall come to at [51] below, I would infer from the two meetings mentioned in the 7 January 2014 letter that the plaintiff must have engaged in some form of diplomatic communications or discussions in the period of time leading up to the meetings.

48 In addition, I am unable to agree with Mr Yeo's assertion that the short time it took the PRC government to respond to the Laos Letter was evidence that the PRC Letter could have been obtained much earlier. This assertion places undue emphasis on the Two Letters themselves when the circumstances leading up to the Two Letters must be looked at in its entirety. In my

¹⁴ 3rd affidavit of John K Baldwin dated 19 March 2014, Exhibit JB-12 at p 2.

¹⁵ Defendant's Core Bundle Vol 2 at p 446.

judgment, the Two Letters should be viewed as the culmination of communications and meetings between the plaintiff and the PRC government which undoubtedly took some time. Moreover, the Two Letters constitute evidence that could possibly have been used in the plaintiff's favour in the arbitration proceedings. It thus seems to me highly unlikely that the plaintiff intentionally dragged out the entire process of obtaining the Two Letters to their own detriment.

49 Reviewing the entire circumstances leading up to the Two Letters including 19 April 2013 email, the two meetings in December 2013 and January 2014 as well as the Two Letters themselves, I accept the plaintiff's explanation that time was needed for diplomatic communications and discussions to take place between the plaintiff and the PRC government. It seems to me that the plaintiff could have perhaps *tried* to obtain the Two Letters earlier but there was no evidence before me to suggest that they *would* have obtained the letters earlier had they done so. I am also mindful that the first condition of the modified *Ladd v Marshall* test is to be applied in a less stringent fashion on the facts of the present application (see [44] above). On balance therefore, I find that the first requirement has been satisfied.

50 The second requirement of whether the Two Letters would probably have an important influence on the result of this application can be dealt with briefly. I think they do have an important influence because they are indicative of the parties' intentions in drafting the PRC-Laos BIT and this goes towards answering the central question of whether the PRC-Laos BIT applied to Macau. The Two Letters are also relevant in determining whether under Art 29 of the Vienna Convention on the Law of Treaties 1969 ("VCLT") and Art 15(b) of the Vienna Convention on the Succession of States in respect of

Treaties 1978 (“VCST”) it is “otherwise established” that the PRC-Laos BIT does not apply to Macau. In deciding whether to admit the Two Letters, I do not have to make a conclusive determination on the numerous issues raised by the defendant – all I had to decide was whether, if admitted, the Two Letters would *probably* have an important influence on the result of this application. Therefore, in my view, the second requirement is satisfied as well.

51 I turn to the final requirement of whether the Two Letters are apparently credible.

52 I first address Mr Yeo’s submissions regarding the translation of the PRC Letter. In my judgment, there is nothing suspicious or sinister about the appearance of the PRC emblem in the plaintiff’s translation of the second letter. It is the *text* of the translation that is of relevance to the present dispute and I do not think there is any contention on the part of the defendant that the translation provided by the plaintiff was inaccurate or incorrect. Indeed, as pointed out by Mr Bull, there is no material difference between the translations furnished by the two parties.

53 Mr Yeo also raises doubts as to the authenticity and credibility of the PRC Letter because there is no mention of the author’s designation and no record of the author’s signature in the letter. The response time of two days, according to Mr Yeo, suggests that no consultation with any PRC governmental authority was undertaken.

54 With respect, there is simply no evidence to support Mr Yeo’s submission that no consultation took place. His view is premised on a certain subjective opinion of standard diplomatic practice which has not been substantiated by factual or expert evidence. I certainly do not think either Mr

Yeo or Sir Daniel is an expert on PRC diplomatic practice and they were not holding themselves out to be experts in that field.

55 More importantly, Mr Alounkeo Kittikhoun, Laos' Vice-Minister for Foreign Affairs, has filed an affidavit attesting to the authenticity of the Two Letters¹⁶ and I have no reason to doubt the authenticity or veracity of Mr Kittikhoun's affidavit.

56 In the circumstances, I think that the Two Letters satisfied the requirement of apparent credibility as well as the two other requirements discussed above and accordingly admitted them.

Issue 1: Whether the PRC-Laos BIT applies to Macau

57 The focus of the parties' submissions was on the central issue of whether the PRC-Laos BIT applies to Macau.

58 Both parties are agreed that Art 29 of the VCLT and Art 15 of the VCST are relevant in determining whether the PRC-Laos BIT applies to Macau.

59 Art 29 of the VCLT enshrines the "moving treaty frontiers" rule and provides as follows:

Article 29 Territorial Scope of Treaties

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*.

¹⁶ 1st affidavit of Alounkeo Kittikhoun dated 7 April 2014 at paras 9 and 10.

[emphasis added]

Art 15 of the VCST states:

Article 15

Succession in respect of part of territory

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]

60 It is pertinent to note that although the PRC and Laos are parties to the VCLT, they are *not* parties to the VCST. Nevertheless, the parties are agreed that both articles are rules of customary international law.

61 The effect of Art 29 of the VCLT and Art 15 of the VCST is that a treaty is binding on the entire territory of each contracting state unless it (a) appears from the treaty; or (b) is otherwise established that the contracting states had intended otherwise. I note that Art 15 of the VCST is more specific in that the object and purpose of the treaty would also be considered.

62 On the present facts, the PRC-Laos BIT is *prima facie* applicable to the entire territories of Laos and the PRC which undisputedly includes Macau

unless it appears from the treaty or is otherwise established that the contracting states had intended otherwise.

63 There is no dispute that the general rule applies and the submissions of the parties are primarily directed at the two exceptions to the rule. I should mention at the outset that it is difficult to see any credible basis for the first exception, *viz*, that a contrary intention *appears from the treaty* because the PRC-Laos BIT is silent on whether it applies to Macau. It does not state positively that the treaty applies to Macau; nor does it exclude Macau from its scope of application (*cf* the PRC-Russia BIT signed in 2006 discussed at [79] below). I therefore agree with the Tribunal's conclusion that "no definite conclusion" can be drawn from the silence in the PRC-Laos BIT.¹⁷

64 The plaintiff submits that the first exception has been established. They argue that the Two Letters establish a subsequent agreement within the meaning of Art 31(3)(a) of the VCLT which provides:

Article 31 General Rule of Interpretation

...

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

...

I think this submission should properly be analysed under the second exception because even if there were a subsequent agreement showing that the

¹⁷ Award at para 277; Defendant's Core Bundle Vol 1 at p 81..

contracting states did not intend for the treaty to apply to Macau, this would not constitute a contrary intention that appears *from the treaty*. I therefore considered this submission as well as the rest of the parties' submissions on the various documents under the second exception instead.

65 Various international instruments, documents and academic writings were tendered by parties to support their respective cases. I shall discuss them in the following order to determine whether the second exception has been fulfilled, *ie*, whether it has been otherwise established that the PRC-Laos BIT does not apply to Macau:

- (a) the Two Letters;
- (b) other BITs;
- (c) the 1987 PRC-Portugal Joint Declaration;
- (d) the 1999 Note to the UNSG ("the 1999 Note");
- (e) the analogy to be drawn with Hong Kong; and
- (f) the World Trade Organisation Trade Policy Report ("the WTO Trade Policy Report").

66 In the course of discussing the various documents listed above, I shall also be referring to the opinions of the parties' experts as well as academic writings tendered by the parties.

The Two Letters

67 I note as a preliminary point that the Two Letters were not available for the Tribunal's consideration because they were only obtained after the Tribunal had handed down its award. This sequence of events was unfortunate because the Tribunal lamented at [232] of its award¹⁸ that they did not have very much to go on in terms of evidence:

A first remark to be made by the Tribunal is the difficulty it faced in ascertaining the application or non-application of the PRC/Laos BIT to [Macau] due to the paucity of factual elements presented by the Parties: there were no affidavits from the PRC, Laos or [Macau], which could probably have been obtained from the respective authorities.

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.¹⁹

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. The defendant's response in its written submissions is that there was in fact no evidence that the relevant PRC authority was involved in the PRC

¹⁸ Defendant's Core Bundle Vol 1 at p 71.

¹⁹ Defendant's written submissions at para 97.

Letter. In substance, this argument goes towards the credibility of the PRC Letter which already has been addressed above at [51].

70 In my judgment, the Two Letters signify an agreement under Art 31(3)(a) of the VCLT between PRC and Laos that the PRC-Laos BIT does not apply to Macau.

71 The High Court in *Review Publishing* faced a similar issue. The question that arose before Sundaresh Menon JC (as he then was) was whether the Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of Singapore and the People's Republic of China (28 April 1997), GN No T2/2001, Bilateral Treaty No B459 (ratified by Singapore 29 April 1998) ("the Singapore-PRC JAT") applied to Hong Kong.

72 In holding that the Singapore-PRC JAT did not apply to Hong Kong, Menon JC relied on a letter from the Ministry of Foreign Affairs, Singapore ("the MFA") which stated that the Hong Kong Department of Justice had confirmed that the Singapore-PRC JAT treaty was not applicable to Hong Kong. He went on to hold (at [124]) that the views of the MFA and the Hong Kong Department of Justice weighed strongly in favour of the respondent's position that the Singapore-PRC JAT treaty did not apply to Hong Kong.

73 Mr Yeo raises a series of objections to the application of Art 31(3)(a) of the VCLT and the characterisation of the Two Letters as a subsequent agreement. He first argues that the PRC Letter is at best a statement on the

interpretation and effect of Art 138 of the Macau Basic Law and “has nothing to do with the interpretation of the PRC-Laos BIT under international law”²⁰.

74 This argument is without merit. To begin with, Art 138 is not even mentioned in the Two Letters. The Laos Letter states that the Basic Law of Macau is *one* of the reasons for the non-applicability of the PRC-Laos BIT to Macau. The other reasons include the policy of one country, two systems and the constitutional and legal framework of PRC. In response, the PRC Letter refers to the Laos Letter and states that bilateral investment agreements concluded by PRC are not applicable to Macau. In other words, Mr Yeo has conflated the agreement reached between the contracting states with the *reasons* furnished for that agreement. Reading the Two Letters as a whole, it is clear that there is an agreement between PRC and Laos that the PRC-Laos BIT does not apply to Macau.

75 Mr Yeo also argues in his written submissions that fairness and due process militate against the consideration of the Two Letters. He further argues that if the wording in the PRC Letter was taken as indicative of the PRC’s intent regarding the application of PRC BITs to Macau, this would deprive Macanese investors and foreign investors in Macau of the protections of nearly 130 PRC BITs and disrupt a stable legal framework for investment.

76 I note that the High Court in *Review Publishing* did not think that any unfairness or lack of due process would result from taking into consideration the MFA letter that was obtained after proceedings had begun. This however

²⁰ Defendant’s written submissions at para 105.

is not conclusive since this argument may not have been taken up by the parties there. Nevertheless, I do not think it is entirely clear how unfairness or lack of due process would result in the light of Art 31(3)(a) of the VCLT which allows subsequent agreements to be taken into account. If Art 31(3)(a) is of general application to most treaties, then parties relying on the provisions of BITs would be forewarned that subsequent agreements could potentially affect the interpretation of the treaty provisions. In any case, the PRC government would have been fully aware of the implications of their opinion as stated in the PRC Letter especially since it was worded in *general* terms. This categorical approach suggests to me that the position adopted in the letter was a confirmation of the status quo rather than a dramatic upheaval of the current expectations held by states which have treaties with PRC.

77 In my judgment, the Two Letters did not amount to a *retroactive* agreement that altered the positions and expectations of third parties such as the defendant. From the way that the PRC Letter was worded, it appears that the non-applicability of the PRC-Laos BIT to Macau was not a dramatic change of position but was rather an affirmation of the common understanding between the states that the treaty from its inception did not apply to Macau.

78 The Two Letters therefore strongly support the plaintiff's claim that the PRC-Laos BIT did not apply to Macau.

Other BITs

79 The defendant also relies on cl 1 of the PRC-Russia BIT concluded in 2006 which specifically excludes Hong Kong and Macau from its application. In the absence of any such exclusionary clause in the PRC-Laos BIT, the defendant argues that the treaty was intended to apply to Macau. Even though

Macau was not part of the territory of the PRC in 1993 when the PRC-Laos BIT was signed (as opposed to the situation in 2006), the defendant submits that the parties were well aware that Macau would be handed over to PRC in 1999 according to the terms of the 1987 PRC-Portugal Joint Declaration.

80 In my judgment, the absence of an express exclusion for Macau post-handover does *not* lead inevitably to the conclusion that the PRC-Laos BIT must apply to Macau. As pointed out by the Tribunal, while the imminent handover was well known to both the PRC and Laos²¹, they may have thought it unnecessary to exclude Macau because the PRC did not at that time exercise sovereignty over Macau.²²

81 The plaintiff also argues that the PRC and Laos may not have considered it necessary to expressly state in the PRC-Laos BIT that its provisions do not apply to Macau because there was a common understanding between them that the treaty did not extend to Macau.²³ To support this view the plaintiff cites the Two Letters as evidence of this common understanding. I am inclined to accept this contention. As I have already made observations on the Two Letters above at [67]–[78], I need not repeat them here.

82 To conclude, the PRC-Russia BIT does not advance either party's case in any meaningful way.

²¹ Defendant's Core Bundle Vol 1 at p 80; para 276.

²² Defendant's Core Bundle Vol 1 at p 80; para 274.

²³ Plaintiff's written submissions at para 100.

83 I turn now to four other BITs which were cited by the Tribunal, namely, the PRC-Portugal BIT, the PRC-Netherlands BIT, the Macau-Portugal BIT and the Macau-Netherlands BIT. The Tribunal found that the provisions in these BITs were very similar to that found in the PRC-Laos BIT.²⁴ In particular, the Tribunal found that the articles on the settlement of investment disputes are the substantially the same. The Tribunal opined that these similarities tend to prove that the rules of the PRC-Laos BIT were compatible with their application in Macau and there was no need to reject them for their incompatibility with the capitalist economic system. The defendant aligned itself with the Tribunal's opinion by arguing that allowing Macanese investors to benefit from both sets of BITs would enhance the object and purpose of BITs.²⁵

84 In response, the plaintiff raises Art 1 of the Mexico-PRC BIT which defines the territory of the PRC. According to the plaintiff, this definition is virtually identical with that found in the PRC-Netherlands BIT. However, the Mexico-PRC BIT contains a footnote which states that the governments of Hong Kong and Macau can separately negotiate and enter into BITs with Mexico. This, so the argument goes, would have been entirely unnecessary if the Mexico-PRC BIT automatically applies to Hong Kong and Macau.

85 The flaw in the plaintiff's reasoning is that the footnote is strictly speaking irrelevant to the issue of whether the PRC-Laos BIT applies to Macau. It does not suggest, one way or the other, whether the Mexico-PRC

²⁴ Defendant's Core Bundle Vol 1 at p 75.

²⁵ Defendant's written submissions at para 188.

BIT applies to Macau. Consider the following two scenarios. In the first, the Mexico-PRC BIT applies to Macau. The footnote would then be a confirmation of Macau's right to enter into *additional* BITs with Mexico just as Macau has entered into BITs with Portugal and Netherlands even though the PRC already has parallel treaties with those countries. In the second alternative scenario where the Mexico-PRC BIT does *not* apply to Macau, this does not prevent Macau from entering into its own BITs with Mexico. In short, the citation of the footnote in the Mexico-PRC BIT by the plaintiff does not advance their case in any way.

86 In a similar vein, I do not think any definitive conclusions can be drawn from the existence of the four parallel BITs. While it is undoubtedly correct to conclude that investors would benefit from overlapping protections contained in separate BITs signed by the PRC and Macau, this conclusion does not answer the logically anterior question of whether the BITs signed by PRC apply to Macau. It could well be the case that the Macau government thought it fit to enter into separate BITs because the BITs signed by PRC did *not* apply to Macau. It might also be the case that very similar provisions were found in the BITs Macau entered into because Macau had wanted to as far as possible enjoy the same protections obtained by the PRC with third countries. In short, the four parallel BITs with very similar provisions do not point towards the conclusion that the PRC-Laos BIT applies to Macau.

87 There is one final point before I move on to the next piece of evidence. In its written submissions, the plaintiff argued that the fact that Macau can enter into BITs in its own capacity does *not* demonstrate in any way that

treaties entered into by the PRC Government were applicable to Macau.²⁶ I agree that no definite conclusion may be drawn from the mere fact of Macau's powers to enter treaties in its own capacity. In a hypothetical scenario where Macau was unable to negotiate its own BITs, then this would suggest that the PRC's BITs would apply to Macau. However, the converse is not necessarily true. According to Art 136 of its Basic Law, Macau is able to negotiate and enter into its own BITs. I recognise that this does not automatically lead to the conclusion that the PRC's BITs do not apply to Macau, although it does seem to indicate to a limited extent that the PRC's treaties do not apply to Macau.

88 To conclude, the other BITs are of limited utility in determining the central question whether the PRC-Laos BIT applies to Macau. However, Macau's ability to negotiate and enter into its own BITs tends to suggest to a limited extent that the PRC's treaties do not apply to Macau.

The 1987 PRC-Portugal Joint Declaration

89 As mentioned at [5] above, Art 2 of the 1987 PRC-Portugal Joint Declaration affirms PRC's one country, two systems principle. Clause VIII of Annex I elaborates on Macau's treaty-making powers and the applicability to Macau of PRC's international agreements in the following terms:

VIII

Subject to the principle that foreign affairs are the responsibility of [PRC's government], [Macau] may on its own ... maintain and develop relations and conclude and implement agreements with states, regions and relevant international or regional organizations in the appropriate fields ...

²⁶ Plaintiff's written submissions at paras 157–158.

The application to [Macau] of international agreements to which [PRC] is or becomes a party shall be decided by [PRC's government], in accordance with the circumstances of each case and needs of [Macau] and after seeking the views of the [Macau government]. ...

90 According to the international law expert for the plaintiff, Professor Simon Chesterman, the 1987 PRC-Portugal Joint Declaration suggests that the PRC government may at a future date decide whether the PRC-Laos BIT should apply to Macau.²⁷ Prof Chesterman went on to opine that the PRC Letter is a confirmation that the process for extending the PRC-Laos BIT to Macau has not taken place.²⁸

91 The main rebuttal presented by the international law expert for the defendant, Sir Daniel, is that the 1987 PRC-Portugal Joint Declaration is a treaty between the PRC and Portugal that is only binding on them and it cannot therefore create rights or duties for other states such as Laos.²⁹ Sir Daniel also suggests that the joint declaration is in the nature of a statement regarding the PRC's internal constitutional arrangements with Macau and therefore "calls to mind" Art 27 of the VCLT which states "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".³⁰

92 With respect, Sir Daniel's objections miss the point. The plaintiff is not relying on the 1987 PRC-Portugal Joint Declaration to enforce the rights

²⁷ 1st affidavit of Simon Chesterman dated 7 April 2014 at para 32.

²⁸ 1st affidavit of Simon Chesterman dated 7 April 2014 at para 34.

²⁹ 1st affidavit of Daniel Bethlehem dated 2 October 2014 at para 96.

³⁰ 1st affidavit of Daniel Bethlehem dated 2 October 2014 at para 97.

contained therein. The plaintiff is only relying on the declaration as evidence of the PRC's intention that the PRC-Laos BIT does not apply to Macau. In my opinion, the plaintiff is entitled to do so. There was also no evidence before me to suggest that the PRC had taken measures to extend the scope of the PRC-Laos BIT to Macau. All this pointed towards the conclusion that the PRC-Laos BIT does not extend to Macau.

93 I would add that Art 27 of the VCLT had no application to the facts at hand. The plaintiff is not seeking to invoke the articles of the 1987 PRC-Portugal Joint Declaration to justify its failure to perform the PRC-Laos BIT. In fact, the defendant has not identified any particular provision of the PRC-Laos BIT that has been breached by the plaintiff because the question before me is a conceptually distinct one: does the PRC-Laos BIT apply to Macau? Hence, I have no hesitation in concluding that Art 27 did not apply here.

The 1999 Note

94 The next piece of evidence that the plaintiff relies on is the 1999 Note. The gist of the note is recorded in a document entitled "Multilateral Treaties deposited with the Secretary-General"³¹. The 1999 Note makes reference to the 1987 PRC-Portugal Joint Declaration and lists treaties that are applicable to Macau. It goes on to state that³²:

IV. With respect to other treaties that are not listed in the Annexes to this Note, to which [PRC] is or will become a Party, the Government of [PRC] will go through separately the

³¹ 1st affidavit of Outakeo Keodouangsinh dated 10 January 2014 at p 354.

³² 1st affidavit of Simon Chesterman dated 7 April 2014 at p 315.

necessary formalities for their application to [Macau] if it is so decided.

95 While the absence of the PRC-Laos BIT in the annexes to the 1999 Note may suggest at first blush that the treaty does not apply to Macau, this suggestion is untenable in the light of the fact that only multilateral treaties are listed in the note. The PRC-Laos BIT, being a bilateral treaty, would not have been listed by the PRC in the 1999 Note in any event because it is simply not a multilateral treaty.

96 The plaintiff attempts to overcome this obstacle by asserting that PRC's overall approach to multilateral and bilateral treaties with respect to Hong Kong and Macau were the same³³ and that "great pains" were taken to ensure that the international legal position of both Hong Kong and Macau would remain largely unchanged.

97 This contention was not substantiated by reference to authorities either in the plaintiff's written submissions or the second affidavit of Prof Chesterman. Even if I accept for the sake of argument that the PRC had adopted such a policy, it is not clear to me whether that policy would have been served by taking the same stance with respect to multilateral and bilateral treaties. It is also not clear whether the application of PRC's treaties to Macau would advance or undermine the PRC's alleged policy to preserve the legal status quo of Macau.

98 Accordingly, I am unable to place any weight on the 1999 Note for the purposes of determining whether the PRC-Laos BIT applies to Macau.

³³ Plaintiff's written submissions at para 192.

The Hong Kong analogy

99 Prof Chesterman noted that the international legal position regarding the application of the PRC's treaties to Hong Kong is similar to that for Macau. He cited the 1984 PRC-UK Joint Declaration, which, like the 1987 PRC-Portugal Joint Declaration, provided that the application of PRC's treaties to Hong Kong would be decided by PRC government in accordance with the needs of Hong Kong and after seeking the views of the Hong Kong government.³⁴ Prof Chesterman also cited two articles to support his view that the clear assumption was that PRC's bilateral treaties would *not* apply to Hong Kong.³⁵

100 Sir Daniel's response was that Prof Chesterman did not address the issue of whether PRC's treaties applied to Hong Kong after the 1997 handover. He also pointed out that it did not follow from Hong Kong's independent treaty-making competence that PRC's treaties do not apply to Hong Kong.³⁶ Broadly speaking, Sir Daniel did not think that the arrangements with respect to Hong Kong apply equally to Macau.³⁷

101 I note parenthetically that although Sir Daniel was previously in the employ of the UK Foreign & Commonwealth Office as its Principal Legal Adviser, he did not express an opinion on the UK's position regarding the 1987 PRC-Portugal Joint Declaration or whether the BIT between the PRC

³⁴ 1st affidavit of Simon Chesterman dated 7 April 2014 at para 49.

³⁵ 1st affidavit of Simon Chesterman dated 7 April 2014 at para 56.

³⁶ 1st affidavit of Daniel Bethlehem dated 2 October 2014 at para 123.

³⁷ 1st affidavit of Daniel Bethlehem dated 2 October 2014 at para 124.

and the UK applies to Hong Kong and/or Macau. This was perhaps unfortunate because an explanation of the UK's position in those respects would have been helpful in determining the issue at hand.

102 Returning to Sir Daniel's response, I do not think that the Hong Kong experience is entirely irrelevant to the present application. I make two observations in this regard.

103 First, identical wording was used in both the 1984 PRC-UK Joint Declaration and the 1987 PRC-Portugal Joint Declaration in relation to the applicability of PRC's treaties to Hong Kong and Macau respectively. Clause XI of Annex I of the 1984 PRC-UK Joint Declaration states:

The application to [Hong Kong] of international agreements to which [PRC] is or becomes a party shall be decided by the [PRC government], in accordance with the circumstances and needs of the [Hong Kong], and after seeking the views of the [Hong Kong government].

Clause VIII of Annex I of the 1987 PRC-Portugal Joint Declaration states:

The application to [Macau] of international agreements to which [PRC] is or becomes a party shall be decided by the [PRC government], in accordance with the circumstances and needs of [Macau] and after seeking the views of the [Macau government].

104 Second, the work of the Joint Liaison Group for Hong Kong ("the JLG") in negotiating and concluding bilateral agreements on behalf of Hong Kong during the period leading up to the 1997 handover suggests that PRC's treaties would not automatically apply to Hong Kong. If the converse were true, *ie*, if PRC's treaties had automatically applied to Hong Kong, it would not have been necessary for the JLG to negotiate and conclude bilateral agreements for Hong Kong in a number of areas, including that of investment

promotion and protection. It therefore seems that the prevailing underlying assumption at the time leading up to the handover was that PRC's treaties would not apply to Hong Kong after the handover. This conclusion is supported by an article written in 1997 by the outgoing Attorney-General of Hong Kong, Mr J F Mathews³⁸ and a 2005 speech by Hong Kong's Secretary for Justice, Mr Wong Yan Lung SC³⁹.

105 I accept that nothing in the arrangements made by PRC and the UK concerning Hong Kong can be regarded as *conclusive* of the arrangements made by PRC and Portugal regarding Macau. However, the identical wording found in the two joint declarations and the approach taken by the Hong Kong Joint Liaison Group suggest that PRC is likely to have adopted the same approach towards Hong Kong and Macau. In other words, the approach and arrangements made with respect to Hong Kong was likely to have been used as a model for Macau. I would note in this regard that the Basic Law for both Hong Kong and Macau are similar in many aspects, and this also supports my view that the approach that was taken for Hong Kong was the same as that for Macau.

106 Consequently, the PRC was likely to have been of the view that their treaties would not automatically apply to Macau after the 1997 handover and the Hong Kong experience is to that extent relevant to the determination of the central question in the present case.

³⁸ 1st affidavit of Simon Chesterman at Annex 14, pp 8-9.

³⁹ 1st affidavit of Simon Chesterman at Annex 15.

The 2001 WTO Trade Policy Report

107 Mr Bull clarified at the hearing before me that the Tribunal did not consider this particular document because it was not adduced in the arbitral proceedings. The Secretariat of the World Trade Organization periodically prepares trade policy reviews in which member countries' trade and related policies are examined and evaluated. The plaintiff relies on the 2001 WTO Trade Policy Report on Macau which states at paragraph 27 that⁴⁰:

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.*

[emphasis added]

Relying on the above extract, Prof Chesterman opines that the BITs entered into by PRC do not automatically apply to Macau.⁴¹

108 In contrast, Sir Daniel interpreted the emphasised sentence in the extract to mean that Macau had *concluded* no other BITs or bilateral tax treaties.⁴² The defendant also tendered the 2007 and 2013 editions of the WTO Trade Policy Report on Macau which do not contain the emphasised sentence in the extract from the preceding paragraph.

109 After carefully reviewing the various editions of the WTO reports, I am of the view that the reports have some bearing on the issue of whether the PRC-Laos BIT applies to Macau although the report is by no means

⁴⁰ 1st affidavit of Simon Chesterman dated 7 April 2014 at p 398.

⁴¹ 1st affidavit of Simon Chesterman dated 7 April 2014 at paras 76 and 77.

⁴² 1st affidavit of Daniel Bethlehem dated 2 October 2014 at para 139.

conclusive. If the PRC-Laos BIT had indeed applied to Macau, it is unlikely that an unequivocal statement to the contrary (see [107] above) would have found its way into a report issued by a reputable organisation such as the WTO. Having said that, I am aware that the 2001 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. In the circumstances, the 2001 report suggests to a limited extent that the PRC-Laos BIT does not apply to Laos.

Conclusion on Issue 1

110 Weighing the evidence cited above in the round, I arrive at the conclusion that the plaintiff has established on a balance of probabilities that the PRC-Laos BIT does not apply to Macau.

111 The Tribunal reached the opposite conclusion by relying on the default application of the general rule found in Art 29 VCLT and Art 15 VCST that a treaty is binding on the entire territory of each contracting state. They found that a different intention had not been otherwise established by the evidence. In my view, there was sufficient evidence to rebut the general rule that the PRC-Laos BIT applies to Macau, even if one was restricted only to the evidence that was placed before the Tribunal. With the introduction of the Two Letters and the 2001 report in the present proceedings, the conclusion that the PRC-Laos BIT does not apply to Macau becomes all the more clear, and I decide accordingly.

Issue 2: Whether the defendant's expropriation claims fall outside the scope of Art 8(3) of the PRC-Laos BIT

112 In view of my decision on Issue 1 that the PRC-Laos BIT does not apply to Macau, it is not necessary for me to rule on Issue 2. However, since counsel for both parties have made full submissions on this issue, I set out below my brief views on the same.

113 The investor protection clause of the PRC-Laos BIT can be found in Art 4 which states:

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.

114 The following paragraphs of Art 8 of the PRC-Laos BIT are also the subject of much contention between the parties:

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]

115 The Tribunal interpreted the word “involving” in Art 8(3) broadly to mean “include” or “wrap” and considered it to be inclusionary rather than exclusionary. It reasoned that if the parties had intended to limit the jurisdiction of the Tribunal exclusively to disputes on the amount of compensation, other terms such as “limited to” would have been used. On the contrary, the plaintiff contends that the ordinary meaning of the word “involve” can also mean “imply” or “entail” and this interpretation would, according to them, be more consistent with the words “amount of compensation for expropriation”.

116 Before delving into an analysis of the word “involving” in Art 8(3), I should first set out the broader context of Arts 4 and 8 of the PRC-Laos BIT.

117 Article 4 lists four conjunctive conditions that would take a contracting state outside the definition of expropriation. The fourth condition is “appropriate and effective” compensation and Art 4(2) elaborates on the elements of appropriate and effective compensation.

118 Article 8 provides a framework for resolving disputes between PRC and Laos. Negotiation is the first port of call under Art 8(1). If the dispute cannot be resolved through negotiation after six months, either party is “entitled” to refer the dispute to the courts of the state accepting the investment under Art 8(2). A dispute involving the amount of compensation for expropriation may also be referred by either party to arbitration under Art 8(3) although this option is only available if Art 8(2) is not invoked.

119 Since the ordinary meaning of the word “involving” and the broader context of Arts 4 and 8 are generally unable to provide much guidance on the way it should be interpreted, I turn to the decision of *Tza Yap Shum v Republic of Peru*, Case No ARB/07/06, Decision on Jurisdiction and Competence (ICSID 19 June 2009)⁴³ (“*Tza Yap Shum*”) which has been cited by both parties. In that case, Mr Tza Yap Shum submitted a request for arbitration against the Republic of Peru (“Peru”), claiming that the Peruvian Tax Authorities had violated certain provisions of the PRC-Peru BIT (“the PRC-Peru BIT”). Peru filed several jurisdictional objections, including one based on Art 8(3) of the PRC-Peru BIT, an article which was similar in all material aspects to Art 8(3) of the PRC-Laos BIT.

120 The tribunal there referred to the dictionary meaning of the word “involve” and held that it meant “to enfold, envelope, entangle, include”. According to the tribunal, a *bona fide* interpretation of these words indicated that the only requirement was that the dispute must *include* the determination of the amount of compensation, and not that the dispute must be restricted to

⁴³ Defendant’s Bundle of Authorities Tab 37.

the amount of compensation (at [151]). The tribunal further held that it might be assumed from the preamble of the PRC-Peru BIT that the purpose of allowing the parties to submit certain disputes to ICSID arbitration was to promote investments (at [153]). It was also held that a restrictive interpretation of the word “involving” would mean that the investor would never have access to arbitration (at [154]). In coming to its conclusion, the tribunal noted that variations of the phrase “disputes involving the amount of compensation for expropriation” have been included in various treaties since the 1980s and that the phrase reflects “a certain degree of distrust or ideological unconformity on the part of communist regimes regarding investment of private capital as well as a “concern about the decisions of international tribunals on matters such regimes are not familiar with and over which they have no control” (at [145]).

121 On balance, I am of the view that the phrase, “a dispute involving the amount of compensation” in Art 8(3) of the PRC-Laos BIT should be given a restrictive meaning, *viz*, disputes limited to the amount of compensation for expropriation. First, the word “involve” is also capable of being interpreted restrictively to mean imply, entail or make necessary⁴⁴. The specific wording of the phrase, “amount of compensation for expropriation” in Art 8(3), when compared with the broad wording of the phrase “any dispute in connection with an investment” in Art 8(1), suggests that a more restrictive meaning was intended for the phrase in Art 8(3). Put another way, the PRC and Laos could have used the phrase, “a dispute in connection with an investment” for consistency with the phrasing in Art 8(1) if they had truly intended for an

⁴⁴ Plaintiff's written submissions at para 263.

arbitral tribunal to have a broad jurisdiction on all aspects of an expropriation dispute and it is of some significance that they chose not to do so.

122 Second, the reasoning in *Tza Yap Shum* is problematic. The tribunal concluded that an investor would never have access to arbitration if Art 8(3) was read restrictively to only refer to disputes on the amount of compensation. This is simply not correct. Limiting an arbitral tribunal's jurisdiction to a dispute which only concerns the amount of compensation for expropriation does not necessarily mean that a party may not refer a dispute to arbitration. Parties may still utilise Art 8(3) where: (a) the dispute remains unresolved after six months of negotiation; (b) the dispute concerns the amount of compensation for expropriation; and (c) Art 8(2) has not been invoked *by the investor, ie*, it may still be invoked if the *State* has invoked Art 8(2). It is important to appreciate that the option to arbitrate under Art 8(3) is extinguished not by limiting disputes to those concerning the amount of compensation for expropriation but by the investor's submission of the dispute to the courts under Art 8(2).

123 While the scope for submitting a dispute to arbitration under the PRC-Laos BIT may seem limited, this limited scope for the submission of a dispute to arbitration is understandable in the light of the observation made in *Tza Yap Shum* that communist regimes possessed a certain degree of distrust regarding investment of private capital and were concerned about the decisions of international tribunals on matters over which they have no control. I had no doubt that these concerns were also present when the PRC-Laos BIT was concluded between the two communist states and this in my judgment formed an important part of the context in which Art 8 of the PRC-Laos BIT should be interpreted (see Art 31(1) of the VCLT).

124 In addition, the restrictive interpretation of the phrase “involving” in Art 8(3) cannot be displaced by the general purpose of promoting investments found in the preamble to the PRC-Peru BIT which the tribunal in *Tza Yap Shum* seemed to place undue reliance on. It is a truism to say that the purpose of any BIT is to promote investments. But it does not follow from this general proposition that every ambiguity found in such treaties should invariably be resolved in favour of the investor. Every BIT represents a negotiated bargain between two contracting states and the provisions therein reflect the extent to which the sovereignty of each contracting state has been curtailed. The bargains struck in BITs should therefore not be lightly displaced without due consideration of the context in which they were made.

125 Another ancillary point deserves some elaboration. The defendant contends that the Tribunal was correct to conclude that “involving” in Art 8(3) should be read broadly to mean “to include”. Such a broad reading is problematic because almost every investment dispute is likely to include a dispute over the amount of compensation payable. This would mean that almost every dispute could be submitted by either party to arbitration under Art 8(3) – a result that two communist states were unlikely to have contemplated or intended at that time (see above at [123]).

126 Third, the shift from PRC’s “first-generation” BITs to “second-generation” suggests that the PRC-Laos BIT which fell into the former category should be read restrictively. The plaintiff submits that first-generation BITs were deliberately restrictive in only permitting disputes relating to the

amount of compensation for expropriation to be submitted to arbitration.⁴⁵ Subsequently, after 1998, more expansive dispute resolution clauses can be found in PRC's second generation BITs. In support of this submission, the plaintiff cites Art 9 of the BIT between PRC and Germany dated 1 December 2005 which uses the broader phrase, "any dispute concerning investments". I accept these submissions and think that they go some way in supporting a more restrictive reading of Art 8(3).

127 I have one final observation before I conclude. The plaintiff argues that Art 8(3) "only estops the investor from seeking arbitration of a dispute concerning 'the amount of compensation for expropriation' if that question has already been submitted for adjudication before the local courts pursuant to Art 8(2)"⁴⁶. The plaintiff goes on to suggest that nothing in Art 8(3) prevents an investor from arbitrating a dispute over the *quantum* of damages for expropriation if he has only submitted the dispute over *liability* to adjudication.⁴⁷ I do not think that this additional gloss to Art 8(3) can be correct. The second sentence of Art 8(3) provides that "the provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in [Art 8(2)]". In my view, this language is unequivocal and nothing in Art 8(3) in fact supports the interpretation advanced by the plaintiff. The plaintiff is advancing a special meaning to that sentence in Art 8(3) when there is no evidence that the parties had intended such a special

⁴⁵ Plaintiff's written submissions at para 297 *et al.*

⁴⁶ Plaintiff's written submissions at para 284.

⁴⁷ Plaintiff's written submissions at para 286.

meaning to be imputed. I therefore cannot agree with the plaintiff's argument on this point.

128 In conclusion, the Tribunal did not possess subject-matter jurisdiction over the defendant's expropriation claims because only disputes over the amount of compensation for expropriation can be submitted to arbitration under Art 8(3).

Conclusion

129 For the foregoing reasons, I allow the plaintiff's application with costs to be agreed or taxed.


Edmund Leow
Judicial Commissioner
Supreme Court

Edmund Leow
Judicial Commissioner

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